UNITED STATES REPORTS

VOLUME 279

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1928

FROM FEBRUARY 18, 1929, TO AND
INCLUDING JUNE 3, 1929

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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, Attorney General.[2]
WILLIAM D. MITCHELL, Solicitor General.
CHARLES E. HUGHES, Jr., Solicitor General.[3]
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.

[2] On March 4, 1929, President Hoover nominated William D. Mitchell, of Minnesota, to fill the place left vacant by the retirement of Attorney General Sargent. The nomination was confirmed by the Senate the same day and Mr. Mitchell took the oath of office the following day.

[3] On May 8, 1929, President Hoover nominated Charles E. Hughes, Jr., of New York, as Solicitor General, to succeed Mr. Mitchell, resigned. The nomination was confirmed by the Senate on May 27, 1929, and Mr. Hughes took the oath of office on June 1, 1929.

SUPREME COURT OF THE UNITED STATES

Order of Allotment of Justices

It is ordered, That the following allotments be made of the Chief Justice and Associate Justices of this Court among the circuits, agreeably to the acts 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, Willis Van Devanter, Associate Justice.

For the Eighth Circuit, Pierce Butler, Associate Justice.

For the Ninth Circuit, George Sutherland, Associate Justice.

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

April 10, 1929.

For next preceding allotment, see 278 U. S., p. IV.

TABLE OF CASES REPORTED

Page.

Abell *v.* Tait 849
Adams *v.* United States 836
Adler *v.* Rector 876
Admiral-Oriental Line *v.* United States 847
Advance Automobile A. Corp'n *v.* United States 859
Aetna L. Ins. Co., Green *v.* 861
Agler, Ohio *ex rel.* Popovici *v.* 828
A. H. Bull S. S. Co. *v.* Hudson 862
Alabama *v.* United States 229
Alabama Public Service Comm'n, St. Louis-S. F. R. Co. *v.* 560
Alberto *v.* Nicolas 139
Albro, U. S. *ex rel.*, *v.* Karnuth 850
Albro, U. S. *ex rel.*, Karnuth *v.* 231
Alderman *v.* United States 869
Alexander, Lucas *v.* 573
Ambrose, New York Central R. Co. *v.* 833
American Code Co., Comm'r of Internal Revenue *v.* .. 832
American Glycerin Co. *v.* Burleson 866
American Livestock Comm'n Co., United States *v.* .. 435
American Surety Co. *v.* Bowers 865
American Tobacco Co. *v.* Porto Rican A. T. Co 858
American Valve & M. Co. *v.* Fairbanks, M. & Co 845
Anchor Coal Co., B. & O. R. Co. *v.* 812
Anchor Coal Co., Barton Coal Co. *v.* 812
Anchor Coal Co., Pittsburgh Operators *v.* 812
Anchor Coal Co., United States *v.* 812
Ancient Egyptian Order *v.* Michaux 737
Anderson, McKenna *v.* 869
Anderson, O'Connor *v.* 828

Page.
Anderson *v.* Pere Marquette R. Co. 851
Anderson, Sadowsky *v.* 849
Anderson *v.* Shipowners' Ass'n 864
Anglo & London P. N. B. *v.* Consolidated N. B. 829
Applegate, White River L. Co. *v.* 692
Ariasi *v.* Orient Ins. Co. 837
Aronson & Co., Lolita Holding Co. *v.* 868
Atchison, T. & S. F. R. Co. *v.* Keddy 856
Atchison, T. & S. F. R. Co. *v.* United States 768
Atlanta & C. A. L. R. Co. *v.* Green 821
Atlantic C. L. R. Co. *v.* Davis 34
Atlantic C. L. R. Co. *v.* Driggers 787
Atlantic C. L. R. Co., *Ex parte* 822
Atlantic G. & W. I. S. S. L. *v.* Interocean Oil Co. . . . 874
Atlantic Mutual Ins. Co., Gulf Refining Co. *v.* 708
Austin *v.* Barclay 828
Austin, Southern Trust Co. *v.* 874
Austin-Bagley Corp'n *v.* United States 863
Automatic Sales Co. *v.* Heise 822
Baciocco, Prudential Ins. Co. *v.* 854
Bakelite Corp'n, *Ex parte* 438
Baltimore & O. R. Co. *v.* Anchor Coal Co. 812
Baltimore & O. R. Co. *v.* United States 781
Bank of America, Southern Pacific Co. *v.* 847
Barber, Independence Indemnity Co. *v.* 868
Barclay, Austin *v.* 828
Barclay, Wabash R. Co. *v.* 828
Barnard, White *v.* 848
Barry *v.* U. S. *ex rel.* Cunningham 597, 827
Barstow San Antonio Oil Co. *v.* Whitney 848
Barth (John) Co., United States *v.* 370
Bartlesville Zinc Co. *v.* Interstate Commerce Comm'n 856
Barton Coal Co. *v.* Anchor Coal Co. 812
Becher *v.* Contoure Laboratories 388
Berkower *v.* Mielziner 848
Bethlehem Shipbuilding Corp'n, Stilz *v.* 834
Bielaski, Meyer *v.* 852

Page.
Billwiller, Estate of, *v.* Comm'r of Internal Revenue. 866
Blaine *v.* United States..... 845
Blair, Conklin, Z. L. Co. *v*..... 871
Blair, Cuyahoga A. T. & T. Co. *v*..... 848
Blair, Pelican Bay L. Co. *v*..... 870
Blair, Red Wing Linseed Co. *v*..... 860
Blue Ridge P. Co., Southern R. Co. *v*..... 860
Board of Comm'rs *v.* Plainfield-Union Water Co.... 858
Bond, Lun *v*..... 818
Booher *v.* Washington..... 822
Booker, St. Louis, B. & M. R. Co. *v*..... 852
Boston & A. R. Co., Central N. E. R. Co. *v*..... 415
Boston & M. R. R., United States *v*..... 732
Bowers, American Surety Co. *v*..... 865
Bowers, Loft, Inc. *v*..... 855
Bowers, Rouss *v*..... 853
Boyd *v.* United States..... 839
Brewster *v.* Gage..... 831
Brower *v.* United States..... 866
Brown *v.* Gamble..... 839
Brown *v.* Lane Cotton Mills Co..... 837
Brunn *v.* Washington..... 853
Bryan, Cutting *v*..... 860
Bryant, Chesapeake & O. R. Co. *v*..... 834
Bull (A. H.) S. S. Co. *v.* Hudson..... 862
Bull S. S. Co., Hudson *v*..... 862
Bundy *v.* Bundy..... 842
Bundy, Bundy *v*..... 842
Burke *v.* Oregon..... 811
Burleson, American Glycerin Co. *v*..... 866
Buzynski *v.* Luckenbach S. S. Co..... 867
Caledonier, The, Jonas & Naumburg, Inc. *v*..... 865
Caledonier, The, Picard *v*..... 865
California Canneries, United States *v*..... 553
California, Davidson *v*..... 856
Campbell, Elsinore Perfume Co. *v*..... 870
Canadian Holding Co., Hooks *v*..... 850

Page.
Cape May, *Ex parte* City of 818
Carpenter *v.* Shaw 830
Carson Petroleum Co. *v.* Vial 95
Carter *v.* Luster 857
Cashmere Fruit Growers Union, Great Northern R. Co. *v.* 851
C. B. Fox Co. *v.* United States 848
Cecil, Geren *v.* 859
Central N. E. R. Co. *v.* Boston & A. R. Co 415
Central Savings Bank, Lake *v.* 836
Chamberlain *v.* United States 845
Chatters, Louisville & N. R. Co. *v.* 320
Chatters, Southern R. Co. *v.* 320
Chelan Electric Co., Perry *v.* 823
Chesapeake & O. R. Co. *v.* Bryant 834
Chesapeake & O. R. Co. *v.* Mihas 827
Chesapeake & O. R. Co. *v.* Stapleton 587
Chicago, M. St. P. & P. R. Co. *v.* Dep't of Public Works 854
City Nat'l Bank *v.* Maryland Casualty Co 847
City Nat'l Bank, Maryland Casualty Co. *v.* 847
Claremont Laboratories, Erb *v.* 837
Clark (James) Distilling Co. *v.* United States 868
Clarke *v.* Haberle Brewing Co 832
Claussen, U. S. *ex rel.*, *v.* Day 398
Collector, Compañia General *v.* 306
Colonna Shipyard, Inc. *v.* Dunn 840
Comerford, Donovan *v.* 842
Comm'r of Internal Revenue *v.* American Code Co.. 832
Comm'r of Internal Revenue, DeLoss *v.* 840
Comm'r of Internal Revenue, Estate of Billwiller *v.*. 866
Comm'r of Internal Revenue, Farrington *v.* 873
Comm'r of Internal Revenue, Feeders' Supply Co. *v.* 874
Comm'r of Internal Revenue, Hardwick Realty Co. *v.* 876
Comm'r of Internal Revenue *v.* Howard 830
Comm'r of Internal Revenue *v.* Old Colony R. Co... 876

Page.
Comm'r of Internal Revenue, Old Colony Trust Co. *v*. 716
Comm'r of Internal Revenue, Oswego & S. R. Co. *v*. . 842
Comm'r of Internal Revenue, Parrott *v*. 870
Comm'r of Internal Revenue, Richmond Hosiery Mills *v*. 844
Comm'r of Internal Revenue, Tootal Broadhurst Lee Co. *v*. 861
Compañia General de Tabacos *v*. Collector. 306
Conklin, Z. L. Co. *v*. Blair. 871
Connecticut *v*. Massachusetts. 821
Consolidated Nat. Bank, Anglo & L. P. N. B. *v*. 829
Continental Ins. Co., Jensen *v*. 818, 842
Contoure Laboratories, Becher *v*. 388
Conway, Ohio Oil Co. *v*. 813
Cooley, Gunning *v*. 828
Corning Distilling Co. *v*. United States. 843
Cornish *v*. O'Donoghue. 871
County of Spokane *v*. United States. 80
Cowles, Harlow *v*. 869
Craig, Superior Confection Co. *v*. 824
Crail, Illinois Central R. Co. *v*. 833
Crozier-Straub, Inc., Downer *v*. 840
Crozier-Straub, Inc., Graham *v*. 840
Crozier-Straub, Inc., Melmod *v*. 840
Culver *v*. Wakem & McLaughlin, Inc. 847
Cunningham, U. S. *ex rel.*, Barry *v*. 597, 827
Cutting *v*. Bryan 860
Cuyahoga A. T. & T. Co. *v*. Blair. 848
Davey *v*. D. L. & W. R. Co. 838
Davidson *v*. California. 856
Davidson *v*. Flood Bros. 853
Davis, Atlantic C. L. R. Co. *v*. 34
Davis, Goltra *v*. 843
Day, Simms Oil Co. *v*. 874
Day *v*. United States. 863
Day, U. S. *ex rel.* Claussen *v*. 398

Page.
Delaware, New Jersey *v*..... 825
Delaware, L. & W. R. Co., Davey *v*..... 838
Delaware, L. & W. R. Co. *v*. Koske..... 7
DeLoss *v*. Comm'r of Internal Revenue..... 840
Dep't of Public Works, Chicago, M., St. P. & P. R. Co. *v*..... 854
Deziel, Lacroix *v*..... 857
Dickey *v*. Volker..... 839
District of Columbia *v*. Riggs Nat'l Bank..... 846
District of Columbia *v*. Thompson..... 829
Donovan *v*. Comerford..... 842
Douglas *v*. New York, N. H. & H. R. Co..... 377
Downer *v*. Crozier-Straub, Inc..... 846
Driggers, Atlantic C. L. R. Co. *v*..... 787
Dunn, Colonna Shipyard, Inc. *v*..... 840
Eagle-Picher (The) Lead Co., Fullerton *v*..... 839
Earle, Leonard & Leonard *v*..... 392
East End Traction Co., Lowellville *v*..... 842
Edelstein *v*. Goddard..... 851
Edwards, Neuss, Hesslein & Co. *v*..... 872
Egyed, Lehigh Valley R. Co. *v*..... 845
Ellerd *v*. Griffith..... 864
Elsinore Perfume Co. *v*. Campbell..... 870
Elvidge *v*. Stelwagon Mfg. Co..... 844
Era Electrical S. Corp'n *v*. Metropolitan Device Corp'n..... 841
Erb *v*. Claremont Laboratories..... 837
Erie R. Co., Klar *v*..... 818
Estate of Billwiller *v*. Comm'r of Internal Revenue.. 866
Ex parte Atlantic C. L. R. Co..... 822
Ex parte Bakelite Corp'n..... 438
Ex parte City of Cape May..... 818
Ex parte Hobbs..... 825
Ex parte Worcester County Nat'l Bank..... 347
Fahey *v*. Sapio..... 871
Fairbanks, M. & Co., American Valve & M. Co. *v*... 845
Falk Mercantile Co. *v*. Nat'l Wool W. & S. Co..... 836

Page.
Farmers Loan & Trust Co. *v.* Minnesota..... 820
Farrington *v.* Comm'r of Internal Revenue..... 873
Fayette B. & T. Co., Firestone T. & R. Co. *v*..... 873
Fayette B. & T. Co. *v.* Herod..... 873, 877
Feather River L. Co. *v.* United States..... 837
Federal Sugar R. Co. *v.* United States..... 831
Federal Surety Co. *v.* City of Staunton..... 840
Federal Trade Commission, International Shoe Co. *v*..... 832, 849
Feeders' Supply Co. *v.* Comm'r of Internal Revenue. 874
Fergus *v.* Kinney..... 854
Fiman *v.* South Dakota..... 841
Fingerhood *v.* United States..... 863
Firestone T. & R. Co. *v.* Fayette B. & T. Co..... 873
Fisler *v.* United States..... 836
Flink *v.* Paladini..... 59
Flood Bros., Davidson *v*..... 853
Florinda, The, Saitta *v*..... 874
Ford (Henry) & Son, Inc. *v.* Little Falls Fibre Co... 829
Foreman Trust & S. B. *v.* Grand Trunk W. R. Co.... 839
Former Corporation (The) *v.* United States..... 857
Fourth Nat'l Bank, Ins. Co. of N. A. *v*..... 853
Fouts, Maryland Casualty Co. *v*..... 852
Fox (C. B.) Co. *v.* United States..... 848
Fruit Growers Express Co., United States *v*..... 363
Fullerton *v.* The Eagle-Picher Lead Co..... 839
Gage, Brewster *v*..... 831
Galveston, H. & S. A. R. Co., United States *v*..... 401
Gamble, Brown *v*..... 839
Gamble, Perkins *v*..... 839
General Ins. Co. *v.* Northern P. R. Co..... 827
Georgia, Manley *v*..... 1
Georgia S. & F. R. Co., Watson *v*..... 857
Gerahty *v.* United States..... 846
Geren *v.* Cecil..... 859
Gibson *v.* United States..... 866
Gilchrist *v.* Interborough Rapid Transit Co..... 159

Page.
Gilchrist Co. (The), Kar-Lac Co. *v*. 838
Globe Indemnity Co. *v*. Southern Pacific Co. 860
Goddard, Edelstein *v*. 851
Goltra *v*. Davis. 843
Graber *v*. Karnuth. 850
Grace (W. R.) & Co., Macondray & Co. *v*. 863
Graffenreid *v*. Yount-Lee Oil Co. 865
Graham *v*. Crozier-Straub, Inc. 840
Grand Trunk W. R. Co., Foreman Trust & S. B. *v*. . . . 839
Grant, Tefft *v*. 824
Gray, O'Neill *v*. 865
Grayson *v*. Harris. 300
Great Northern R. Co. *v*. Cashmere Fruit Growers Union. 851
Great Northern R. Co. *v*. Wenatchee Federated Growers, Inc. 851
Great Northern R. Co. *v*. Wood. 851
Green, A. & C. A. L. R. Co. *v*. 821
Green *v*. Aetna L. Ins. Co. 861
Greene, Wheeler *v*. 829
Griffith, Ellerd *v*. 864
Griggs, C. & Co., U. S. Printing & L. Co. *v*. 156
Guardian Trust Co., Kansas City S. R. Co. *v*. 827
Gulf, M. & N. R. Co. *v*. Williams. 830
Gulf Refining Co. *v*. Atlantic Mutual Ins. Co. 708
Gunning *v*. Cooley. 828
Haberle Brewing Co., Clarke *v*. 832
Hardwick Realty Co. *v*. Comm'r of Internal Revenue 876
Harley & Lund Corp'n *v*. Murray Rubber Co. 872
Harlow *v*. Cowles. 869
Harris, Grayson *v*. 300
Harris *v*. North British & M. Ins. Co. 852
Harvie *v*. Heise. 822
Haskell *v*. Perkins. 872
Hass *v*. United States. 865
Heiner, Kehota Mining Co. *v*. 864
Heise, Automatic Sales Co. *v*. 822

Page.
Heise, Harvie *v*. 822
Heise, Kiser *v*. 824
Helson & Randolph *v.* Kentucky. 245
Henderson, Western & A. R. Co. *v*. 639
Henry Ford & Son, Inc. *v.* Little Falls Fibre Co. 829
Herod, Fayette B. & T. Co. *v*. 873, 877
Highland *v.* Russell Car & S. P. Co. 253
Hill County C. O. Co., J. H. Jonas & Son *v*. 846
Hobbs, *Ex parte*. 825
Holt, Russell *v*. 856
Hooks *v.* Canadian Holding Co. 850
Howard, Comm'r of Internal Revenue *v*. 830
Hudson, A. H. Bull S. S. Co. *v*. 862
Hudson *v.* A. H. Bull S. S. Co. 862
Hudson *v.* Norfolk & W. R. Co. 866
Hurst *v.* Nagle. 861
Illinois Central R. Co. *v.* Crail. 833
Illinois, Michigan *v*. 820, 821
Illinois, New York *v*. 820, 821
Illinois, Wisconsin *v*. 820, 821
Independence Indemnity Co. *v.* Barber. 868
India Tire & R. Co., Murphy *v*. 838
Indian Motocycle Co. *v.* United States. 826
Industrial Accident Comm'n, London G. & A. Co. *v*. . 109
Insurance Co. of N. A. *v.* Fourth Nat'l Bank. 853
Interborough Rapid Transit Co., Gilchrist *v*. 159
Internat'l Finance Corp'n, Peoples Bank *v*. 858
Internat'l Shoe Co. *v.* Federal Trade Comm'n. . . 832, 849
Internat'l Shoe Co. *v.* Shartel. 429
Interocean Oil Co., Atlantic G. & W. I. S. S. L. *v*. . . . 874
Interstate Commerce Comm'n, Bartlesville Zinc Co. *v*. 856
Interstate Commerce Comm'n *v.* U. S. *ex rel.* Los Angeles. 830
Irvine *v.* United States. 846
Isenberg, Trent Trust Co. *v*. 862
Ithaca Trust Co. *v.* United States. 151

Page.
Jacobs *v.* United States..... 869
James Clark Distilling Co. *v.* United States..... 868
Jensen *v.* Continental Ins. Co..... 818, 842
Johnson, New York Central R. Co. *v*..... 310
Johnson, Nielsen *v*..... 47
Johnson *v.* U. S. Fleet Corporation..... 819
Jonas (J. H.) & Son *v.* Hill County C. O. Co..... 846
Jonas & Naumburg, Inc. *v.* The Caledonier..... 865
Jones, Maryland Casualty Co. *v*..... 792
Jumer *v.* Smith..... 825
Kadrie, U. S. *ex rel.*, Wilbur *v*..... 833
Kansas City S. R. Co. *v.* Guardian Trust Co..... 827
Kar-Lac Co. *v.* The Gilchrist Co..... 838
Karnuth, Graber *v*..... 850
Karnuth, U. S. *ex rel.* Albro *v*..... 231, 850
Kartz, Max Levy & Co. *v*..... 870
Keddy, Atchison, T. & S. F. R. Co. *v*..... 856
Kehota Mining Co. *v.* Heiner..... 864
Kehota Mining Co. *v.* Lewellyn..... 864
Kemp *v.* Seattle..... 825
Kentucky, Helson & Randolph *v*..... 245
Kerner Incinerator Co., Townsend Estates, Inc. *v*... 843
King *v.* United States..... 833
Kinney, Fergus *v*..... 854
Kirk *v.* Maumee Valley E. Co..... 797
Kirk *v.* Providence Mill Co..... 807
Kiser *v.* Heise..... 824
Klar *v.* Erie R. Co..... 818
Koske, Delaware, L. & W. R. Co. *v*..... 7
Kothe *v.* R. C. Taylor Trust..... 830
Krauss Bros. L. Co. *v.* Mellon..... 872
Kresge (S. S.) Co. *v.* Ward..... 337
Krushnic, U. S. *ex rel.*, Wilbur *v*..... 831
Lacroix *v.* Deziel..... 857
Lacroix *v.* Lacroix..... 857
Lacroix, Lacroix *v*..... 857
Lacroix *v.* Rivard..... 857

Page.
Lake *v.* Central Savings Bank..... 836
Lane Cotton Mills Co., Brown *v*..... 837
Larkin *v.* Washington L. & T. Co..... 867
Latrobe, New York *v*..... 421
Lazzara *v.* Wisconsin Boxing Club..... 851
Leeper, Magnolia Gas Co. *v*..... 876
Lehigh Valley R. Co. *v.* Egyed..... 845
Leonard *v.* United States..... 40
Leonard & Leonard *v.* Earle..... 392
Lesser-Goldman Cotton Co. *v.* Missouri Pacific R. Co..... 855
Levy (Max) & Co. *v.* Kartz..... 870
Lewellyn, Kehota Mining Co. *v*..... 864
Lewis *v.* United States..... 63
Lewy *v.* United States..... 850
Lindgren *v.* United States..... 827
Lisansky *v.* United States..... 873
Little Falls Fibre Co., Henry Ford & Son, Inc. *v*.... 829
Loft, Inc. *v.* Bowers..... 855
Lolita Holding Co. *v.* Aronson & Co..... 868
London G. & A. Co. *v.* Industrial Accident Comm'n.. 109
Longa, Sinco *v*..... 845
Los Angeles, U. S. *ex rel.*, Interstate Commerce Comm'n *v*..... 830
Louisville & N. R. Co. *v.* Chatters..... 320
Lowellville *v.* East End Traction Co..... 842
Lucas *v.* Alexander..... 573
Luckenbach S. S. Co., Buzynski *v*..... 867
Luckenbach S. S. Co. *v.* United States..... 831
Lun *v.* Bond..... 818
Luster, Carter *v*..... 857
Lustgarten, U. S. Fleet Corporation *v*..... 828
Macallen Co. *v.* Massachusetts..... 620
Machias L. Co., Orient Point W. Co. *v*..... 874
Mackenzie, Pennsylvania R. Co. *v*..... 854
Macondray & Co. *v.* W. R. Grace & Co..... 863
Madonna *v.* Wheeling Steel Corp'n..... 838

Page.
Magma Copper Co., Minerals Separation N. A. Corp'n *v*. 832
Magnolia Gas Co. *v.* Leeper. 876
Maine Central R. Co., Thomas *v*. 835
Malley, Wooley *v*. 860
Manley *v.* Georgia. 1
Margolies, Riehle *v*. 218
Marsh *v.* United States. 849
Marshall & Illsley Bank, Virginia *v*. 867
Marshall, Minnesota Mutual L. Ins. Co. *v*. 851
Marshall (W. A.) & Co. *v.* The President Arthur. . . . 564
Maryland Casualty Co. *v.* City Nat'l Bank. 847
Maryland Casualty Co., City Nat'l Bank *v*. 847
Maryland Casualty Co. *v* Fouts. 852
Maryland Casualty Co. *v.* Jones. 792
Marysville, Standard Oil Co. *v*. 582
Massachusetts, Connecticut *v*. 821
Massachusetts F. & M. Ins. Co. *v.* Schneider. 844
Massachusetts, Macallen Co. *v*. 620
Mathues, U. S. *ex rel.* Wenger *v*. 817
Matthews *v.* Southern R. Co. 844
Maumee Valley E. Co., Kirk *v*. 797
Max Levy & Co. *v.* Kartz. 870
McCoy (P.) Fuel Co., Illinois Central R. Co. *v*. 833
McDonald *v.* United States. 12
McInnes, McKay *v*. 820
McKay *v.* McInnes. 820
McKenna *v.* Anderson. 869
McLane, Wilson *v*. 822
McMillan *v.* Nat'l Wool W. & S. Co. 836
Mellon, Krauss Bros. L. Co. *v*. 872
Melmod *v.* Crozier-Straub, Inc. 840
Menzi, Posados *v*. 340
Messinger, Reilly *v*. 855
Metropolitan Device Corp'n, Era Electrical S. Corp'n *v*. 841

Page.
Meyer *v.* Bielaski..... 852
Michaux, Ancient Egyptian Order *v*..... 737
Michigan *v.* Illinois..... 820, 821
Mid-Kansas O. & G. Co., Transcontinental Oil Co. *v*. 853
Mielziner, Berkower *v*..... 848
Mihas, Chesapeake & O. R. Co. *v*..... 827
Minerals Separation N. A. Corp'n *v*. Magma Copper Co..... 832
Minerich *v*. United States..... 843
Minneapolis, St. P. & S. S. M. R. Co. *v*. Rock..... 410
Minnesota, Farmers Loan & Trust Co. *v*..... 820
Minnesota Mutual L. Ins. Co. *v*. Marshall..... 851
Minnesota Mutual L. Ins. Co. *v*. United States..... 856
Missouri Pacific R. Co., Lesser-Goldman Cotton Co. *v*..... 855
Mitchell, Moore *v*..... 834
Moore *v*. Mitchell..... 834
Morgan *v*. Wisconsin Tax Comm'n..... 835
Morimura, Arai & Co. *v*. Taback..... 24
Morris & Co. *v*. Skandinavia Ins. Co..... 405
Morrison *v*. Regus..... 868
Motor Products Corp'n, Wallace *v*..... 859
Murphy *v*. India Tire & R. Co..... 838
Murray Rubber Co., Harley & Lund Corp'n *v*..... 872
Mutual L. Ins. Co., Smith *v*..... 868
Nagle, Hurst *v*..... 861
National Wool W. & S. Co., Falk Mercantile Co. *v*.. 836
National Wool W. & S. Co., McMillan *v*..... 836
Neuss, Hesslein & Co. *v*. Edwards..... 872
Nevada County N. G. R. Co., United States *v*..... 73
New Jersey *v*. Delaware..... 825
New Jersey *v*. New York..... 823
New Jersey S. & D. Co., Red Star T. & T. Co. *v*..... 844
New Orleans, Sampere *v*..... 812
New York Central R. Co. *v*. Ambrose..... 833
New York Central R. Co. *v*. Johnson..... 310

Page
New York Central R. Co., United States *v*..... 73
New York, C. & St. L. R. Co. *v.* Peele..... 842
New York *v.* Illinois..... 820, 821
New York *v.* Latrobe..... 421
New York L. Ins. Co. *v.* Ross..... 852
New York, New Jersey *v*..... 823
New York, N. H. & H. R. Co., Douglas *v*..... 377
New York & N. J. S. Co. *v.* Schomburg..... 837
Nicolas, Alberto *v*..... 139
Nicolich, United States *v*..... 875
Nielsen *v.* Johnson..... 47
North British & M. Ins. Co., Harris *v*..... 852
North Carolina *v.* Southern R. Co..... 858
Norfolk & W. R. Co., Hudson *v*..... 866
Northern P. R. Co., General Ins. Co. *v*..... 827
Norton *v.* United States..... 841
O'Connor *v.* Anderson..... 828
O'Donoghue, Cornish *v*..... 871
O'Fallon Case, The..... 461
Ohio *ex rel.* Popovici *v.* Agler..... 828
Ohio Oil Co. *v.* Conway..... 813
Okanogan Indians *v.* United States..... 655
Old Colony R. Co., Comm'r of Internal Revenue *v*.. 876
Old Colony Trust Co. *v.* Comm'r of Internal Revenue..... 716
Olmstead *v.* United States..... 849
O'Neill *v.* Gray..... 865
Oregon, Burke *v*..... 811
Oregon Exploration Co. *v.* Reeves..... 862
Orient Ins. Co., Ariasi *v*..... 837
Orient Point W. Co. *v.* Machias L. Co..... 874
Osage Indians *v.* United States..... 811
Oswego & S. R. Co. *v.* Comm'r of Internal Revenue.. 842
Paladini, Flink *v*..... 59
Pampanga Sugar Mills *v.* Trinidad..... 211
Parrott *v.* Comm'r of Internal Revenue..... 870
Peele, New York, C. & St. L. R. Co. *v*..... 842

Page.
Pelican Bay L. Co. *v.* Blair 870
Pennington, Sill *v* 845
Pennsylvania Mining Co. *v.* United Mine Workers .. 841
Pennsylvania R. Co. *v.* Mackenzie 854
Peoples Bank *v.* Internat'l Finance Corp'n 858
Pere Marquette R. Co., Anderson *v* 851
Pere Marquette R. Co. *v.* Russell 864
Perkins *v.* Gamble 839
Perkins, Haskell *v* 872
Perry *v.* Chelan Electric Co 823
Persson, United States *v* 875
Philipsborn's *v.* United States 857
Picard *v.* The Caledonier 865
Pittsburgh Operators *v.* Anchor Coal Co 812
Plainfield-Union Water Co., Board of Comm'rs *v* ... 858
Pocket Veto Case 655
Popovici, Ohio *ex rel.*, *v.* Agler 828
Porter *v.* United States 875
Porto Rican A. T. Co., American Tobacco Co. *v* 858
Posados *v.* Menzi 340
Posados *v.* Warner, B. & Co 340
President Arthur, The, W. A. Marshall & Co. *v* 564
Providence Mill Co., Kirk *v* 807
Prudential Ins. Co. *v.* Baciocco 854
Railroad Comm'n, Sutter Butte Canal Co. *v* 125
R. C. Taylor Trust, Kothe *v* 830
Rector, Adler *v* 876
Red Star T. & T. Co. *v.* New Jersey S. & D. Co 844
Red Wing Linseed Co. *v.* Blair 860
Reeves, Oregon Exploration Co. *v* 862
Regus, Morrison *v* 868
Reilly *v.* Messinger 855
Reinecke *v.* Spalding 831
Richardson *v.* United States 859
Richmond Hosiery Mills *v.* Comm'r of Internal Revenue 844
Riehle *v.* Margolies 218

Page.
Riggs Nat'l Bank, District of Columbia *v*..... 846
Rivard, Lacroix *v*..... 857
Riverside Mfg. Co. *v*. United States..... 863
Robinson *v*. United States..... 845
Rock, Minneapolis, St. P. & S. S. M. R. Co. *v*..... 410
Roschen *v*. Ward..... 337
Ross, New York L. Ins. Co. *v*..... 852
Rouss *v*. Bowers..... 853
Routzahn *v*. Wiener..... 333
Russell *v*. Holt..... 856
Russell, Pere Marquette R. Co. *v*..... 864
Russell *v*. United States..... 836
Russell *v*. Wallace..... 871
Russell Car & S. P. Co., Highland *v*..... 253
Sadowsky *v*. Anderson..... 849
Saitta *v*. The Florinda..... 874
St. Louis, B. & M. R. Co. *v*. Booker..... 852
St. Louis & O'Fallon R. Co. *v*. United States..... 461
St. Louis & O'Fallon R. Co., United States *v*..... 461
St. Louis-S. F. R. Co. *v*. Public Service Comm'n.... 560
Sampere *v*. New Orleans..... 812
Sapio, Fahey *v*..... 871
Schindler, Tudor *v*..... 850
Schneider, Massachusetts F. & M. Ins. Co. *v*..... 844
Schnell *v*. United States..... 858
Schomburg, New York & N. J. S. Co. *v*..... 837
Schwimmer, United States *v*..... 644
Seattle, Kemp *v*..... 825
Shartel, International Shoe Co. *v*..... 429
Shaw, Carpenter *v*..... 830
Shipowners' Ass'n, Anderson *v*..... 864
Shriners *v*. Michaux..... 737
Sill *v*. Pennington..... 845
Simms Oil Co. *v*. Day..... 874
Sinclair *v*. United States..... 263, 749
Sinco *v*. Longa..... 845
Skandinavia Ins. Co., Morris & Co. *v*..... 405

Page.
Skinner, United States *v*. 877
Smith, Jumer *v*. 825
Smith *v*. Mutual L. Ins. Co. 868
Smith, Tillitson *v*. 866
Spalding, Reinecke *v*. 831
Spokane, County of, *v*. United States. 80
South Dakota, Fiman *v*. 841
Southern Pacific Co. *v*. Bank of America. 847
Southern Pacific Co., Globe Indemnity Co. *v*. 860
Southern R. Co. *v*. Blue Ridge P. Co. 860
Southern R. Co. *v*. Chatters. 320
Southern R. Co., Matthews *v*. 844
Southern R. Co., North Carolina *v*. 858
Southern R. Co., Stearns Bros. *v*. 838
Southern Trust Co. *v*. Austin. 874
Southland L. Ins. Co. *v*. U. S. Fidelity & G. Co. 846
Standard Oil Co. *v*. Marysville. 582
Stapleton, Chesapeake & O. R. Co. *v*. 587
Staunton, City of, Federal Surety Co. *v*. 840
Stearns Bros. *v*. Southern R. Co. 838
Stelwagon Mfg. Co., Elvidge *v*. 844
Stilz *v*. Bethlehem Shipbuilding Corp'n. 834
Stimson, U. S. *ex rel.* Ulrich *v*. 868
Superior Confection Co. *v*. Craig. 824
Sutter Butte Canal Co. *v*. Railroad Comm'n. 125
S. S. White Dental Co. *v*. United States. 862
Taback, Morimura, Arai & Co. *v*. 24
Tait, Abell *v*. 849
Taylor (R. C.) Trust, Kothe *v*. 830
Tefft *v*. Grant. 824
Texas, Urias *v*. 863
Thomas *v*. Maine Central R. Co. 835
Thompson, District of Columbia *v*. 829
Tidal Osage Oil Co. *v*. Wilbur. 855
Tillitson *v*. Smith. 866
Tootal Broadhurst Lee Co. *v*. Comm'r of Internal Revenue. 861

Page.
Townsend Estates, Inc. *v.* Kerner Incinerator Co... 843
Transcontinental Oil Co. *v.* Mid-Kansas O. & G. Co.. 853
Transit Comm'n *v.* Interborough Rapid Transit Co.. 159
Trent Trust Co. *v.* Isenberg..... 862
Trinidad, Pampanga Sugar Mills *v*..... 211
Tudor *v.* Schindler..... 850
Ulrich, U. S. *ex rel.*, *v.* Stimson..... 868
United Mine Workers, Pennsylvania Mining Co. *v*.. 841
United States, Adams *v*..... 836
United States, Admiral-Oriental Line *v*..... 847
United States, Advance Automobile A. Corp'n *v*... 859
United States, Alabama *v*..... 229
United States, Alderman *v*..... 869
United States *v.* American Livestock Comm'n Co... 435
United States *v.* Anchor Coal Co..... 812
United States, Atchison, T. & S. F. R. Co. *v*..... 768
United States, Austin-Bagley Corp'n *v*..... 863
United States, Baltimore & O. R. Co. *v*..... 781
United States, Blaine *v*..... 845
United States *v.* Boston & M. R. R..... 732
United States, Boyd *v*..... 839
United States, Brower *v*..... 866
United States *v.* California Canneries..... 553
United States, C. B. Fox Co. *v*..... 848
United States, Chamberlain *v*..... 845
United States, Corning Distilling Co. *v*..... 843
United States, County of Spokane *v*..... 80
United States, Day *v*..... 863
United States *ex rel.* Albro *v.* Karnuth..... 850
United States *ex rel.* Albro, Karnuth *v*..... 231
United States *ex rel.* Claussen *v.* Day..... 398
United States *ex rel.* Cunningham, Barry *v*.... 597, 827
United States *ex rel.* Kadrie, Wilbur *v*..... 833
United States *ex rel.* Krushnic, Wilbur *v*..... 831
United States *ex rel.* Los Angeles, Interstate Commerce Comm'n *v*..... 830
United States *ex rel.* Ulrich *v.* Stimson..... 868

Page.
United States *ex rel.* Wenger *v.* Mathues..... 817
United States, Feather River L. Co. *v*..... 837
United States, Federal Sugar R. Co. *v*..... 831
United States, Fingerhood *v*..... 863
United States, Fisler *v*..... 836
United States, Former Corporation *v*..... 857
United States *v.* Fruit Growers Express Co..... 363
United States *v.* Galveston, H. & S. A. R. Co..... 401
United States, Gerahty *v*..... 846
United States, Gibson *v*..... 866
United States, Hass *v*..... 865
United States, Indian Motocycle Co. *v*..... 826
United States, Irvine *v*..... 846
United States, Ithaca Trust Co. *v*..... 151
United States, Jacobs *v*..... 869
United States, James Clark Distilling Co. *v*..... 868
United States *v.* John Barth Co..... 370
United States, King *v*..... 833
United States, Leonard *v*..... 40
United States, Lewis *v*..... 63
United States, Lewy *v*..... 850
United States, Lindgren *v*..... 827
United States, Lisansky *v*..... 873
United States, Luckenbach S. S. Co. *v*..... 831
United States, Marsh *v*..... 849
United States, McDonald *v*..... 12
United States, Minerich *v*..... 843
United States, Minnesota Mutual L. Ins. Co. *v*.... 856
United States *v.* Nevada County N. G. R. Co..... 73
United States *v.* New York Central R. Co..... 73
United States *v.* Nicolich..... 875
United States, Norton *v*..... 841
United States, Okanogan Indians *v*..... 655
United States, Olmstead *v*..... 849
United States, Osage Indians *v*..... 811
United States *v.* Persson..... 875
United States, Porter *v*..... 875

Page.
United States, Richardson *v*. 859
United States, Riverside Mfg. Co. *v*. 863
United States, Robinson *v*. 845
United States, Russell *v*. 836
United States, St. Louis & O'Fallon R. Co. *v*. 461
United States, Schnell *v*. 858
United States *v*. Schwimmer. 644
United States, Sinclair *v*. 263, 749
United States *v*. Skinner. 877
United States, S. S. White Dental Co. *v*. 862
United States *v*. Utah. 816
United States, Vukich *v*. 847
United States, Wheeler Lumber B. & S. Co. *v*. 826
United States, White *v*. 872
United States, Wilcox *v*. 834
United States, Woodman *v*. 855
U. S. Fidelity & G. Co., Southland L. Ins. Co. *v*. . . . 846
U. S. Fleet Corporation, Johnson *v*. 819
U. S. Fleet Corporation *v*. Lustgarten. 828
U. S. Printing & L. Co. *v*. Griggs, C. & Co. 156
Urias *v*. Texas. 863
Utah, United States *v*. 816
Van Camp Sea F. Co. *v*. Westgate Sea P. Co. 841
Verde River I. & P. Co. *v*. Wilbur. 854
Vial, Carson Petroleum Co. *v*. 95
Virginia *v*. Marshall & Illsley Bank. 867
Volker, Dickey *v*. 839
Vukich *v*. United States. 847
Wabash R. Co. *v*. Barclay. 828
Wakem & McLaughlin, Inc., Culver *v*. 847
Wallace *v*. Motor Products Corp'n. 859
Wallace, Russell *v*. 871
Ward, Roschen *v*. 337
Ward, S. S. Kresge Co. *v*. 337
Warner, Barnes & Co., Posados *v*. 340
Washington, Booher *v*. 822

Page.
Washington, Brunn *v*. 853
Washington L. & T. Co., Larkin *v*. 867
Watson *v*. Georgia S. & F. R. Co. 857
Weiss *v*. Wiener. 333
Wenatchee Federated Growers, Inc., Great Northern R. Co. *v*. 851
Wenger, U. S. *ex rel.*, *v*. Mathues. 817
Western & A. R. R. *v*. Henderson. 639
Westgate Sea P. Co., Van Camp Sea F. Co. *v*. 841
Wheeler *v*. Greene. 829
Wheeler Lumber B. & S. Co. *v*. United States. 826
Wheeling Steel Corp'n, Madonna *v*. 838
White *v*. Barnard. 848
White *v*. United States. 872
White (S. S.) Dental Co. *v*. United States. 862
White River L. Co. *v*. Applegate. 692
Whitney, Barstow San Antonio Oil Co. *v*. 848
Wiener, Routzahn *v*. 333
Wiener, Weiss *v*. 333
Wilbur, Tidal Osage Oil Co. *v*. 855
Wilbur *v*. U. S. *ex rel.* Kadrie. 833
Wilbur *v*. U. S. *ex rel.* Krushnic. 831
Wilbur, Verde River I. & P. Co. *v*. 854
Wilcox *v*. United States. 834
Williams, Gulf, M. & N. R. Co. *v*. 830
Wilson *v*. McLane. 822
Wisconsin *v*. Illinois. 820, 821
Wisconsin Boxing Club, Lazzara *v*. 851
Wisconsin Tax Comm'n, Morgan *v*. 835
Wood, Great Northern R. Co. *v*. 851
Woodman *v*. United States. 855
Wooley *v*. Malley. 860
Worcester County Nat'l Bank, *Ex parte*. 347
Yount-Lee Oil Co., Graffenreid *v*. 865

TABLE OF CASES

Cited in Opinions

	Page.
Abrams *v.* United States, 250 U. S. 616	299
Adair *v.* United States, 208 U. S. 161	261
Adams *v.* Penn Bank, 35 Hun. 393	386
Adams Express Co. *v.* Ohio, 166 U. S. 185	249
Adams Express Co. *v.* Ohio Auditor, 165 U. S. 194	253
Addyston Pipe Co. *v.* United States, 175 U. S. 211	261
Adkins *v.* Childrens Hospital, 261 U. S. 525	261
Adler *v.* Seaman, 266 Fed. 828	557
Admiral Realty Co. *v.* New York, 206 N. Y. 110	203
Air-Way Corp'n *v.* Day, 266 U. S. 71	424, 433
Alaska Packers' Ass'n *v.* Accident Comm'n, 276 U. S. 467	120
Alejandrino *v.* Quezon, 271 U. S. 528	813, 818
Allen *v.* Smith, 173 U. S. 389	217
Allgeyer *v.* Louisiana, 165 U. S. 578	261
Almy *v.* California, 24 How. 169	251, 627
Alpha Cement Co. *v.* Commonwealth, 244 Mass. 547	635
Alpha Cement Co. *v.* Massachusetts, 268 U. S. 203	631, 635
American B. & F. Co. *v.* Pere Marquette R. Co., 263 Fed. 237	226
American Development Co. *v.* Boyd, 148 Fed. 258	451
American Express Co. *v.* Daniel 269 U. S. 40	331
American Ins. Co. *v.* Canter, 1 Pet. 511	449
American S. & R. Co. *v.* United States, 259 U. S. 75	78
American Steamboat Co. *v.* Chase, 16 Wall. 531	119
American Steel Foundries *v.* Robertson, 262 U. S. 209	158
American Sugar Co. *v.* Louisiana, 179 U. S. 89	427
Anglo-American Co. *v.* Cheshire Institution, 124 Fed. 464	227
Ann C. Pratt, The, 1 Fed. Cas. 947	570
Arkadelphia Co. *v.* St. Louis, etc. R. Co., 249 U. S. 134	559, 785
Arkansas Comm'n *v.* Chicago, etc. R. Co., 274 U. S. 597	787
Armour Packing Co. *v.* United States, 209 U. S. 56	299
Arnold *v.* United States 263 U. S. 427	820
Asakura *v.* Seattle, 265 U. S. 332	52
Askren *v.* Continental Oil Co., 252 U. S. 444	398
Aspen Mining Co. *v.* Billings, 150 U. S. 31	555
Assigned Car Cases, 274 U. S. 564	493, 781
Astiazaran *v.* Santa Rita Co., 148 U. S. 80	451, 456
Atchison, etc. R. Co. *v.* Wells, 265 U. S. 101	223
Atherton Mills *v.* Johnston, 259 U. S. 13	818
Atlantic Coast Line R. Co. *v.* Davis, 279 U. S. 34	788
Atlantic Coast Line R. Co. *v.* Goldsboro, 232 U. S. 548	138

Page.

Atlantic Coast Line R. Co. *v.* Riverside Mills, 219 U. S. 186 261
Atlantic Coast Line R. Co. *v.* Southwell, 275 U. S. 64 821
Atlantic Transport Co. *v.* Imbrovek, 234 U. S. 52 124
Attorney General *v.* Boston & A. R. Co., 233 Mass. 460 635
Attorney General *v.* Legion of Honor, 196 Mass. 151 228
Auffmordt *v.* Hedden, 137 U. S. 310 451
Bacon *v.* Illinois, 227 U. S. 504 104
Bailey *v.* Alabama, 219 U. S. 219 6, 644
Bakelite Corp'n, *Ex parte,* 279 U. S. 438 722
Baldwin Co. *v.* Robertson, 265 U. S. 168 158
Balmoral Co. *v.* Marten, [1902] A. C. 511 713
Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68 635
Baltimore & O. R. Co. *v.* Settle, 260 U. S. 166 780
Baltimore & O. S. R. Co. *v.* I. C. C., 221 U. S. 612 261
Baltimore & O. S. R. Co. *v.* Voigt, 176 U. S. 498 368
Bank *v.* Fidelity Co., 299 Fed. 478 796
Barrett *v.* Imhof, 291 Mo. 603 434
Barrett & Co., *In re,* 27 F. (2d) 159 228
Bassett *v.* Johnson, 2 N. J. Eq. 154 242
Behn, Meyer & Co. *v.* Miller, 266 U. S. 457 63
Belfast, The, 7 Wall. 624 124
Benedict *v.* New York, 250 U. S. 321 749
Benner *v.* Porter, 9 How. 235 450
Bennett *v.* Watson, 3 M. & S. 1 617
Benson, *In re,* 58 Fed. 962 71
Benwood Brewing Co., *In re,* 202 Fed. 326 228
Berry *v.* Davis, 242 U. S. 468 813
Berwind-White Co. *v.* United States, 9 F. (2d) 429 368

Page.

Biddle *v.* United States, 156 Fed. 759 451
Blake *v.* McClung, 172 U. S. 239 387
Blalock *v.* Georgia R. & E. Co., 246 Fed. 387 730
Block *v.* Atchison, T. & S. F. R. Co., 21 Fed. 529 326
Blodgett *v.* Silberman, 277 U. S. 1 636
Bloom *v.* Richards, 2 Oh. St. 387 243
Bluefield Water Co. *v.* Service Comm'n, 262 U. S. 679 484, 538
Board of Comm'rs *v.* Bank, 27 F. (2d) 286 557
Board of Comm'rs *v.* Telephone Co., 271 U. S. 23 532
Boom Co. *v.* Patterson, 98 U. S. 403 504
Boston Chamber of Commerce *v.* Boston, 217 U. S. 189 504
Bowe *v.* Scott, 233 U. S. 658 822
Boyd *v.* United States, 116 U. S. 616 293
Boyer, *Ex parte,* 109 U. S. 629 124
Brady Foundry Co., *In re,* 3 F. (2d) 437 228
Bramwell *v.* Fidelity Co., 269 U. S. 483 92
Brasfield *v.* United States, 272 U. S. 448 319
Bratton *v.* Chandler, 260 U. S. 110 578
Brewer *v.* Ins. Co., 123 Mass. 78 713
British Ins. Co. *v.* Maldonado & Co., 182 Fed. 744, certiorari denied, 220 U. S. 622 709
Brown *v.* Maryland, 12 Wheat. 419 626
Brown *v.* Swineford, 44 Wis. 282 318
Browning *v.* Waycross, 233 U. S. 16 397
Brownlow *v.* Schwartz, 261 U. S. 216 813, 818
Bryar *v.* Campbell, 177 U. S. 649 728

Page.

Buchan's Soap Corp'n, *In re*, 169 Fed. 1017 228
Buckeye Co. *v.* Hocking Valley R. Co., 269 U. S. 42 559
Burnes Bank *v.* Duncan, 265 U. S. 17 361
Buscher *v.* Southern R. Co., 4 La. App. 653 325
Butler *v.* Frazee, 211 U. S. 459 12
Butte County Ass'n *v.* R. R. Comm'n, 185 Cal. 218 132
Butterworth *v.* Hoe, 112 U. S. 50 451
Buzynski *v.* Luckenbach Co., 277 U. S. 226 797
Byers *v.* McAuley, 149 U. S. 608 226
Calhoun *v.* Lanaux, 127 U. S. 634 223
Calhoun Co. *v.* Ajax Co., 27 Colo. 1 345
California *v.* Pacific R. Co., 127 U. S. 1 629
Canada N. R. Co. *v.* Eggen, 252 U. S. 553 386
Capital Traction Co. *v.* Hof, 174 U. S. 1 150
Carrington *v.* Pratt, 18 How. 63 570
Carroll *v.* United States, 16 F. (2d) 948 298
Carson Petroleum Co. *v.* Vial, 279 U. S. 95 780
Cary *v.* Curtis, 3 How. 236 458
Casey *v.* Galli, 94 U. S. 673 356
Cauffiel *v.* Lawrence, 256 Fed. 714 557
Central of Georgia R. Co. *v.* Barnett, 35 Ga. App. 528 642
Central of Georgia R. Co. *v.* Hartley, 25 Ga. App. 110 642
Central R. Co. *v.* United States, 257 U. S. 247 493, 780
Central Transp. Co. *v.* Pullman Co., 139 U. S. 24 795
Central Trust Co. *v.* D'Arcy, 238 Mo. 676 227
Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. 551 226
Central Vermont R. Co. *v.* White, 238 U. S. 507 591
Champlain Realty Co. *v.* Brattleboro, 260 U. S. 366 102

Page.

Cheney Bros. Co. *v.* Massachusetts, 246 U. S. 147 426
Cherry Creek Bank *v.* Fidelity Co., 207 App. Div. 787 317
Cheung Sum Shee *v.* Nagle, 268 U. S. 336 52
Chicago, B. & Q. R. Co. *v.* McGuire, 219 U. S. 549 138
Chicago, G. W. R. Co. *v.* Kentucky, 266 U. S. 94 231
Chicago, M. & St. P. R. Co. *v.* Coogan, 271 U. S. 472 590
Chicago, R. I. & P. R. Co., *Ex parte*, 255 U. S. 273 449
Chicago, R. I. & P. R. Co. *v.* United States, 274 U. S. 29 493, 509
Chicago, R. I. & P. R. Co. *v.* Wright, 239 U. S. 548 592
Chicago, St. L. & N. O. R. Co. *v.* Pullman Co., 139 U. S. 79 368
Chicago & A. R. Co. *v.* Kirby, 225 U. S. 155 331
Chicago & A. R. Co. *v.* Tranbarger, 238 U. S. 67 587
Chicago Junction Case, 264 U. S. 258 493
Chisholm *v.* Georgia, 2 Dall. 431 723
Choctaw & G. R. Co. *v.* Harrison, 235 U. S. 292 625
Cincinnati, H. & D. R. Co. *v.* I. C. C., 206 U. S. 142 493
Cincinnati, N. O. & T. P. R. Co. *v.* I. C. C., 162 U. S. 184 368
City Bank, *Ex parte*, 3 How. 292 448
City Service Co. *v.* Marysville, 117 Kan. 514 586
Clabborn *v.* Phillips, 245 Mass. 47 362
Clark *v.* Ins. Co., 7 Mass. 365 711
Cleveland, C., C. & St. L. R. Co. *v.* Backus, 154 U. S. 439 253, 504
Cleveland, C., C. & St. L. R. Co. *v.* United States, 275 U. S. 404 787
Cline *v.* Frink Dairy Co., 274 U. S. 445 6
Clinton *v.* Englebrecht, 13 Wall. 434 450

Page.
Clyde S. S. Co. *v.* Walker, 244 U. S. 255 118
Coca Cola Co. *v.* Mosby, 289 Mo. 462 434
Cochran *v.* United States, 254 U. S. 387 310
Coe *v.* Errol, 116 U. S. 517 101
Coe *v.* United States, 155 U. S. 76 456
Coffin *v.* Chattanooga Water Co., 44 Fed. 533 556
Coffin Bros. *v.* Bennett, 277 U. S. 29 820
Collins *v.* Miller, 252 U. S. 364 558
Colorado *v.* United States, 271 U. S. 153 418
Columbus, etc. R. Co. *v.* Fondren, 145 Miss. 679 644
Commercial Cable Co. *v.* Burleson, 250 U. S. 360 813
Commissioners *v.* Compania General, 249 U. S. 425 813
Commonwealth v. Hamilton Co., 94 Mass. 298 635
Commonwealth *v.* Provident Institution, 94 Mass. 312 635
Commonwealth - Atlantic Bank, 249 Mass. 440 360
Commonwealth - Atlantic Bank, 261 Mass. 217 360
Connally *v.* General Construction Co., 269 U. S. 385 6
Connolly *v.* Union Pipe Co., 184 U. S. 540 427
Continental Ins. Co. *v.* United States, 259 U. S. 156 559
Cook *v.* Pennsylvania, 97 U. S. 566 627
Cooke *v.* United States, 267 U. S. 517 766
Coppage *v.* Kansas, 236 U. S. 1 261
Cothran *v.* State, 39 Miss. 541 298
Crandall *v.* Nevada, 6 Wall. 35 251
Credits Co. *v.* United States, 177 U. S. 311 556
Creswill *v.* Knights of Pythias, 225 U. S. 246 744

Page.
Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292 635
Crosby *v.* Potts, 8 Ga. App. 463 617
Cudahy Co. *v.* Hinkle, 278 U. S. 460 433
Cudahy Co. *v.* Minnesota, 246 U. S. 450 253
Cunard S. S. Co. *v.* Mellon, 262 U. S. 100 401
Cunningham *v.* Rodgers, 171 Fed. 835 451
Cusack Co. *v.* Chicago, 242 U. S. 526 584
Cutting, *In re*, 94 U. S. 15 556
Davis *v.* Cohen Co., 268 U. S. 638 417
Davis *v.* Cornwell, 264 U. S. 560 331
Davis *v.* Green, 260 U. S. 349 821
Davis *v.* Henderson, 266 U. S. 92 331
Davis *v.* Kennedy, 266 U. S. 147 39
Davis *v.* Wechsler, 263 U. S. 22 745
Dayton-Goose Creek R. Co. *v.* United States, 263 U. S. 456 418, 483, 491, 501
De Groot *v.* United States, 5 Wall. 419 452
Delatour, etc., *v.* Southern R. Co., 4 La. App. 658 325
Delaware R. R. Tax Cases, 18 Wall. 206 253, 427
Delley, *In re*, 297 Fed. 676 228
Dickason *v.* County Court, 128 Mo. 427 434
Dillingham *v.* Hawk, 60 Fed. 494 226
Dobbins *v.* Comm'rs, 16 Pet. 435 626
Dolph *v.* Lake Shore, etc., R. Co., 149 Mich. 278 319
Doyle *v.* Mitchell Bros. Co., 247 U. S. 179 577
Du Boulay *v.* Du Boulay, L. R. 2 P. C. 430 749
Du Pont Powder Co. *v.* Masland, 244 U. S. 100 391
Duquesne Club *v.* Penn Bank, 35 Hun. 390 386

Page.
Eastern Lumber Ass'n *v.* United States, 234 U. S. 600 437
Eaton Crane Co. *v.* Commonwealth, 237 Mass. 523 635
Edwards *v.* Slocum, 264 U. S. 61 155
Eisner *v.* Macomber, 252 U. S. 189 341, 577
Elevator Co. *v.* Cincinnati, 30 Oh. St. 629 803
Elk Cotton Mills *v.* Grant, 140 Ga. 727 593
Ellenberg *v.* Southern R. Co., 5 Ga. App. 389 642
Elliott Fischer Co. *v.* Sohmer, 148 App. Div. 514, aff'd 206 N. Y. 634 423
Ellis *v.* I. C. C., 237 U. S. 434 368
Ellis *v.* United States, 206 U. S. 246 261
Emery *v.* United States, 27 F. (2d) 992 728
Empire Surety Co., Matter of, 216 N. Y. 273 227
Engelhard, *In re,* 231 U. S. 646 556
Erie R. Co. *v.* Winfield, 244 U. S. 170 589
Essanay Film Co. *v.* Kane, 258 U. S. 358 223
Euclid *v.* Ambler Realty Co., 274 U. S. 365 584, 812
Evans *v.* Surety Co., 319 Ill. 105 227
Express Cases, 117 U. S. 1 368
Fairbank *v.* United States, 181 U. S. 283 629
Farmers' Loan Co. *v.* Kansas City R. Co., 53 Fed. 182 557
Farrell *v.* O'Brien, 199 U. S. 89 811
Fassett, *In re,* 142 U. S. 479 451
Federal Land Bank *v.* Crosland, 261 U. S. 374 627
Federal Trade Comm'n *v.* American Tobacco Co., 264 U. S. 298 293
Federal Trade Comm'n *v.* Eastman Kodak Co., 274 U. S. 623 723
Page.
Federal Trade Comm'n *v.* Klesner, 274 U. S. 145 559
Federal Trade Comm'n *v.* Paper Ass'n, 273 U. S. 52 576
Ferris *v.* Chic-Mint Gum Co., 14 Del. Ch. 232 91
Fidelity Bank *v.* Swope, 274 U. S. 123 454, 725
Fidelity Title Co. *v.* United States, 259 U. S. 304 310
Field *v.* United States, 9 Pet. 182 89
First Nat'l Bank *v.* Fellows, 244 U. S. 416 361
Fischer *v.* St. Louis, 194 U. S. 361 587
Fisher *v.* Trinidad, 43 Phil. 973 345
Fisher *v.* Weinholzer, 91 Minn. 22 317
Flash *v.* Conn., 109 U. S. 371 63
Fleischmann Co. *v.* United States, 270 U. S. 349 795
Fleming *v.* United States, 279 Fed. 613 451
Flint *v.* Stone Tracy Co., 220 U. S. 107 628, 636
Florida R. Co. *v.* Reynolds, 183 U. S. 471 698, 704
Florida R. Co. *v.* United States, 234 U. S. 167 492
Fong Yue Ting *v.* United States, 149 U. S. 698 451, 723
Forbes *v.* Mfrs. Ins. Co., 67 Mass. 371 710
Forbes *v.* Railroad, Fed. Cas. No. 4926 556
Fore River Corp'n *v.* Commonwealth, 248 Mass. 137 635
Ft. Edwards *v.* Hudson Valley R. Co., 192 N. Y. 139 209
Ft. Smith Lumber Co. *v.* Arkansas, 251 U. S. 532 699, 704
Fox *v.* Cincinnati, 33 Oh. St. 492 803
Fox *v.* Haarstick, 156 U. S. 674 310
Frederickson *v.* Louisiana, 23 How. 445 50
French *v.* Barber Asphalt Co., 181 U. S. 324 397
French *v.* Gapen, 105 U. S. 509 556

Page.
French Republic *v.* Saratoga Vichy Co., 191 U. S. 427 749
Frese *v.* Chicago, B. & Q. R. Co., 263 U. S. 1 39, 596
Frick *v.* Pennsylvania, 268 U. S. 473 631
Frisbie *v.* United States, 157 U. S. 160 261
Galveston, H. & S. A. R. Co. *v.* Texas, 210 U. S. 217 626
Garesche v. Roach, 258 Mo. 541 434
Garnett, *In re*, 141 U. S. 1 124
Garrison v. Nixon, 229 N. Y. 575 209
General Baking Co. *v.* Gorman, 3 F. (2d.) 891 159
General Investment Co. *v.* Lake Shore, etc. R. Co., 250 Fed. 160 327, 409
General Oil Co. *v.* Crain, 209 U. S. 211 104, 109
Genesee Chief, The, 12 How. 452 124
Geofroy *v.* Riggs, 133 U. S. 258 52
Georgia Banking Co. *v.* Smith, 128 U. S. 174 22
Georgia R. Co. *v.* Bailey, 9 Ga. App. 106 642
Georgia R. Co. *v.* Blish Milling Co., 241 U. S. 190 331
Georgia R. Co. *v.* R. R. Comm'n, 262 U. S. 625 542
Georgia R. Co. *v.* Thornton, 144 Ga. 481 642
Gerdes *v.* Lustgarten, 266 U. S. 321 26
Gibbons *v.* Ogden, 9 Wheat. 1 125
Gilliland Oil Co. v. Arkansas, 274 U. S. 717 426
Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196 249
Glynn *v.* Central R. Co., 175 Mass. 510 332
Gonsalves *v.* Morse Dry Dock Co., 256 U. S. 171 122
Good *v.* Martin, 95 U. S. 90 450
Goodrich *v.* Edwards, 255 U. S. 527 579
Page.
Gordon *v.* United States, 117 U. S. 697 451, 454
Gorieb *v.* Fox, 274 U. S. 603 812
Grabowsky *v.* Baumgart, 128 Mich. 267 317
Grand Rapids Trust Co. *v.* Beverage Co., 219 Mich. 208 593
Grant Smith-Porter Co. *v.* Rohde, 257 U. S. 469 119
Graves *v.* United States, 150 U. S. 118 318
Gray Motor Co. *v.* United States, 16 F. (2d) 367 376
Grayson *v.* Harris, 267 U. S. 352 300
Great Lakes Dock Co. *v.* Kierejewski, 261 U. S. 479 119
Great Northern R. Co. *v.* Merchants Elevator Co., 259 U. S. 285 420
Great Northern R. Co. *v.* Sutherland, 273 U. S. 182 261
Great Northern R. Co. *v.* Wiles, 240 U. S. 444 39, 415
Green *v.* Chicago, B. & Q. R. Co., 205 U. S. 530 326
Gregonis *v.* P. & R. Coal Co., 235 N. Y. 152 386
Gregory *v.* McVeigh, 23 Wall. 294 412
Greiner *v.* Lewellyn, 258 U. S. 384 636
Griffin *v.* State, 142 Ga. 636 4
Griffin *v.* Thompson, 10 F. (2d) 127 796
Griffith *v.* Loughman, 249 N. Y. 369 423
Grisar *v.* McDowell, 6 Wall. 363 451, 456
Guaranty Trust Co. *v.* Chicago, M. & St. P. R. Co., 15 F. (2d) 434 495
Guilford Water Rates, *In re*, 118 Me. 367 138
Gulf, etc. R. Co. *v.* Brown, 138 Miss. 39 644
Gulf, etc. R. Co. *v.* Butcher, 83 Tex. 309 318
Gulf, etc. R. Co. *v.* Wells, 275 U. S. 455 35

Page.
Hackett *v.* Legion of Honor, 206 Mass. 139 228
Hadacheck *v.* Los Angeles, 239 U. S. 394 584
Haines *v.* Carpenter, 91 U. S. 254 223
Hall *v.* United States, 150 U. S. 76 318
Hamilton, The, 207 U. S. 398 119
Hamilton *v.* Kentucky Distilleries, 251 U. S. 146 261
Hamilton *v.* Kentucky, etc. R. Co., 289 Fed. 20 730
Hamilton Co. *v.* Massachusetts, 6 Wall. 632 635
Hammond *v.* Schappi Bus Line, 275 U. S. 164 787
Hanover Ins. Co. *v.* Harding, 272 U. S. 494 424
Harkin *v.* Brundage, 276 U. S. 36 220
Harriman *v.* I. C. C., 211 U. S. 407 293
Hartford A. & I. Co. *v.* Southern Pacific Co., 273 U. S. 207 62
Hassler *v.* Shaw, 271 U. S. 195 409
Hatch *v.* Morosco Holding Co., 5 F. (2d) 1015, s. c. 19 F. (2d) 222 221, 222
Havens, *In re,* 272 Fed. 975 228
Hawes *v.* Georgia, 258 U. S. 1 7
Hayward *v.* Nat'l Bank, 96 U. S. 611 749
Head Money Cases, 112 U. S. 580 251
Heitmuller *v.* Stokes, 256 U. S. 359 813
Henderson *v.* Mayor, 92 U. S. 259 251
Henderson Water Co. *v.* Corp'n Comm'n, 269 U. S. 278 209
Hess *v.* Reynolds, 113 U. S. 73 225
Heydenfeldt *v.* Daney Gold, etc. Co., 93 U. S. 634 243
Hill *v.* Harding, 107 U. S. 631 226
Hobbs *v.* Head & Dowst, Co., 184 Fed. 409 228
Page.
Hocking Valley R. Co. *v.* Lackawanna C. & L. Co., 224 Fed. 930 771
Hoey, Tilden & Co., *In re,* 292 Fed. 269 228
Holder *v.* Aultman, 169 U. S. 81 309
Holy Trinity Church *v.* United States, 143 U. S. 457 243
Home Ins. Co. *v.* New York, 134 U. S. 594 427, 628, 636
Home Savings Bank *v.* Des Moines, 205 U. S. 503 624, 629
Hooper *v.* Bradford, 178 Mass. 95 155
Hopkins *v.* Lancaster, 254 Fed. 190 557
Horn *v.* Pere Marquette R. Co., 151 Fed. 626 557
Hornbuckle *v.* Toombs, 18 Wall. 648 450
Horning *v.* District of Columbia, 254 U. S. 135 299
Houston B. & T. R. Co. *v.* United States, 250 Fed. 1 730
Houston & T. R. Co. *v.* United States, 234 U. S. 342 230
Hover & Co. *v.* Denver & R. G. W. R. Co., 17 F. (2d) 881 596
Hubbard *v.* Toledo, 21 Oh. St. 379 803
Hudson County Co. *v.* McCarter, 209 U. S. 349 138
Hughes, *In re,* 262 Fed. 500 25
Hughes Bros. Co. *v.* Minnesota, 272 U. S. 469 102
Huguley Co., *In re,* 184 U. S. 297 449
Hull *v.* Burr, 234 U. S. 712 223, 824
Humes *v.* United States, 276 U. S. 487 154
Hump Hairpin Co. *v.* Emmerson, 258 U. S. 290 426, 433, 637
Humphreys v. Bank, 75 Fed. 852 796
Hutchinson *v.* Philadelphia & G. S. S. Co., 216 Fed. 795 557

Page.

Illinois Central R. Co. *v.* I. C. C., 206 U. S. 441 493, 494, 552
Illinois Central R. Co. *v.* Utilities Comm'n, 245 U. S. 493 420
Indian Oil Co. *v.* Oklahoma, 240 U. S. 522 627
Insurance Co. *v.* Railroad Co., 104 U. S. 146 330
International & G. N. R. Co. *v.* Adkins, 14 F. (2d) 149 226
International Harvester Co. *v.* Carlson, 217 Fed. 736 25
International Harvester Co. *v.* Kentucky, 234 U. S. 216 155, 326
International Nav. Co. *v.* Ins. Co., 100 Fed. 304, aff'd 108 Fed. 987, certiorari denied, 181 U. S. 623 710
International Nav. Co. *v.* Ins. Co., 129 Fed. 13 713
International Shoe Co. *v.* Shartel, 279 U. S. 429 425, 636
International Stevedoring Co. *v.* Haverty, 272 U. S. 50 63
International Textbook Co. *v.* Pigg, 217 U. S. 91 326
Interstate C. C. *v.* Alabama, M. R. Co., 168 U. S. 144 493
Interstate C. C. *v.* Baird, 194 U. S. 25 559
Interstate C. C. *v.* Brimson, 154 U. S. 447 293, 723
Interstate C. C. *v.* Goodrich Transit Co., 224 U. S. 194 368
Interstate C. C. *v.* Illinois Central R. Co., 215 U. S. 452 493
Interstate C. C. *v.* L. & N. R. Co., 227 U. S. 88 492
Interstate C. C. *v.* Northern Pacific R. Co., 216 U. S. 538 493, 777
Interstate C. C. *v.* Union Pacific, 222 U. S. 541 492
Irving Iron Works *v.* Kerlow Flooring Co., 96 N. J. Eq. 702 391
Irwin, Estate of, 196 Cal. 366 730

Page.

Ithaca Trust Co. *v.* United States, 279 U. S. 151 579
Jacobsen *v.* Massachusetts, 197 U. S. 11 584
James *v.* United States, 202 U. S. 401 455
Jennings *v.* Smith, 242 Fed. 561 557
Johnson *v.* Harrison, 47 Minn. 575 344
Johnson *v.* Louisville Trust Co., 293 Fed. 857 429
Johnson *v.* Sheddon, 2 East 581 710
Joines *v.* Patterson, 274 U. S. 544 301
Joins, *Ex parte*, 191 U. S. 93 448
Jordan *v.* Tashiro, 278 U. S. 123 51
Julian *v.* Central Trust Co., 193 U. S. 93 223
Kansas City, F. S. & M. R. Co. *v.* Botkin, 240 U. S. 227 433
Kansas City, M. & B. R. Co. *v.* Stiles, 242 U. S. 111 433
Kansas City S. R. Co. *v.* I. C. C., 252 U. S. 178 484
Kansas City S. R. Co. *v.* United States, 231 U. S. 423 490, 523
Keller *v.* Potomac Elec. Co., 261 U. S. 428 450, 454
Kelley *v.* Gill, 245 U. S. 116 223
Kelley *v.* Rhoads, 188 U. S. 1 102
Kenna *v.* Calumet, etc. R. Co., 206 Ill. App. 17 411
Kilbourn *v.* Thompson, 103 U. S. 168 293
King *v.* Barr, 262 Fed. 56 557
King *v.* R. R. Comm'n, 190 Cal. 321 132
Kinkead *v.* United States, 150 U. S. 483 52
Klicke *v.* Steel Co., 200 Fed. 933 596
Kline *v.* Burke Construction Co., 260 U. S. 226 228, 728
Klotz *v.* Angle, 220 N. Y. 347 386

Page.

Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149 118
Knowlton *v.* Moore, 178 U. S. 41 155, 628
Krauss Bros. Co. *v.* Mellon, 276 U. S. 386 797
La Abra Mining Co. *v.* United States, 175 U. S. 423 451, 677, 725
La Bourgogne, 210 U. S. 95 119
Lafayette Ins. Co. *v.* French, 18 How. 404 325
Lake Superior & M. R. Co. *v.* United States, 93 U. S. 442 404
Lambert Co. *v.* B. & O. R. Co., 258 U. S. 377 420
Land Title Co. *v.* Asphalt Co., 114 Fed. 484 556
Lane County *v.* Oregon, 7 Wall. 71 90, 397
Lankford *v.* Comm'rs, 73 Md. 105 677
Lapina *v.* Williams, 232 U. S. 78 401
Last Chance Mining Co. *v.* Tyler Mining Co., 157 U. S. 683 225
LaTourette *v.* McMaster, 248 U. S. 465 387
Laurel Hill Cemetery *v.* San Francisco, 216 U. S. 358 584
Law *v.* R. R. Comm'n, 184 Cal. 737 138
Lawrence *v.* New York Ins. Co., 3 Johns. Cas. 217 710
Lawrence *v.* St. Louis-S. F. R. Co., 274 U. S. 588 563, 787
Lawrence *v.* St. Louis-S. F. R. Co., 278 U. S. 228 563
Leaf Tobacco, etc., *Ex parte,* 222 U. S. 578 556
Leary v. United States, 224 U. S. 567 556
Lee *v.* C. & O. R. Co., 260 U. S. 653 409
Leland *v.* Medora, 15 Fed. Cas. 298 570
Leloup *v.* Port of Mobile, 117 U. S. 640 249
Lem Moon Sing *v.* United States, 158 U. S. 538 235

Page.

Levalley, Estate of, 191 Wis. 356 730
Lewellyn *v.* Electric Reduction Co., 275 U. S. 243 155, 795
Lewis *v.* Frick, 233 U. S. 291 401
Lewis *v.* Rucker, 3 Burr. 1167 710
Liberty Warehouse Co. *v.* Grannis, 273 U. S. 70 454
Liggett Co. v. Baldridge, 278 U. S. 105 708
Limoneira Co. *v.* R. R. Comm'n, 174 Cal. 232 138
Lincoln Gas Co., *Ex parte,* 256 U. S. 512 786
Lion B. & S. Co. *v.* Karatz, 262 U. S. 77 220, 224
Live Oak Ass'n *v.* R. R. Comm'n, 192 Cal. 132, s. c. 269 U. S. 354 132
Lloyd Thomas Co. *v.* Grosvenor, 144 Tenn. 349 309
Lohre *v.* Aitchison, L. R. 2 Q. B. D. 501 713
Lombard Investment Co. *v.* Seaboard Mfg. Co., 74 Fed. 325 556
London Assurance *v.* Companhia de Moagens, 167 U. S. 149 710
Looney *v.* Crane Co., 245 U. S. 178 433
Los Angeles Switching Case, 234 U. S. 294 493
Louisiana *v.* Pilsbury, 105 U. S. 278 344
Louisville & N. R. Co. *v.* Barber Co., 197 U. S. 430 504
Louisville & N. R. Co. *v.* Chatters, 279 U. S. 320 409
Louisville & N. R. Co. *v.* Lyons, 155 Ky. 396 593
Louisville & N. R. Co. *v.* Mink, 168 Ky. 394 332
Louisville & N. R. Co. *v.* Motley, 219 U. S. 467 138, 261
Louisville & N. R. Co. *v.* United States, 238 U. S. 1 777
Love *v.* Atchison, T. & S. F. R. Co., 185 Fed. 321 815

Page.

Luckenbach S. S. Co. *v.* United States, 272 U. S. 533 451, 452
Luria *v.* United States, 231 U. S. 9 649
Lynch *v.* Alworth-Stephens Co., 267 U. S. 364 336
Lynch *v.* Turrish, 247 U. S. 221 577
Lyng *v.* Michigan, 135 U. S. 161 249
Mammoth Oil Co. *v.* United States, 275 U. S. 313 286
Manhattan Trust Co. *v.* Chicago E. T. Co., 188 Fed. 1006 226
Manigault *v.* Springs, 199 U. S. 473 138
Manley *v.* Georgia, 279 U. S. 1 492, 642
Manson *v.* Williams, 213 U. S. 453 391
Manufacturers R. Co. *v.* United States, 246 U. S. 457 777
Margay Corp'n *v.* Applegate, 273 U. S. 666 426
Martin *v.* Hunter's Lessee, 1 Wheat. 304 679
Mason, *In re,* 85 Fed. 145 71
Masterson *v.* Chicago & N. W. R. Co., 102 Wis. 571 318
Maxwell *v.* Bugbee, 250 U. S. 525 387
Mayor *v.* McNeely, 274 U. S. 676 249
McAllister *v.* United States, 141 U. S. 174 450
McCall *v.* California, 136 U. S. 104 250
McCardle *v.* Water Co., 272 U. S. 400 484, 490, 538
McCulloch *v.* Maryland, 4 Wheat. 316 628
McElrath *v.* United States, 102 U. S. 426 452
McFarland *v.* American Sugar Co., 241 U. S. 79 6, 644
McGrain *v.* Daugherty, 273 U. S. 135 398, 616
McNamara *v.* B. & M. R. Co., 202 Mass. 491 332

Page.

McNamara *v.* Washington Terminal Co., 37 App. D. C. 384 413
Meccano, Ltd. *v.* John Wanamaker, 253 U. S. 136 231
Meinert's Estate, *In re,* 204 Ia. 355 51
Mercantile Trust Co. *v.* Pittsburgh & W. R. Co., 29 Fed. 732 227
Merchants' L. & T. Co. *v.* Smietanka, 255 U. S. 509 577
Merryweather *v.* United States, 12 F. (2d) 407 91
Messel *v.* Foundation Co., 274 U. S. 427 122
Metcalf & Eddy *v.* Mitchell, 269 U. S. 514 638
Metropolitan Water Co., *Ex parte,* 220 U. S. 539 785
Miles *v.* Graham, 268 U. S. 501 455
Miller *v.* Cornwall R. Co., 168 U. S. 131 822
Miller *v.* Milwaukee, 272 U. S. 713 630, 638
Miller *v.* Robertson, 266 U. S. 243 262
Miller's Underwriters *v.* Braud, 270 U. S. 59 120
Milligan, *Ex parte,* 4 Wall. 2 261
Minneapolis & St. L. R. Co. *v.* Minnesota, 186 U. S. 257 520
Minnesota *v.* Grace, 18 Minn. 398 617
Minnesota Rate Cases, 230 U. S. 352 484, 543
Minot *v.* Philadelphia, W. & B. R. Co., 2 Abb. (N. S.) 323, 17 Fed. Cas. 458 250
Mishimura Ekiu *v.* United States, 142 U. S. 651 451
Missouri *v.* Pierce Petroleum Corp'n, 318 Mo. 1020 431
Missouri Pacific R. Co. *v.* Aeby, 275 U. S. 426 12
Missouri Pacific R. Co. *v.* Clarendon Boat Co., 257 U. S. 533 325
Missouri Pacific R. Co. *v.* Danuser, 6 S. W. (2d) 907 435

Page.

Missouri Pacific R. Co. *v.* Kansas, 248 U. S. 276 682
Missouri Pacific R. Co. *v.* Merrill, 65 Kan. 436 332
Missouri Pacific R. Co. *v.* Prude, 265 U. S. 99 331
Mitchell Furniture Co. *v.* Selden Breck Co., 257 U. S. 213 325, 409
Mitchum *v.* Georgia, 11 Ga. 615 317
Mittleman *v.* Bartikowsky, 283 Pa. 485 317
Mizell *v.* Beard, 25 F. (2d) 324 71
Mobile, J. & K. C. R. Co. *v.* Turnipseed, 219 U. S. 35 6, 643
Monongahela Nav. Co. *v.* United States, 148 U. S. 312 504
Monroe *v.* Chicago & A. R. Co., 297 Mo. 633 318
Montclair v. Ramsdell, 107 U. S. 568 344
Montenes *v.* Metropolitan Street R. Co., 77 App. Div. 493 12
Mueller *v.* Adler, 292 Fed. 138 557
Murray *v.* Lazarus, 17 Fed. Cas. 1049 568
Murray's Lessee *v.* Hoboken Co., 18 How. 272 451
Muskrat *v.* United States, 219 U. S. 346 454, 723
Mutual Ins. Co. *v.* Spratley, 172 U. S. 602 325
Myers *v.* International Trust Co., 273 U. S. 380 417
Myers *v.* United States, 272 U. S. 52 690
Narramore *v.* Cleveland, C., C. & St. L. R. Co., 96 Fed. 298 596
Nashville, C. & St. L. R. Co. *v.* Tennessee, 262 U. S. 318 777
National Ins. Co. *v.* United States, 277 U. S. 508 631
National Leather Co. *v.* Massachusetts, 277 U. S. 413 635
Nelson *v.* Southern R. Co., 246 U. S. 253 12

Page.

New England Divisions Case, 261 U. S. 184 420, 492, 501, 534, 777
New Jersey Refrigerating Co., *In re*, 97 N. J. Eq. 358 227
New Orleans & N. E. R. Co. *v.* Harris, 247 U. S. 367 591
New Orleans & N. E. R. Co. *v.* Scarlet, 249 U. S. 528 591
New York *v.* Barker, 179 U. S. 279 697, 704
New York *v.* Brooklyn, 232 N. Y. 463 209
New York *v.* Consolidated Gas Co., 253 U. S. 219 556
New York *v.* Latrobe, 279 U. S. 421 431
New York *v.* Nixon, 229 N. Y. 356 209
New York *v.* Sage, 239 U. S. 57 155
New York *v.* Telephone Co., 261 U. S. 312 556
New York *v.* United States, 257 U. S. 591 420
New York Central *v.* N. Y. & P. Co., 271 U. S. 124 745
New York Central *v.* Winfield, 244 U. S. 147 589
New York, N. H. & H. R. Co. *v.* United States, 251 U. S. 123 78
New York Trust Co. *v.* Eisner, 256 U. S. 345 155
Noel *v.* Parrott, 15 F. (2d) 669 730
Nofire *v.* United States, 164 U. S. 657 73
North Carolina R. Co. *v.* Zachary, 232 U. S. 248 591
North Dakota *v.* Chicago, etc. R. Co., 257 U. S. 485 420
Northern Coal Co. *v.* Strand, 278 U. S. 142 119
Northern Pacific R. Co. *v.* Slaght, 205 U. S. 122 225
Northern R. Co. *v.* Lowe, 250 Fed. 856 730
Northern R. Co. *v.* Page, 274 U. S. 65 11
Northwestern Fuel Co. *v.* Brock, 139 U. S. 216 786

Page.

Northwestern Ins. Co. *v.* Wisconsin, 275 U. S. 136 631, 635
Norton *v.* Switzer, 93 U. S. 355 226
Norton *v.* Whiteside, 239 U. S. 144 824
Norwegian Co. *v.* Tariff Comm'n, 274 U. S. 106 813, 818
Ohio Oil Co. *v.* Conway, 279 U. S. 813 231, 563
Ohio R. Comm'n *v.* Worthington, 225 U. S. 101 103
Oklahoma, *Ex parte,* 220 U. S. 191 449
Oklahoma (No. 2), *Ex parte,* 220 U. S. 210 449
Oklahoma *v.* Texas, 272 U. S. 21 301
Oklahoma Gas Co. *v.* Russell, 261 U. S. 290 79
Old Colony Co. *v.* Comm'r, 279 U. S. 716 732
Old Colony R. Co. *v.* United States, 27 F. (2d) 994 728
Old Wayne Ass'n *v.* McDonough, 204 U. S. 8 325, 409
Oregon-W. R. Co. *v.* United States, 255 U. S. 339 405
Osborn *v.* Bank, 9 Wheat. 738 724
Ownbey *v.* Morgan, 256 U. S. 94 820
Ozark Pipe Line *v.* Monier, 266 U. S. 555 249
Ozawa *v.* United States, 260 U. S. 178 243
Pacific R. Comm'n, *Re,* 32 Fed. 241 292, 723
Panama, The City of, 101 U. S. 453 450
Panama R. Co. *v.* Johnson, 264 U. S. 375 387, 578
Pan American Co. *v.* United States, 273 U. S. 456 286
Parker *v.* Elmira, etc. R. Co., 165 N. Y. 274 209
Parks *v.* Boston, 15 Pick. 198 79
Passavant *v.* United States, 148 U. S. 214 451
Passenger Cases, 7 How. 283 250
Patterson *v.* Director General, 115 S. C. 390 792

Page.

Patton *v.* Texas & Pacific R. Co., 179 U. S. 658 11
Payne *v.* Wells 28 Ga. App. 29 642
Peck & Co. *v.* Lowe, 247 U. S. 165 635
Pedersen, *In re* Estate of, 198 Ia. 166 50
Pendleton *v.* Russell, 144 U. S. 640 227
Penn Mutual Co. *v.* Lederer, 252 U. S. 523 577
Pennsylvania Ins. Co. *v.* Mining Co., 243 U. S. 93 325
Pennsylvania R. Co. *v.* Puritan Coal Co., 237 U. S. 121 420
Pennsylvania R. Co. *v.* Sonman Coal Co., 242 U. S. 120 420
Pennsylvania R. Co. *v.* Stalker, 67 Ind. App. 329 597
Pennsylvania Steel Co. *v.* N. Y. City Ry., 229 Fed. 120 224
People *v.* Bowen, 30 Barb. (N. Y.) 24 677
People *v.* Compagnie Transatlantique, 107 U. S. 59 250
People *v.* Grant, 283 Ill. 391 412
People *v.* Hatch, 33 Ill. 9 677
People's Tobacco Co. *v.* American Tobacco Co., 246 U. S. 79 326
Perkins *v.* Fourniquet, 14 How. 328 785
Petersen *v.* Iowa, 245 U. S. 170 50
Peterson, *Ex parte,* 253 U. S. 300 449
Peterson *v.* Chicago, R. I. & P. R. Co., 205 U. S., 364 326
Petranek *v.* Minneapolis, St. P. & S. S. M. R. Co., 240 Mich. 655 594
Phelps *v.* The Camilla, 19 Fed Cas. 441 569
Philadelphia & R. R. Co. *v.* McKibbin, 243 U. S. 264 326, 408
Philadelphia, B. & W. R. Co. *v.* Schubert, 224 U. S. 603 413
Piatt *v.* Vattier, 9 Pet. 405 749
Pickard *v.* Pullman Car Co., 117 U. S. 34 251

Page.

Piedmont Coal Co. *v.* Seaboard Fisheries Co., 254 U. S. 1 567
Piedmont Power Co. *v.* Graham, 253 U. S. 193 811
Pierce Oil Corp'n *v.* City of Hope, 248 U. S. 498 584
Pierce Oil Corp'n *v.* Hopkins, 264 U. S. 137 398
Pine Lake Iron Co. *v.* Lafayette Car Works, 53 Fed. 853 227
Pitman *v.* Ins. Co., L. R. 9 Q. B. D. 192 714
Plummer *v.* Coler, 178 U. S. 115 636
Plymouth, The, 3 Wall. 20 124
Portland Bank *v.* Apthorp, 12 Mass. 252 635
Posados v. Warner, B. & Co., 279 U. S. 340 434
Postal Telegraph Co. *v.* Adams, 155 U. S. 688 433
Postum Co. *v.* California Nut Co., 272 U. S. 693 451, 454
Potts, *In re,* 166 U. S. 263 785
Pratt v. Paris Gas Co., 168 U. S. 255 392
Prentis *v.* Atlantic C. L., 211 U. S. 210 208
Price *v.* Illinois, 238 U. S. 446 584
Price *v.* United States, 269 U. S. 492 92
Prigg *v.* Pennsylvania, 16 Pet. 539 592
Pringle *v.* Woolworth, 90 N. Y. 502 227
Producers' Trans. Co. *v.* R. R. Comm'n, 251 U. S. 228 139
Propeller Commerce, The, 1 Black 574 124
Providence & S. S. S. Co. *v.* Ins. Co., 89 N. Y. 559 713
Provident Institution *v.* Massachusetts, 6 Wall. 611 628, 635
Pullman Car Co. *v.* Nolan, 22 Fed. 276 251
Pullman Car Co. *v.* Pennsylvania, 141 U. S. 18 253
Pusey & Jones Co. *v.* Hanssen, 261 U. S. 491 220

Page.

Quaker City Cab Co. *v.* Pennsylvania, 277 U. S. 389 696, 703
Quinby *v.* Public Service Comm'n, 223 N. Y. 244 209
Quong Ham Wah *v.* Industrial Comm'n, 255 U. S. 445 811
Quong Wing *v.* Kirkendall, 223 U. S. 59 427
Railroad Co. *v.* Lockwood, 17 Wall. 357 414
Railroad Co. *v.* Mfg. Co., 16 Wall. 318 330
Railroad Comm'n *v.* Eastern Texas R. Co., 264 U. S. 79 745
Railroad Comm'n *v.* Texas & P. R. Co., 229 U. S. 336 108
Rast *v.* Demen & Lewis, 240 U. S. 342 587
Raymond *v.* United States, Fed. Cas. No. 11596 376
Raymond L. Co. *v.* Raymond L. & W. Co., 92 Wash. 330 138
Reed *v.* County Comm'rs, 277 U. S. 376 613
Reinman *v.* Little Rock, 237 U. S. 171 587
Rennselaer & S. R. Co. *v.* Irwin, 249 Fed. 726 729
Reynolds *v.* United States, 98 U. S. 145 450
Rice, *In re,* 155 U. S. 396 449
Rice & Adams Corp'n *v.* Lathrop, 278 U. S. 509 231
Richardson *v.* Harmon, 222 U. S. 96 62
Roanoke, The, 189 U. S. 185 567
Roberts & Schaefer Co. *v.* Emmerson, 271 U. S. 50 425
Robinson *v.* Oceanic Nav. Co., 112 N. Y. 315 386
Robins Dry Dock Co. *v.* Dahl, 266 U. S. 449 118
Romeu *v.* Todd, 206 U. S. 358 450
Rosenberg Bros. & Co. *v.* Curtis Brown Co., 260 U. S. 516 328
Ross, *In re,* 140 U. S. 453 52, 451
Rothenstein, *In re,* 276 Fed. 704 228
Rouse *v.* Letcher, 156 U. S. 47 223

Page.

Russell, *Ex parte*, 13 Wall. 646 452
Ruthenberg *v.* United States, 245 U. S. 480 72
Ryan *v.* Carter, 93 U. S. 78 21
St. Louis *v.* Western Union, 148 U. S. 92 796
St. Louis, B. & M. R. Co. *v.* Green, 183 S. W. 829 227
St. Louis, I. M. & S. R. Co. *v.* Hasty, 255 U. S. 252 559
St. Louis, I. M. & S. R. Co. *v.* Hesterly, 228 U. S. 702 590
St. Louis, I. M. & S. R. Co. *v.* McKnight, 244 U. S. 368 559
St. Louis, I. M. & S. R. Co. *v.* Steel, 129 Ark. 520 595
St. Louis-S. F. R. Co. *v.* Conly, 154 Ark. 29 594
St. Louis-S. F. R. Co. *v.* Middlecamp, 256 U. S. 226 433
St. Louis-S. F. R. Co. *v.* Mills, 271 U. S. 344 11, 332, 821
St. Louis S. W. R. Co. *v.* Alexander, 227 U. S. 218 325
St. Louis S. W. R. Co. *v.* Arkansas, 235 U. S. 350 426, 433
St. Louis S. W. R. Co. *v.* Holbrook, 73 Fed. 112 226
St. Louis S. W. R. Co. *v.* United States, 245 U. S. 136 772, 777
Salabrin *v.* Ann Arbor R. Co., 194 Mich. 458 597
Sanborn, *In re*, 148 U. S. 222 454
Sanford Fork Co., *In re*, 160 U. S. 247 785
Sartoris *v.* Construction Co., 21 F. (2d) 1 796
Savin, Petitioner, 131 U. S. 267 762
Saxlehner *v.* Eisner & M. Co., 179 U. S. 5 749
Scharrenberg *v.* Dollar S. S. Co., 245 U. S. 122 401
Schenck *v.* United States, 249 U. S. 47 654
Schillinger *v.* United States, 155 U. S. 163 452

Page.

Schlemmer *v.* Buffalo, R. & P. Ry., 205 U. S. 1 22
Schlosser *v.* Hemphill, 198 U. S. 173 820
School District *v.* Chapman, 152 Fed. 887 296
Seaboard Air Line *v.* Horton, 233 U. S. 492 11, 590
Second Employers' Liability Cases, 223 U. S. 1 261, 388, 413
Selective Draft Cases, 245 U. S. 366 650
Shaffer *v.* Carter, 252 U. S. 37 433
Shearman *v.* Irvine's Lessee, 4 Cranch 367 305
Shelby *v.* Bacon, 10 How. 56 227
Sheppard, *Ex parte*, 43 Tex. Cr. Rep. 372 618
Shoemaker *v.* United States, 147 U. S. 282 150
Schuenfeldt *v.* Junkermann, 20 Fed. 357 309
Shulthis *v.* McDougal, 225 U. S. 561 824
Silver Co. *v.* Federal Trade Comm'n, 292 Fed. 752 723
Simon *v.* Southern R. Co., 236 U. S. 115 325, 409
Smith *v.* Gale, 144 U. S. 509 556
Smith *v.* Whitney, 116 U. S. 167 448
Smith & Egge Mfg. Co. *v.* Webster, 87 Conn. 74 392
Smith & Son *v.* Taylor, 276 U. S. 179 122
Smithson *v.* Atchison, T. & S. F. R. Co., 174 Cal. 148 594
Smolik *v.* P. & R. Coal Co., 222 Fed. 148 325
Smyth *v.* Ames, 169 U. S. 466 484, 504
Snead *v.* State, 165 Ga. 44 4
Society, etc. *v.* New Haven, 8 Wheat. 464 237
Society for Savings *v.* Coite, 6 Wall. 594 628, 636
Soden *v.* Claney, 269 Ill. 98 412
South St. Paul *v.* Lamprecht Co., 88 Fed. 449 344
Southern Pacific Co. *v.* Bartine, 170 Fed. 725 150

Page.

Southern Pacific Co. *v.* Denton, 146 U. S. 202 409
Southern Pacific Co. *v.* I. C. C., 219 U. S. 433 398
Southern Pacific Co. *v.* Jensen, 244 U. S. 205 117
Southern Pacific Co. v. Lowe, 247 U. S. 330 577
Southern P. T. Co. *v.* I. C. C., 219 U. S. 498 106, 398
Southern R. Co. *v.* Gray, 241 U. S. 333 39
Southern R. Co. *v.* Greene, 216 U. S. 400 424
Southern R. Co. *v.* Kentucky, 274 U. S. 76 504
Southern R. Co. *v.* Simmons, 105 Va. 651 319
Southern R. Co. *v.* Watts, 260 U. S. 519 433
Southwestern Oil Co. *v.* Texas, 217 U. S. 114 427
Southwestern Surety Co., *Ex parte*, 247 U. S. 19 449
Southwestern Telephone Co. *v.* Service Comm'n, 262 U. S. 276 484, 489, 551
Spaulding & Bros. *v.* Edwards, 262 U. S. 66 108
Speckert *v.* German Bank, 98 Fed. 151 226
Sperry & Hutchinson Co. *v.* Rhodes, 220 U. S. 502 812
Spratt *v.* Spratt, 4 Pet. 393 649
Springer *v.* Philippine Islands, 277 U. S. 189 21, 144
S. S. White Dental Co. *v.* Commonwealth, 212 Mass. 35 635
Stafford *v.* B. & O. R. Co., 262 Fed. 807 415
Standard Mfg. Co. *v.* United States, 226 U. S. 20 299
Standard Oil Co. *v.* Southern Pacific Co., 268 U. S. 146 494, 537
Stanton *v.* Embrey, 93 U. S. 548 728
Star Clay Co. v. Budno, 269 Fed. 508 596
State *v.* Carrigan, 39 N. J. L. 35 102

Page.

State *v.* Engle, 34 N. J. L. 425 102
State *v.* Freehold Investment Co., 305 Mo. 88 432
State *v.* K. C. & M. Co., 117 Ark. 606 701
State v. Lumber Co., 128 Ark. 505 702
State *v.* Lyon Oil Co., 171 Ark. 209 702
State *v.* Middletown Hydraulic Co., 114 Oh. St. 437 806
State *v.* Mullinix, 301 Mo. 385 434
State *v.* South Norwalk, 77 Conn. 257 690
State Comm'n *v.* Nordenholt Corp'n, 259 U. S. 263 122
State Freight Tax Case, 15 Wall. 232 249
State Trust Co. *v.* Kansas City, etc., Co., 120 Fed. 398 556
Steel Car Forge Co. *v.* Chec, 184 Fed. 868 596
Steel *v.* Drummond, 275 U. S. 199 261
Steers *v.* United States, 192 Fed. 1 73
Stephens *v.* Cherokee Nation, 174 U. S. 445 723
Stickney Co. *v.* Lynch, 163 Wis. 353 309
Stockard v. Morgan, 185 U. S. 27 250
Stover *v.* Scotch Hills Coal Co., 4 F. (2d) 748 91
Stripe v. United States, 269 U. S. 503 92
Strong *v.* Ins. Co., 11 Johns. (N. Y.) 323 714
Strudgeon *v.* Sand Beach, 107 Mich. 496 317
Sultan R. Co. *v.* Dep't of Labor, 277 U. S. 135 121
Sun Publishing Ass'n *v.* The Mayor, 152 N. Y. 257 191
Sutton *v.* Sutton, 1 Russ. & M. 663 238
Swan Brewing Co. *v.* Rex, [1914] A. C. 231 346

Page.

Swayne & Hoyt *v.* Everett, 255 Fed. 71 451
Swift *v.* Black Panther Co., 244 Fed. 20 556
Swift & Co. *v.* United States, 196 U. S. 375 108
Swift & Co. *v.* United States, 276 U. S. 311 555
Tameling *v.* Freehold Co., 93 U. S. 644 456
Tax Comm'r *v.* Putnam, 227 Mass. 522 345
Taylor *v.* Commonwealth, 23 Fed. Cas. 756 570
Taylor *v.* Gray, 59 N. J. Eq. 621 227
Tennessee *v.* Whitworth, 117 U. S. 139 679
Terminal Ass'n *v.* United States, 266 U. S. 17 783
Terrace *v.* Thompson, 263 U. S. 197 52
Terry, *Ex parte,* 128 U. S. 289 762
Terry Dairy Co. *v.* Malley, 146 Ark. 448 593
Texas *v.* Eastern Texas R. Co., 258 U. S. 204 578
Texas & N. O. R. Co. *v.* Tram Co., 227 U. S. 111 107, 780
Texas & P. R. Co. *v.* I. C. C., 162 U. S. 197 493, 501
Texas & P. R. Co. *v.* Marshall, 136 U. S. 393 242
Texas Trans. Co. *v.* New Orleans, 264 U. S. 150 250
Thaddeus Davies Co. *v.* Davids Mfg. Co., 233 U. S. 461 158
Thomas *v.* Iowa, 209 U. S. 258 822
Thompson, *In re* Estate of, 196 Ia. 721 51
Tiffany, *Ex parte,* 252 U. S. 32 449
Tilghman *v.* Proctor, 125 U. S. 136 33
Toledo Co. *v.* United States, 247 U. S. 402 763
Toledo, St. L. & W. R. Co. *v.* Allen, 276 U. S. 165 11

Page.

Toledo, St. L. & W. R. Co. *v.* Slavin, 236 U. S. 454 592
Toup *v.* Land Co., 237 U. S. 580 811
Trade Mark Cases, 100 U. S. 82 158
Tucker *v.* Alexandroff, 183 U. S. 424 52
Tucker *v.* Henniker, 41 N. H. 317 317
Tunno *v.* Edwards, 12 East 488 710
Tuttle *v.* Boston, 215 Mass. 57 677
Tutun *v.* United States, 270 U. S. 568 649
Ulster, etc. R. Co. *v.* Service Comm'n, 171 App. Div. 607 205
Underwood Co. *v.* Chamberlain, 254 U. S. 113 433, 637
Union Dry Goods Co. *v.* Georgia Corp'n, 248 U. S. 372 138
Union Fish Co. *v.* Erickson, 248 U. S. 308 118
Union Pacific R. Co. *v.* Field, 137 Fed. 14 318
Union Trust Co. *v.* Jones, 16 F. (2d) 236 557
United Drug Co. *v.* Theodore Rectanus Co., 248 U. S. 90 158
United Fuel Gas Co. *v.* Service Comm'n, 278 U. S. 322 231
United States v. Anderson, 269 U. S. 422 310
United States *v.* Babbit, 1 Black 55 21
United States *v.* Babcock, 250 U. S. 328 451
United States *v.* B. & O. R. Co., 225 U. S. 306 231
United States *v.* Benson, 31 Fed. 896 71
United States *v.* Boston, etc. Canal Co., 271 Fed. 877 544
United States *v.* Butterworth-Judson Corp'n, 269 U. S. 504 92
United States *v.* Chemical Foundation, 272 U. S. 1 262

Page.
United States *v.* Coe, 155 U. S. 76 451
United States *v.* Cohen Grocery Co., 255 U. S. 81 262
United States *v.* Cruikshank, 92 U. S. 542 6
United States *v.* Delaware, etc. Co., 213 U. S. 366 577
United States *v.* Dental Co., 274 U. S. 398 335
United States *v.* Dickson, 15 Pet. 141 21
United States *v.* Duell, 172 U. S. 576 451
United States *v.* E. C. Knight Co., 60 Fed. 306 558
United States, *Ex parte,* 226 U. S. 420 448, 783
United States, *Ex parte,* 263 U. S. 389 449
United States *v.* Express Co., 265 U. S. 425 777, 780
United States *v.* Ferreira, 13 How. 40 452, 454
United States *v.* Fisher, 2 Cranch 358 87
United States *v.* Flannery, 268 U. S. 98 579
United States *v.* Freight Ass'n, 166 U. S. 290 398
United States *v.* Ginsberg, 243 U. S. 472 649
United States *v.* Habbick, 287 Fed. 593 23
United States *v.* Hackett, 29 Fed. 848 71
United States *v.* Hamburg-American Co., 239 U. S. 466 813
United States *v.* Illinois Central R. Co., 263 U. S. 515 777, 780
United States *v.* Illinois Surety Co., 238 Fed. 840 227
United States *v.* Judge Peters, 5 Cranch 115 89
United States *v.* King, 7 How. 833 767
United States *v.* Klein, 13 Wall. 128 455
Page.
United States *v.* Lloyd, 4 Blatchf. 427 617
United States *v.* Louisiana, 123 U. S. 32 452
United States *v.* L. & N. R. Co., 236 U. S. 318 293, 368
United States *v.* Ludey, 274 U. S. 295 336
United States *v.* Manzi, 276 U. S. 463 650
United States *v.* McElvain, 272 U. S. 633 21
United States *v.* McGee, 171 Fed. 209 557
United States *v.* Midwest Oil Co., 236 U. S. 459 297
United States *v.* Missouri Pacific R. Co., 278 U. S. 269 774, 777
United States *v.* Nat'l Surety Co., 254 U. S. 73 91
United States *v.* New River Co., 265 U. S. 533 493
United States *v.* Nicholls, 4 Yeates 251 88
United States *v.* Nicolich, 25 F. (2d) 245 19
United States *v.* Northern Securities Co., 128 Fed. 808 557
United States *v.* Oklahoma, 261 U. S. 253 92
United States *v.* Onken Bros., 23 F. (2d) 367 376
United States *v.* Rennolds, 27 F. (2d) 628 376
United States *v.* Ritchie, 17 How. 525 723
United States *v.* Rockteschell, 208 Fed. 530 22
United States *v.* Royer, 268 U. S. 394 73
United States *v.* St. Louis Terminal, 224 U. S. 383 783
United States *v.* St. Louis Terminal, 236 U. S. 194 783
United States *v.* San Juan County, 280 Fed. 120 91
United States *v.* Shipp, 203 U. S. 563 765
United States *v.* Singleton, 54 Fed. 288 298

Page.
United States *v.* Snyder, 149 U. S. 210 90
United States *v.* Standard Brewery, 251 U. S. 210 577
United States *v.* Sullivan, 274 U. S. 259 731
United States *v.* Supplee-Biddle Co., 265 U. S. 189 576
United States *v.* Texas, 162 U. S. 1 52
United States *v.* Trans-Missouri Freight Ass'n, 53 Fed 440 558
United States *v.* Tyler, 105 U. S. 244 41
United States *v.* Union Pacific R. Co., 98 U. S. 569 455
United States *v.* Union Pacific R. Co., 249 U. S. 354 404
United States *v.* U. S. F. & G. Co., 221 Fed. 27 376
United States *v.* Western Union, 19 F. (2d) 157 730
United States *v.* Whitridge, 197 U. S. 135 22
U. S. Glue Co. *v.* Oak Creek, 247 U. S. 321 433, 635
Usher *v.* Noble, 12 East 639 711
Veach, *In re*, 4 F. (2d) 334 557
Venner *v.* Michigan Central R. Co., 271 U. S. 127 420
Villanueva *v.* Villanueva, 239 U. S. 293 310
Virginian R. Co. *v.* United States 272 U. S. 658 230, 493, 775, 781, 787, 823
Vought *v.* Railroad Co., 58 Oh. St. 123 803
Wabash R. Co. v. Hayes, 234 U. S. 86 592
Wagner *v.* Covington, 251 U. S. 95 398
Wallace *v.* Adams, 204 U. S. 415 451, 457
Walsh *v.* Atlantic C. L., 256 Fed. 47 326
Walsh *v.* Brewster, 255 U. S. 536 579
Ward *v.* Love County, 253 U. S. 17 745
Ware *v.* Hylton, 3 Dall. 199 52
Warren *v.* Searle & Hereth Co., 191 U. S. 195 158
Page.
Washington *v.* W. C. Dawson & Co., 264 U. S. 219 118
Waterman *v.* Bank, 215 U. S. 33 226
Watkins *v.* Land & Timber Co., 106 La. 621 325
Watson *v.* St. Louis, etc. R. Co., 169 Fed. 942 413
Wayman *v.* Southard, 10 Wheat. 1 21
Webster *v.* Fall, 266 U. S. 507 455
Welch *v.* Ins. Co., 117 Ia. 394 317
Wells Fargo & Co. *v.* Taylor, 254 U. S. 175 223
West End R. Co. *v.* Malley, 246 Fed. 625 729, 735
Western & A. R. Co. *v.* Dobbs, 36 Ga. App. 516 642
Western & A. R. Co. *v.* Georgia Comm'n, 267 U. S. 493 563
Western & A. R. Co. *v.* Thompson, 38 Ga. App. 599 642
Western Chemical Co. *v.* United States, 271 U. S. 268 493
Western Fuel Co. *v.* Garcia, 257 U. S. 233 119
Western Oil Co. *v.* Lipscomb, 244 U. S. 346 103
Western Union *v.* Czizek, 264 U. S. 281 331
Western Union *v.* Missouri, 190 U. S. 412 253
Western Union *v.* Priester, 276 U. S. 252 331
Weston *v.* Charleston, 2 Pet. 449 624
White *v.* Ewing, 159 U. S. 36 223
Whitney *v.* California, 274 U. S. 357 696
Wilberg *v.* Yakima County, 132 Wash. 219 93
Wilder *v.* New Orleans, 87 Fed. 843 227
Willcox *v.* Gas Co., 212 U. S. 19 484, 520
Willcox *v.* Jones, 177 Fed. 870 226
Wm. Filene's Sons Co. *v.* Weed, 245 U. S. 597 224

Page.
Williams *v.* Bruffy, 102 U. S. 248 412
Williams *v.* Fears, 179 U. S. 270 427
Williams *v.* Walsh, 222 U. S. 415 812
Willing *v.* Chicago Auditorium, 277 U. S. 274 454
Wilson *v.* United States, 149 U. S. 60 318
Winona Land Co. *v.* Minnesota, 159 U. S. 526 697, 704
Winter, *In re,* 17 F. (2d) 153 228
Wisconsin R. Comm'n. *v.* Chicago, B. & Q. R. Co., 257 U. S. 563 230, 482
Page.
Woodruff *v.* Parham, 8 Wall. 123 251, 627
Wulfsohn *v.* Bank, 11 F. (2d) 715 451
Yazoo & M. V. R. Co. *v.* Jackson Vinegar Co., 226 U. S. 217 731
Yazoo & M. V. R. Co. *v.* Mullins, 249 U. S. 531 591
Yonley *v.* Lavender, 21 Wall. 276 225
Y. M. C. A. *v.* Davis, 264 U. S. 47 155
Zahn *v.* Board of Public Works, 274 U. S. 325 584, 812

TABLE OF STATUTES

Cited in Opinions

(A) Statutes of the United States

Page.

1797, Mar. 3, c. 20, 1 Stat. 515..... 87
1799, Mar. 2, c. 22, 1 Stat. 676..... 87
1800, May 7, c. 41, 2 Stat. 58 459
1805, Jan. 11, c. 5, 2 Stat. 309..... 459
1809, Feb. 3, c. 13, 2 Stat. 514..... 459
1831, Mar. 2, c. 99, 4 Stat. 487 761
1855, Feb. 24, c. 122, 10 Stat. 612..... 452
1863, Mar. 3, c. 92, 12 Stat. 765..... 454
1863, Mar. 3, c. 98, 12 Stat. 773..... 403
1864, June 3, c. 106, 13 Stat. 99..... 357
1866, Mar. 17, c. 19, 14 Stat. 9..... 454
1866, July 25, c. 242, 14 Stat. 240..... 403
1866, July 27, c. 278, 14 Stat. 297..... 403
1870, May 5, c. 80, 16 Stat. 98..... 740
1882, June 30, c. 254, 22 Stat. 117..... 41
1883, Mar. 3, c. 116, 22 Stat. 485..... 454
1884, June 26, c. 121, 23 Stat. 57..... 62
1885, Jan. 20, c. 25, 23 Stat. 283..... 454
1887, Feb. 4, c. 104, 24 Stat. 379 (Interstate Commerce Act)..... 330, 366, 417, 478

Page.

1887, Mar. 3, c. 359, 24 Stat. 505..... 454
1890, May 2, c. 182, 26 Stat. 81..... 303
1891, Mar. 3, c. 517, 26 Stat. 826..... 558
1891, Mar. 3, c. 539, 26 Stat. 854..... 456
1898, July 1, c. 541, 30 Stat. 549 (Bankruptcy Act) 25, 228
1902, June 30, c. 1323, 32 Stat. 500 302
1903, Feb. 11, c. 544, 32 Stat. 823..... 555
1903, Mar. 2, c. 975, 32 Stat. 927..... 42
1905, Feb. 20, c. 592, 33 Stat. 728 (Trade Mark Act) 158
1906, June 29, c. 3591, 34 Stat. 584..... 776
1906, June 29, c. 3592, 34 Stat. 596 (Naturalization Act)..... 19, 646
1907, Nov. 16, 35 Stat. 2160.. 301
1908, Apr. 22, c. 149, 35 Stat. 65 (Employers' Liability Act)..... 35, 385, 410, 589, 788
1908, May 11, c. 163, 35 Stat. 106..... 41
1909, Aug. 5, c. 636 Stat 11.. 457
1910, Apr. 5, c. 143, 36 Stat. 291..... 385
1910, June 18, c. 303, 36 Stat. 539..... 776
1910, June 18, c. 309, 36 Stat. 534..... 459, 482

Page.

1910, June 23, c. 373, 36 Stat. 604 (Maritime Lien Act) 567
1910, June 25, c. 412, 36 Stat. 836..... 25
1910, June 25, c. 421, 36 Stat. 847..... 285
1913, Oct. 22, c. 32, 38 Stat. 208..... 482, 770
1913, Dec. 23, c. 6, 38 Stat. 251 (Federal Reserve Act) 354
1916, June 3, 39 Stat. 166... 259
1916, July 17, c. 245, 39 Stat. 360..... 623
1916, July 28, c. 261, 39 Stat. 412..... 77
1916, Aug. 9, c. 301, 39 Stat. 441..... 776
1916, Aug. 29, c. 416, 39 State. 545 (Philippine Organic Act).....142, 343
1916, Sept. 8, c. 463, 39 Stat. 756 (Revenue Act of 1916)..... 308
1917, Feb. 5, c. 29, 39 Stat. 889..... 399
1917, Apr. 6, c. 1, 40 Stat. 1.. 259
1917, June 15, c. 29, 40 Stat. 182..... 259
1917, Aug. 9, c. 50, 40 Stat. 270..... 776
1917, Aug. 10, c. 53, 40 Stat. 276 (Lever Act)..... 258
1917, Sept. 24, c. 56, 40 Stat. 288..... 623
1917, Oct. 3, c. 63, 40 Stat. 300 (Revenue Act of 1917)..... 308
1917, Dec. 26, 40 Stat. 1733. 259
1918, Mar. 21, c. 25, 40 Stat. 451 (Federal Control Act)..... 499
1918, May 9, c. 69, 40 Stat. 542..... 19
1918, Nov. 7, c. 209, 40 Stat. 1044..... 353
1919, Feb. 24, c. 18, 40 Stat. 1057 (Revenue Act of 1918)..... 153, 308, 335, 373, 575, 729
1919, Mar. 2, c. 95, 40 Stat. 1277..... 510

Page.

1920, Feb. 28, c. 91, 41 Stat. 456 (Transportation Act)..... 330, 417, 478, 488, 776
1920, June 4, c. 227, 41 Stat. 759..... 46
1920, June 4, c. 228, 41 Stat. 812..... 285
1920, June 5, c. 250, 41 Stat. 988..... 567
1921, Aug. 15, c. 64, 42 Stat. 159 (Packers and Stockyards Act)..... 436
1921, Nov. 23, c. 136, 42 Stat. 227 (Revenue Act of 1921) 375, 728, 734
1922, June 10, c. 212, 42 Stat. 625..... 41
1922, Sept. 14, c. 306, 42 Stat. 836..... 460
1922, Sept. 21, c. 356, 42 Stat. 858 (Tariff Act).. 446, 457
1924, May 26, c. 190, 43 Stat. 153..... 233
1924, June 2, c. 234, 43 Stat. 253 (Revenue Act of 1924)..... 375, 721
1925, Jan. 30, c. 120, 43 Stat. 801..... 776
1925, Feb. 13, c. 229, 43 Stat. 936..... 481
811, 817, 818, 819
820, 823, 824, 825
1925, Feb. 16, c. 233, 43 Stat. 945..... 67
1926, Feb. 26, c. 27, 44 Stat. 9 (Revenue Act of 1926) 376, 719
1926, May 27, c. 406, 44 Stat. 662..... 25
1926, May 28, c. 411, 44 Stat. 669..... 457
1927, Jan. 21, c. 47, 44 Stat. 1016..... 510
1927, Feb. 25, c. 191, 44 Stat. 1224..... 353
1927, Mar. 4, c. 510, 44 Stat. 1446..... 776
1928, May 26, c. 787, 45 Stat. 774..... 46
1928, May 29, c. 852, 45 Stat. 791 (Revenue Act of 1928)..... 376

Page.
1929, Mar. 2, c. 488, 45 Stat. 1475 460
Constitution. See Index at end of volume.
Criminal Code.
§ 135 762
Judicial Code.
§ 23 67
§ 24 ..... 728, 734
§ 59 68
§ 66 226
§ 101 67
§ 208 420
§ 237 (a) as amended .. 819, 820, 824, 825
§ 238 481
§ 238 (4) as amended .. 823
§ 239 284
§ 240 (b) and (c) as amended 817, 818
§ 256 115
§§ 262, 265 223
§ 266 798
§ 268 762
§ 269 768
§ 277 72
Revised Statutes.
§ 101 291
§ 102 284
§ 649 794
§§ 688, 716 448
§ 700 795
§ 725 762
§§ 863, 865–867 816
§§ 1261, 1262, 1263 41
§ 1274 ..... 41, 45
§§ 1612, 1622 41
§ 3466 85
§ 3468 92

Page.
Revised Statutes–Continued.
§ 4283 62
§§ 5399, 5404 762
U. S. Code.
Tit. 2, § 191 291
§ 192 284
8, § 15 399
§ 173 400
§ 203 233
§§ 381, 382 646
§ 384 20
10, § 683 45
§§ 801, 802, 803, 811 403
§ 810 404
15, § 96 158
18, § 241 762
19, chaps. 2 and 3 ... 451
§§ 174–179 446
§§ 381, 383, 398–402, 404–406 457
28, § 22 460
§ 41 728
§§ 47, 47a 785
§§ 254, 257 454
§§ 342, 377 448
§ 345 481
§ 346 284
§ 375 455
§ 380 814
§ 385 762
§ 391 768
§ 659 617
§ 724 409
39, c. 15 77
§§ 541, 542, 551, 554, 563 78
45, §§ 51–59 410
§ 56 385
46, §§ 183, 189 62
§§ 971, 974 567

(B) Statutes of the States and Territories

Alabama.
1923 Code, §§ 5350, 5399, 9713, 9730, 9731 561
Arkansas.
1913 Acts, § 1, Act No. 169 693
Crawford & Moses Digest, §§ 10204, 10207 .. 693
Mansfield's Digest, § 4471 303
California.
1911, Public Utilities Act, § 67 136
1923, Deering's General Laws, p. 2734 136
Civil Code, § 322 62
Const. Art. XII, § 3 ..., 62
Art. XIV, § 1; Art. XII, § 23, as amended 135

District of Columbia. Page.
Code, § 226..... 558
Georgia.
1833, Penal Code..... 4
1919, State Banking Act, § 28, Art. XX..... 3
Civil Code, § 2780..... 640
Illinois.
Cahill's Revised Statutes, § 120, c. 110..... 411
Iowa.
1927, Code, c. 351, §§ 7309, 7311, 7363..... 57
1927, Code, c. 351, § 7315 49
Kansas.
1923, Oct. 8, City of Marysville Ordinance No. 350..... 583
Kentucky.
1922, Carroll's Stats., §§ 331a–9, 331a–16..... 588
1924, Acts, § 1, c. 120.. 247
Louisiana.
1922, Act No. 140..... 814
1924, Act No. 184..... 324
1928, Act No. 5..... 813
Civil Code, Art. 2315.. 122
Maryland.
1927, Acts, c. 119..... 394
Massachusetts.
1922 Stats., c. 292..... 356
1923 Stats., c. 424, § 1.. 622
1925 Stats., c. 343, § 1A. 622
General Laws:
c. 59, § 5..... 624
c. 63 §§ 30, 32, as amended. 622
c. 174, § 44..... 356
Mississippi.
1927, Hemingway's Code:
§ 537..... 409
§§ 5865, 5866, 5868, 5877, 5888.... 408
§ 5864..... 407
Missouri.
1921, Laws, Stock Corp'n Act, p. 661..... 431
Constitution, Art. IV. § 28..... 434
Revised Statutes, § 9836. 431
New York. Page.
1886, Laws, c. 143..... 423
1907, Laws, c. 429..... 190
1909, Laws, c. 62, § 181, Art. 9..... 422
1913, Laws, c. 60..... 386
1920, Laws, c. 916, § 47.. 386
1921, Laws, c. 134..... 190
1928, Laws, c. 379..... 338
Code of Civil Procedure. 386
Ohio.
1820, Act of Feb. 23, 18 O. L. 147..... 802
1825, Act of Feb. 4, 23 O. L. 50..... 802
1830, Act of Feb. 18, 28 O. L. 58..... 803
1840, Act of Mar. 23, 38 O. L. 87.....799, 803
1863, Act of Mar. 24, 60 O. L. 44..... 805
1864, Act of Mar. 26, 61 O. L. 74..... 805
1888, Act of Apr. 12, 85 O. L. 207..... 805
1891, Act of Mar. 3, 88 O. L. 72..... 805
1898, Act of Apr. 25, 93 O. L. 370..... 805
1902, Act of Apr. 9, 95 O. L. 118..... 805
1920, Act of Jan. 22, 108 O. L., Pt. 2, 1138..801, 805
1925, Act of Mar. 25, 111 O. L. 208..... 805
1925, Act of Mar. 27, 111 O. L. 367..... 805
1927, Act of Apr. 21, 112 O. L. 388..... 805
1927, Act of May 11, 112 O. L. 360–353, §§ 14178 to 14178–12.....800, 805
Philippines.
1916, Administrative Code, Act No. 2657.. 144
1917, Administrative Code, § 206, as amended..... 142
1917, Administrative Code §§ 1459, 1460, Act No. 2711..... 213

Philippines–Continued. Page.
1917, Revised Code, § 138 342
1918, Mar. 5, Act No. 2768..... 142
1919, Mar. 7, Act No. 2833, 14 P. L., p. 221 ..... 307, 341
1919, Mar. 20, Act No. 2926, 15 P. L., p. 260. 307
1920, Mar. 26, Act No. 2926 341

(C) Foreign Laws

Danish Laws. Page.
Code of Christian V, Book V, c. 2, §§ 76–79..... 53

(D) Treaties

Page.
1778, 2 R. S. 203 (France).. 57
1783, 8 Stat. 80 (Great Britain)..... 235
1826, 8 Stat. 340 (Denmark), renewed in 1857, 11 Stat. 719 50
1850, 2 R. S. 748 (Switzerland) 57
1853, 2 R. S. 249 (France).. 57
1864, 2 R. S. 426 (Honduras) 57
1900, 31 Stat. 1939 (Great Britain)..... 57

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1928.

MANLEY v. STATE OF GEORGIA.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 429. Argued December 4, 1928.—Decided February 18, 1929.

Section 28, Art. XX, of the Georgia Banking Act declares that "every insolvency of a bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary . . . *provided* that the defendant . . . may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally, with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe . . ." The Act elsewhere declares that a bank is to be deemed insolvent when it cannot meet its liabilities as they become due in the regular course of business, or when the cash market value of its assets is insufficient to pay its liabilities, or when its reserve falls under a required amount and is not made good within the time prescribed. *Held* that the presumption created by § 28 is unreasonable and arbitrary, and conflicts with the due process clause of the Fourteenth Amendment. P. 5.

166 Ga. 563, reversed.

APPEAL from a judgment of the Supreme Court of Georgia affirming a conviction of the appellant of an alleged violation of the state banking law.

Messrs. Walter T. Colquitt and *Marion Smith,* with whom *Messrs. Ben J. Conyers, Paul S. Etheridge,* and *A. G. Powell* were on the brief, for appellant.

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Mr. Reuben R. Arnold, with whom *Mr. John A. Boykin,* Solicitor General of Georgia was on the brief, for appellee.

Under the statute as construed, the presumption is *prima facie* only; anything excluding the idea that defendants' fraudulent or illegal management caused the insolvency is a defense. *Griffin* v. *State,* 142 Ga. 636; *Fordham* v. *State,* 148 Ga. 758; *Snead* v. *State,* 165 Ga. 44; and the present case, 166 Ga. 563.

The statute satisfies due process. It is not too vague. The word "fraud" is of plain signification, especially when used in connection with the management of a bank by its officers.

Cf. *United States* v. *Dexter,* 154 Fed. 890; *United States* v. *Jones,* 10 Fed. 469; *United States* v. *Loring,* 98 Fed. 881; *Oesting* v. *United States,* 234 Fed. 304, certiorari denied, 242 U. S. 647; *Rimmerman* v. *United States,* 186 Fed. 307, certiorari denied, 223 U. S. 721; *Harrison* v. *United States,* 200 Fed. 662; *Miller* v. *United States,* 133 Fed. 337; *Crawford* v. *United States,* 30 App. D. C. 1; *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 86; *Nash* v. *United States,* 229 U. S. 373; *Tozer* v. *United States,* 52 Fed. 917; *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106; *Sears Roebuck* v. *Federal Trade Comm'n,* 258 Fed. 307. Distinguishing *Collins* v. *Kentucky,* 234 U. S. 634; *United States* v. *Pennsylvania R. R. Co.,* 242 U. S. 208; *United States* v. *Cohen Grocery Co.,* 255 U. S. 581.

The fact that the statute raises the presumption does not render it unconstitutional. There is a rational connection between the facts from which the presumption is raised, to-wit, the facts that the defendants are the managing and controlling officers of the bank, and that the bank becomes insolvent, and the thing presumed, which is that the bank became insolvent because of the fraudulent or illegal management of those officers. In a large percentage

of cases, it is a matter of public knowledge that the wrongful acts of the officers in charge have caused the insolvency of banks. It is enough that the connection between the thing presumed and the facts from which it is presumed is reasonable. It is not necessary that the inference be true in every case, or even in a majority of cases. The presumption is only *prima facie* and can be rebutted. *Griffin* v. *State,* 142 Ga. 636. Distinguishing *McFarland* v. *American Sugar Refining Co.,* 241 U. S. 79; and citing *Hawes* v. *Georgia,* 258 U. S. 1; *State* v. *Donato,* 127 La. 393; *State* v. *Dowdy,* 145 N. C. 432; *State* v. *Buck,* 120 Mo. 479; *State* v. *Sattley,* 131 Mo. 464; *Robertson* v. *People,* 20 Colo. 279; *State* v. *Beach,* 147 Ind. 74; *Meadowcroft* v. *People,* 163 Ill. 56; *In re Milecke,* 52 Wash. 312; *State* v. *Yardley,* 95 Tenn. 546; *People* v. *Cannon,* 139 N. Y. 32; *Anselvich* case, 186 Mass. 376.

There could be no vagueness growing out of the word "illegal" as applied to the defendant's acts causing insolvency of the bank. The State has various laws regulating bank management, and violation of any of these laws, causing insolvency of a bank, comes within the statute.

Mr. Justice Butler delivered the opinion of the Court.

Appellant was convicted in the Superior Court of Fulton County, Georgia, of a violation of § 28, Art. XX of the state Banking Act of 1919. The judgment was affirmed in the highest court of the State. 166 Ga. 563. Appellant challenged the validity of that section on the ground, among others, that the presumption created by it is so unreasonable and arbitrary as to amount to a denial of due process of law in violation of the Fourteenth Amendment. His contentions were overruled by both courts, and that question is here for decision. § 237 (a), Judicial Code.

The questioned section follows: "Every insolvency of a bank shall be deemed fraudulent, and the president and

directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years; provided, that the defendant in a case arising under this section, may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally, with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe; and upon such showing the jury shall acquit the prisoner."

This section is in words substantially the same as one first found in the Georgia Penal Code of 1833. But its meaning has been changed by a recent statutory definition of insolvency. Section 5, Art. I, Banking Act of 1919, declares: "A bank shall be deemed to be insolvent, first, when it cannot meet its liabilities as they become due in the regular course of business; second, when the actual cash market value of its assets is insufficient to pay its liabilities to depositors and other creditors; third, when its reserve shall fall under the amount herein required and it shall fail to make good such reserve within thirty (30) days after being required to do so by the Superintendent of Banks." Prior to its enactment, none of the conditions specified was deemed insolvency. *Griffin* v. *State,* 142 Ga. 636, 642, *et seq.*

Construing § 28, after this enlargement of the meaning of insolvency, the state court, *Snead* v. *State* (1927), 165 Ga. 44, held that upon proof of insolvency, it is presumed to be fraudulent, and an accused president or director is presumed to be guilty. The court said (p. 53) that this " is but an application to a criminal case of the doctrine of *res ipsa loquitur,* often applied in civil proceedings. . . . (p. 55) The State is only required to prove that the bank was under the management and control of the accused, and that it became insolvent while it was within the management and control of the defendant either by

himself alone or conjointly with associates in its management."

The indictment in the case at bar merely alleges that at a time and place specified appellant, being president of a bank named and he and two others being directors of said bank "and the said accused being by law then and there charged with the fair and legal administration of the business and affairs of the said" bank "then and there pending and during the said official charge and responsibility of the said accused, the said" bank "did become fraudulently insolvent, contrary . . ." etc.

Referring to the language of the section, the court in this case declared that the affairs of a bank are "fairly and legally" administered when they are administered "honestly" and "in accordance with law." And it said (p. 578) that the presumption that the insolvency is fraudulent "places upon these officers the burden of showing that they administered the affairs of the bank with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe. . . . (p. 579) In addition, this statute . . . permits the accused to rebut the presumption against him . . . by showing other facts, such as that the insolvency was caused by an unexpected panic in the country, or by the speculation of some officer or agent for which the accused was in no way responsible, or by any other facts rebutting the presumption of fraudulent conduct on his part." The proviso permits the presumption that a crime has been committed to be repelled by the showing specified therein; and, under the decisions of the court, the accused may show any facts that tend to rebut the presumption that he is guilty of the offense charged.

State legislation declaring that proof of one fact or a group of facts shall constitute prima facie evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be in-

ferred. If the presumption is not unreasonable and is not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law. *Mobile, J. & K. C. R. R.* v. *Turnipseed,* 219 U. S. 35, 43. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. *Bailey* v. *Alabama,* 219 U. S. 219, 233, *et seq.* Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. " . . . it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland* v. *American Sugar Co.,* 241 U. S. 79, 86.

The presumption here involved does not rest upon any definite basis. It is raised upon proof of any one or more of the conditions described as insolvency and without regard to the facts from which such condition resulted. The statute does not specify the elements of the offense; and so the inference is not restricted to any particular point or specific issue. The facts so to be presumed are as uncertain and vague as the terms "fraudulent" and "fraud" contrasted with "fairly," "legally," "honestly," and "in accordance with law," when used to describe the management of a bank. *Connally* v. *General Construction Co.,* 269 U. S. 385, 391. *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 454. Nor is the generality of the presumption aided by the allegations of the accusation. The indictment merely follows the general words of the statute without specifying facts to disclose the nature or circumstances of the charge. *Snead* v. *State, supra,* 54. And see *United States* v. *Cruikshank,* 92 U. S. 542, 562. And as to guilt also, the presumption is sweeping. It extends

to all directors. There may be from three to twenty-five. The president is required to be a director.

The presumption extends to the *corpus delicti* as well as to the responsibility of the president or director accused. The proof which makes a prima facie case points to no specific transaction, matter or thing as the cause of the fraudulent insolvency or to any act or omission of the accused tending to show his responsibility. He is to be convicted unless he negatives every fact, whether act or omission in the management of the bank, from which fraudulent insolvency might result or shows that he is in no way responsible for the condition of the bank.

Inference of crime and guilt may not reasonably be drawn from mere inability to pay demand deposits and other debts as they mature. In Georgia banks are permitted to lend up to 85 per cent. of their deposits. Unforeseen demands in excess of the reserves required do not tend to show that the crime created by § 28 has been committed. The same may be said as to the other conditions defined as insolvency. The connection between the fact proved and that presumed is not sufficient. Reasoning does not lead from one to the other. *Hawes* v. *Georgia,* 258 U. S. 1, 4. The presumption created by § 28 is unreasonable and arbitrary. *Bailey* v. *Alabama, supra. McFarland* v. *American Sugar Co., supra.*

Judgment reversed.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY *v.* KOSKE.

CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

No. 219. Argued January 17, 1929.—Decided February 18, 1929.

1. A case under the Employers' Liability Act that was tried in the courts below upon the theory that the place of the accident was a certain ditch in a railway yard, as to which it was adjudged

that the railroad company was negligent and that the plaintiff had not assumed the risk, can not be reviewed upon the theory that the place may have been some other depression or hole in the yard of the existence of which no finding is warranted by the evidence. P. 9.

2. A railway employee, alighting in the dark from an engine in a railway yard in the course of his employment, fell into a shallow ditch near the track which had long been maintained there for drainage purposes and with the location and condition of which he had long been familiar. In an action under the Federal Employers' Liability Act for resulting injuries, *held*:

(1) That the railway company was not proven to have been guilty of any breach of duty owed the employee, either in adopting and maintaining the ditch rather than some other method of drainage, or in respect of its condition at the time and place in question. P. 11.

(2) That, as a matter of law, the employee had assumed the risk, and the company was entitled to a directed verdict. P. 12.

3. The fact that sunrise occurs considerably before seven o'clock during some weeks immediately before June 4th, may be judicially noticed. P. 12.

104 N. J. L. 627, reversed.

CERTIORARI, 278 U. S. 586, to a judgment of the Court of Errors and Appeals of New Jersey, affirming a recovery of damages in an action under the Federal Employers' Liability Act.

Mr. Walter J. Larrabee, with whom *Mr. Frederic B. Scott* was on the brief, for petitioner.

Mr. I. Faerber Goldenhorn, with whom *Mr. Saul Nemser* was on the brief, for respondent.

Mr. JUSTICE BUTLER delivered the opinion of the Court.

Respondent sued petitioner under the Federal Employers' Liability Act in the circuit court of Hudson County, New Jersey, to recover damages for injuries sustained by him while in the service of petitioner. At the close of the evidence, defendant moved the court to direct a verdict in

its favor on the grounds that the evidence was not sufficient to warrant a finding of negligence on the part of defendant and that it conclusively appeared that plaintiff assumed the risk of the accident and injury complained of. The motion was denied, there was a verdict for plaintiff, and the judgment entered thereon was affirmed by the highest court of the State.

Plaintiff was employed in defendant's roundhouse and coal-chute yard at Hoboken. The complaint alleged that defendant negligently " permitted an open, uncovered and unlighted and dangerous hole to exist between certain parts of said tracks," that plaintiff was there employed at four o'clock in the morning of June 4, 1925, and " while alighting from an engine in the course of his said employment fell into said opening," and was injured.

Plaintiff's work was to put sand into the boxes on engines and to turn switches for them. During eleven years he worked nights from nine o'clock in the evening until seven in the morning and for one year, about five years before the accident, he worked in the day time. He was familiar with the tracks and ground in the yard. Throughout the period of his employment, the yard was drained by a shallow open ditch or trench. This depression varied in depth from eight to eleven inches and in width from eight to twenty-four inches. It passed between ties under the tracks and, at a place not far from the coal-chute, it extended a short distance longitudinally between the tracks. During all the time that plaintiff worked there the drain or ditch was in the same place and was maintained in the same condition as it was at the time of the accident.

The case was tried, the jury charged and the judgment given and affirmed upon the understanding that the place where plaintiff fell was a part of the above-mentioned longitudinal section of the drain. Nevertheless, plaintiff here suggests that it is not certain that the hole com-

plained of was a part of the trench. But, as it was in respect of the ditch or drain that defendant was found negligent and plaintiff was held not to have assumed the risk and as that only was considered by the lower courts, the judgment cannot be affirmed on the theory that plaintiff was not injured there but at another place.

Three or four days after the accident, plaintiff went to the yard to get his pay and then told the coal-chute foreman of the accident saying he "fell down in the ditch somewhere off an engine." He also indicated to the roundhouse foreman not the exact spot but the vicinity of the place where he claimed to have been injured. The part of the yard so pointed out includes the section of the drain here in question.

In his testimony plaintiff described the accident in substance as follows. He went upon an engine standing near the roundhouse and rode it to a point about 60 feet from the coal-chute, where it stopped near a switch he intended to turn. The engine step was between three and four feet above the general level of the ground between the tracks. He said he jumped from the engine and "just struck a certain hole"; that there was coal or stone in the hole; "there was something there very hard," that he immediately became unconscious and did not know what happened or who took him "out of that hole or how they took" him. He also said that he did not know about the hole before he jumped; that it was so dark that he could not see the hole; that he thought everything was level and did not expect the hole to be in that place. There is nothing to support a finding that there was then any hole or depression in the yard other than the open drain.

The Federal Employers Liability Act permits recovery upon the basis of negligence only. The carrier is not liable to its employees because of any defect or insufficiency in plant or equipment that is not attributable to negli-

gence. The burden was on plaintiff to adduce reasonable evidence to show a breach of duty owed by defendant to him in respect of the place where he was injured and that in whole or in part his injuries resulted proximately therefrom. And, except as provided in § 4 of the Act, the employee assumes the ordinary risks of his employment; and, when obvious or fully known and appreciated, he assumes the extraordinary risks and those due to negligence of his employer and fellow employees. *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 501. *St. Louis, etc. Ry.* v. *Mills,* 271 U. S. 344. *Northern Ry. Co.* v. *Page,* 274 U. S. 65, 75.

The record contains no description of the place where plaintiff was injured other than that above referred to. Fault or negligence may not be found from the mere existence of the drain and the happening of the accident. The measure of duty owed by defendant to plaintiff was reasonable or ordinary care having regard to the circumstances. *Patton* v. *Texas and Pacific Railway Co.,* 179 U. S. 658, 664. There is no evidence that the open drain was not suitable or appropriate for the purpose for which it was maintained or that there was in use by defendant or other carriers any means for the drainage of railroad yards which involve less of danger to switchmen and others employed therein. Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. Courts will not prescribe standards in respect of such matters or leave engineering questions such as are involved in the construction and maintenance of railroad yards and the drainage systems therein to the uncertain and varying judgment of juries. *Toledo, St. L. & W. R. Co.* v. *Allen,* 276 U. S. 165, 170. The evidence is not sufficient to warrant a finding that defendant was guilty of any breach of duty owed to plaintiff in respect

of the method employed or the condition of the drain at the time and place in question. *Nelson* v. *Southern Ry. Co.*, 246 U. S. 253. *Missouri Pacific Railroad Co.* v. *Aeby*, 275 U. S. 426.

The court takes judicial notice of the fact that for some weeks immediately before the accident the sun rose and it was light for some time before plaintiff's quitting hour. *Montenes* v. *Metropolitan Street R. Co.*, 77 App. Div. 493. He worked in daylight for some time every morning during the spring and summer months, and during one year he worked days. There was nothing obscure or of recent origin about the place where he was injured. The conditions were constant and of long standing. The evidence requires a finding that he had long known the location of the drain and its condition at the place in question. The dangers attending jumping from engines in the vicinity of the drain, especially in the dark, were obvious. Plaintiff must be held to have fully understood and appreciated the risk.

It was the duty of the judge presiding at the trial to direct the jury to return a verdict in favor of the defendant. *Butler* v. *Frazee*, 211 U. S. 459, 467.

Judgment reversed.

McDONALD *v.* UNITED STATES.

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

No. 117. Argued January 10, 1929.—Decided February 18, 1929.

1. Service on a vessel of foreign registry can not be considered residence in the United States for naturalization purposes. P. 19.
2. A proviso is not always limited in its effect to the part of the enactment with which it is immediately associated; it may apply generally to all cases within the meaning of the language used. P. 20.

3. For the proper construction of a proviso, consideration need not be limited to the subdivision in which it is found; the general purpose of the section may be taken into account. P. 22.
4. In paragraph Seven, added to the Naturalization Law by the Act of May 9, 1918, the proviso declaring "That service by aliens upon vessels other than of American registry . . . shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry," does not relate to the special classes of persons made eligible to naturalization by the preceding parts of the same paragraph, but (like other provisions in the paragaph) states a rule of general application. P. 22.

22 F. (2d) 747, affirmed.

CERTIORARI, 277 U. S. 581, to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court denying a petition for naturalization.

Messrs. J. Harry Covington and *Dean G. Acheson,* with whom *Mr. Wm. K. Jackson* was on the brief, for petitioner.

Under § 4 of the Naturalization Act, continuous physical presence in the United States and in the particular State or Territory is not required, but continuous domicile for the statutory period must have been maintained; and the physical absence of a seaman from his domicile—whether on a foreign or a domestic vessel—does not interrupt the statutory residence required. *United States* v. *Rockteschell,* 208 Fed. 530; *In re Schneider,* 164 Fed. 335; *In re Deans,* 208 Fed. 1018; *In re Timourian,* 225 Fed. 570; *United States* v. *Jorgenson,* 241 Fed. 412; *United States* v. *Habbick,* 287 Fed. 593; *United States* v. *Dick,* 291 Fed. 420; *U. S. ex rel. Devenuto* v. *Curran,* 299 Fed. 206; *Neuberger* v. *United States,* 13 F. (2d) 541.

Subdivision 7 of § 4, added by the Act of May 9, 1918, was a war-time measure, applicable only to particular classes of aliens therein designated, and did not change the law applicable to this petitioner.

The provisos are incorporated in the very body of the subdivision. They are attached at the end of the long, involved first paragraph which specifies the aliens entitled to the special privileges and exemptions therein mentioned, and details the procedure to be observed. This procedure is singularly informal as compared with that which other aliens must follow. The provisos are immediately followed by a second paragraph of the same subdivision dealing with the same subject matter, to-wit: further exemption of such favored aliens from payment of court costs. It is evident that Congress, when it inserted these provisos, was dealing with these favored aliens; for, before turning to the consideration of other subjects covered by the Act, it completed the provisions relating to them by enacting exemptions in their favor from court costs.

Evidently it was thought by Congress that the unqualified provisions of the "seventh" subdivision were too lax as applied to alien seamen. These provisions, if the provisos had not been added, would have permitted: (a) Discontinuous or intermittent service on American ships for three years to establish residence within the United States for naturalization purposes, if some part of the service on American vessels was rendered within six months of the filing of the petition; (b) the declaration of intention to be filed within thirty days of an election; (c) the certificate of the master of such ship to be *prima facie* proof of such service and of necessary residence.

Such provisions would have been peculiarly open to abuse. But by the provisos this broad statute is restricted by providing: That declaration of intention cannot be filed within thirty days of an election; that service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and that such aliens can not se-

cure residence for naturalization purposes during service upon vessels of foreign registry; or, *per contra,* that residence within the United States for naturalization purposes can be established by such privileged aliens only by three years' continuous service on American ships, and discharge from such service had within six months prior to the filing of the petition. These circumstances show the direct and necessary relations of the provisos to the immediately preceding general enacting clauses of the "seventh" subdivision.

Keeping in mind the object and purpose of this amendatory Act, it would seem absurd that Congress, anxious as it was to make citizens of aliens who could be of service to the United States in the military, naval or merchant marine service, should at the same time deliberately cut off from citizenship persons even more desirable, and even more deserving of citizenship than the classes they were dealing with in this Act. For, if the Circuit Court of Appeals' construction is correct, an alien master mariner who had lived continuously in continental United States for twenty years, who had declared his intention of becoming a citizen and was in all other respects qualified, would be denied the privilege of citizenship, if at any time, no matter how short, within the last preceding five years he had served on a foreign vessel. Yet Congress deliberately extended citizenship to an alien who had never been in continental United States, or even in any of its territories or possessions, under less rigorous requirements, if he happened to have served the last preceding three years on a fishing vessel of the United States over twenty tons burden. *United States* v. *Nicolich,* 25 F. (2d) 245.

To give the proviso the effect and meaning claimed by the Circuit Court of Appeals would be to reverse the century-old policy of the Government as expressed in its naturalization laws and in the decisions of its courts.

If Congress had intended to reverse this policy, it would seem that it would have done so by separate enactment or in unmistakable language, and not by an obscure, ambiguous proviso.

The reports of committees and the explanations by committee members occurring in Congress while the Act of May 9, 1918, was under consideration, definitely show that the purpose of this Act was not to place any additional limitations or restrictions upon the naturalization of aliens under the provisions of the Act of June 29, 1906, but was to enlarge the right of naturalization and to extend to the classes of aliens specifically described in the Act of May 9, 1918, the opportunity to become citizens of the United States under conditions much more favorable than those extended to aliens generally by the Act of 1906.

The opinion below apparently centers on the failure of Congress to place the word "such" in front of the word "alien" in the opening clause of the proviso. That this omission was an accident is clearly shown by the second clause of the same sentence,—"and such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry." If necessary to make the intent of Congress a rational one, the Court should interpolate the word "such." *Ozawa* v. *United States,* 260 U. S. 178.

Distinguishing *Petition of MacKinnon,* 21 F. (2d) 445; *United States* v. *Habbick,* 287 Fed. 593; *In re Willis,* 169 N. Y. Supp. 261.

The proviso, even if given general scope, is not applicable to the facts of this case. Petitioner does not claim constructive residence within the United States, but actual residence. He claims a residence not on a ship, but in Massachusetts where his family is and has been established for more than five years. He does not claim

that anything be regarded as residence within the United States which is not actual bona fide legal residence in a particular house in a particular town in Massachusetts. Therefore, the first clause of the proviso can have no application to him on any view of its scope.

Its second clause is also inapplicable, since he did not secure his residence for naturalization or any other purpose, during service upon vessels of foreign registry. He came to the United States as a passenger and entered as an immigrant paying the head tax.

If the proviso is sought to be given any application to aliens outside the special and privileged classes created by subdivision "seventh," its plain words will permit no wider meaning than that an alien seaman serving on a foreign ship can not come ashore in the United States under a seaman's temporary permit and, while so present in this country, attempt to "secure" a shore residence.

Mr. George C. Butte, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* were on the brief, for the United States.

The words of the proviso show the intention of Congress to deny applicants for naturalization credit for domicile or residence in the United States during periods they serve on vessels of foreign registry. Congress had previously given advantages in naturalization to alien seamen serving on American vessels, allowing them to be naturalized after three years of such maritime service. The Act now being considered was intended to further encourage service on American merchant ships by discouraging alien seamen domiciled in the United States from serving on foreign ships. There is nothing unreasonable about this. An alien, though technically domiciled here, who spends most of his time outside the United States serving on foreign

ships, is not in a position to learn much of our institutions or to acquire an attachment to the principles of the Constitution.

A reading of the entire subdivision shows that the proviso is not limited to the classes of aliens dealt with in the subdivision, as there is no relation between service on foreign ships and the other classes of aliens dealt with in the new subdivision.

The words "service by aliens upon vessels other than of American registry" relate to all aliens in that service, and the words "such aliens" in the last clause of the proviso refer to the aliens serving on foreign vessels, mentioned in the preceding clause.

The reasoning of the courts below is more persuasive than that in *United States* v. *Nicolich,* 25 F. (2d) 245, in which the contrary conclusion was reached. The argument there that the proviso was intended only to prevent service on foreign ships from constituting in itself residence in the United States, is not reasonable. Saying that aliens serving three years on vessels of American registry might be naturalized did not make it necessary, out of abundance of caution, to add a proviso that service on vessels of foreign registry should not be considered service on American ships.

The proviso obviously deals with aliens serving on foreign ships who, by having domicile here, could claim residence. The phrase "residence for naturalization purposes" implies the existence of residence for other purposes. Nothing in the Congressional Record or Reports of Committees supports the contention of the petitioner or discloses an intention not derived from the words of the statute.

Mr. Justice Butler delivered the opinion of the Court.

Petitioner, a British subject, was born in Nova Scotia in 1877. He lawfully entered the United States at New

York, September 17, 1920. He immediately established and has since maintained a place of residence at or near Boston, Massachusetts, where his wife and child joined him September 1, 1921, and have since lived. Since his entry he has continuously served as a master of a vessel of British registry belonging to the United Fruit Company, a New Jersey corporation, plying between Boston and Central American countries. November 30, 1921, he filed his declaration of intention to become a citizen in the district court for Massachusetts, and December 22, 1926, his petition for naturalization. That court denied his application, and its judgment was affirmed by the Circuit Court of Appeals. 22 F. (2d) 747. There is conflict between that decision and one of the Circuit Court of Appeals of the Fifth Circuit. *United States* v. *Nicolich,* 25 F. (2d) 245. This Court granted a writ of certiorari. 277 U. S. 581.

The sole question is whether service on a vessel of foreign registry is to be considered residence in the United States for naturalization purposes.

The Fourth subdivision of § 4 of the Act of June 29, 1906, 34 Stat. 598, provides that on the petition of an alien for citizenship it shall be made to appear "that immediately preceding the date of his application he has resided continuously within the United States five years at least." U. S. C., Tit. 8, § 382.

That Act was amended May 9, 1918, 40 Stat. 542, by adding to § 4 seven subdivisions. The Seventh subdivision, being the first of those so added, is here involved; and, so far as material, its substance is indicated in the margin.* It contains the following: "*Provided further,*

* [The numbers and other matter within brackets are added for convenience in reading.]

Seventh. [1] Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in

That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry." U. S. C., Tit. 8, § 384.

If that provision relates only to those classified in the added subdivision, petitioner is entitled to naturalization; but if it is given general application the judgment below is right.

As a general rule, a proviso is intended to take a special case or class of cases out of the operation of the body of

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the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment;

[2] or any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, . . . or in the . . . Navy or Marine Corps, or in the . . . Coast Guard, or who has served for three years on board of any vessel of the United States Government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service on a reenlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough . . . ,

[The Filipinos, aliens and Porto Ricans aforesaid] may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States . . . ; [U. S. C., Tit. 8, § 388 and see R. S. § 2174]

[3] any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States; [*id.* § 392]

[4] any alien declarant who has served in the United States Army, or Navy, or the Philippine Constabulary, and has been honorably

the section in which it is found. *Wayman* v. *Southard,* 10 Wheat. 1, 30. *United States* v. *Dickson,* 15 Pet. 141, 165. *Ryan* v. *Carter,* 93 U. S. 78, 83. *United States* v. *McElvain,* 272 U. S. 633, 635. But a proviso is not always limited in its effect to the part of the enactment with which it is immediately associated; it may apply generally to all cases within the meaning of the language used. *United States* v. *Babbit,* 1 Black 55. *Springer* v. *Philippine Islands,* 277 U. S. 189, 207. Little if any significance is to be given to the use of the word "provided." In

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discharged therefrom, and has been accepted for service in either the military or naval service of the United States on the condition that he becomes a citizen of the United States, may file his petition for naturalization upon proof of continuous residence within the United States for the three years immediately preceding his petition, . . . and in these cases only residence in the Philippine Islands and the Panama Canal Zone by aliens may be considered residence within the United States, and the place of such military service shall be construed as the place of residence required to be established for . . . naturalization. [*id.* § 389.]

. . . [Provisions governing procedure follow] . . .

[5] Members of the Naturalization Bureau and Service may be designated by the Secretary of Labor to administer oaths relating to the administration of the naturalization law; [*id.* § 354]

[6] and the requirement of section ten of notice to take depositions to the United States attorneys is repealed, and the duty they perform under section fifteen of the Act of June twenty-ninth, nineteen hundred and six . . ., may also be performed by the Commissioner or deputy Commissioner of Naturalization: [*id.* § 405]

[7] *Provided,* That it shall not be lawful to make a declaration of intention before the clerk of any court on election day or during the period of thirty days preceding the day of holding any election in the jurisdiction of the court: [*id.* § 374, and see § 362]

[8] *Provided further,* That service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry. [*id.* § 384.]

Acts of Congress, that word is employed for many purposes. *Schlemmer* v. *Buffalo, Rochester, &c. Ry.,* 205 U. S. 1, 10. Sometimes it is used merely to safeguard against misinterpretation or to distinguish different paragraphs or sentences. *Georgia Banking Co.* v. *Smith,* 128 U. S. 174, 181. For the proper construction of the provision in question, consideration need not be limited to the subdivision in which it is found; the general purpose of the section may be taken into account. *United States* v. *Whitridge,* 197 U. S. 135, 143.

The general rule in respect of residence of aliens seeking naturalization was established by § 4 of the Act of 1906. The subdivision added by the amendatory Act takes out of that rule four classes, which include (1) native-born Filipino declarants, having served in the Navy, Marine Corps or Naval Auxiliary, (2) aliens, or Porto Ricans not citizens of the United States, having served in the Army, Navy, Marine Corps, Coast Guard or on merchant or fishing vessels of the United States, (3) aliens in the military or naval service during the war, and (4) alien declarants who have been honorably discharged from the Army, Navy or Philippine constabulary and have been accepted for military or naval service on condition that they naturalize. As to those included in the first three classes, no proof of residence is required. As to members of the fourth class, three years' residence is required. Provisions regulating procedure in cases covered by the subdivision follow. After these are the clauses designated in the margin, 5, 6 and 7, followed by the proviso above quoted.

Petitioner contends and it may be assumed that, under the Act of 1906 before the amendment, mere absence of a sailor in pursuit of his calling whether serving on vessels of United States or of foreign registry did not interrupt the required period of residence in the case of one maintaining a domicile in this country. *United States* v. *Rockteschell,*

208 Fed. 530. *United States* v. *Habbick,* 287 Fed. 593, 595.

The amendatory Act was passed in war time, and the new classes include those who, by reason of service in support of the national purpose, specially merit the protection of our flag and the benefits of citizenship. As to them Congress undoubtedly intended generously to relax the requirements for naturalization. See House Report No. 502, 65th Congress, 2d Session. But petitioner is not within any of the new classes; he claims under the earlier Act. And he insists that service on vessels of foreign registration is to be deemed residence for naturalization of aliens domiciled here who are within the five year rule. But under that construction, such service cannot be considered as residence for those within the favored classes created by the amendment.

Moreover, there is nothing in the subdivision to which the proviso can reasonably be held to relate. And, if not construed to apply to those who like petitioner are subject to the five year rule, it would have no effect. This is plainly so because those in the first three classes are not required to prove any period of residence; and the place of their military service is the place of residence required to be established by those belonging to the fourth class.

The subdivision contains provisions plainly not limited to the special classes created by it. It is manifest without discussion that the clauses numbered 5, 6 and 7 in the margin are intended to have effect beyond the scope of the subdivision. The language and circumstances attending the enactment of the amendment do not permit a construction of the proviso limiting its effect to the special classes aforesaid. It was intended to apply generally according to its terms and to establish the rule that service on foreign vessels would not be deemed residence within the United States for the purposes of naturalization.

Decree affirmed.

MORIMURA, ARAI & COMPANY *v.* TABACK ET AL.

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

No. 18. Argued October 9, 1928.—Decided February 18, 1929.

1. Under § 14 b of the Bankruptcy Act, as amended by § 6 of the Act of June 25, 1910, bankrupts who have obtained goods on credit upon a written statement that was materially and grossly incorrect, are not entitled to discharges if they made the statement to the vendor, or acquiesced in its making, for the purpose of obtaining the credit, with actual knowledge that it was incorrect, or with reckless indifference to the actual facts and with no reasonable ground to believe that it was correct. Pp. 25, 33.
2. In the absence of concurrent findings by the two lower courts upon any of the material issues relating to such a written statement, this Court examined the evidence at length for the purpose of determining the essential facts. P. 27.
3. The rule attaching special weight to findings of a master is inapplicable to a finding which does not depend upon the weighing of conflicting testimony and credibility of witnesses. P. 33.

21. F. (2d) 161, reversed.

CERTIORARI, 275 U. S. 520, to a judgment of the Circuit Court of Appeals reversing an order of the District Court which sustained objections to a report of a special master, recommending that the present respondents be discharged in bankruptcy, and denied the discharge.

Mr. James D. Carpenter, Jr., with whom *Mr. Edmonds Putney* was on the brief, for petitioners.

Mr. Frederic M. P. Pearse, with whom *Messrs. David H. Bilder* and *Nathan Bilder* were on the brief, for respondents.

Mr. JUSTICE SANFORD delivered the opinion of the Court.

In September, 1920, Nathan Taback and Louis Taback were adjudged bankrupts, both individually and as part-

ners trading as Taback Brothers, under an involuntary petition in bankruptcy filed against them in the District Court for New Jersey. They seasonably applied for discharge. The firm of Morimura, Arai & Co., an objecting creditor, filed specifications of opposition on the two grounds, among others: That the bankrupts had obtained property on credit on a materially false statement in writing made by them to the objecting creditor for the purpose of obtaining credit; and that with intent to conceal their financial condition they had destroyed, concealed or failed to keep books of account or records from which such condition might be ascertained. Bankruptcy Act, § 14b, as amended by § 6 of the Act of June 25, 1910, 36 Stat. 838, c. 412.[1] The issues so raised were referred to the referee, as special master, to take proof and report it to the court, with his findings thereon.[2] He took the proof in 1921 and 1922, and in 1926 reported that in his opinion the bankrupts were entitled to discharge. The District Judge sustained exceptions to this report and ordered that the application for discharge be denied. The Circuit Court of Appeals reversed this order, with directions to dismiss the exceptions and discharge the bankrupts, 21 F. (2d) 161.

The Morimura Company relies here on both of the grounds of opposition mentioned above.

The first of these grounds is predicated on a written statement made to the Morimura Company in January 1920. This, under § 14b(3) of the Bankruptcy Act, as amended in 1910, required a denial of the discharge, if (a) the bankrupts obtained property on credit from the

[1] Sec. 14b was later amended in material respects by § 6 of the Act of May 27, 1926, 44 Stat. 662, c. 406.

[2] As to such references see generally §§ 14(b) and 38(4) of the Bankruptcy Act; General Order in Bankruptcy No. 12, § 3; *International Harvester Co.* v. *Carlson* (C. C. A.), 217 Fed. 736; and *In re Hughes* (C. C. A.), 262 Fed. 500.

Morimura Company upon this statement, and (b) the statement was materially false and (c) was made to the Morimura Company for the purpose of obtaining such property on credit. See *Gerdes* v. *Lustgarten,* 266 U. S. 321, 323, 326.

In the master's report—which is set forth in the margin [3]—he made no specific findings of fact in reference to the precise issues, but without citing any testimony or giving his reason, stated generally that he believed the statement "was substantially correct." The District Judge—after referring to the vagueness and generality of this report—stated that obviously the statement was false and was made for the purpose of obtaining credit. The Circuit Court of Appeals—after referring to the fact that

[3] In this report the master stated: "I beg leave to report that the objections to the discharge of the bankrupts in this case are predicated largely upon a statement issued by the bankrupts as of December 31st, 1919. The adjudication in this matter was September 29th, 1920, and during the time between the giving of the statement . . . and the adjudication, . . . the silk business passed through one of the worst periods in its existence, raw silk declining from around $15.00 to $4.50 per pound, and I believe the statement issued by the bankrupts in 1919 was substantially correct. The old books of the bankrupts were apparently destroyed, but the new books, for considerable time prior to the bankruptcy, had been so far as the records show, correctly kept. The bankrupts did obtain property on credit, but not to the extent of the credit that had been extended to them; they bought a large quantity of raw silk on contract, running into the several hundred thousand dollars, which was apparently a gamble between the bankrupts and the creditors as to which one was going to win, and with the exception of a few discrepancies in the books which were afterwards explained, it is my opinion that the said bankrupts have in all things conformed to the requirements of (the Bankruptcy Act of 1898); and that the testimony herein and returned herewith shows that the said bankrupts have committed none of the offenses and done none of the acts prohibited by said Act, and that, in my opinion, the said bankrupts, Nathan Taback and Louis Taback, ind. and as prts. trdg. as Taback Brothers, are entitled to their discharge."

the master saw and heard all the witnesses—without determining whether or not the statement was correct, stated that they were not satisfied that "a consciously false financial statement was made for the purpose of obtaining credit."

As there is no concurrent finding on any of the material issues relating to the written statement, we have examined the evidence at length for the purpose of determining the essential facts.

Shortly stated, it appears that in 1917 the two Tabacks entered into the business of buying and selling silk as partners under the firm name of Taback Brothers. The capital consisted of borrowed money. The firm carried on business in New York until May 1920, when it moved to New Jersey. The business gradually enlarged, and the firm established a good credit, paying its bills promptly and frequently taking the cash discounts. It began to purchase silk from the Morimura Company in 1919. On a financial statement showing that on July 1 the firm had a net worth of $140,000, the Morimura Company in September extended it a line of credit of $20,000, on terms of sixty days. From that time until January 1, 1920, the firm bought about $150,000 worth of silk from the Morimura Company, and paid all of its bills before maturity. However, during that time Nathan Taback, who had charge of this branch of the firm's business, on different occasions, applied, both in person and through the salesman from whom he purchased the silk, to the credit manager of the Morimura Company for an enlargement of the line of credit. This the manager refused until he had a new financial statement on which to base an increase.

On January 1, 1920, the firm opened a new set of books. An accountant carried forward to the new books the entries from the previous books which showed the status of affairs of the firm on December 31, 1919. The correct-

ness of the old books and of the transfer to the new books is not questioned. In the opening entries of the new books the capital of one of the partners was shown as $4,385.93, and that of the other as $7,285.50, making a total capital of $11,671.43.

From that time until the bankruptcy the new books were used by the firm; and they were introduced in evidence. The old books, which were stored in the office until the firm moved to New Jersey in the following May, were then cast aside and could not be produced in evidence.

There was introduced in evidence a tabulated statement compiled from the opening entries in the new books, which is set forth in the margin.[4] This tabulated statement—the accuracy of which was not questioned—shows that on January 1, 1920, the total assets of the firm, as shown by the new books, were $277,846.48, and the total liabilities $266,175.05, leaving a net worth of $11,671.43—the exact amount of the aggregate capital of the two partners as shown on the books.

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[4] This reads as follows:

Taback Bros.

Assets and Liabilities as per Books January 1st, 1920

Assets.

Cash in Banks, Paterson, N. J.	$25,318.95	
Accts. Receivable (Good)	19,887.98	
Notes Receivable (Good)	43,352.89	
Inventory of Mdse. on hand at Cost, Raw Silk	43,500.00	
Liberty Bonds	12,170.79	
First Mortgage held on Real Estate Property acquired at 80 George St., Paterson, N. J.	126,225.00	
Loans Receivable	3,215.99	
Furniture & Fixtures	288.45	
Delivery Equipment	3,886.43	
Total Assets		$277,846.48

On January 7, 1920, six days after the new books were opened, Nathan Taback furnished the credit manager of the Morimura Company a written statement which he had prepared and signed, purporting to show the assets and liabilities of the firm on December 31, 1919. The manager testified that at that time Nathan Taback requested an enlargement of the firm's credit, and that, after questioning Taback as to various items in the statement, he agreed to extend the firm a line of credit of $40,000 on four months' time. This was denied by Nathan Taback; and both the bankrupts testified that this statement was made merely to show how they stood, and that they did not then need any credit from the Morimura Company.

This statement, which is set forth in the margin,[5] is utterly irreconcilable with the financial condition of the

Liabilities.

Mortgage Payable	$42,500.00	
Notes "	109,246.18	
Accts. "	28,876.09	
Loans "	9,926.63	
Exchanges	36,840.30	
H. F. Taback—Loan	38,785.85	
Total Liabilities		$266,175.05
Net Worth		11,671.43
N. Taback—Capital	$4,385.93	
L. Taback— "	7,285.50	
	$11,671.43	

[5] This reads as follows:

Phone Farragut 9986.
Taback Bros., Broad Silks, 1133 Broadway, New York.
Financial Statement of Taback Brothers, Dec. 31st, 1919.

Assets.

Cash in Banks, Paterson, N. J.	$28,089.79
A/c Receivable, Good	13,830.54
Notes Receivable, Good	78,355.70

firm as disclosed by the new books opened on January 1. This appears by a comparison with the tabulated statement compiled from these books.[6] The statement of January 7 shows on its face total assets of $372,066.03 as against only $277,846.48 shown by the books; a liability, of only $96,395.20, by open account, as against total liabilities of $266,175.05 shown by the books; and a net worth of $275,670.83 as against only $11,671.43 shown by the books; that is, the statement of January 7 shows $94,219.55 more of assets and $169,779.85 less of liabilities than those shown by the books; and a net worth of $263,999.40 more than the net worth shown by the books. And, as appears by a detailed comparison between the statement of January 7 and the tabulated statement, every item in the statement of January 7 is materially different from the corresponding item appearing on the books.

No evidence whatever was offered by the bankrupts to account for the discrepancies between the statement of January 7 and the tabulated statement drawn from the books. There was no effort to show that the firm had on December 31, 1919, any assets that were not shown on the books, or did not owe any of the liabilities shown on

Inventory of Mdse. on hand at cost, Raw Silk	$67,500.00	
Liberty Bonds	16,200.00	
First Mortgage held on Real Estate	8,000.00	
Property acquired at 80 George St., Paterson, N. J	160,000.00	
Total Assets		$372,066.03
Liabilities.		
A/c Payable not due		96,395.20
Net worth		$275,670.83

Taback Bros. (Sign-by) Nathan Taback.

[6] Note 4, *supra*.

the books. While Nathan Taback stated generally that the statement of January 7 was correct to the best of his knowledge, he testified that the accountants who opened the new books had not then reported to him the financial condition appearing on the books; and, being asked where he got his statement, said: "I sat down in the office on a certain day and I looked up the balance sheets in the bank, both banks, . . . and I looked up my stock, and I looked up what we had on contract, and what we have sold to be delivered, January, February and March—we had at that time $100,000 profits to be made which was sold to good concerns, and I figured my building so much worth, and so I wrote out my profit what it was worth on January 1st, so much for building, and I made up my statement with my own soul. Q. You didn't compare your assets and liabilities with the books? A. I followed my own information of what we had, and my brother came up from New York and I told him what we took up as profits, which was not cashed in yet, but I figured I am worth the money. Q. Where did you get the liabilities from? A. I looked up the unpaid items and I checked up and found out what was paid and unpaid, and that is what I put down, my own figures to my best knowledge. Q. Did you compare them with the items of liabilities as appeared on the books? A. Mr. Putney, as far as I had knowledge of, I tried my best to not give a false statement. Q. Did you look at your books to see? A. I looked at the books to see what was owing to us and to see what we owed, and I took it down to my own best knowledge. . . . . Q. Did you, when you were making this statement for (the credit manager) look at (the purchase ledger) book in order to get the amount of the debts which you owed? A. No." And when asked in reference to the fact that the statement of January 7 showed that the liabilities were only $96,395.20 (by accounts payable), while the general ledger showed "notes payable" alone

of $109,246.18 on January 1, he said: "I took it the way I explained before, but I didn't touch the books."

Louis Taback, who had charge of the firm's sales and could not read or write, testified that he did not find out that a statement had been given to the Morimura Company until about a day or two afterward when his brother told him he had been up to the Morimura Company and given a statement of how they stood, and that, as he understood, "my brother looked up the stock and said it was worth between $275,000 and $300,000. . . . He figured up what we took in and what we sold and the mill, and he showed me how much we are worth."

On January 10 the firm contracted with the Morimura Company for the purchase of twenty bales of silk at a stipulated price on terms of four months after delivery in February.[7] In April the Morimura Company delivered to the firm the twenty bales called for by the contract, taking in payment two trade acceptances, aggregating $39,536.19, at four months each. The credit manager of the Morimura Company testified that the contract and deliveries were made in reliance upon the statement of January 7.

In the latter part of January the price of silk began to fall. This finally resulted in a panic in the silk market, and the firm became bankrupt in September. Between January 1 and the bankruptcy it had bought more than $100,000 worth of silk from the Morimura Company in addition to the twenty bales of silk mentioned above, and had also bought a large amount of silk on credit from other dealers. For some time it paid its bills to the Morimura Company before maturity, and at the time of the bankruptcy had paid everything due the Morimura Com-

[7] The memorandum of purchase which was introduced in evidence is not copied in the transcript, but is set out in the brief for the Morimura Company, and is not questioned in the brief for the bankrupts.

pany except the trade acceptances for $39,536.19 given in April, which were still unpaid.

Upon the entire evidence we reach the following conclusions:

1. The undisputed evidence shows that the written statement of January 7 was materially and grossly incorrect, purporting as it did to show that the firm had a net worth of approximately $264,000 more than the actual net worth shown by its books. The opinion of the master that this statement was " substantially correct "—the only specific finding made in his report—manifestly did not depend upon the weighing of conflicting testimony or the credibility of witnesses. For this reason, if for no other, it does not have the weight ordinarily attaching to the conclusions of a master upon conflicting evidence, as stated in *Tilghman* v. *Proctor,* 125 U. S. 136, 149; and it was clearly due to error or mistake.

2. It is established by the clear weight of the evidence that the written statement—which was made to the Morimura Company by Nathan Taback in behalf of the firm and was acquiesced in by Louis Taback—was not only incorrect but materially false within the meaning of § 14b (3) of the Bankruptcy Act; that is, that it was made and acquiesced in either with actual knowledge that it was incorrect, or with reckless indifference to the actual facts, without examining the available source of knowledge which lay at hand, and with no reasonable ground to believe that it was in fact correct.

3. It is established by the clear weight of the evidence that this false statement was made to the Morimura Company for the express purpose of obtaining silk on credit, and that upon it silk was in fact obtained from the Morimura Company on credit. Compare *Gerdes* v. *Lustgarten, supra.*

It follows that the specification of opposition based on this written statement should have been sustained, and

the bankrupts' application for discharge should have been denied.

It is not necessary to determine whether the other specification of opposition to the application for discharge, which was predicated upon the books of account or records kept by the firm after January 1, 1920, should also have been sustained, since even if this were the case the result would not be changed.

The decree will be reversed and the cause remanded to the District Court, with instructions to enter a decree sustaining the specification of opposition relating to the written statement and denying the bankrupts' application for discharge.

Reversed and remanded.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* DAVIS, ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 70. Argued November 23, 1928.—Decided February 18, 1929.

1. Where a railway employee voluntarily abandons one of several places which are reasonably safe and well adapted to the work in which he was engaged, and assumes and places himself in a position of extreme danger which was neither furnished for the performance of his work nor well adapted thereto, and this negligence on his part is the sole and direct cause of his death, there is no ground upon which liability of the employer, under the Federal Employers' Liability Act, may be predicated. P. 39.
2. In an action for wrongful death, brought under the Federal Employers' Liability Act, if the charge that the death was caused by the negligence of the employer in any respect in which it owed a duty to the decedent is without any substantial support, the jury should be instructed to find for the defendant. P. 39.

150 S. C. 130, reversed.

CERTIORARI, 276 U. S. 614, to a judgment of the Supreme Court of South Carolina, affirming a judgment

recovered by the administrator of a deceased railway employee in an action for wrongful death, brought under the Federal Employers' Liability Act.

Messrs. Thomas W. Davis and *Henry E. Davis* for petitioner.

Mr. Wm. C. Wolfe, with whom *Messrs. Adam H. Moss* and *Thomas H. Peeples* were on the brief, for respondent.

Mr. JUSTICE SANFORD delivered the opinion of the Court.

Richards, an employee of the Railroad Company, suffered personal injuries that resulted in his death. Davis, the administrator of his estate, brought this action against the Railroad Company in a common pleas court of South Carolina. The declaration alleged that the injury was caused by the negligence of the Railroad Company in failing to provide Richards a safe place in which to work. At the conclusion of the evidence the Railroad Company moved for a directed verdict. This was denied. The jury found for the administrator; and the judgment entered on the verdict was affirmed by the Supreme Court of the State.

It is unquestioned that the case is controlled by the Federal Employers' Liability Act,[1] under which it was prosecuted. Hence, if it appears from the record that under the applicable principles of law as interpreted by the Federal courts, the evidence was not sufficient in kind or amount to warrant a finding that the negligence of the Railroad Company was the cause of the death, the judgment must be reversed. *Gulf, etc. R. R.* v. *Wells,* 275 U. S. 455, 457; and cases cited.

Richards was injured while on a steam shovel standing by the side of the railroad track that was being operated

[1] 35 Stat. 65, c. 149.

by an independent contractor employed by the Railroad Company to fill in trestles on its lines. With this steam shovel the contractor excavated dirt from the railroad right of way and loaded it upon a train of dump cars, which was hauled to the trestles, where the dirt was deposited. The contractor furnished and operated the steam shovel, and also furnished the train of cars. The Railroad Company furnished the locomotive and train crew "for the operation of the contractor's train while on the railroad tracks," and hauled the train of cars to and from the trestles.

Richards was employed by the Railroad Company as a member of the train crew. He was the flagman, and his duty was to put out flags and protect the train from collisions.

In excavating and loading the dirt the steam shovel was stationed at a convenient distance on the side of the railroad track. The accessible dirt was excavated and loaded on the train of cars standing on the track. As each car was loaded the train was moved to get the loaded car out of the way and bring the next car into position for loading. For this it was necessary to signal the engineer to move the train. This was sometimes done by the shovel operator by the use of a whistle, and sometimes by the contractor's crew of laborers who were used "to spot cars," that is, watch the loading and signal to the engineer. One of these laborers, called a "spotter," was used for this particular purpose. The evidence shows, however, that the cars were frequently spotted by members of the train crew. This appears to have been entirely voluntary on their part. The contractor had never requested that they be required to do this, and the conductor of the train, who was in sole charge of the crew, had never directed them to spot the cars. The conductor also sometimes voluntarily spotted cars, and he had seen other members of the crew thus engaged; but, understanding

that, like himself, they were doing this voluntarily, did not stop them from doing this work when they chose.

The main platform of the steam shovel was occupied by a " shovel house " covering the engine and boiler. By the side of this was a running board extending to the front corner post of the shovel house. In front of the shovel house was a crane, having a revolving boom about thirty feet long, to which a dipper stick and scoop was attached. This scooped up the dirt, and by a circular movement of the boom was brought into position for loading the dirt on the cars. When the shovel was stationed in the position occupied on the day of the accident, at a considerable distance from the track, this required a " full swing " of the boom. Between the shovel house and the crane there was an upright steel frame which prevented the boom from striking the shovel house. But attached to the side of the boom several feet from its base was an iron ladder, which would pass above the steel frame, and when the boom made a full swing the lower part of the ladder would come within four inches of the upper part of the corner post of the shovel house. In front of the running board and at the side of the steel frame the upper end of a " jack-arm," planted in the ground to steady the shovel, projected above the platform. This was not only so small as to afford an insecure footing, but it was so high and so located that if anyone standing on it did not move out of the way when the boom made a full swing he would necessarily be struck by the iron ladder and crushed against the corner post of the shovel house.

While it does not appear that any specific place had ever been assigned for the spotter, the uncontradicted evidence shows that there were at least four safe places in which he could stand without danger of being struck by the revolving boom: 1. On the running board by the side of the shovel house, this being the position usually taken; 2, on the top of a loaded car, this being the posi-

tion frequently taken; 3, inside of the shovel house, from which he could signal the engineer through an open window; and 4, on the ground, on the opposite side of the track from the shovel.

While a brakeman stated that he had sometimes stood on the "jack-bar" to spot cars when it was very hot—it being protected from the sun at certain hours of the day—he added that when he had done this, realizing the danger, he had watched the boom "very, very carefully"; and it did not appear that he had ever stood there when the shovel was stationed in a position requiring the boom to make a full swing. Neither the conductor nor the contractor's manager had ever seen anyone standing on the jack-arm while spotting. And the shovel operator, who had once seen Richards on the jack-arm at a time when the shovel was not running, had told him that it was a dangerous place and "to never get caught there or he would get killed."

There was also evidence that if a railroad caboose had been attached to the end of the train a spotter could with safety have signalled the engineer from the windows of the cupola; but it appeared that he could not have efficiently spotted the cars from this position as the roof would have prevented him from seeing when they had been loaded.

On the day of the accident Richards, without any order from the conductor, voluntarily took the place of a brakeman who had been engaged in spotting the cars. He first mounted on the running board by the side of the shovel house in the position which the brakeman had occupied. Shortly thereafter, for some unexplained reason—possibly to get away from the heat of the sun—he left this position of safety and got on the jack-arm; and while standing there was struck by the iron ladder when the boom swung into position for loading a car, and received the injuries which resulted in his death. That this was the manner

of his death is demonstrated by the undisputed physical facts, and is not controverted.

We pass without determination the question whether the case was properly submitted to the jury to determine whether Richards at the time of the accident was engaged within the scope of his employment by the Railroad Company or was merely aiding the contractor as a volunteer. However this may be it is clear that, even if the Railroad Company then owed him any duty in this respect, there was no substantial evidence that there was any negligence upon its part in failing to furnish a safe place in which to work. The evidence is undisputed that there were several places in which he could have stood in spotting cars, all of which were reasonably safe and well adapted to the performance of the work, and in which he could not have been struck by the swinging boom. And the inevitable conclusion from all the evidence is that he voluntarily abandoned the safe position on the running board which he at first assumed and placed himself in a position of extreme danger on the "jack-arm," a place not furnished for the performance of this work and ill adapted thereto, and one of obvious danger in which he would inevitably be struck if the boom made a full swing unless he moved out of its path; and thereby through his own negligence, as the sole and direct cause of the accident, brought on his own death. Under these circumstances there is plainly no ground upon which the liability of the Railroad Company may be predicated. Compare *Gt. Northern Ry.* v. *Wiles,* 240 U. S. 444, 448; *Southern Ry.* v. *Gray,* 241 U. S. 333, 339; *Frese* v. *C., B. & Q. R. R.,* 263 U. S. 1, 3; *Davis* v. *Kennedy,* 266 U. S. 147, 148.

The contention that Richards' death was caused by the negligence of the Railroad Company in any respect in which it owed a duty to him is without any substantial support; and the jury should have been instructed to find for the Railroad Company. The judgment is reversed

and the cause remanded to the Supreme Court of South Carolina for further proceedings not inconsistent with this opinion.

Reversed.

LEONARD *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 183. Argued January 17, 1929.—Decided February 18, 1929.

1. In the Act of June 10, 1922, which adjusts the base pay of officers of the Army, Navy, and Marine Corps, according to rank and length of service, the clause in § 1 providing that "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," refers only to officers who were in active service on that date. P. 44.
2. The Act to equalize pay of retired officers, approved May 8, 1926, in providing that the pay of officers retired on or before June 30, 1922, shall not be less than that of officers of equal rank and length of service retired subsequent to that date, contemplates that the standard of comparison in each case shall be an officer continually in active service until his retirement after that date, and does not operate to extend to officers retired before June 10, 1922, the benefits of the clause from the Act of that date quoted *supra*, par. 1. P. 45.
3. An officer of the Marine Corps who retired in 1911, and, under the Act of March 2, 1903, received longevity pay for his retired service because the retirement was on account of wounds received in battle, *held* not entitled, under the Acts of June 10, 1922, and May 8, 1926, to have the years spent by him on the retired list counted in determining his base pay period. P. 45.

64 Ct. Cls. 384, affirmed.

CERTIORARI, 278 U. S. 586, to a judgment rejecting a claim for additional pay, preferred by a retired officer of the Marine Corps.

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

Solicitor General Mitchell and *Assistant Attorney General Galloway* submitted for the United States.

Mr. JUSTICE STONE delivered the opinion of the Court.

This case is here on writ of certiorari, granted October 8, 1928, under § 3 (b) of the Act of February 13, 1925, to review a judgment of the Court of Claims, 64 Ct. Cls. 384, denying recovery of additional pay claimed to be due to petitioner as a major in the Marine Corps on the retired list. Petitioner, because of wounds received in battle, was retired on September 30, 1911, when his active service was a little more than thirteen years. He was later, at various times, detailed to active duty, making his total active service, both before and after his retirement, more than seventeen years. His service, both active and retired, amounted to more than twenty-seven years at the time this suit was brought. The question presented is whether the Court of Claims correctly held that the years spent by him in inactive service on the retired list could not be counted in determining the amount of his base or period pay as an officer on the retired list.

The pay and allowances of officers of the Marine Corps, and provisions for their retirement, are in general the same as those of like grades in the Army. R. S. §§ 1612, 1622. Under R. S. § 1274, officers retired from active service are entitled to receive 75% of the pay "of the rank upon which they are retired." Before the Act of June 10, 1922, c. 212, 42 Stat. 625, officers in the Army received pay based upon rank, $2,500 a year in the case of a major, R. S. § 1261, increased to $3,000 by Act of May 11, 1908, c. 163, 35 Stat. 106, 108, and a certain additional amount, termed "longevity pay," based on length of service. R. S. §§ 1262, 1263, and Act of June 30, 1882, c. 254, 22 Stat. 117, 118.

In *United States* v. *Tyler,* 105 U. S. 244, decided in the October term, 1881, this Court held that under the appli-

cable statutes a retired army officer was entitled to count the period during which he had been on the retired list in computing longevity pay. The effect of this decision was modified by the Act of March 2, 1903, c. 975, 32 Stat. 927, 932, which provided that "except in case of officers retired on account of wounds received in battle," officers then or later retired should not receive further increases in longevity pay for retired service. Under these provisions the petitioner was entitled, after his retirement in 1911, to 75% of the base pay of a major, $3,000 a year, and as his retirement was because of wounds received in battle, he was permitted by the Act of 1903 to count his period of retirement in determining the amount of his longevity pay.

By the Act of June 10, 1922,[1] revising generally the scheme of service pay, a new schedule of base and longevity pay was adopted. The amount of base pay was fixed with reference to specified pay periods and was made to depend both upon rank and length of service. Under it majors who had completed fourteen years of service were to receive fourth period pay of $3,000 per annum,

[1] An Act To readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps . . .

Be it enacted . . . That, beginning July 1, 1922, for the purpose of computing the annual pay of the commissioned officers of the Regular Army and Marine Corps below the grade of brigadier general . . . pay periods are prescribed, and the base pay for each is fixed as follows:

. . . . . .

The pay of the fifth period shall be paid to . . . majors of the Army . . . and officers of corresponding grade who have completed twenty-three years' service: . . .

The pay of the fourth period shall be paid to . . . majors of the Army . . . and officers of corresponding grade who have completed fourteen years' service, . . .

. . . . . .

Every officer paid under the provisions of this section shall receive an increase of 5 per centum of the base pay of his period for each

and majors of twenty-three years of service fifth period pay of $3,500. It also provided that an officer should receive an increase of 5% of the base pay of his period for each three years of service up to thirty years, with certain limitations not now important.

As this Act, effective July 1, 1922, provided that it should not operate to authorize an increase or decrease in the pay of officers on the retired list on June 30, 1922, the petitioner continued after its enactment, as before, to be entitled to base pay of $3,000 a year as fixed by the Act of May 11, 1908, and to longevity pay as fixed by other applicable provisions of the statutes. But by the Act of May 8, 1926, c. 274, 44 Stat. 417, enacted "to equalize the pay of retired officers," the benefits of the Act of June 10, 1922, were to some extent extended to officers retired on or before June 30, 1922, by providing that the retired pay of such officers should not be less than that provided for "officers . . . of equal rank and length of service retired subsequent to that date."

Petitioner has received longevity pay as a major of twenty-seven years service, his right to which is not

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three years of service up to thirty years: . . . Nothing contained in the first sentence of Section 17 or in any other section of this Act shall authorize an increase in the pay of officers or warrant officers on the retired list on June 30, 1922.

For officers appointed on and after July 1, 1922, no service shall be counted for purposes of pay except active commissioned service under a Federal appointment and commissioned service in the National Guard when called out by order of the President. 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 . . .

. . . . . .

Sec. 17. That on and after July 1, 1922, retired officers and warrant officers shall have their retired pay, or equivalent pay, computed as now authorized by law on the basis of pay provided in this Act: *Provided,* That nothing contained in this Act shall operate to reduce the present pay of officers . . . now on the retired list . . .

contested. He has also received 75% of the base pay for the fourth period as prescribed by the Act of June 10, 1922, for a major of more than fourteen years service. If entitled to base pay calculated on the twenty-seven years of his total active and inactive service, he should receive, under the provisions of the 1926 Act, the benefit of the higher pay of the fifth period, 75% of the difference between this pay and the base pay for the fourth period being the amount involved in the present suit.

It is not denied that petitioner should be allowed to count his entire period of active service, including that since his retirement, of more than seventeen years, which would entitle him to pay of the fourth period which he is now receiving, and it is argued by petitioner that the benefits of the Act of June 10, 1922, which by the Act of May 8, 1926, were extended to all retired officers, include, in the case of petitioner, the right to count inactive service in computing base pay. This claim is based on the provision of the Act of March 2, 1903, allowing officers whose retirement was on account of wounds received in battle, as was petitioner's, to count retired service in computing longevity pay and on the clause in the Act of 1922 which provides that "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."

That this latter clause, when enacted, was intended to include only officers then in active service is, we think, apparent on an inspection of the whole 1922 Act. As already noted, the pay of officers on the retired list remained unaffected by this legislation at the time of its enactment. Section 1 expressly stipulated that the act should not authorize any increase in the pay of officers already retired on June 30, 1922, and this provision must be read with the next sentence, save one, on which the petitioner relies. Having by the first clause excluded

retired officers from any increase authorized by the act, the later provision for computing the pay of "officers in service" by including all service then counted in computing longevity pay must be taken to have referred only to officers on the active list.

The equalization Act of May 8, 1926, was passed in order to correct certain inequalities in the pay of retired officers, due to the fact that the Act of 1922 was not, by its terms, applicable to officers retired before its effective date, and also to continue the former policy, exemplified by R. S. § 1274, of securing to retired officers proportionate benefits of increased pay legislation affecting officers on the active list. See House Report No. 857, 69th Congress, First Session.

But in carrying out this purpose, the 1926 Act did not strike down the provision of the 1922 Act expressly excluding from its benefits officers then retired and, as so modified, apply it to those officers. Had it done so it would more certainly have secured to officers retired before the effective date of the earlier act the benefit of the clause allowing all service counted in computing longevity pay to be included in the computation of base pay. Instead, by its terms, the Act of 1926 implies a comparison with an officer benefited by the 1922 Act, that is—so far as the clause of that act in question is concerned—an officer in active service on July 1, 1922.

Even assuming, as petitioner argues, that under the provisions of the 1922 Act, an officer then in active service would be entitled to count prior service while retired on account of wounds received in battle, in computing his base pay, which is not free from doubt,[2] it seems unlikely that Congress, by the equalization Act of 1926, meant to set up as a standard of comparison, a case so exceptional

[2] The compilers of the U. S. Code regarded the Act of 1903 as being repealed and consequently as permitting only active service to be included. See U. S. Code, Tit. 10, Sec. 683.

as that of an officer reappointed to active service after being retired, chancing to be engaged in such service on the operative date of the 1922 Act. It is argued by the Government that section 24 of the Act of June 4, 1920, c. 227, 41 Stat. 759, had rendered reappointments from the retired to the active service (as distinguished from temporary assignments of retired officers to active duty, like that of petitioner) practically impossible, except by special act of Congress. The Act is open to such a construction for it limited the number of commissions permitted in each rank, provided that vacancies should be filled from senior active officers of next lower rank and thus seemingly terminated the former practice of permitting appointments to the active service from those on the retired list.

It seems more reasonable to believe that Congress in general legislation of this character contemplated comparison only to a more universal standard—the normal case of an officer continually in active service until his retirement after July 1, 1922, and that consequently the 1926 Act should not be read to extend to officers retired before 1922, the benefits of the clause permitting active officers alone to include all service counted in computing longevity pay. There is nothing in the 1926 Act expressly indicating an intention of Congress to allow to an officer retired in 1911, the same base pay as that given to one who, appointed at the same time, had continued in active service until after the date of the 1922 Act—which is what petitioner contends. Moreover, the construction adopted by us is more in consonance with the policy seemingly expressed in the amendment to the 1922 Act contained in the Act of May 26, 1928, c. 787, 45 Stat. 774, that from and after July 1, 1922, only active service should authorize increases in the base pay.

On the facts presented we need not decide whether officers in active service on June 30, 1922, and retired after that date because of wounds received in battle were en-

titled to count such subsequent retired service in computing their base pay.

Recognizing the force of petitioner's argument and that the number and complexity of the statutes involved and their inept phrasing leave the question not free from doubt, we conclude that the construction given to them by the Court of Claims is the more reasonable one. The judgment is accordingly

Affirmed.

Mr. JUSTICE MCREYNOLDS is of the opinion that the petitioner's claim is within the words of the statutes and should be allowed.

NIELSEN, ADMINISTRATOR, *v.* JOHNSON, TREASURER.

CERTIORARI TO THE SUPREME COURT OF IOWA.

No. 115. Argued January 9, 10, 1929.—Decided February 18, 1929.

1. When a treaty provision fairly admits of two constructions, one restricting, the other enlarging, the rights which may be claimed under it, the more liberal interpretation is to be preferred. P. 52.
2. As the treaty-making power is independent of and superior to the legislative power of the States, the meaning of treaty provisions liberally construed is not restricted by any necessity of avoiding possible conflict with state legislation, and when so ascertained must prevail over inconsistent state enactments. P. 52.
3. When the meaning of treaty provisions is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter, and to their own practical construction of it. P. 52.
4. Article 7 of the Treaty of April 26, 1826, with Denmark, providing "that hereafter no higher or other duties, charges, or taxes of any kind, shall be levied in the territories or dominions of either party, upon any personal property, money or effects, of their respective citizens or subjects, on the removal of the same from their territories or dominions reciprocally, either upon the inheritance of such property, money, or effects, or otherwise,

than are or shall be payable in each State, upon the same, when removed by a citizen or subject of such State respectively," was intended to prohibit not merely taxes on removal, but also discriminatory taxes like the *droit de détraction* (applied only to alien heirs of a resident decedent and substantially equivalent, as to them, to the modern inheritance tax), and is violated by a state inheritance tax discriminating against non-resident alien heirs of a resident decedent and constituting a lien upon the property. Pp. 52, 57.

205 Ia. 324, reversed.

CERTIORARI, 277 U. S. 583, to a judgment of the Supreme Court of Iowa affirming a judgment imposing an inheritance tax.

Mr. Nelson Miller for petitioner.

Mr. John Fletcher, Attorney General of Iowa, with whom *Messrs. C. J. Stephens,* Assistant Attorney General, and *Albert H. Adams* were on the brief, for respondent.

An inheritance tax is not a tax upon the property itself or upon the estate, but upon the succession or right to take by succession. Such a tax is not, therefore, within the contemplation of Article VII of the Treaty, which applies only to taxes levied upon property.

The Treaty does not apply to the right of the citizens of either country to acquire, by transfer or inheritance, property situated in the other belonging to its own citizens, free from restraints imposed by the law of each country on its own citizens, even although such restraints would not have been applicable in case the property had been disposed of or transmitted to a citizen.

The most that can be said for the Article is that it applies only to the disposal or transmittal of property by a citizen of either country, and that it was not intended to apply to the acquisition or receipt of property by the citizens of either country. That is to say, the

Treaty does not in any way protect the rights of citizens of either country with respect to their right to receive or acquire property. *Petersen* v. *Iowa,* 245 U. S. 170.

A tax upon the exercise of the right to succeed to or inherit property is not a burden upon the right to remove the property, as the right of property is dependent on the payment of the tax and could not and does not arise until the tax is paid. This rule was announced by this Court in *United States* v. *Perkins,* 163 U. S. 625. See also *Duus* v. *Brown,* 245 U. S. 176; *In re Estate of Anderson,* 166 Ia. 617; *In re Estate of Pedersen,* 198 Ia. 166.

The tax imposed on the share passing to a non-resident alien, is the same whether the decedent is a citizen of Iowa or a citizen of Denmark, and, therefore, there is no discrimination.

The right to inherit property exists only by statute, and a State may tax that right as it sees fit so long as it does not contravene constitutional or treaty provisions. *McGoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283; *Mager* v. *Grima,* 8 How. 490.

Mr. JUSTICE STONE delivered the opinion of the Court.

This case is here on certiorari, granted June 4, 1928, 277 U. S. 583, under § 237 of the Judicial Code, to review a judgment of the Supreme Court of Iowa affirming a judgment of the Plymouth District Court imposing an inheritance tax on the estate of petitioner's intestate. Anders Anderson, the intestate, a citizen of the Kingdom of Denmark residing in Iowa, died there February 9, 1923, leaving his mother, a resident and citizen of Denmark, his sole heir at law and entitled by inheritance, under the laws of Iowa, to his net estate of personal property, aggregating $3,006.37. By § 7315, Code of Iowa (1927), c. 351, the estate of a decedent passing to his mother or other named close relatives, if alien non-residents of the United States,

is subject to an inheritance tax of 10%, but by § 7313 an estate of less than $15,000, as was decedent's, passing to a parent who is not such a non-resident alien is tax free. In the proceedings in the state court for fixing the inheritance tax, petitioner asserted that the provisions of the statutes referred to, so far as they authorized a tax upon this decedent's estate, were void as in conflict with Article 7 of the Treaty of April 26, 1826, between the United States and Denmark, 8 Stat. 340, 342, renewed in 1857, 11 Stat. 719, 720, reading as follows:

"ARTICLE 7. The United States and his Danish Majesty mutually agree, that no higher or other duties, charges, or taxes of any kind, shall be levied in the territories or dominions of either party, upon any personal property, money or effects, of their respective citizens or subjects, on the removal of the same from their territories or dominions reciprocally, either upon the inheritance of such property, money, or effects, or otherwise, than are or shall be payable in each State, upon the same, when removed by a citizen or subject of such State respectively."

The Supreme Court of Iowa, 205 Iowa 324, following its earlier decision, *In re Estate of Pedersen,* 198 Iowa 166, upheld the statute as not in conflict with the Treaty

In *Petersen* v. *Iowa,* 245 U. S. 170, this court held, following *Frederickson* v. *Louisiana,* 23 How. 445, that Article 7 was intended to apply only to the property of citizens of one country located within the other and so placed no limitation upon the power of either government to deal with its own citizens and their property within its own dominion. Hence, it did not preclude the inheritance tax there imposed upon the estate of a resident citizen of Iowa at a higher rate upon legacies to a citizen and resident of Denmark than upon similar legacies to citizens or residents of the United States. The court said (p. 172):

" Conceding that it [Article 7] requires construction to determine whether the prohibitions embrace taxes ge-

nerically considered, or death duties, or excises on the right to transfer and remove property, singly or collectively, we are of the opinion that the duty of interpretation does not arise since in no event would any of the prohibitions be applicable to the case before us."

But, in the present case, the decedent was a citizen of Denmark, owning property within the State of Iowa, and Article 7, by its terms, is applicable to charges or taxes levied on the personal property or effects of such a citizen; hence its protection may be invoked here if the discrimination complained of is one embraced within the terms of the Treaty.

That there is a discrimination based on alienage is evident, since the tax is imposed only when the non-resident heirs are also aliens. But it is argued by respondent, as the court below held, that the present tax is not prohibited by the Treaty since it is one upon succession, *In re Estate of Thompson,* 196 Iowa 721, *In re Meinert's Estate,* 204 Iowa 355, and not on property or its removal which, it is said, is alone forbidden; and that in any case since the only tax discrimination aimed at by Article 7 in cases of inheritance is that upon the power of disposal of the estate and not the privilege of succession, the particular discrimination complained of is not forbidden, for the statutes of Iowa permit a citizen of Denmark to dispose of his estate to citizens and residents of Denmark on the same terms as a citizen of Iowa to like non-resident alien beneficiaries.

The narrow and restricted interpretation of the Treaty contended for by respondent, while permissible and often necessary in construing two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which are controlling in the interpretation of treaties. Treaties are to be liberally construed so as to effect the apparent intention of the parties. *Jordan* v. *Tashiro,* 278

U. S. 123; *Geofroy* v. *Riggs,* 133 U. S. 258, 271; *In re Ross,* 140 U. S. 453, 475; *Tucker* v. *Alexandroff,* 183 U. S. 424, 437. When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, *Asakura* v. *Seattle,* 265 U. S. 332; *Tucker* v. *Alexandroff, supra; Geofroy* v. *Riggs, supra,* and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments. See *Ware* v. *Hylton,* 3 Dall. 199; *Jordan* v. *Tashiro, supra;* cf. *Cheung Sum Shee* v. *Nagle,* 268 U. S. 336. When their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it. Cf. *In re Ross, supra,* at 467; *United States* v. *Texas,* 162 U. S. 1, 23; *Kinkead* v. *United States,* 150 U. S. 483, 486; *Terrace* v. *Thompson,* 263 U. S. 197, 223.

The history of Article 7 and references to its provisions in diplomatic exchanges between the United States and Denmark leave little doubt that its purpose was both to relieve the citizens of each country from onerous taxes upon their property within the other and to enable them to dispose of such property, paying only such duties as are exacted of the inhabitants of the place of its situs, as suggested by this Court in *Petersen* v. *Iowa, supra,* p. 174, and also to extend like protection to alien heirs of the non-citizen.

On March 5, 1824, Mr. Pedersen, Minister of Denmark to the United States, presented to John Quincy Adams, Secretary of State, a project of convention for the consideration of this Government. This project dealt with the commercial relations between the two countries and their

territories and the appointment of consular officers, but did not contain any provisions corresponding to Article 7. On January 14, 1826, certain citizens of the United States addressed to Henry Clay, then Secretary of State, a memorial complaining of certain taxes, imposed by the Danish Government with respect to property of citizens of the United States located in the Danish West Indies, known as "sixths" and "tenths," the former being one-sixth of the value of the property, payable to the crown, and the latter a further one-tenth of the residue, payable to the town or county magistrate, as a prerequisite to removal of property from the Islands. Both taxes were imposed on the property inherited by an alien heir. Danish Laws, Code of Christian V, Book V, c. 2, §§ 76, 77, 78, 79. The memorial prayed that an article be inserted in the treaty then contemplated with Denmark, comparable to the similar provisions of existing treaties between Denmark and Great Britain and Denmark and France, forbidding the imposition of taxes of this character.

Previously, on November 7, 1825, Mr. Clay had addressed a note to the Minister of Denmark, setting forth the conditions under which the United States would be disposed to proceed with negotiations. 3 Notes to Foreign Legations, 451. The note included, in numbered paragraphs, certain proposals which the government of the United States desired to have considered in connection with the draft convention submitted by the Danish Minister. Paragraph 5 was as follows:

"When citizens or subjects of the one party die in the country of the other, their estates shall not be subject to any *droit de détraction,* but shall pass to their successors, free from all duty."

In a letter of April 14, 1826, shortly before the execution of the Treaty, the Danish Minister transmitted to Mr. Clay a copy of what he termed "the additional Article to the late Convention between Denmark and Great

Britain respecting the mutual abolition of the *droit de détraction.*" This article, dated June 16, 1824, is substantially in the phraseology of Article 7 of the present treaty between the United States and Denmark.[1]

In the communication of Mr. Clay to the Danish Chargé d'Affaires of November 10th, 1826, following the ratification of the Treaty, referring to Article 7; he said: "The object which the government of the United States had in view in that stipulation, was to secure the right of their citizens to bring their money and movable property home from the Danish islands, free from charges or duties and especially from the onerous law, known in those islands, under the denominations of sixths and tenths. This object was distinctly known to Mr. Pedersen, throughout the whole of the negotiation, and was expressly communicated by me to him in writing." In the reply of the following day, the Danish Chargé d'Affaires stated: "I have been authorized . . . to declare to you, that measures have been taken accordingly by the Danish Government, to secure the due execution of the 7th Article of the Convention, conformably to the intent and meaning thereof as by you stated. . . ."

The *droit de détraction,* referred to in the communication of Mr. Clay of November 7, 1825, and in the note of

[1] "Their Britannick and Danish Majesties mutually agree, that no higher or other Duties shall be levied, in either of Their Dominions . . . upon any personal property of Their respective Subjects, on the removal of the same from the Dominions of Their said Majesties reciprocally, (either upon the inheritance of such property, or otherwise,) than are or shall be payable in each State, upon the like property, when removed by a Subject of such State, respectively." 12 British and Foreign State Papers, 1824–1825 (1826) 49. Article 40 of the Treaty of Commerce and Navigation, concluded between France and Denmark August 23, 1742, provided that the citizens of each of the two countries reciprocally should be exempt in the other from the *droit d'aubaine* or other similar disability, under whatever name, and that their heirs should succeed to their property without impediment. 1 Coercq, Recueil des Traités de la France (1864) 57.

the Danish Minister of April 14, 1826 in which he identified that phrase with the tax prohibited by the additional article of the treaty between Denmark and Great Britain of June 16, 1824, similar in terms to the article now before us, was a survival from medieval European law of a then well recognized form of tax, imposed with respect to the right of an alien heir to acquire or withdraw from the realm the property inherited.[2] Although often referred to as a tax on property or its withdrawal, the *droit de détraction* seems rather to have been a form of inheritance tax, but one which, because of its imposition only with respect to property of aliens who normally removed it from the realm, was sometimes associated with the re-

[2] The *droit de détraction* was derived from the *droit d'aubaine,* one of the many harsh feudal laws and customs directed against strangers and which, in its narrowest sense, was the right of the sovereign, as successor of the feudal lords, to appropriate all the property of a non-naturalized alien dying, either testate or intestate, within the realm. 1 Calvo, Dictionnaire de Droit International (1885) 67, Aubaine; 1 Merlin, Répertoire de Jurisprudence (5th Ed. 1827) 523, Aubaine; Halleck, International Law (1861) 155; 2 Ferriere, Oeuvres de Bacquet (1778) 8, *et seq.* This right was exercised to the exclusion of all heirs whether they were citizens or aliens or resided within or without the realm, with the single exception of resident legitimate offspring, and continued to be exercised long after aliens had been accorded unrestricted power of disposition of goods *inter vivos.* Demangeat, Historie de la Condition Civile des E'trangers en France (1844) 110, 125; Loisel, Institutes Contumiers, Liv. 1, règle 50. The term has, however, sometimes been applied to all the varying disabilities of aliens, Fiore, Le Droit International Privé (1907) 14, and more often used to include not only the inability of the alien to transmit but the complementary incapacity of an alien to inherit, even from a citizen. Merlin, *supra,* Aubaine.

But commercial expediency led, at an early date, to a mitigation of the rigors of the *droit d'aubaine.* This process took several forms, the exemption of alien merchants in certain trading centers, of certain classes of individuals (ex soldiers, etc.) and, most prominently, treaties providing for its reciprocal abandonment or contraction. In these treaties, the *droit de détraction* was recognized as a tax, of from

moval rather than the inheritance of the property. It was limited to inheritances, existed with and supplemented other taxes, the *droit de retraite* or the *droit de sortie,* imposed on the removal of property other than inheritances, Guyot, Répertoire de Jurisprudence (1785) Sortie; Calvo, Dictionnaire du Droit International (1885) Détraction; Oppenheim, International Law (4th ed., 1928) 559, and was, in most cases, applied regardless of the subsequent disposition of the property. Merlin, Répertoire de Jurisprudence (5th ed., 1827) Détraction; Guyot, *supra,* Détraction. Its origin and an examination of the commentators likewise leave no doubt that the *droit de détraction*—the tax—accrued upon the death of the decedent, and only after it had been collected was the heir entitled to take possession of the property and remove or otherwise dispose of it.[3] It was thus the

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five to twenty, usually ten, per cent of the value, imposed on the right of an alien to acquire by inheritance (testate or intestate) the property of persons dying within the realm. Demangeat, *supra,* at 219, 225; 2 Massé, Le Droit Commercial (1844) 14; 1 Calvo, *supra,* Détraction; Fuzier-Herman, Répertoire Général Alphabétique du Droit Francaise (1890) Aubaine, 6; Guyot, Répertoire de Jurisprudence (1785) Détraction; Merlin, *supra,* Détraction. Oppenheim, International Law (4th Ed. 1928) 560; Halleck, *supra,* at 155; Wheaton, Elements of International Law (8th Ed. 1866) 138. The *droit d'aubaine* and the *droit de détraction* were abolished in France by decrees of the Assembly in 1790 and 1791, but subsequently reappeared in the Civil Code, Arts. 726, 912, with provision for abandonment as to a nation according similar treatment to French nationals. They were again abolished, with certain protective provisions for French heirs, by the Law of July 14, 1819. See Dalloz, Répertoire Pratique (1825) Succession; Demangeat, *supra,* at 239, *et seq;* and citations, *supra.*

[3] " C'est un droit par lequel le souverain distrait à son profit une certaine partie de succession qu'il permet aux étrangers de venir receueiller dans ses états." 4 Merlin, *supra,* 518, Détraction; Guyot, *supra,* Détraction. " Ce droit . . . consistait dans un prélèvement opéré par le gouverment . . . sur le produit net des successions transférés à l'étranger." Calvo, *supra,* Détraction; see also Fuzier-Herman, Répertoire Général du Droit Francaise (1890) Aubaine, 6.

precursor of the modern inheritance tax, differing from it in its essentials solely in that it was levied only where one of the parties to the inheritance was an alien or non-resident.[4]

That the present discriminatory tax is the substantial equivalent of the *droit de détraction* is not open to doubt. That it was the purpose of the high contracting parties to prohibit discriminatory taxes of this nature clearly appears from the diplomatic correspondence preceding and subsequent to the execution of the Treaty, although the "sixths and tenths" tax, with which the parties were immediately concerned, was a removal tax.

We think also that the language of Article 7, interpreted with that liberality demanded for treaty provisions, sufficiently expresses this purpose. It is true that the tax prohibited by the Treaty is in terms a tax on property or on its removal, but it is also true that the modern conception of an inheritance tax as a tax on the privilege of transmitting or succeeding to property of a decedent, rather than on the property itself, was probably unknown to the draftsmen of Article 7. But whatever, in point of present day legal theory, is the subject of the tax, it is the property transmitted which pays it, as the Iowa statute carefully provides.[5] In the face of the broad language embracing "charges, or taxes of any kind . . . upon any personal property . . . on the removal

[4] A number of early treaties of the United States clearly recognize this essential characteristic of the *droit de détraction*, either by providing in terms for the abolition of both removal duties and the *droit de détraction*, cf. Treaties with: France of 1778, 2 R. S. 203, 206; Wurttemberg of 1844, 2 R. S. 809; Saxony of 1845, 2 R. S. 690; or by words of similar import. Cf. Treaties with: France of 1853, 2 R. S. 249, 251; Switzerland of 1850, 2 R. S. 748, 749, 750; Honduras of 1864, 2 R. S. 426, 428; Great Britain of 1900, 31 Stat. 1939.

[5] "The tax shall be and remain a legal charge against and a lien upon such estate, and any and all the property thereof from the death of the decedent owner until paid." Iowa Code (1927) c. 351, § 7311. See also §§ 7309, 7363.

of the same . . . either upon the inheritance of such property . . . or otherwise," the omission, at that time, of words more specifically describing inheritance taxes as now defined, can hardly be deemed to evidence any intention not to include taxes theoretically levied upon the right to transmit or inherit, but which nevertheless were to be paid from the inheritance before it could be possessed or removed. Moreover, while it is true that the tax is levied whether the property is actually removed or not, it is, nevertheless, imposed only with respect to a class of persons who would normally find it necessary so to remove the property in order to enjoy it, and since payment of the tax is a prerequisite to removal, the tax is, in its practical operation, one on removal. In the light of the avowed purpose of the Treaty to forbid discriminatory taxes of this character, and its use of language historically deemed to embrace them, such effect should be given to its provisions.

The contention that the present discrimination is not one forbidden by the language of Article 7, since the decedent's power of disposal is the same as that of a citizen, leaves out of consideration both the nature of the tax contemplated by the contracting parties and the fact that the treaty provisions extend explicitly to the withdrawal of such property by the alien heir upon inheritance and, as already pointed out, protect him in his right to receive his inheritance undiminished by a tax which is not imposed upon citizens of the other contracting party.

Reversed.

FLINK *v.* PALADINI ET AL.

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

No. 299. Submitted February 21, 1929.—Decided March 5, 1929.

1. The words of the Acts of Congress limiting the liability of shipowners to the value of the vessel and pending freight, and of part owners to their proportional share, must be taken in a broad and popular sense in order not to defeat the policy of the acts to encourage investment in shipping. P. 62.
2. Therefore, where the title to the vessel is in a corporation whose stockholders are by state law made proportionately liable for obligations of the corporation, the stockholders may limit liability as "part owners." P. 62.
3. The individual liability assumed under Art. XII, § 3, of the California Contitution, and § 322 of the Civil Code, by becoming a stockholder of a California ship-owning corporation, though voluntary and contractual, is to be construed as subject to the limited liability acts of Congress. P. 63.

26 F. (2d) 21, affirmed.

CERTIORARI, 278 U. S. 589, to a decree of the Circuit Court of Appeals reversing an order of the District Court in a proceeding to limit liability for personal injuries suffered by the present petitioner while serving aboard ship at sea. The reversed order refused a stay of actions in state and federal courts, which the petitioner had brought against the respondents to enforce their liability under the state law as stockholders of the corporation owning the ship.

Messrs. H. W. Hutton and *R. T. Lynch* submitted for petitioner.

The limited liability is for shipowners. The court has no jurisdiction to limit the liability of persons not within the statute. *The Irving F. Ross,* 8 F. (2d) 313; *In re Reichert Towing Line,* 251 Fed. 214.

The law must be taken and construed as Congress made it, and if any amendments or revisions appear desirable, they can be made by Congress.

The corporation is the sole owner of the legal and equitable title to its property. This rule has even been applied in the extreme case where all of the stock in the corporation is held by one person, the distinction being very clearly pointed out in *Solas* v. *United States,* 234 Fed. 842.

Ships owned by domestic corporations were held in England to be free from seizure, during the late war, when all of the stockholders were alien enemies. *Continental Tyre & Rubber Co.* v. *Daimler Co.,* 1915, 1 K. B. 893; *The Queen* v. *Arnaud,* 15 L. J. Q. B. N. S. 50. See also *Hamburg-American Co.* v. *United States,* 277 U. S. 138.

The term "equitable owner" in its ordinary legal significance means that the asserted owner has an estate in the property which is recognized as a right of ownership by a court of equity, i. e., that he is a *cestui que trust* of an express trust, the owner of an equity of redemption, vendee under a contract of sale of real estate or in some similar equitable position. A stockholder in a corporation has, however, no equitable ownership, title, or interest in the corporate property in the sense in which the term "equitable ownership" is thus used. *United States* v. *Eisner,* 252 U. S. 189.

An aid to the construction of the Acts is found in the circumstance that Congress in R. S. 4286 (U. S. C., Tit. 46, § 186), found it necessary specifically to include charterers within the term "owners." A charterer could more easily be construed to be an owner of a vessel than a stockholder. A charterer has a limited legal ownership in the vessel in the nature of a leasehold interest, while a stockholder has no legal or equitable rights of ownership in the vessel whatsoever, upon which a qualified ownership could be predicated.

Again, § 4286, R. S., including charterers as owners, is expressly limited in its application to such charterers as man, victual, and navigate the vessel at their own expense; i. e., a bareboat charter. The intent appears to be to include as owners only those having actual control of the vessel and power of direction and control over its officers and crew. This does not include stockholders of a corporate owner.

The corporation is the " owner " for the purpose of the Limited Liability Acts. The stockholders have the status of deferred creditors of the corporation.

Respondents make much of the policy of Congress of encouraging investments in ships by relieving shipowners from the obligation to pay their debts in full in certain cases. The reasons which presumably led Congress to this determination are without force as applied to the case at bar. The vessels of Attilio Paladini, Inc., are immune from foreign ship, and from railroad, competition. The protection of the Limited Liability Acts is wholly unnecessary in such case, and to apply them works an injustice upon petitioner.

The manifest policy of Congress in recent years is to give greater justice to maritime workers. A forced construction of the Limited Liability Acts should not be indulged to defeat this intent.

Messrs. Ira S. Lillick, J. Arthur Olson, and *Chalmers G. Graham* submitted for respondents.

Messrs. Louis T. Hengstler and *Frederick W. Dorr* filed a brief as *amici curiae* on behalf of the American-Hawaiian Steamship Company, by special leave of Court.

Mr. Justice Holmes delivered the opinion of the Court.

The petitioner suffered a severe injury on the high seas while employed as an engineer on the tugboat *Henrietta,*

belonging to A. Paladini, Incorporated, a corporation of the State of California. He sued the corporation and also the respondents, the stockholders of the same, seeking to hold the latter liable under the Constitution of the State, Article XII, § 3 and the Civil Code, § 322, which provide that each stockholder shall be individually and personally liable for such proportion of all its debts and liabilities contracted during the time he was a stockholder, as the amount of stock owned by him bears to the whole of the subscribed capital stock. The respondents took proceedings in the District Court of the United States to limit their liability under the Acts of Congress, and the limitation was established by the Circuit Court of Appeals for the Ninth Circuit under R. S. § 4283, (Code, Title 46, § 183,) and the Act of June 26, 1884, c. 121, § 18, 23 Stat. 57. (Code, Title 46, § 189.) 26 F. (2d) 21. These statutes, it will be remembered, provide for the limitation of the liability of shipowners to the value of the vessel and pending freight, and of part owners to their proportional share. The argument of the present petitioner is that the stockholders of A. Paladini, Inc., were not the owners of the *Henrietta* and that their liability under the law of California was an independent one voluntarily assumed by contract, with which the Acts of Congress do not interfere.

The Circuit Court of Appeals disposed of the case after a thorough discussion. It is unnecessary to do more than to make a short statement of the points. The purpose of the act of Congress was "to encourage investment by exempting the investor from loss in excess of the fund he is willing to risk in the enterprise." 26 F. (2d) 24. *Richardson* v. *Harmon,* 222 U. S. 96, 103. *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.,* 273 U. S. 207, 214. For this purpose no rational distinction can be taken between several persons owning shares in a vessel directly and making the same division by putting the title in a corporation and distributing the corporate stock. The

policy of the statutes must extend equally to both. In common speech the stockholders would be called owners, recognizing that their pecuniary interest did not differ substantially from those who held shares in the ship. We are of opinion that the words of the acts must be taken in a broad and popular sense in order not to defeat the manifest intent. This is not to ignore the distinction between a corporation and its members, a distinction that cannot be overlooked even in extreme cases, *Behn, Meyer & Co.* v. *Miller,* 266 U. S. 457, 472, but to interpret an untechnical word in the liberal way in which we believe it to have been used—as has been done in other cases. *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50.

The other branch of the petitioner's argument seems to us a perversion of the California law. The effect of that law so far as it goes is to destroy the operation of a charter as a nonconductor between the persons injured by a breach of corporate duty and the members of the corporation, who but for the charter would be liable. As suggested in *Flash* v. *Conn,* 109 U. S. 371, it leaves the members to a certain extent in the position of copartners. But that is the liability that the Acts of Congress mean to limit. Having no doubt of the comprehensive purpose of Congress we should not be ingenious to construe the California statute in such a way as to raise questions whether it could be allowed to interfere with the uniformity which has been declared a dominant requirement for admiralty law.

Decree affirmed.

LEWIS ET AL. *v.* UNITED STATES.

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

No. 182. Argued December 3, 4, 1928.—Decided March 5, 1929.

1. An offense committed within the territorial limits of the Eastern District of Oklahoma as then existing was indictable and triable

in the court of that district after the county where the offense was committed had been transferred by the Act of February 16, 1925, (amending Jud. Code, § 101) to the new Northern District, this jurisdiction having been reserved by the terms of the Act and of Jud. Code, § 59. P. 70.

2. The court of the Eastern District, as it is since the transfer of territory, is the same court as before, and whether exercising its jurisdiction over its restricted district or over transferred parts of the former district, sits as one and the same tribunal. P. 71.
3. Consistently with the Sixth Amendment, a person who committed an offense in a part of a judicial district which was subsequently transferred to another district, may be indicted and tried in the court of the diminished district exercising jurisdiction *pro hac vice* over its original territory, and the jurors, both grand and petit, may be drawn exclusively from the diminished district. Jud. Code, § 277. P. 72.
4. Approval by the District Judge of the removal of all names from certain counties from the jury box, may be inferred from his action in ordering a petit jury to be drawn from it after his attention had been called to such removal. P. 72.
5. If a written direction from the judge be essential, under Jud. Code, § 277, to a valid drawing of jurors from part of the district only, it may be presumed to have been given, in the absence of a showing to the contrary. P. 73.

22 F. (2d) 760; 26 F. (2d) 465, affirmed.

CERTIORARI, 278 U. S. 587, to a judgment of the Circuit Court of Appeals affirming a conviction for violations of the national banking laws.

Mr. R. L. Davidson, with whom *Messrs. W. I. Williams* and *Finis E. Riddle* were on the brief, for petitioners.

The word "court," as a mental conception, has been defined in *Todd* v. *United States,* 158 U. S. 278, as "a place in which justice is judicially administered. It is the exercise of judicial power by the proper officer or officers at a time and place appointed by law." And see *In re Steele,* 156 Fed. 853; *United States* v. *Clark,* 25 Fed. Cas. 441, Case No. 14804; *In re Terrell,* 52 Kan. 29; *State* v. *LaBlonde,* 108 Oh. St. 126; *Belford* v. *State,* 96 Ark. 274.

Where territory has been transferred from one previously existing district to another previously existing district, the identity of the old district and the identity of the old district court must be preserved in order to commence and proceed with the prosecution of crimes and offenses committed before the change. *United States* v. *Hackett,* 29 Fed. 848; *United States* v. *Benson,* 31 Fed. 896; *Lewis* v. *United States* 14 F. (2d) 369. Distinguishing *United States* v. *Peuschel,* 116 Fed. 642.

There is a very marked distinction between a case where the offense was committed in transferred territory and a case where the offense was committed in territory not transferred; and there is also a marked distinction between a case where the prosecution is in the court of the District to which the transferred territory has been added and a case where the prosecution is in the court of a district from which the transferred territory has been taken.

Under the Sixth Amendment, the district must have been ascertained by law prior to the commission of the offense. *United States* v. *Maxon,* 5 Blatch. 360, 26 Fed. Cas. 1220, Case No. 15748; *United States* v. *Dawson,* 15 How. 468; *Cook* v. *United States,* 138 U. S. 157; *United States* v. *Greene,* 146 Fed. 776.

The indictment in this case must be found, and the trial had, in the court of the old Eastern District by a grand jury and a petit jury of that district as it was constituted and existed at the time the offenses are alleged to have been committed. This was not done.

The court in which the indictment was returned and in which the trial was had, had no jurisdiction to summon grand or petit jurors from the ten counties of the old Eastern District (including Tulsa County) which under the Act of February 16, 1925, are included in the Northern District. *Lewis* v. *United States,* 14 F. (2d) 369; *Hale* v. *United States,* 25 F. (2d) 430.

If petitioners had been indicted and tried in the court of the old Eastern District as required by the Sixth Amendment, § 59 of the Judicial Code, and the Act of February 16, 1925, the court would have had jurisdiction to summon both grand and petit jurors from the utmost limits of the old Eastern District, including the ten counties referred to. *United States* v. *Hackett,* 29 Fed. 848. See also *Gut* v. *Minnesota,* 9 Wall. 35; *Salinger* v. *Loisel,* 265 U. S. 224; *Biggerstaff* v. *United States,* 260 Fed. 926; *Mizell* v. *Beard,* 25 F. (2d) 324; *Ruthenburg* v. *United States,* 245 U. S. 280; *United States* v. *Peuschel,* 116 Fed. 642; *United States* v. *Standard Oil Co.,* 170 Fed. 988; *May* v. *United States,* 199 Fed. 53, certiorari denied, 229 U. S. 617; *Case* v. *United States,* 14 F. (2d) 510; *Rosencrans* v. *United States,* 165 U. S. 257; 28 C. J., § 88, p. 797; *Logan* v. *United States,* 144 U. S. 263; *United States* v. *Hill,* 26 Fed. Cas. 315, Case No. 15364.

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

Mr. Justice Sanford delivered the opinion of the Court.

In 1925 the petitioners were indicted in the District Court for the Eastern District of Oklahoma for violations of the National Banking Laws alleged to have been committed in 1923 at Tulsa, in Tulsa County, Oklahoma. Motions to quash and dismiss the indictment on the grounds that the court was without jurisdiction of the prosecution and that the grand jury had not been legally constituted, and to quash the petit jury panel, were overruled. The petitioners were tried, convicted and sentenced. The judgment was affirmed by the Circuit Court of Appeals. 22 F. (2d) 760; 26 F. (2d) 465. And the cause is here for limited review. 278 U. S. 587.

The contentions of the petitioners are, in substance: that the District Court had no jurisdiction, because when the indictment was returned and when the case was tried, Tulsa County, in which it was alleged the offenses had been committed, was not within the territorial limits of the district; and that the grand and petit juries were not legally constituted because drawn from a jury box from which the names of all persons from Tulsa and certain other counties had been removed.

Under § 101 of the Judicial Code, enacted in 1911, Oklahoma was divided into two judicial districts:—the Eastern, embracing Tulsa and thirty-nine other counties; and the Western, the remaining counties in the State.

In 1924—the two judges of the Eastern District not having agreed upon the division of business and assignment of cases for trial—the senior circuit judge, pursuant to § 23 of the Judicial Code, made an order assigning the holding of sessions of the grand jury and the receiving of indictments, etc., for the entire district,[1] and all other judicial business arising in or coming from certain designated counties to the senior district judge, and all other judicial business in or from the remaining counties, including Tulsa County, to the junior district judge, and assigning the Tulsa County cases for hearing and trial at Tulsa unless otherwise ordered by that judge.

By an Act of February 16, 1925,[2] § 101 of the Judicial Code was amended so as to divide Oklahoma into three judicial districts: the Northern, Eastern, and Western. The Northern District embraced ten counties, including Tulsa County, which previously had been in the Eastern

[1] The reason for this, as stated in the order, was that the offices and records of the marshal and district attorney were at Muskogee [a court town in Muskogee County], and it had been the practice to hold there the sessions of the grand jury for the entire district.

[2] 43 Stat. 945, c. 233.

District, and two counties formerly in the Western District. The Eastern District embraced the remaining thirty counties which previously had been in that district. The senior judge of the Eastern District was assigned to that District; and the junior judge, to the Northern District. Terms of court for the Eastern District, were to be held at Muskogee, Ardmore and three other court towns, as before, and at two other places instead of Tulsa and another court town which were placed in the Northern District. And the clerk, in addition to keeping his office at Muskogee, as before, was also required to maintain an office in charge of a deputy at Ardmore. No other change was made in the court for the Eastern District. By § 5 of the Act it was further provided that:

"The jurisdiction and authority of the courts and officers of the . . eastern district of Oklahoma as heretofore divided between them by the order of the senior judge of the Circuit Court of Appeals . . over the territory embraced within said northern district of Oklahoma shall continue as heretofore until the organization of the district court of said northern district, and thereupon shall cease and determine save and except . . as to the authority expressly conferred by law on said courts, judges or officers, or any of them, to commence and proceed with the prosecution of crimes and offenses committed therein prior to the establishment of the said northern district, and save and except as to any other authority expressly reserved to them or any of them under any law applicable in the case of the creation or change of the . . districts of district courts of the United States."

This last reference, it is plain, covered the general provision in § 59 of the Judicial Code that: "Whenever any new district . . has been or shall be established, or any county or territory has been or shall be transferred from one district . . to another district . . , prosecutions for crimes and offenses committed within such district, . .

county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district . . had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the cause to be removed to the new district . . for trial." [3]

The Northern District was organized on April 1, 1925. Thereupon, as provided by the Act of 1925, the divisional order of the circuit judge as to the Eastern District ceased to be operative; and the court of the Eastern District continued to function without any reorganization under the senior district judge.

On April 7 the clerk and jury commissioner of the Eastern District removed from the jury box from which the grand and petit jurors were drawn, the names of all persons from the ten counties that had been transferred to the Northern District. Nearly two months thereafter the senior district judge, presiding in the Eastern District, made an order for the drawing of the names of grand jurors for a term to be held at Muskogee. This was one of the court towns of the Eastern District both under § 101 of the Judicial Code and the amendment of 1925, and the town at which it had been the practice to hold sessions of the grand jury for the entire district.[4] In consequence of the previous removal of the names of persons from the ten transferred counties, the grand jury, as drawn in pursuance of the judge's order, contained no persons from any of these counties. The indictment was returned in June, 1925, at Muskogee.

After the return of the indictment the fact that the names of all persons from the ten transferred counties

[3] At the hearing of the motion to dismiss the indictment counsel for the petitioners, in answer to a question from the court, stated that it was not their purpose to claim the right to be tried in the Northern District.

[4] See note 1, *supra*.

had been removed from the jury box was called to the attention of the judge by the motion to quash and dismiss the indictment and the evidence offered in support thereof, on which he ruled in July. Thereafter, in December, 1925, nearly eight months after these names had been removed, he made an order directing that petit jurors be drawn from the jury box for a term of court to be held at Ardmore—another one of the court towns in the Eastern District under both § 101 of the Judicial Code and the amendment of 1925. The petit jury drawn in obedience to this order likewise contained no persons from any of the transferred counties. The trial was had at Ardmore in January, 1926, before a district judge of Kansas, sitting by assignment, and the petit jury.

1. The contention that the District Court was without jurisdiction in this case rests, in substance, upon the argument that the petitioners were not indicted and tried in the court for the old Eastern District that had jurisdiction in Tulsa County, but in the separate court created by the Act of 1925 for the new Eastern District that was not the same court as that of the old Eastern District and had jurisdiction in only thirty of the forty original counties.

This, we think, is untenable. Rightly construed, the Act of 1925—as shown especially by the specific provisions of § 5, including the reference to § 59 of the Judicial Code—did not create a new court for a new district, but merely amended § 101 of the Judicial Code by limiting the territorial jurisdiction of the court for the Eastern District, for most purposes, to certain counties, while continuing its original territorial jurisdiction for the purpose of commencing and continuing prosecutions for crimes and offenses previously committed therein. In short, the identity of the court was not changed; and it continued to be, as it had been before, the court of the Eastern District. Aside from the transfer of one of the judges, its officers continued as before, retained the custody of its records,

and were charged with the same duties. And while its territorial jurisdiction was reduced for most purposes, this was not changed for the prosecution of past offenses, but for that purpose remained as before—that is, as defined and ascertained by § 101 of the Judicial Code. Compare *United States* v. *Hackett* (C. C.), 29 Fed. 848, 849; *United States* v. *Benson* (C. C.), 31 Fed. 896, 898, in which the opinion was delivered by Mr. Justice Field as circuit justice; *In re Benson* (C. C.), 58 Fed. 962, 963; *In re Mason* (C. C.), 85 Fed. 145, 148; *Mizell* v. *Beard* (D. C.), 25 F. (2d) 324, 325.

We are further of opinion that the Act of 1925 did not contemplate that the court for the Eastern District, sitting in a dual capacity as the court for both the original and the restricted district, should be reorganized and divided into two distinct tribunals—one for the original the other for the restricted district—but that it was intended that, sitting as one and the same court, it should from time to time exercise either its original or restricted territorial jurisdiction, as occasion might require. Here, the indictment—which was entitled in the District Court for the Eastern District of Oklahoma and alleged specifically that the offenses had been committed in 1923 at Tulsa, " in said district, and within the jurisdiction of this court "—was, plainly, sufficient to invoke the exercise of its jurisdiction as the court for the Eastern District sitting for the commencement and conduct of prosecutions of offenses committed prior to the amendment of 1925 within the territorial limits of the district as originally constituted.

We therefore conclude that the petitioners were both indicted and tried in the court for the Eastern District, sitting as the court for the entire original district, including the counties that had been transferred to the Northern District after the offenses were committed. This was in accord with § 5 of the Act of 1925 and § 59 of the Judicial Code. And, as this district had been ascertained by § 101

of the Judicial Code before the offenses had been committed, there was no violation of the provision of the Sixth Amendment granting an accused person the right to a trial by a "jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

2. Since the court for the Eastern District was sitting *pro hac vice* as one for the entire district as originally constituted, it had authority for the purposes of the prosecution and trial to draw and summon jurors from the entire district, including the ten transferred counties. See *United States* v. *Hackett, supra,* 849. It was not necessary, however, that this be done. The Sixth Amendment does not require that the accused be tried by jurors drawn from the entire district. *Ruthenberg* v. *United States,* 245 U. S. 480, 482, and cases cited. Section 277 of the Judicial Code provides that "Jurors shall be returned from such parts of the district from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service."

In the situation in which the court would deal occasionally with past offenses in which jurors from the ten transferred counties would be eligible, but ordinarily with cases in which jurors from such counties would not be eligible, the judge might well have thought that it would be most favorable to impartial trials and avoid unnecessary expense or undue burden to the citizens of these ten counties to return only jurors from the thirty other counties—who would be eligible to service in all cases. The evidence, it is true, does not affirmatively disclose that he gave any such direction or required the names of the persons from the ten counties to be removed from the box; nor does it affirmatively show the contrary. But since the names of these persons had been removed

almost two months before he made the order to draw the grand jurors—he did not direct those names to be restored to the box—and his attention had been called to the removal of these names before making the order to draw the petit jurors from the box—it fairly may be inferred that he had either directed that the names be removed or approved the removal before making the orders for drawing the jurors.

And even if it can be regarded as essential, under § 277 of the Judicial Code, that the judge should have given written direction to draw the jurors from part of the district only, still, as the contrary is not expressly shown, such a direction may be taken as sufficiently established by the presumption of regularity. See *Steers* v. *United States* (C. C. A.), 192 Fed. 1, 4. It is the settled general rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and that where the contrary is asserted it must be affirmatively shown. *Nofire* v. *United States,* 164 U. S. 657, 660; *United States* v. *Royer,* 268 U. S. 394, 398; and cases cited.

We find that the District Court had jurisdiction of the case; that the constitution of the grand and petit juries was not illegal; and that there was no invasion of the petitioners' rights under the Sixth Amendment. The judgment is

Affirmed.

UNITED STATES *v.* NEW YORK CENTRAL RAILROAD COMPANY, LESSEE.

UNITED STATES *v.* NEVADA COUNTY NARROW GAUGE RAILROAD COMPANY.

CERTIORARI TO THE COURT OF CLAIMS.

Nos. 238 and 304. Argued February 21, 25, 1929.—Decided March 11, 1929.

Under the Act of July 28, 1916, the Interstate Commerce Commission, in fixing the compensation to be paid by the United States

to railroads for services in carrying the mails, has authority to make its order increasing rates operative from the time of the filing of the carrier's petition for increase. P. 77.

65 Ct. Cls. 115, affirmed.

CERTIORARI, 278 U. S. 588, to judgments recovered by the railroad companies for services in carrying the mails.

Solicitor General Mitchell, with whom *Messrs. Joseph Stewart, George C. Butte* and *Robert P. Reeder,* Special Assistants to the Attorney General, were on the brief, for the United States.

The question is as to the intention of Congress and is one of statutory construction. The Commission's authority is limited by the Act. The terms of the statute show that the orders were to operate prospectively. It is provided that an order shall continue in force until changed by the Commission; that the rates fixed are those "to be received," and that they shall be paid "during the continuance of the order." The Act further provides that the Commission shall proceed as if determining rates for private shippers and, under the Commerce Act, the Commission has no authority to make or allow retrospective increases.

The Act expressly authorized a retrospective readjustment at the time of the first rate order made by the Commission, of rates fixed by law at the time of the passage of the Act. The expression of such power to readjust excludes the power to make retrospective orders subsequently.

The intention of Congress is further disclosed by the legislative practice for many years of providing for periodic readjustments of railway mail pay, always prospective and not retrospective in their operation. The Congressional Record supports the contention that Congress understood these orders were to operate prospectively.

So construed, the statute is not invalid as to all cases, nor is it shown that confiscation occurred here. Prior to the Act of July 28, 1916, Congress had not asserted the power to compel railroads to carry mail or to fix the pay.

It is not important here, whether the power to compel the service results from the fact that the railroads are common carriers, or is incident to the power to establish post roads, or is an exercise of the power of eminent domain. The railroads may be required to carry the mails provided just compensation is paid.

The fair and reasonable rates authorized by this Act, as in the case of rates applicable to private shippers, may be more than those necessary to avoid confiscation. It does not follow from the findings of the Commission that the respondent was subjected to confiscatory action by the rates in effect pending the hearing. The Commission's findings relate to groups of carriers, and on them no one carrier may show confiscation.

A statute that requires a public utility to obtain consent of a public commission to increase rates is not necessarily invalid because some time may elapse between the application for, and the granting of, relief. The Commerce Act allows suspension of increases for a reasonable time, with no provision for retrospective increase. Many state statutes have similar provisions. No system of rate regulation or adjustment keeps up with the necessity for increases or decreases. Adjustments lag behind the need for them. If there be undue delay in granting relief, the courts will grant it where the utility is operating under confiscatory rates. These carriers could have refused to transport the mails at confiscatory rates, and, on proper showing, resisted the enforcement of the rates, and the Postmaster General could have kept the mails moving by exercising his statutory authority to contract for higher rates than those established in the Commission's orders.

The acceptance by the carriers of the mail offered and the acceptance of the compensation paid, without " saving the question of price " other than by filing a petition for relief, amounted to an agreement to carry the mails at the existing rates subject only to such readjustment as under the terms of the statute, properly construed, the Commission could make.

Messrs. Frederick H. Wood and *George H. Fernald, Jr.*, with whom *Messrs. Clarence M. Oddie* and *Ben B. Cain* were on the brief, for respondents.

The power conferred upon and exercised by the Commission was not the power to regulate the charges of interstate railroads for the performance of common carrier services, but was the power to determine just compensation for the taking of private property for public use.

The interpretation placed upon the statute by the court below, should be sustained to avoid giving rise to a serious constitutional question.

As a matter of statutory interpretation, the construction placed upon the Act by the court below was right. The arguments advanced by the Government to avoid the constitutional difficulty are so destructive of the purpose of the Act and of its orderly administration, either by the Postmaster General or by the Commission, as to call for the adoption of the interpretation placed upon it by the court below, if at all permissible.

The interpretation placed upon the statute by the court below is not only a permissible one, but is the only one by which its general intent may be effected and by which injustice either to the United States or to the carriers may be avoided.

The words relied on by the Government do not in express terms limit the power of the Commission, as claimed, and should not be so construed as to limit the general intent of the Act or to be productive of unjust and incongruous results.

Respondents did not acquiesce in the payment to them of less than fair and reasonable compensation.

The statute, read as a whole, should be construed as conferring the authority exercised.

MR. JUSTICE HOLMES delivered the opinion of the Court.

On February 25, 1921, and June 30, 1921, the respondent railroads respectively filed applications with the Interstate Commerce Commission for a readjustment of the compensation for services in carrying the mails rendered by them, from dates before the applications and for the future. The Commission at first expressed an opinion that it had "authority to establish rates only for the future" but made orders establishing rates as fair and reasonable after the date of the orders. On further hearings, however, it made new orders establishing the same rates as fair and reasonable for the times between the filing of the applications and the orders previously made. 85 I. C. C. 157. 95 I. C. C. 493. See 144 I. C. C. 675. The railroads applied to the Postmaster General for payment as ordered by the Commission, but their applications were refused. Thereupon they sued in the Court of Claims and got judgments for compensation computed according to the last orders of the Commission. 65 Ct. Cls. 115. The United States asked and obtained a writ of certiorari from this Court.

The ground taken by the United States is that the Interstate Commerce Commission had been given no authority to change the rates of payment to be received by the railroads for any time before its orders went into effect. The question is one of construction which requires consideration not of a few words only but of the whole Act of Congress concerned. This is the Act of July 28, 1916, c. 261, § 5; 39 St. 412, 425-431 (C., Tit. 39, ch. 15, where the long § 5 is broken up into smaller

sections) which made a great change in the relations between the railroads and the Government. Before that time the carriage of the mails by the railroads had been regarded as voluntary, *New York, New Haven & Hartford R. R. Co.* v. *United States,* 251 U. S. 123, 127, now the service is required (C., Tit. 39, § 541); refusal is punished by a fine of $1,000 a day (C., Tit. 39, § 563), and the nature of the services to be rendered is described by the statute in great detail. Naturally, to save its constitutionality there is coupled with the requirement to transport a provision that the railroads shall receive reasonable compensation. The words are "All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith." The Government admits, as it must, that reasonable compensation for such required services is a constitutional right. So far as the Government has waived its immunity from suit this right may be enforced, in the absence of other remedies, not only by injunction against further interference with it but by an action to recover compensation already due. Accordingly the statute provides for application from time to time to the Interstate Commerce Commission to establish by order a fair, reasonable rate or compensation to be paid at stated times. C., §§ 542, 551, 554.

We assume that while the railroads perform these services and accept pay without protest they get no ground for subsequent complaint. *American Smelting & Refining Co.* v. *United States,* 259 U. S. 75, 78. But the filing of an application expresses a present dissatisfaction and a demand for more. A further protest would be a super-

fluous formality. If the claim of the railroads is just they should be paid from the moment when the application is filed. In the often quoted words of Chief Justice Shaw, "If a pie-powder court could be called on the instant and on the spot the true rule of justice for the public would be, to pay the compensation with one hand, while they apply the axe with the other." *Parks* v. *Boston,* 15 Pick. 198, 208. In fact the necessary investigation takes a long time, in these cases years; but reasonable compensation for the years thus occupied is a constitutional right of the companies no less than it is for the future. *Oklahoma Natural Gas. Co.* v. *Russell,* 261 U. S. 290, 293. This being so, and the Interstate Commerce Commission being the tribunal to which the railroads are referred, it is a natural incident of the jurisdiction that it should be free to treat its decision as made at once. Obviously Congress intended the Commission to settle the whole business, not to leave a straggling residuum to look out for itself, with possible danger to the validity of the Act. No reason can have existed for leaving the additional annoyance and expense of a suit for compensation during the time of the proceedings before the Commission, when the Commission has had that very question before it and has answered it, at least from the date of its orders. We are quite aware that minutiae of expression may be found that show Congress to have been thinking of the future. We put our decision not on any specific phrase, but on the reasonable implication of an authority to change the rates of pay which existed from the day when the application was filed, the manifest intent to refer all the rights of the railroads to the Interstate Commerce Commission, and the fact that, unless the Commission has the power assumed, a part of the railroads' constitutional rights will be left in the air.

Judgments affirmed.

COUNTY OF SPOKANE, WASHINGTON, ET AL. *v.* UNITED STATES.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 164. Argued February 20, 21, 1929.—Decided April 8, 1929.

1. Congress has power to provide that taxes due to the United States by an insolvent debtor shall have priority in payment over taxes due by him to a State. Pp. 86–93.
2. Under Rev. Stats. § 3466, a debt owed to the United States in the form of income taxes and penalties assessed for former years after the taxpayer has become insolvent and his personal property has been taken by a receiver in a state court for the payment of his debts, is entitled to payment out of the funds derived by the receiver from his sale of such property, with priority (1) over county taxes assessed on those funds after the federal assessments were made and (2) over county taxes assessed on personal property of the taxpayer before the appointment of the receiver but not shown to be supported by a specific lien under the state law. P. 93.

147 Wash. 176, affirmed.

CERTIORARI, 278 U. S. 585, to review a judgment of the Supreme Court of Washington which, reversing a state court of first instance, upheld a claim of the United States for payment of income taxes and penalties from funds in the hands of a receiver, in priority over claims for county taxes.

Mr. Charles W. Greenough, with whom *Messrs. A. O. Colburn* and *S. R. Clegg* were on the brief, for petitioners.

These taxes became a lien on the personal property taxed, Remington's Comp. Stats. of Washington, 1922, § 11272; *American Bank* v. *King County,* 92 Wash. 650; *Raymond* v. *King County,* 117 Wash. 343; *Pennington* v. *Yakima County,* 127 Wash. 538; *Minshull* v. *Douglas Co.,* 133 Wash. 650, which is transferred from the specific items sold to the fund in the hands of the receiver. *State*

ex rel. Dooley v. *Superior Court,* 128 Wash. 253; *Western Electric Co.* v. *Norway, etc. Co.,* 126 Wash. 204.

It has never been held by this Court that the Government's claim came ahead of a pre-existing lien. The applicable decisions seem to hold otherwise. *United States* v. *Griswold,* 8 Fed. 496; *York Mfg. Co.* v. *Cassel,* 201 U. S. 344; *Marshall* v. *New York,* 254 U. S. 380; *In re Tressler,* 20 F. (2d) 663; *In re A. E. Fountain,* 295 Fed. 873. And see *Ferris* v. *Chic-Mint Gum Co.,* 14 Del. Ch. 270.

Section 3466 of the Revised Statutes does not create a lien in favor of the United States. *United States* v. *Oklahoma,* 261 U. S. 253.

The estate in the hands of the receiver is subject to assessment for personal property taxes, and they are in substance and effect an expense of the receivership. The government claim for income taxes did not become a lien until March 5, and May 7, 1923, and was never filed in the office of the clerk of the District Court, unless the filing of the claim with the receiver was such a filing.

The state tax is levied without regard to the income of the taxpayer; the federal income tax is a contingent tax, levied only on profit above a certain amount.

Why are not taxes levied by a State to pay its judges and maintain its courts just as much expenses and costs of administering an insolvent estate as the fees of the receiver or his attorney, or storage charges for housing the assets, paid by authority of and under the direction of that court? Neither § 3186 nor § 3466 excludes the expenses of the receivership from the operation of its express terms.

An absurd result follows the Government's construction of § 3186. Mortgages, purchasers, and judgment creditors having prior liens, are expressly given preference to the government lien. Nothing is said about state tax liens; but the State makes a tax lien superior to that of mortgagees and judgment creditors. See *Ferris* v. *Chic-*

Mint Gum Co., 14 Del. Ch. 270. Cf. *United States* v. *Katz*, 271 U. S. 354.

When Congress has seen fit to subordinate its claim for income taxes to that of mere private citizens, isn't it "consistent with the legislative purpose" to assume that it intended also to subordinate its claim to that of a sovereign State? And why isn't the doctrine that an independent sovereignty is not bound by a statute unless specifically mentioned therein also applicable here? *Arkansas R. Comm'n* v. *Chicago, R. I. & P. R. Co.*, 274 U. S. 597.

This Court has repeatedly held that a statute will not be construed so as to raise a grave and doubtful constitutional question if some other construction is open. If no other construction can be given than that contended for by the Government, then it is our contention that the Federal Constitution prohibits the interference of the Government in the present situation. *Metcalf* v. *Mitchell*, 269 U. S. 514.

Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt, and *Messrs. Sewall Key* and *John Vaughan Groner,* Special Assistants to the Attorney General, were on the brief for the United States.

The priority secured to the United States by § 3466, Rev. Stats., is priority over all other creditors, including a State and its subdivisions. *Price* v. *United States*, 269 U. S. 492; *United States* v. *Nat'l Surety Co.*, 254 U. S. 73; *United States* v. *San Juan County*, 280 Fed. 120; *Stover* v. *Scotch Hills Coal Co.*, 4 F. (2d) 748; *Merryweather* v. *United States*, 12 F. (2d) 407; *United States* v. *Snyder*, 149 U. S. 210; *Field* v. *United States*, 9 Pet. 182; *United States* v. *Oklahoma*, 261 U. S. 253; *Frick* v. *Pennsylvania*, 268 U. S. 473; *Florida* v. *Mellon*, 273 U. S. 12; *Bramwell* v. *U. S. Fidelity Co.*, 269 U. S. 483.

The theory that in collecting its own taxes the Federal Government may not interfere with the collection of state taxes results in supremacy of the state law and is fundamentally erroneous. *United States* v. *Fisher,* 2 Cranch 358.

If the counties had a prior lien, some support for petitioners might perhaps be found in *Conard* v. *Atlantic Ins. Co.,* 1 Pet. 386; and *Brent* v. *Bank of Washington,* 10 Pet. 596.

But, the counties have no prior lien and we are not dealing here, as in those cases, with a demand of the United States for priority of a general claim over prior specific liens. The decisions of the Supreme Court of Washington establish that the personal property tax is a personal obligation of the owner of the property at the time of the assessment, and also a lien upon the specific personal property charged from and after the date of the assessment. There is no evidence that such a specific lien exists. While the state law also provides a lien upon all other real and personal property of the person assessed, it is a floating lien which does not become fixed until the property is seized by the sheriff. §§ 11257 and 11258, Remington's Comp. Stats.; P. C., §§ 6957 and 6958. See also *Pennington* v. *Yakima County,* 127 Wash. 538; *Minshull* v. *Douglas County,* 133 Wash. 650.

The priority in favor of the United States attached upon the appointment of a receiver. *United States* v. *Oklahoma,* 261 U. S. 253.

Petitioners have no lien as to any of the six years involved, such as would take precedence over the claim of the United States. Distinguishing *State ex rel. Dooley & Co.* v. *Superior Court,* 128 Wash. 253, and *Western Electric Co.* v. *N. P. C. & D. D. Co.,* 126 Wash. 204.

The record in no way shows that the specific property on which the State assessed its tax (save that on the

money held by the receiver which was only assessed after the priority of the United States had attached) ever came into the hands of the receiver or was, by him, sold.

The State must affirmatively identify the property held by the receiver as the identical property against which the tax was assessed. See *Wilberg* v. *Yakima County*, 132 Wash. 219.

But, even if the situation were otherwise and the claim of the United States were not preferred by the statute, it would still be true that the federal claim antedates the claim of the counties. The liability for federal income taxes relates to the years 1917 to 1920, inclusive. It is settled that no assessment of the Commissioner of Internal Revenue was necessary for the collection of a tax at least in a direct action by the United States. *Dollar Savings Bank* v. *United States*, 19 Wall. 227; *United States* v. *Chamberlain*, 219 U. S. 250; *New York Life Ins. Co.* v. *Anderson*, 257 Fed. 576. The failure of the taxpayer to make proper returns does not make the taxes which should have been paid before any the less of a debt from the time they ought to have been paid. *King* v. *United States*, 99 U. S. 229.

The appointment of a receiver and the taking of property into the hands of the court through its officers do not withdraw it from taxation. *In re Tyler*, 149 U. S. 164. In some cases it has been held that taxes levied upon personal property in the hands of a receiver become a charge upon the estate and are properly payable as a part of the costs of administration. *Wiswall* v. *Kunz*, 173 Ill. 110; *Gehr* v. *Iron Co.*, 174 Pa. St. 430. However, the authorities are not uniform. *New Jersey* v. *Lovell*, 179 Fed. 321; *In re Halsey Electric Generator Co.*, 175 Fed. 825, certiorari denied, 219 U. S. 587; *Chesapeake & Ohio Ry. Co.* v. *Atlantic Transportation Co.*, 62 N. J. Eq. 751; *In re Oxley*, 204 Fed. 826; *In re Wyley Co.*, 292 Fed. 900; *In re Jacobson*, 263 Fed. 883.

The record in this case shows that the expenses of administration were given priority over petitioners' tax claims, including those assessed against the receiver. Section 3466, Rev. Stats., may be open to the construction that it gives priority to debts owing to the United States from the insolvent, only over debts owing to others from the insolvent and not over debts of the receiver arising after insolvency. Had the taxes levied upon the personal property in the hands of the receiver been considered as a part of the administration expenses and so given priority as in the nature of a current personal obligation of the receiver himself, the United States would hesitate to claim priority over the county taxes levied after the receiver was appointed. However, they were not so treated in the state courts, and the petition for the writ of certiorari does not raise that question.

The lien of the United States under § 3186 of the Revised Statutes is prior to any lien of the counties.

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

This case presents the question of the priority of payment of debts due to the United States over those due to a State or its agencies against the same fund for state taxes, under § 3466 of the Revised Statutes of the United States.

In August, 1922, a receiver for the Culton-Moylan-Reilly Auto Company, an insolvent corporation, was appointed by the Superior Court of Spokane County, Washington. Under the order of the court the receiver sold the personal property of the corporation and reduced the same to cash, which he held for distribution. On March 1, 1921, and March 1, 1922, Spokane and Whitman Counties, of the State of Washington, had assessed against the personal property of the company the total amounts of $6,195.38 and $410.36, respectively; but the taxes were

not paid and the proceeds of the subsequent sale of assets by the receiver were deposited in court. On September 23, 1924, Spokane County assessed the money in the hands of the receiver for the years 1923 and 1924, and levied taxes thereupon in the total amount of $1,390.10. On December 20, 1926, Spokane County made a further assessment and levy on the moneys in the hands of the receiver for the years 1925 and 1926 in the total amount of $1,229.52.

The United States Commissioner of Internal Revenue, on February 28, 1923, and May 2, 1923, assessed Federal income taxes and penalties for the years 1917, 1918, 1919 and 1920 in the total amount of $70,268.58. But none of these taxes or penalties were paid.

The funds in the hands of the receiver are insufficient to pay in full the claims of the United States, and Spokane and Whitman counties. By proper pleadings, issues were made, presenting the question of the comparative priorities in distribution of the fund in his hands. The Superior Court held that the two counties were entitled to priority, not only as to the county taxes levied against the corporation, but for the county taxes for 1923–1926 assessed on the money in the receiver's hands. On an appeal to the Supreme Court of Washington, the judgment was reversed and priority awarded to the United States. 147 Wash. 176.

Section 3466 of the Revised Statutes provides in part that " whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied."

The Constitution, Article 1, Section 8, provides that Congress shall have power to lay and collect taxes and to make all laws which shall be necessary and proper to carry this and its other powers into execution. Article IV of

the Constitution declares that the Constitution and the laws made in pursuance thereof shall be the supreme law of the land.

The constitutional validity of the priority of claims of the United States against insolvent debtors, declared in § 3466, was established by this Court very early in the history of the Government. *United States* v. *Fisher,* 2 Cranch 358. But it was not established as between debts owing to the States and debts owing to the United States until after a critical controversy between those who looked to the maintenance of the supremacy of the national government and those who were anxious to sustain undiminished the power of the States.

Section 3466 R. S. was § 5 of an Act entitled "An Act to provide more effectually for the settlement of accounts between the United States and receivers of public money," enacted in 1797, c. 20; 1 Stat. 515. It was amended by an Act of 1799, § 65, c. 22; 1 Stat. 676.

The language has been varied very little since these original enactments. The whole Act of 1797 came up for consideration in *United States* v. *Fisher.* There seems to have been a division among the Judges. Chief Justice Marshall delivered the opinion of the Court, which upheld the priority of the United States as against the claims of the States, and held that the Act extended not only to revenue officers and persons accountable for public money, but to debtors generally. The Chief Justice said (p. 396):

"If the act has attempted to give the United States a preference in the case before the court, it remains to inquire whether the constitution obstructs its operation. . . .

"The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise,

and to take those precautions which will render the transaction safe.

"This claim of priority on the part of the United States will, it has been said, interfere with the right of the state sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies on the part of their own revenue officers. But this is an objection to the constitution itself. The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of congress extends."

This case was decided in 1805. Later that year the question arose in a Pennsylvania state court. *United States* v. *Nicholls,* 4 Yeates 251. Nicholls was indebted to the United States, and on June 9, 1798, executed a mortgage to the United States supervisor of the revenue for the use of the United States. There was a levy upon the lands of Nicholls and they were sold for $14,530. The money was deposited in the hands of the prothonotary of the court, subject to the court's order. Nicholls made an assignment for the benefit of his creditors and a commission of bankruptcy issued against him. The Attorney General relied on this same 5th section of the Act of 1797, and the issue arose whether in the distribution of that fund the laws of Pennsylvania, giving a preference to that State in the payment, should prevail over the federal act of 1797. Mr. Justice Yeates, speaking for the Court, said, p. 259:

"Congress have the concurrent right of passing laws to protect the interest of the union, as to debts due to the government of the United States arising from the public revenue; but in so doing, they can not detract from the uncontrollable power of individual states to raise their own revenue, nor infringe on, or derogate from the sovereignty of any independent state. . . . The rights of

the general government to priority of payment, and the rights of individual states, are contemplated as subsisting at the same time, and as perfectly compatible with each other. This can only be effected by giving preference to each existing lien, according to its due priority in point of time. I know of no other mode whereby the several conflicting claims can with justice be protected and secured."

The colleagues of Judge Yeates concurred with him, but one of them expressed regret that the opinion in the *Fisher* case, *supra,* delivered previously, had not been furnished for comparison. The decisions in the *Fisher* and the *Nicholls* cases created much popular excitement, and, united with other issues of a similar character as between the supporters of the federal government and the state governments, led to much concern over the open defiance of the decisions of this Court, until the issues were disposed of in the case of *United States* v. *Judge Peters,* 5 Cranch 115. See the account of the litigation in Charles Warren's Supreme Court in United States History, vol. 1, pp. 372, 538 *et seq.* Four years after the decision in the *Nicholls* case, a review of that case was sought in this Court on a writ of error. When it came to be heard, after nine years more of inaction, it was dismissed for lack of jurisdiction, on the ground that the record did not disclose the insolvency of the debtor so as to make § 3466 applicable; and thus was eliminated the federal question. 4 Wheat. 311.

No question of the construction of § 3466 seems to have come before this Court again until, in *Field* v. *United States,* 9 Pet. 182, it was sought to make certain trustees liable from their own funds, because they had made disbursements out of a bankrupt's estate, as to which the United States was entitled to priority. It was objected that the distribution had been made under order of the parish court in an action in which the United States was

not a party. This Court held that the United States was not bound to become a party, and said, p. 201:

"The local laws of the state could not, and did not, bind them [the United States] in their rights. They could not create a priority in favor of other creditors, in cases of insolvency, which should supersede that of the United States."

The power of the Congress of the United States, in giving preference to the debts of the Government of the United States over those of the separate States, is very clearly brought out in *Lane County* v. *Oregon,* 7 Wall. 71, which may well be referred to here, because there are some expressions in that opinion which, taken away from their context, have been used to give an erroneous view.

After discussing the taxing powers of the national and state governments, the Court, speaking by Chief Justice Chase, said of the state power of taxation, p. 77:

"It is indeed a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government."

In *United States* v. *Snyder,* 149 U. S. 210, the question was raised whether the tax system of the United States could be made subject to the recording liens of the States. This Court said, p. 214:

". . . the grant of the power and its limitation are wholly inconsistent with the proposition that the States

can by legislation interfere with the assessment of Federal taxes . . ."

In *United States* v. *San Juan County,* 280 Fed. 120, and in *Stover* v. *Scotch Hills Coal Co.,* 4 F. (2d) 748, § 3466 came directly under consideration, and the priority of the United States against that of the States was fully sustained. It was also sustained by an unreported decision of the District Court of the Eastern District of Washington, in a proceeding relating to the very taxes here involved, but the judgment was reversed for lack of jurisdiction because the jurisdiction of the state courts had first attached. *Merryweather* v. *United States,* 12 F. (2d) 407.

Petitioners rely on *Ferris* v. *Chic-Mint Gum Co.,* 14 Del. Ch. 232, where there were several claimants,—a mortgagee, the State, and the United States. Under R. S. 3186, the mortgagee was given priority over the United States. By state law, the State was preferred to the mortgagee. The Chancellor allowed the claims in the order of the State, the mortgagee, and the United States, holding that " when the Government agreed by Section 3186 to take rank after the mortgagee, it must necessarily follow that it is subordinate in rank to those who are superior to its immediate senior." The Chancellor observed that his conclusion arose out of the peculiar facts of the case, and that it was unnecessary for him to venture into the broad field of constitutional law. Without concurring in the conclusion of the Chancellor, it is enough to say that, as there is no such third creditor here, the case is not in point. Moreover, it is contended by the Government that the relative priorities could have been maintained in that case by setting apart sufficient funds to pay the mortgage before paying the federal taxes and then providing for payment of the state tax out of the sum so set apart.

In *United States* v. *National Surety Co.,* 254 U. S. 73, the question was whether, in the distribution of a bank-

rupt's estate, the United States had priority over a surety company entitled to subrogation under § 3468 of the Revised Statutes. Upon this point this Court said, p. 76:

"The priority secured to the United States by § 3466 is priority over all other creditors; that is, private persons and other public bodies."

After these cases came the case of *United States* v. *Oklahoma,* 261 U. S. 253, in which the question was of the application of § 3466 to the liquidation of a state bank under the state law and of priority of debts of the United States in such a case. This Court found that the section did not apply, because there did not appear to be insolvency of the bank as used therein. But the Court had to consider the meaning and effect of the section, and said, p. 260:

"Where the debtor is divested of his property in one of the modes specified in the act, the person who becomes invested with the title is made trustee for the United States and bound first to pay its debt out of the debtor's property. *Beaston* v. *Farmers' Bank of Delaware,* 12 Pet. 102, 133–135. The priority given the United States can not be impaired or superseded by state law."

Section 3466 was fully considered in the case of *Price* v. *United States,* 269 U. S. 492, and its history from 1789 clearly traced. See also *United States* v. *Butterworth-Judson Corp.,* 269 U. S. 504; *Bramwell* v. *U. S. Fidelity Co.,* 269 U. S. 483; *Stripe* v. *United States,* 269 U. S. 503. In these cases the word "debts" used in the section was held to include taxes. The Court said in the *Price* case, citing an opinion of Mr. Justice Story, p. 499:

"The claim of the United States does not rest upon any sovereign prerogative; but the priority statutes were enacted to advance the same public policy which governs in the cases of royal prerogative; that is, to secure adequate public revenue to sustain the public burdens. *United States* v. *State Bank of North Carolina,* 6 Pet. 29,

35. And to that end, § 3466 is to be construed liberally. Its purpose is not to be defeated by unnecessarily restricting the application of the word 'debts' within a narrow or technical meaning."

The foregoing citations certainly make it clear that the United States has power, in order to collect its taxes and its revenues and debts due it, to confer priority for them over those of the States.

There remains only to determine what priority it has conferred. It may withhold it or vary it, and it has sometimes done so. When, in this case, did the priority attach and apply? It was said in *United States* v. *Oklahoma,* 261 U. S. 253, 260, that in a case like this it applied when the receiver was appointed. The appointment was on August 28, 1922. The taxes and penalties due the United States, amounting to $70,268.58, were assessed on February 28, 1923, and May 2, 1923, and therefore the priority of the United States attached on or before those dates. No assessment by the counties upon specific property in the hands of the receiver was made until September 23, 1924. The claim of the United States, therefore, had priority over such claims.

Assessments for Spokane County for $6,195.38, and of Whitman County for $410.36, were made in 1921 and 1922 before the receiver was appointed. What is the effect of those claims against the fund in court? In *Wilberg* v. *Yakima County,* 132 Wash. 219, it is held that the amount of the tax is the personal obligation of the person who owned the property at the time of the assessment, and that the tax is to be collected, if the property still continues in the hands of the person against whom it was assessed, from the property; if that specific property does not exist in such hands, the amount of the tax may be collected as a lien upon all the real and personal property of the person assessed, and may be collected from the other personal or real property of such person by seizure,

distraint or other specific proceedings. It would seem to follow that a lien for these particular taxes could not interfere with the priority of the United States, for there is nothing in this record to show that distraint by the sheriff or any of the necessary procedure mentioned in the statute followed.

From the judgment of the majority of the Supreme Court of Washington in this case, we must infer that the liens of the two counties for the taxes levied before the receiver was appointed and not collected were not specific. This is really a state question. It is explained by the concurring opinion of Judge Parker, as follows:

"I concur in the result reached in the foregoing majority opinion solely upon the ground that this tax debt due to the United States, viewed apart from any supporting lien right, has priority over this tax debt due the State of Washington, viewed apart from any supporting lien right. It seems to me that each of these two tax debts primarily came into existence by the levy of a tax in personam, and not by the levy of a tax in rem. I think a critical reading of the revenue legislation of the respective sovereignties, the United States and the state, and the record in this case showing the manner of levying in these respective taxes, will render this plain. The revenue legislation of each has prescribed procedure by which its personam tax debts may be made specific liens upon property of one personally owing such tax debt. This record, I think, warrants the conclusion that neither the United States, the state of Washington nor Spokane County for the state of Washington has ever, by the prescribed statutory procedure, perfected its inchoate tax lien right against any of the property of which the funds here in question are the proceeds. I therefore view these respective tax debts wholly apart from any supporting lien right. Thus I think the question of which shall be first satisfied out of these funds is determinable by the language of §3466,

quoted in the majority opinion, and hence must be determinable in favor of the United States."

Whatever might have been the effect of more completed procedure in the perfecting of the liens under the law of the State, upon the priority of the United States herein, the attitude of the state court relieves us of consideration of it.

Judgment affirmed.

CARSON PETROLEUM COMPANY *v.* VIAL, SHERIFF AND TAX COLLECTOR, ET AL.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 306. Argued February 28, 1929.—Decided April 8, 1929.

1. Goods purchased at interior points for export do not lose their character as goods in foreign commerce and become subject to state taxation because, after shipment to the exporter to a domestic port, they are temporarily stored there for reasons of expedition and economy, preparatory to their loading on the vessels of foreign consignees. P. 101.
2. An exporter bought oil in interior States to fill orders from abroad; had it shipped by rail in tank cars to a port in Louisiana, on bills of lading to the exporter at export rates; pumped it from the car tanks into storage tanks at the port; and from these delivered it into the ships of foreign consignees, the title passing from the exporter to them upon such delivery. The oil in each tank car, and as stored, was not segregated or destined to any particular cargo or shipment abroad; but it was all bought and held to fill foreign orders previously received; none of it was or could be otherwise disposed of at that port; none of it was subjected to any treatment of manufacture there; and the storage was but a necessary means of securing prompt transshipment and avoiding demurrage charges, by accumulating the oil from the tank cars pending the arrival of a foreign consignee's ship, or to make up a full cargo for one already waiting. *Held* that the continuity of the journey was not broken by the storage, and that a Louisiana tax on the oil while so stored was unconstitutional.

166 La. 378, reversed.

CERTIORARI, 278 U. S. 595, to review a decree of the Supreme Court of Louisiana which reversed a decree of a district court enjoining the levying of a tax, in the suit of the Petroleum Company against a sheriff, an assessor, and the Louisiana Tax Commission.

Messrs. George M. Burditt and *John K. Murphy,* with whom *Messrs. Wm. E. Leahy, Harry A. Newby,* and *Harold A. Moise* were on the brief, for petitioner.

The interstate and foreign journey started when the oil left the refineries in the mid-continent field, and the continuity of that journey was not broken by the interruption at St. Rose. *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366; *Baltimore & Ohio S. W. R. R. Co.* v. *Settle,* 260 U. S. 166; *Hughes Bros. Timber Co.* v. *Minnesota,* 272 U. S. 469; *Swift & Co.* v. *United States,* 196 U. S. 375; *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n,* 219 U. S. 498; *R. R. Comm'n* v. *Worthington,* 225 U. S. 101; *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.,* 227 U. S. 111; *R. R. Comm'n* v. *Texas & Pacific Ry. Co.,* 229 U. S. 336; *Philadelphia & Reading Ry. Co.* v. *Hancock,* 253 U. S. 284. Cases distinguished, *General Oil Co.* v. *Crain,* 209 U. S. 211; *Coe* v. *Errol,* 116 U. S. 517; *Bacon* v. *Illinois,* 227 U. S. 504.

The equipment at St. Rose was solely a safety appliance used in the continuous transit of the oil from the mid-continent field to its foreign destination. Citing some of the above cases, and *State* v. *Engle,* 34 N. J. L. 425; *State* v. *Carrigan,* 39 *id.* 35.

The tax was repugnant to the Constitution. Article I, § 8, cl. 3; § 9, cl. 5; § 10, cl. 2; *Peck & Co.* v. *Lowe,* 247 U. S. 165; *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366; *Hughes Bros. Timber Co.* v. *Minnesota,* 272 U. S. 469; *Coe* v. *Errol,* 116 U. S. 517.

Mr. Harry P. Sneed, with whom *Messrs. A. P. Frymire, R. R. Ramos,* and *C. S. Lagarde* were on the brief, for respondents.

The title to the oil is in the Company. Insurance is carried on the oil for account of the Company, and it remains the property of the Company until, by loading aboard ship, it actually starts on its foreign journey destined to a new consignee. No oil ever passes through St. Rose on a through bill of lading; and the quantity of a foreign shipment is never exactly determined until loading is accomplished, the Company having the option of shipping, and the buyer of taking, ten per cent. more or less than his order.

No showing is made that the oil in each railroad tank car is segregated, or assigned, or destined, to any particular cargo or shipment abroad. A cargo is made up of the contents of from three to five hundred tank cars, twelve to sixteen trainloads, and up to fifty tankers per year are shipped.

It is thus completely shown that appellant's plant at St. Rose is an *entrepôt* for the accumulation of oil which is not in transit in either interstate or foreign commerce. Oil in the tanks is property at rest in Louisiana and under the complete control of petitioner.

It is idle to assert that the oil was on a continuous journey from the oil fields to foreign destinations. There are two journeys, or rather two kinds of journeys: many interstate journeys of the various cars or trainloads from the refineries to St. Rose, and one journey from St. Rose to points abroad.

The stoppage at St. Rose was not an interruption only to promote safe and convenient transit, as in *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366, where " the boom at the mouth of the West River did not constitute an *entrepôt* or *depot* for the gathering of logs preparatory for the final journey," but, as in the case of *General Oil Co.* v. *Crain,* 209 U. S. 211, the stoppage of the oil was because, " It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommoda-

tion to the means of transportation, but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the State beyond a mere halting in its transportation. It required storage there,—the maintenance of the means of storage; of putting it in and taking it from storage."

It is impossible to distinguish the case from that of *General Oil Co.* v. *Crain, supra.* The fact that petitioner enjoyed a low freight rate because of its intention to export the oil, does not indicate that the State is without power to tax such oil as is at rest in the State. *Swift & Co.* v. *United States,* 196 U. S. 400.

The safety of the oil was but a single factor in the equipment set up at St. Rose for its handling.

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

This was a petition by the Carson Petroleum Company, a corporation of Delaware, to enjoin Leon C. Vial, sheriff and tax collector of the Parish of St. Charles, Louisiana, R. A. De Broca, assessor for the Parish, and the Louisiana Tax Commission, from laying and levying against it an alleged illegal assessment of duties on a quantity of oil in storage tanks at St. Rose in the Parish. They were ad valorem duties levied on all the property of the petitioner subject to taxation. The taxation was objected to because it was deemed an interference with interstate and foreign commerce.

The District Court granted the injunction on the ground that the oil was in transit from another State to a foreign country, and was halted only temporarily at St. Rose, and had no situs in the Parish or State. The Supreme Court of Louisiana reversed the decree and ordered that the tax be collected, with the penalties imposed by law.

166 La. 398. There is no dispute about the facts. We avail ourselves of the statement made by the Chief Justice of the Supreme Court of Louisiana, which is a clear and fair representation of the case:

" The Petroleum Import & Export Corporation is a subsidiary of the Carson Petroleum Company, and owns and operates the system of tanks and pumping equipment for receiving the contents of the railroad tank cars of oil into the tanks owned by the Petroleum Import & Export Corporation and afterwards loading it into ships for export. The Port of New Orleans has no facility or equipment for assembling or receiving from railroad tank cars cargoes of oil and loading it aboard ships for export. The tanks and equipment at St. Rose, a few miles above New Orleans, were constructed for that purpose. No oil is sold at St. Rose except what is exported. The only business conducted there is the unloading of oil from railroad tank cars into the storage tanks and the loading of the oil from the storage tanks aboard the tankers for shipment to England, France, and other foreign ports. The oil is bought by the Carson Petroleum Company from the refiners in the Mid-Continent Field, comprising Kansas, Oklahoma and Texas, and is shipped to St. Rose, Louisiana, in railroad tank cars consigned to the Carson Petroleum Company. The shipments are not on through bills of lading, but on an export rate, which is lower than the domestic rate. The oil is a higher grade of gasoline than is used in this country generally, and is made especially for export, because the automobiles in England, France and other foreign countries require a higher grade of gasoline than that which is used in this country. The Carson Petroleum Company takes orders for cargoes of oil from the foreign buyers, who charter the vessels to transport the oil from St. Rose to the foreign ports. The company always has orders on hand in excess of the quantity of oil at St. Rose, and buys the oil in the Mid-Continent Field for the pur-

pose of filling orders already received from the foreign buyers. The oil in each railroad tank car, however, is not segregated or assigned or destined to any particular cargo or shipment abroad, but is pumped into the large storage tanks, having the capacity of many tank cars, and is held in the tanks until a ship arrives, or until a sufficient quantity of oil is accumulated to make up a cargo. A ship carries from two to three million gallons; hence it takes 300 to 500 railroad tank cars, or 10 to 16 trains of tank cars, to make up a cargo of oil. The buyers are allowed a ten per cent leeway on the quantity of oil bought for each shipment; which, as we understand, means that, if the capacity of the ship is either more or less than the quantity of oil contracted for, the buyers can demand a delivery of the ship's capacity, at the contract price of the oil per gallon, provided the quantity shall be not more than ten per cent above or below the quantity contracted for. A delivery of the oil thus sold is made by loading the oil aboard the ship chartered by the buyer. Until the oil is thus loaded aboard a ship it belongs to the Carson Petroleum Company and is insured in the name of the company, loss payable to the company. There are times when an accumulation of oil in the tanks is awaiting the arrival of a ship, and at other times a ship is awaiting the accumulation of a sufficient quantity of oil to make up a cargo. In order to save demurrage on ships, which amounts to $1,500 or $2,000 per day on a ship, the Carson Company endeavors to have a sufficient quantity of oil on hand at St. Rose to fill each order promptly on arrival of the ship. On account of the demurrage charges on tank cars, as well as on steamships, it would be impracticable to carry on the export oil business by any other method than by storing the oil in large storage tanks as the train loads of oil arrive, and shipping from the accumulation when the ships arrive. The oil is shipped from the storage tanks in the same condition in which it was received from the tank

cars, without being treated in any way. The oil is never kept on hand at St. Rose any longer than is necessary. The quantity on hand is always awaiting either the arrival of a ship or the accumulation of a sufficient quantity to load a ship."

The Oil Company asserts that the interstate and foreign shipment of the oil, from the refineries in the Mid-Continent Field, into and across the State, and across the sea to the foreign ports, is a continuous interstate and foreign shipment, notwithstanding the stoppage and storage of the oil at St. Rose, where it had to await either the arrival of a ship or the accumulation of a sufficient quantity of oil to load a ship. On the other hand, the state authorities claim that there were two separate shipments—the one which ended when the tank cars arrived and were unloaded at St. Rose, and the foreign shipment, which began when the oil was loaded aboard ship for a foreign port. Hence they contend that while the oil was stored in the tanks at St. Rose, under the protection of the state and local government, it was subject to state and local taxation, even though intended and prepared for exportation.

The crucial question to be settled in determining whether personal property or merchandise moving in interstate commerce is subject to local taxation is that of its continuity of transit. The leading case is that of *Coe* v. *Errol,* 116 U. S. 517, in which Mr. Justice Bradley for this Court laid down the principles that should be applied. It was a case of floating logs. There were two lots, one where the logs were cut in Maine, and were floated down the Androscoggin on their way to Lewiston, Maine, but after starting on the trip were detained for a season in New Hampshire by low water. It was held that they were free from local taxation in New Hampshire because they had begun the interstate trip and the cause of detention was to be found in the necessities of the passage and trip back to Maine, which was held to be continuous.

This ruling, which was by the state court of New Hampshire, was approved by this Court. But, in respect to the other lot, this Court found that the logs were gathered in New Hampshire in what the Court termed an "entrepôt," looking to ultimate transportation to another State, but that when taxed they had not started on their final and continuous journey, and hence were not in interstate commerce, and were taxable.

In *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366, logs gathered on the West River in Vermont for a destination in New Hampshire, were held not taxable in Vermont, though detained for a considerable time by a boom at Brattleboro to await subsidence of high water in the Connecticut River. It was held that as the interruption was only to promote the safe or convenient transit, the continuity of the interstate trip was not broken, as shown in *State* v. *Engle,* 34 N. J. L. 425; *State* v. *Carrigan,* 39 N. J. L. 35, and in *Kelley* v. *Rhoads,* 188 U. S. 1, where sheep driven 500 miles from Utah to Nebraska, traveling 9 miles a day, were held immune from taxation in Wyoming, where they stopped and grazed on their way.

In *Hughes Brothers Co.* v. *Minnesota,* 272 U. S. 469, pursuant to a contract of sale, logs cut were gathered on the Swamp River, in Minnesota, by the vendors and were floated by river to Lake Superior, there loaded on to the vendee's vessels, and transported to their destination in Michigan. This Court said, p. 475:

"The conclusion in cases like this must be determined from the various circumstances. Mere intention by the owner ultimately to send the logs out of the State does not put them in interstate commerce, nor does preparatory gathering, for that purpose, at a depot. It must appear that the movement for another State has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another

State. It is much more difficult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination, as in the *Champlain Company* case. The character of the shipment in such a case depends upon all the evidential circumstances looking to what the owner has done in the preparation for the journey and in carrying it out. The mere power of the owner to divert the shipment already started does not take it out of interstate commerce, if the other facts show that the journey has already begun in good faith and temporary interruption of the passage is reasonable and in furtherance of the intended transportation, as in the *Champlain* case. Here the case is even stronger in that the owner and initiator of the journey could not by his contract divert the logs after they had started from Swamp River without a breach of contract made by him with his vendee, who, by the agreement of sale, divided with him the responsibility for the continuous interstate transportation."

The principle of continuity of journey is shown in *Ohio Railroad Commission* v. *Worthington,* 225 U. S. 101, where coal from the Ohio mines, intended for transportation on the lakes and stored for some weeks or months on docks in Cleveland for delivery beyond the lakes, was held to be subject to interstate rates. So in *Western Oil Co.* v. *Lipscomb,* 244 U. S. 346, in which, speaking of the effect of billing and rebilling in causing a break in the trip, it was said, p. 349:

" Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one State to another, a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the re-

mainder. As this court has often said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive."

An instance of interruption of railroad transportation is *Bacon* v. *Illinois*, 227 U. S. 504. Bacon, the owner of the grain, and the taxpayer, had bought it in the South and had secured the right from the railroads transporting it to remove it from their custody to his private grain elevator in Illinois, where, for his own purpose, he proceeded to inspect, weigh, clean, clip, dry, sack, grade or mix it, and had power, under his contract with the carriers, either to change its ownership, consignee or destination or to restore the grain, after the processes mentioned, to the carriers to be delivered at the destination in another State according to his original intention. The question was whether the removal of the grain to his private elevator interrupted the continuity of the transportation and made the grain subject to local taxation there. It was held that it did; that the grain was locally dealt with in the interest of the owner, while it was in his custody and was subject to his complete disposition for a collateral business purpose of his own.

Another case is that of *General Oil Co.* v. *Crain*, 209 U. S. 211. The company conducted a large oil business in Memphis, where it gathered from the North much oil and maintained an establishment for its distribution. It had tanks of various sizes, from which the oil was put in barrels or other small vessels to be sold locally or in other States, or to fill orders already received from customers in Arkansas, Louisiana and Mississippi. For years the company had unloaded its oil from its tank cars on arrival into large stationary tanks indiscriminately, and had sold and distributed it as required in its business. After a time, in order to escape the local inspection tax, part of the oil was deposited in a stationary tank No. 1

marked " Oil already sold in Arkansas, Louisiana and Mississippi," while the local oil and that yet to be sold was kept in other tanks. The oil in No. 1 was divided, according to the orders already received, into barrels and larger containers, to be forwarded by rail to customers in the three States named. It was contended that oil of tank No. 1 was on a continuous trip through Memphis from sources in the North to the ascertained customers in Arkansas, Louisiana and Mississippi, and was not taxable at Memphis. It was held that the doings of the company, in thus separating the oil after it reached Memphis into various amounts in different containers, was itself a local business in Memphis, and that the delivery into Memphis of the oil, and its subsequent shipment made two separate interstate shipments and permitted local taxation on the oil while it awaited the second shipment. The Court seemed to regard the redistribution of the oil at Memphis as a rest interrupting the journey, and the Memphis yard for the tanks as an assembling entrepôt like that described by Mr. Justice Bradley in *Coe* v. *Errol.*

The Court was divided and there was very vigorous dissent. The case has caused discussion, and it must be admitted that it is a close one and might easily have been decided the other way. The result was probably affected by the impression created by the original situation and the somewhat artificial rearrangement of tanks in a large entrepôt for redistribution of oil to avoid previous taxability.

We do not think, in deciding the case at bar, that we should give the *Crain* case the force claimed for it by the court below and by counsel for the State. Since its decision this Court has had to consider several cases where there was transshipment of the commodity from local carriage in a State to a ship at an export port and conveyance thence to a foreign destination. There has been a liberal

construction of what is continuity of the journey, in cases where the Court finds from the circumstances that export trade has been actually intended and carried through.

In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498, cotton oil cake and meal destined for export was bought by the intending exporter in Texas, Oklahoma and Louisiana. It was shipped to him on bills of lading and way bills showing the point of origin in those States and the destination at Galveston. The purchases were made for export, there being no consumption of the products at Galveston. His sales to foreign countries were sometimes for immediate and sometimes for future delivery, irrespective of whether he had the product on hand at Galveston. At times he had it on hand. At other times orders must be filled from cake or meal to be purchased in the interior or then in transit to him. When the cake reached Galveston, it was ground into meal and sacked by the exporter, and for the meal thus ground, and such meal as had been bought in ground form, he took out ships' bills of lading made to his order. The Court said, p. 526:

". . . the manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in the transshipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the substance of things and make evasions of the act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the

Terminal Company being a part of the railway for such purpose. The case, therefore, comes under *Coe* v. *Errol,* 116 U. S. 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another State or delivered to a carrier for transportation.' "

In *Texas & New Orleans R. R.* v. *Sabine Tram Co.,* 227 U. S. 111, the question was whether the rates charged on shipments of lumber on local bills of lading from one point in Texas to another, but destined for export, were intrastate or foreign commerce. The exporter purchased the lumber from other mills in Texas with which to supply its sales in part. It did not know, when any particular car of lumber left the starting point, into which ship or to what particular destination the contents of the car would ultimately go, or on which sale it would be applied; this not being found out until its agents inspected the invoice mailed to and received by him after shipment. The lumber remained after arrival at the shipping port, in the slips or on the dock, until a ship chartered by the exporter arrived, when the exporter selected the lumber suited for that cargo and shipped it to its destination. There was no local market for lumber at the port of shipment, the population of which did not exceed fifty, and the exporter had never done any local business at that point. This Court held that the shipments to the point of shipment from other points of Texas were in interstate and foreign commerce and should pay rates accordingly. The Court said, p. 126:

"The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped and to give

it a various character by the steps in its transportation would be extremely artificial. Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the interior of a State. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character, though it be essentially foreign."

Again this Court said, p. 130:

"And the shipment was not an isolated one but typical of many others, which constituted a commerce amounting in the year 1905 to 14,667,670 feet of lumber, and in the year 1906, 39,554,000 feet. Nor was there a break, in the sense of the Interstate Commerce law and the cited cases, in the continuity of the transportation of the lumber to foreign countries by the delay and its transshipment at Sabine. *Swift & Co.* v. *United States,* 196 U. S. 375. Nor, as we have seen, did the absence of a definite foreign destination alter the character of the shipments."

See also *Railroad Commission* v. *Texas & Pacific Ry.,* 229 U. S. 336; *Spaulding & Bros.* v. *Edwards,* 262 U. S. 66, 70.

We do not think the *Sabine Tram* case can be distinguished from the one before us. It has been suggested that, in the present case, there was a failure to fix the exact point of destination abroad before shipment, and that this prevents the continuity required in a continuous exportation. But there was the same indefiniteness on this point in the *Sabine Tram* case. Then, it is said, there was no separation of the various shipments of oil from the interior points to the tanks and thence to ships at the port of shipment. But in the *Sabine Tram* case cars of lumber were sent to the transshipment point without regard to the filling of one order or another. In both cases the delay in transshipment was due to nothing but the failure of the arrival of the subject to be shipped at the same

time as the arrival of the ships at the port of transshipment. The use of the tanks at the point of transshipment can not be distinguished from the storing of the lumber on the docks, or in the slips between them, till the vessel to carry it should be ready. The quickness of transshipment in both cases was the chief object each exporter plainly sought. In both cases the selection of the point of shipment and the equipment at that point were solely for the speedy and continuous export of the product abroad, and for no other purpose. No lumber or oil was sold there but that to be exported. There was no possibility of any other business there. Whatever hesitation might be prompted in deciding this case, if the *Crain* case stood alone, the effect of the decisions of this Court since is such as to make it inapplicable to the case before us.

The judgment is reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE SANFORD are in favor of affirming the judgment on the authority of *General Oil Co.* v. *Crain,* 209 U. S. 211.

LONDON GUARANTEE & ACCIDENT COMPANY, LTD., *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 491. Argued March 7, 1929.—Decided April 8, 1929.

1. Employment as sailor and assistant navigator of a vessel capable of 500 mile sea voyages, registered as a vessel engaged in transporting people for hire, is a maritime employment though the business be confined to taking patrons on trips of from five to ten miles to and from deep sea fishing places within the territorial jurisdiction of the State. P. 123.
2. Where a person so employed lost his life by drowning while endeavoring, under orders from a superior, to save the vessel with relation to which he was employed when she was driven by a

storm from her moorings with no one on board, the fact that he was not employed on board at the time did not take his case from the admiralty jurisdiction. P. 123.

3. The jurisdiction of the admiralty over a maritime tort does not depend upon the wrong having been committed on board a vessel, but upon its having been committed upon the high seas, or other navigable waters. P. 123.
4. Jurisdiction in admiralty arises from Art. 3, § 2, of the Constitution, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction; it does not depend on interstate or foreign commerce. P. 124.
5. The business of transporting persons for hire on navigable waters of the United States is none the less commerce, and within the admiralty jurisdiction, if the object of the trips be to serve the pleasure of the passengers in fishing. P. 124.
6. Application of a state workmen's compensation act to a claim for death of a seaman in a case involving no interstate or foreign commerce but having no features other than those characteristically maritime, is a violation of the exclusive maritime jurisdiction. P. 125.

75 Cal. Dec. 481, reversed.

APPEAL from a decree of the Supreme Court of California, which, reversing the District Court of Appeal, 53 Cal. App. Dec. 457, affirmed an award of the State Industrial Accident Commission in behalf of relatives of a deceased seaman, in a proceeding under the state Workmen's Compensation Act. The appellant was the insurer of the employer.

Mr. Leo C. Weiler, with whom *Messrs. Wm. E. Lowther* and *Max Ash* were on the brief, for appellant.

It is not necessary to admiralty jurisdiction that interstate or international navigation or commerce be involved. *Propeller Genesee Chief* v. *Fitzhugh,* 12 How. 443; *The Belfast,* 7 Wall. 624; *The Robert W. Parsons,* 191 U. S. 17; *Rodgers & Hagerty, Inc.* v. *City of New York,* 285 Fed. 362; *City of New York* v. *Rodgers & Hagerty, Inc.,* 261 U. S. 621; *Workman* v. *New York City,* 179 U. S. 552.

See *Alaska Packers Ass'n* v. *Industrial Accident Comm'n,* 276 U. S. 467; *Sultan R. & T. Co.* v. *Department of Labor,* 277 U. S. 135. Distinguishing *Sherlock* v. *Alling,* 93 U. S. 99; *Anderson* v. *Pacific Coast S. S. Co.,* 225 U. S. 187; *The Daniel Ball* v. *United States,* 10 Wall. 557; *The General Smith,* 4 Wheat. 438; *The Robert W. Parsons,* 191 U. S. 17; *The Lottawanna,* 21 Wall. 558. See also *Ex parte Boyer,* 109 U. S. 629; *In re Garnett,* 141 U. S. 1.

The motives of the employer's customers in riding upon its boats for recreation, cannot affect the fact that the employer was engaged in commerce,—in navigation for strictly monetary gain.

The contract of employment was maritime. *The Thomas Jefferson,* 10 Wheat. 428; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52.

It is not necessary to the attachment of the admiralty jurisdiction that the employee shall have been aboard any vessel at the time of his death. *The Plymouth,* 3 Wall. 20; *Atlantic Transport Co.* v. *Imbrovek, supra.* See also *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, dissenting opinion.

The state compensation act cannot be made applicable to an accident in which the employee was a seaman or apprentice navigator, without affecting or impinging upon the admiralty jurisdiction to an extent heretofore never permitted by this Court. A seaman's injury or death on navigable waters can never be a local matter within the local jurisdiction. Injuries to stevedores or longshoremen, occurring upon navigable waters, have been held to be within the exclusive operation of the maritime jurisdiction, as necessary to the maintenance of uniformity in its general characteristics. In *Steamship Bowdoin Co.* v. *Industrial Accident Comm'n,* 246 U. S. 648, this was held

of a seaman upon a steamer tied to a wharf. All considerations are equally cogent for requiring a like determination in the case at bar.

Mr. George C. Faulkner, Jr., for appellees.

The rule now is that the application of state workmen's compensation acts to maritime injuries, or to injuries occurring upon navigable waters, is forbidden only where it would interfere with the characteristic harmony and uniformity of the maritime law in its interstate and international aspects. *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469; *Miller's Ind. Underwriters* v. *Braud,* 270 U. S. 59; *Rosengrant* v. *Havard,* 273 U. S. 664; *Alaska Packers Ass'n* v. *Industrial Accident Comm'n,* 276 U. S. 467; *Sultan R. & T. Co.* v. *Dep't of Labor,* 277 U. S. 135; *Eclipse Mill Co.* v. *Dep't of Labor,* 277 U. S. 135.

The maritime law surrenders to the domestic law all regulation of matters concerned purely with the domestic or internal affairs of the vessel, and the civil rights and duties of its owner in his relation to individuals in the State of his own domicile. *The General Smith,* 4 Wheat. 438; *The Lottawanna,* 21 Wall. 558.

It clearly appears in the *Jensen* case, that the employee was unloading a ship engaged in interstate and foreign commerce. This was true also in every case cited as adopting the rule in the *Jensen* case.

By contrast, in every case following the rule in the *Rohde* case, the ship was not engaged in interstate or foreign commerce. This basic differentiation goes on beyond mere coincidence and must indicate the foundation of the distinction between local maritime matters under the state courts' concurrent jurisdiction and purely maritime matters under the admiralty courts' exclusive jurisdiction.

The control of the Federal Government over commerce and navigation is: (1) The power of Congress to regu-

late: (a) interstate commerce, and (b) foreign commerce, that power being the same over both forms of commerce; (2) the jurisdiction of the federal courts over all cases of admiralty and maritime jurisdiction,—not over " cases " of non-maritime causes of action.

The exclusive jurisdiction of the admiralty courts in certain (admiralty and maritime) cases is exercised concurrently with the jurisdiction of the same courts as granted by Congress (Jud. Code, §§ 24 and 256) over all civil causes of admiralty and maritime jurisdiction. *Netherlands, etc. Co.* v. *Gallagher,* 282 Fed. 171; *The Belfast,* 7 Wall. 637.

Thus, the inherent power of the federal judiciary as granted it by the Constitution, Art. III, § 2, over admiralty or maritime cases is strengthened, enlarged and rounded out by an Act of Congress functioning under its own constitutional grant of power. Art. I, § 8, subd. 3. The two grants, one constitutional, the other legislative, are exercised by the admiralty courts for a common purpose, i. e., to secure, maintain and preserve uniformity in the regulation of interstate and foreign commerce and, thereby, harmony in that branch of our interstate and foreign relations. The two constitutional grants of power, one to the judiciary and the other to Congress, have thus merged in a common field and are to be viewed as each supplementing the other. *N. J. Steam Navigation Co.* v. *Merchants Bank,* 6 How. 392.

Prior to the decision in the *Jensen* case, *supra,* this Court had always held that the maritime law furnished no remedy in a death case and the state law might apply. *The Harrisburg,* 119 U. S. 199; *The Alaska,* 130 U. S. 201; *American S. B. Co.* v. *Chase,* 16 Wall. 522; *The Hamilton,* 207 U. S. 398.

The Jones Act having given a remedy in cases of death of maritime workers, the admiralty courts now have exclusive jurisdiction in such cases where the casualty oc-

curred on navigable waters. That is the new principle evolved by this Court in *Northern Coal & Dock Co.* v. *Strand,* 278 U. S. 142. In that case the rule in the *Rohde* case did not apply because: (1) The services being rendered by Strand at the time of his injury were a direct part of interstate commerce; (2) Strand in rendering those services was a seaman engaged in that commerce called "maritime"; (3) As a seaman engaged in interstate commerce, the maritime law furnished him a remedy.

The principles in *New York Central R. Co.* v. *Winfield,* 244 U. S. 147, and *Panama R. Co.* v. *Johnson,* 264 U. S. 375, gave the admiralty court in the *Strand* case a jurisdiction exclusive of that of the state courts because: (1) regulation of interstate commerce by Congress is exclusive; (2) the Merchant Marine Act incorporated the Federal Employers' Liability Act into the maritime law, bringing with it exclusive jurisdiction of cases directly involving interstate commerce; (3) the maritime law thereby furnished a remedy in deaths on navigable waters of seamen and stevedores engaged in interstate commerce.

But, the Merchant Marine Act did not bring into the maritime law any rules applicable to domestic or local or intrastate commerce. Court jurisdiction over this class of commerce was never relinquished by the States to the Federal Government through the Federal Constitution. The Merchant Marine Act did not enlarge the maritime law so as to furnish a remedy in death cases of seamen engaged in a domestic or local enterprise.

The cause of action in the case at bar is one over which admiralty has no jurisdiction because it is not founded on a maritime tort. *Ketchikan L. & S. Co.* v. *Bishop,* 24 F. (2d) 63. There was no "tort" proven; only a "casualty" that happened to occur on navigable waters.

Insurance is not commerce. Appellant's contract, through regulation by the Compensation Act of the State,

necessarily contained a provision whereby appellant became "directly and primarily liable." Enforcement of that contract by the state courts will not violate the "exclusive" jurisdiction of the admiralty courts. Cf. *Northern Coal & Dock Co.* v. *Strand,* 278 U. S. 142; *Hooper* v. *California,* 155 U. S. 653; *Western Union* v. *James,* 162 U. S. 656.

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

This proceeding was begun by a petition to the Industrial Accident Commission of California to obtain an award for the death of John James Uttley Brooke, an unmarried minor nineteen years of age, who was drowned in Santa Monica Bay on April 8, 1926, while in the service of the Morris Pleasure Fishing, Inc. The appellant was the insurance carrier of the employer, and the question presented in this appeal is whether the case was for the exclusive cognizance of a court of admiralty under § 256 of the Judicial Code, or might be brought within the purview of the Workmen's Compensation Act of California.

The petition was filed by the mother and the stepfather of the deceased before the Commission, which on October 6th, 1926, made its findings and held that he was not at the time of his death engaged in maritime employment, and that both he and his employer were subject to the provisions of the Compensation Act. The Commission found that neither the mother nor the stepfather was dependent on him, and, accordingly, that the award should be limited to the reasonable expenses of burial, fixed at $150.

There was a proceeding in certiorari in the District Court of Appeal, Second Appellate District, Division Two, to review the award of the Commission. The District Court of Appeal found that the Workmen's Compensation Act of California did not give jurisdiction of this cause

and annulled the award. 256 Pac. 857. The Supreme Court of the State reversed the District Court of Appeal and affirmed the award of the Industrial Accident Commission. 265 Pac. 825. An appeal to this Court was then allowed.

The facts as shown before the Commission and as stated by the District Court of Appeal were as follows:

"The Morris Pleasure Fishing, Inc., is a corporation which carries on the business of maintaining and operating from Santa Monica Bay a small fleet of fishing vessels for the accommodation of the public seeking recreation in deep-sea fishing. In the fishing seasons its practice has been to have excursions daily from Santa Monica Bay to the ocean fishing grounds, a distance of three to five miles, with fixed charges both for half-day and full-day trips. For use in this business the company has several vessels, ranging from four to fourteen tons registry, equipped with gas engines and capable of cruising a distance of 500 miles. The business has been confined entirely to the maintenance of these pleasure-fishing vessels and the transportation of patrons to and fro by water, except that excursionists have also been supplied with bait. As one of the necessary incidents of its business the company employs seamen to navigate its vessels; and before and at the time of the accident which occasioned Brooke's death, he was in the company's employ as an apprentice navigator and seaman. In that capacity he made daily trips as required with the company's vessels, and at times was substituted as 'spare skipper' for one of the regular skippers. On April 8, 1926, one of the company's fishing vessels called 'W. K.,' of about seven tons registry, was moored, with no one aboard, in Santa Monica Bay about three-quarters of a mile to a mile from the pier. A storm having arisen, the vessel broke from her moorings early in the afternoon and began to drift toward the shore. In an effort to save the vessel from

destruction, Captain Morris, as Brooke's superior officer, had Brooke and another employe, named Gregory, put off from the pier with the captain himself, in a boat about eighteen feet long, with the purpose in mind of boarding the 'W. K.' and returning her to her anchorage. But as they neared the drifting vessel, their boat was capsized by a heavy wave and all three were drowned."

The appellant contends that, under § 256 of the Judicial Code, this is a cause of action in admiralty, enforceable in a court of admiralty, or at common law if the latter affords a remedy, and is not a matter of which cognizance may be had under a state workmen's compensation act.

The Commission contends that the matter is one of local concern which does not affect commerce or navigation and of which the Commission is not deprived of jurisdiction.

Section 256 of the Judicial Code provides that jurisdiction vested in the courts of the United States in all civil causes of admiralty and maritime jurisdiction shall be exclusive of the courts of the several States, saving, however, to suitors in all cases the right of a common law remedy where the common law is competent to give it.

In *Southern Pacific Company* v. *Jensen,* 244 U. S. 205, where a stevedore, engaged in unloading a ship in navigable waters in New York, was killed, and an award of compensation was made against the ship-owner under the state workmen's compensation act, it was held that that remedy, providing for compensation under a prescribed scale for injuries and deaths of employees without regard to fault, and being administered through a state administrative commission, was a remedy unknown to the common law and incapable of enforcement by the ordinary processes of any court, and hence was not among the common law remedies saved to suitors under § 256, and therefore such a remedy was contrary to the Constitution and laws of the United States. The same principle was

followed in *Clyde Steamship Company* v. *Walker,* 244 U. S. 255.

In *Knickerbocker Ice Company* v. *Stewart,* 253 U. S. 149, it was held that an addition to the saving clause of § 256, by which rights and remedies under the workmen's compensation law of any State were given to claimants thereunder, was unconstitutional as being a delegation of legislative power to States and a defeat of the purpose of the Constitution in preserving the harmony and uniformity of maritime law.

In *Union Fish Company* v. *Erickson,* 248 U. S. 308, it was held that a maritime contract of employment was not affected by the California statute of frauds requiring such an agreement, where not to be performed within a year, to be in writing, and that such a contract was not subject to state limitation, because such limitation would materially prejudice the characteristically uniform features of the general maritime law.

The same principle was applied in *State of Washington* v. *W. C. Dawson & Company,* 264 U. S. 219, where it was sought to compel an employer of stevedores to contribute to an accident fund created by the workmen's compensation act of the State. Under the same title, it was held on the same principle that workmen's compensation under a state statute could not be awarded for the death of a workman killed while engaged at maritime work, under a maritime contract, upon a vessel moored on navigable waters and discharging her cargo.

In *Robins Dry Dock Co.* v. *Dahl,* 266 U. S. 449, the same principle was recognized and enforced in a case of maritime tort suffered by one doing repair work on board a completed vessel. The case was reversed, on the ground that the liability of the employer in such a suit could not be affected by the provision of a state law regulating the duties of employers generally to furnish safe scaffolds.

Another class of cases is illustrated by *Western Fuel Co.* v. *Garcia,* 257 U. S. 233. There a stevedore was killed while at work in the hold of a vessel under charter to the Fuel Company. The Workmen's Compensation Commission granted an award to the widow and children. This was annulled by the state court, and then the widow and children brought a suit in admiralty against the Fuel Company in the District Court of the United States, alleging death by negligence, and prayed for damages. The District Court was held to have jurisdiction in admiralty under *La Bourgogne,* 210 U. S. 95; *American Steamboat Co.* v. *Chase,* 16 Wall. 531; *The Hamilton,* 207 U. S. 398. The plaintiff was defeated in the admiralty suit by application of the state statute of limitations. This Court thus recognized a well established exception to the nonapplication of state statutes to admiralty jurisdiction, which is when they give a common law remedy for death by wrongful act. But this Court, in the *Knickerbocker Ice Co.* case, decided that it could not extend the saving clause of § 256 to include an award under a state workmen's compensation act. Such cases as the *Garcia* case, *supra, Northern Coal Co.* v. *Strand,* 278 U. S. 142, and *Great Lakes Dock Co.* v. *Kierejewski,* 261 U. S. 479, are therefore hardly to be regarded as real exceptions to the exclusive jurisdiction of admiralty by § 256.

Other cases, however, are cited to sustain the state jurisdiction in this case. The first and chief one is *Grant Smith-Porter Company* v. *Rohde,* 257 U. S. 469. That was a proceeding to recover an award under a workmen's compensation act, from a ship-builder, for injuries which a carpenter received while he was working on an unfinished vessel moored in the Willamette River. The contract for constructing the vessel was non-maritime, and although the uncompleted structure upon which the accident occurred was lying in navigable waters, neither

Rohde's general employment nor his activities at the time had any direct relation to navigation. It was held to be a matter of merely local concern, in view of the fact that reference of the rights and liabilities of the parties, under a contract between them, had been made by their consent to the local statute; that they had not consciously contracted in view of admiralty, and such an exception would not injure any characteristic feature of the general maritime law or the harmony or uniformity of that law in its international and state relations.

In *Miller's Indemnity Underwriters* v. *Braud,* 270 U. S. 59, the plaintiff's intestate was employed as a diver by a ship building company. He submerged himself from a floating barge anchored in a navigable river 35 feet from the bank, in order to saw off some timbers of an abandoned set of ways once used for launching ships which had become an obstruction to navigation. He died from suffocation for lack of air supply during his work. His representative was allowed to recover from the employer's insurer under the Texas Workmen's Compensation Law. The facts disclosed a possible maritime tort to which the general admiralty jurisdiction might extend, except that the state compensation law prescribed an exclusive remedy. The state statute was allowed to have effect. It was thought that enforcing such a state statute would not tend to destroy the characteristic features of maritime law.

In *Alaska Packers' Association* v. *Industrial Accident Commission,* 276 U. S. 467, a person engaged by a fishing and canning company as a seaman, also as a fisherman, and then for general work in and about a cannery, was injured after the fishing season was over while standing upon the shore and endeavoring to push a stranded fishing boat into navigable waters for the purpose of floating it to a nearby dock, where it was to be lifted out and stored for the winter. It was held that the injury, even if within

admiralty jurisdiction, was of such a local character as to be cognizable under a state compensation law,—a ruling which would not injure the characteristic features or uniformity of the admiralty law.

In *Sultan Railway Co.* v. *Department of Labor and Industries of the State of Washington,* 277 U. S. 135, an award for injuries under the Workmen's Compensation Law of Washington was sustained. The plaintiff was engaged in assembling saw logs in booms for towage elsewhere for sale, and the breaking up of the booms, which had been towed on a river to a saw mill, and the guiding of the logs to a conveyor extending into the river, by which they were drawn into the mill for sawing. Clearly, even if this had any admiralty feature, it had only an incidental relation to navigation. The rights and obligations of the employees and their employers could well be regulated by local rules which would not work material prejudice to the characteristic features of the general maritime law.

Nothing in these cases could apply to the case before us. They may be said to be of an amphibious character. They have an admiralty feature about them in the locality where they occurred, although even this is doubtful with respect to the *Alaska* case. But the contract in the *Rohde* case was non-maritime, the ship was incomplete, and being completed under a non-maritime contract; both parties had made a non-maritime contract with reference to their liabilities and not in contemplation of the admiralty law. The *Braud* case was one of a maritime tort. But it had no characteristic feature of the general maritime law except locality, and it was very like, in its relation to the state law, to the *Rohde* case. The employment was not maritime, and the transaction and the circumstances thus seemed to have but one characteristic that was maritime. This was true of the *Sultan Company* case.

Other cases cited, but which seem to have no application here, rest on the undisputed circumstance of locality in fixing or excluding admiralty jurisdiction.

In *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263, the tort complained of was committed upon a dock which was an extension of the land, and was not within the jurisdiction in admiralty at all.

Smith & Son v. *Taylor,* 276 U. S. 179, was a case in which a longshoreman was struck by a sling while working on a stage resting solely upon a wharf and projecting a few feet over the water to or near a vessel. He was knocked into the water, where sometime later he was found dead. It was there held that the right of action was controlled by the state and not by the maritime law, since the blow was received on the wharf, which was to be deemed an extension of the land.

And so in *Gonsalves* v. *Morse Dry Dock & Repair Company,* 256 U. S. 171, where an employee, engaged in the repair of a vessel resting on a dock floating on navigable waters, was allowed to recover for negligence of the vessel-owner in the explosion of a blau torch negligently permitted to be out of repair. It was held that repairs to a vessel while in an ordinary dry dock were not made on land, and that the admiralty jurisdiction in tort matters was settled by the locality.

In *Messel* v. *Foundation Co.,* 274 U. S. 427, it was held that a boiler-maker, employed to lengthen the smoke-stack on the deck of a vessel lying in navigable waters, and injured by negligence of the owner through the sudden burst of hot steam, was entitled to recovery in admiralty or under the saving clause of § 256, by virtue of the Louisiana Civil Code, Art. 2315, declaring that every act whatever of a man that causes damage to another obliges him by whose fault it happened to repair it. This was held equivalent to the operation of the common law, and so, under the saving clause of § 256, to support a suit for dam-

ages either in admiralty or common law. The Louisiana Workmen's Compensation Act gave him no right of action.

We have thus examined all the cases in this Court since *Southern Pacific Co.* v. *Jensen,* with respect to the efforts to apply the workmen's compensation acts in admiralty, and we have found nothing in them that would justify an award in the present case.

Here it is without dispute that the deceased was a sailor, that his employment and relation to the owner of the vessel were maritime. It is without dispute that the vessel, in the navigation of which he was employed, was registered as a vessel engaged in the navigable waters of the United States, in the business of transporting people for hire. He was a skipper engaged in assisting the navigation of these registered vessels from their mooring place in Santa Monica Bay to the place where the deep sea fishing was to be carried on, a distance of from three to five miles or more, all in navigable waters. The vessels were capable of navigation for 500 miles. There was no feature of the business and employment that was not purely maritime. To hold that a seaman, engaged and injured in an employment purely of admiralty cognizance, could be required to change the nature or conditions of his recovery under a state compensation law, would certainly be prejudicial to the characteristic features of the general maritime law.

Objection is made that the deceased here lost his life by drowning when he was not on a vessel in the navigation of which he had been employed as a seaman. This is immaterial. He was lost in navigable waters. He was engaged in attempting to moor and to draw into a safe place the vessel with relation to which he was employed. It is clearly established that the jurisdiction of the admiralty over a maritime tort does not depend upon the wrong having been committed on board a vessel, but

rather upon its having been committed upon the high seas or other navigable waters. *The Plymouth,* 3 Wall. 20; *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 59, 60.

Another objection to the admiralty jurisdiction here is that the vessel was not engaged in interstate or foreign commerce. It was employed only to run from shore to Santa Monica Bay, five or ten miles to the deep sea fishing place, and then return, and all within the jurisdiction of California. This argument is a complete misconception of what the admiralty jurisdiction is under the Constitution of the United States. Its jurisdiction is not limited to transportation of goods and passengers from one State to another, or from the United States to a foreign country, but depends upon the jurisdiction conferred in Article 3, Section 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction.

Mr. Justice Clifford, in *The Belfast,* 7 Wall. 624, 640, said:

"Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it can not be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants." Citing *The Genesee Chief,* 12 How. 452. See also *In re Garnett,* 141 U. S. 1, 15; *Ex parte Boyer,* 109 U. S. 629, 632; *The Propeller Commerce,* 1 *Black* 574, 578.

Another objection which is pressed on us is that § 256 of the Judicial Code does not exclude the jurisdiction under the California Compensation Act, because the object of the trips was for pleasure and not for commerce. This is a misconception. Commerce is not prevented because the object of it is to serve the pleasure of passengers. The business was that of earning money by transporting people on the navigable waters of the United States, and, strictly

speaking, it is just as much a part of commerce and of the admiralty jurisdiction as if these vessels were carrying cargoes of merchandise. *Gibbons* v. *Ogden,* 9 Wheat. 1, 215 *et seq.* The conclusion sought to be drawn by counsel for the Commission from the *Rohde* and other cases is that workmen's compensation acts will apply unless their application would interfere with the uniformity of the general maritime law in interstate and foreign commerce, and there is neither here. But this omits one of the grounds for making an exception—that it shall not be prejudicial to the characteristic features of the maritime law. That is just what it would be here, for here we have a transaction on the navigable waters of the United States which in every respect covers all the characteristic features of maritime law and has no other features but those. To apply to such a case a state compensation law would certainly be prejudicial to those features. We must hold, therefore, that it was a violation of the exclusive maritime jurisdiction conferred by the Constitution to apply in this case the California Compensation Act.

The judgment of the Supreme Court of California is

Reversed.

MR. JUSTICE BRANDEIS dissents.

SUTTER BUTTE CANAL COMPANY *v.* RAILROAD COMMISSION OF CALIFORNIA.

ERROR TO THE SUPREME COURT OF CALIFORNIA.

No. 403. Argued March 6, 7, 1929.—Decided April 8, 1929.

1. The record does not disclose any substantial evidence that would impeach the findings of the Railroad Commission upon the subject of a fair rate-base and a proper return to the petitioner Company. P. 134.
2. Contracts between a public utility water company and its consumers are subject to modification in respect of their duration as well

as their rates through a proper exercise of the state police power. P. 137.

3. A California corporation, which owned a water right dedicated to public use and, under the state constitution and laws, was a public utility whose rates and service were subject to regulation by the State Railroad Commission, served the water to two classes of consumers: (1) consumers who, in virtue of early contracts, were entitled to water in perpetuity for designated tracts and were under a continuing obligation to pay service and water charges each season on the acres for which they desired water and also to pay the service charges on the remaining acres for which, in any season, they did not desire it; and (2) consumers who obtained water at these same rates under periodical applications defining the lands to be served but limiting the obligation to pay service charges on acres not irrigated to three years from date of application. For the purpose of preventing this discrimination against contract consumers, and resulting difficulties of administration, the Commission made an order under which they might release themselves from the continuing obligation to pay charges on lands not irrigated and acquire a status like that of the consumers under applications. *Held* that the order did not deprive the water company of contract rights in violation of the Fourteenth Amendment. Pp. 134–137.
4. Upon review of a judgment of the Supreme Court of California upholding, on certiorari, an order of the State Railroad Commission affecting the rates and contracts of a water company, *held* that a construction of the order made by that court and which the counsel for the Commission, in the oral argument here, declared to be regarded by the Commission as binding, should not be given an independent construction by this Court. P. 139.

202 Cal. 179, affirmed.

ERROR to review a judgment of the Supreme Court of California affirming an order of the State Railroad Commission relating to the rates and contracts of the Canal Company, and the valuation of its property for rate-fixing purposes.

Mr. Isaac Frohman, with whom *Mr. Douglas Brookman* was on the brief, for plaintiff in error.

The Commission has attempted to preserve what might be found desirable by the contract holders, and to de-

stroy what they deem undesirable. The right to do this very thing was involved in the *Live Oak Water Users' Ass'n* case, 192 Cal. 132. See also *Butte County Water Users' Ass'n* v. *R. R. Comm'n,* 185 Cal. 218, where it is recognized that the right of a consumer " is a vested right of which he cannot be deprived by the diversion of water to others." *Stanislaus Water Co.* v. *Bachman,* 152 Cal. 716; *Southern Pacific Co.* v. *Spring Valley Water Co.,* 173 Cal. 291; *Palermo L. & W. Co.* v. *R. R. Comm'n,* 173 Cal. 380; *Henrici* v. *South Feather Land Co.,* 177 Cal. 442; *Allen* v. *R. R. Comm'n,* 179 Cal. 68.

The right of the Company to reasonable compensation for its duty to hold itself in readiness to serve water to the contract holders as provided in the contracts, at such times as they desire to use it, is likewise a vested property right which cannot, under the Constitution, be made subject to the right of the contract holders to say, at their option, whether they want to pay at all, or at intervals only. The Commission is not vested with the power to deal with the contracts in any of these ways. It cannot interpolate optional rights in favor of either of the parties. Its orders must be germane to its power to control and regulate, and must necessarily not be violative of rights guaranteed by the Constitution of the United States; and it must regularly pursue its authority.

If, as is declared in the case at bar by the court below, it is within the power of the Commission to release the contract holders, or to go to the extent of ordering an " out-and-out termination " of the contracts, notwithstanding what has been previously held by that court in cases involving these types of contracts, the fact remains that the Commission has left the contracts in effect, but operative only when and if the contract holders, at their option, want them to be operative. It is admitted in the opinion below that " it is true that the contracts may be retained at the election of the consumer." This, we

contend, is not "regulation" in any proper sense of the word.

The decision is plainly inconsistent with *Live Oak Water Users' Ass'n* case, 192 Cal. 132.

As to discrimination, it was held in the *Live Oak* case, and it is correct to say now, that the classification into contract and non-contract consumers was neither unfair nor unreasonable, and that there was no unlawful discrimination as between them.

It is suggested by the court below in its opinion that "any contract consumer who elects to avail himself of the status of a non-contract consumer may not, if petitioner [plaintiff in error] properly protests, return to his former status under the contract." It is manifest that the order of the Commission does not so provide, and the controversy here necessarily concerns that order. It must be kept in mind that plaintiff in error is subject to the orders of the Commission in so far, of course, as its orders are lawful and do not violate rights guaranteed by the Constitution.

It cannot be said that the Commission can change, limit and modify the contracts so as to strip them of their mutual, dependent and concurrent conditions and convert them into unilateral contracts, or mere options or privileges, in favor of the contract holders.

It was error to exclude the so-called Sutter County Extension donations from the valuation of property of the Company for the purpose of fixing water rates. The failure of the Commission to give any consideration to reproduction cost of the physical properties of the Company was likewise erroneous.

Rates yielding a net return of less than 5½% are confiscatory.

Messrs. Arthur T. George and *Carl I. Wheat* were on the brief for defendant in error.

Under the rules, non-contract consumers pay a service charge of $1.25 per acre and fixed irrigation charges per acre (dependent upon the water use) on all lands covered in their respective applications—so long as the water is used for active irrigation. The service charge of $1.25 on such acreage continues for a period of two years after such use is discontinued. Such consumers, of course, are under no obligation to take water or pay service charges except as obligated by their respective applications.

In an effort to terminate all discrimination in rates between contract and non-contract consumers, it is provided that the contract consumers, if they so elect, can avail themselves of the same rate schedule as is applicable to non-contract consumers, and once such contract consumer so elects to abide by such rate schedule, no provision is made in the rules or otherwise for his return to the rate schedule provided for those who remain contract consumers.

Under this rule any contract consumer so electing to obtain water under his contract must pay the service charge of $1.25 per acre and the other charges fixed in the schedule of rates (dependent upon the nature of the use) on all land for which service is desired in any particular year, and, for a period of two years, the service charge of $1.25 per acre on the land covered by the contract as to which no service is desired. This service charge of $1.25 per acre is also payable on the land for which service is desired—for a period of two years after said service is discontinued.

Either class of consumer under the new rules may elect to discontinue using water and by following the requirements of the rules, effect his release from further payments.

Thus, it appears that the various objections which are urged as to the alleged options open to the contract users are more apparent than real, and that the contract and

non-contract rate schedules are, for the first time, truly comparable.

The California Supreme Court has repeatedly held that the Commission, in the exercise of its jurisdiction, is vested with authority to alter, modify or abrogate contracts existing between such utility companies and consumers. *Law* v. *R. R. Comm'n,* 184 Cal. 737; *Limoneira Co.* v. *R. R. Comm'n,* 174 Cal. 232; *Southern Pacific Co.* v. *Spring Valley Water Co.,* 173 Cal. 291; *Traber* v. *R. R. Comm'n,* 183 Cal. 304; *Market Street Ry. Co.* v. *Pacific Gas Co.,* 6 F. (2d) 633.

All waters covered by the contracts in question are waters impressed with a public use. *King* v. *R. R. Comm'n,* 190 Cal. 321.

Dicta in *Allen* v. *R. R. Comm'n,* 179 Cal. 68, that might well be construed to hold that contracts for the use of waters devoted to public use create vested rights which cannot be altered by the State in the exercise of its police power, do not represent the law in California today. *Leavitt* v. *Lassen Irrigation Co.,* 157 Cal. 82.

It is now well established that the owner of water devoted to public use cannot, by contract or otherwise, carve out of the public trust a preferential private right; that any contracts purporting to grant permanent and continuous rights to such waters " of course, would not technically attach it to the land as an appurtenance. It would do nothing more than bring the land within the territory to which the public use extended and establish its status as land permanently entitled to share in the public use." *Glenn-Colusa Irrigation District* v. *Paulson,* 75 Cal. App. 57; *Southern Pacific Co.* v. *Spring Valley Water Co.,* 173 Cal. 291.

Under the above cited authorities, the Commission has complete authority to modify the rate provisions of the contracts or to establish new rates and rules in their stead.

The order now in question concerns only rates and the computation of rates. No attempt was made to adjudicate the rights of the parties under the contracts in any particular other than in the matter of rates. These rights, in the light of the order, could not be litigated in this proceeding, but only before some other tribunal and in some other proceeding which properly puts them in issue.

In fixing the rate base the Commission properly excluded sums contributed to the development of the so-called Sutter County Extension, and refused to be controlled by an alleged reproduction cost estimate submitted by plaintiff in error.

There is no basis in the record for the claim that the rates fixed by the Commission will not yield a full and fair return.

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

This is a writ of error to an order of the Supreme Court of California reviewing on certiorari an order of the Railroad Commission of the State fixing water rates and contracts. 202 Cal. 179. The Sutter Butte Canal Company, a corporation of the State, petitioned for a review and the annulment of an order of the Railroad Commission designated as decision No. 16289, made on March 20, 1926, relating to water rates, the valuation of its property for rate-fixing purposes, the rate of return thereon and the modification and practical abrogation of certain continuous contracts for the furnishing of water held by it with a certain class of consumers.

The history of the Company as a public utility engaged in the business of appropriating water from the Feather River and selling and distributing it for irrigation purposes in Butte and Sutter counties, is set forth in *Butte County Water Users Association* v. *Railroad Commission,*

185 Cal. 218; *King* v. *Railroad Commission,* 190 Cal. 321, and *Live Oak Water Users Association* v. *Railroad Commission,* 192 Cal. 132, s. c. 269 U. S. 354.

The Canal Company is a public utility subjected by law to the power and direction of the State Railroad Commission and is in possession of a water right dedicated to the public use. Its consumers are divided into two classes—contract consumers and non-contract consumers. The water was originally furnished to the contract consumers under water right contracts which were continuous supply contracts, whereby the consumer paid an initial amount, which varied somewhat, and agreed to pay a stipulated rate for irrigation water service each year thereafter upon the total acreage covered by the contract, and the Company on its part agreed to furnish water as required for all of the acres covered thereby. Non-contract consumers, or applicants, pursuant to the order of the Commission made in March, 1918, were served upon the basis only of applications for water made from year to year.

In December, 1924, a decision, numbered 14422, on application by the Company, further increased the water rates over those allowed under a decision of 1922, and abolished the differential in rates which had theretofore existed between contract and non-contract consumers. It created what was called a stand-by or service charge, of $1.25 per acre, payable by both classes, effective as to non-contract holders for all of their lands covered by their applications during such time as they should continue thereunder, and in any event for not less than three years, and to be continuously effective as to contract holders for all of the lands covered by their contracts; provided that if such contract holder did not desire to use in any year the whole or any part of said water to which he was entitled, and filed with the Company on or before February 1st of that year notice in writing of what he did not desire in respect to the service of the water, he should then

be obligated to pay in that year, and in each year thereafter, on or before February 1st thereof, the service charge of $1.25 per acre of the land for which no water was desired, as specified in the notice, and as to the remainder of his land he was to pay such rates or charges based upon the extent and character of the use of the water which he desired to use as were in effect.

This, however, was not a satisfactory adjustment, as the Commission ultimately determined, and in 1925 there was a completely new investigation by the Commission of the rates, charges, classifications, contracts, rules, regulations and service of the Canal Company, in view of existing protests and dissatisfaction. This led to a hearing of all parties in interest covering the main question as to the jurisdiction of the Commission, under the California law, to modify the obligations of the parties, not only by use of the rates, but by direct variation of the terms between the Canal Company and the owners of so-called continuous contracts; and also to a consideration of the fairness and equity of the rates to be fixed for the payment for water furnished by both contract and non-contract users, and other details involved in a broad investigation.

The proceedings resulting in decision No. 16289, modified the previous rules so as to give each continuous contract holder the right, at his option, either (1) to obtain water under applications for so much of his land as he desired to irrigate, similarly with applicants generally who were not holders of continuous contracts, or (2) to obtain water under his continuous contract, provided that if he so elected, he might still, by notifying petitioner that he did not desire to use in any year the whole or any of the water which he was so entitled to receive, and filing with the Company on or before February 1st of that year notice in writing of what he did desire in respect to the non-service of water, be obligated in that year, and in the next succeeding year thereafter, but for no further period in

which said notice remained in effect, to pay, on or before February 1st thereof, the service charge of $1.25 per acre of the land for which no water was desired, as specified in said notice; or (3) to release himself from any obligation to pay any charges to petitioner under his continuous contract by giving notice that he did not desire any water for his land in any year, or to give notice or use the water.

The substance of this was to release all contract consumers. The contracts might be retained at the election of the consumer, but the whole plan was really to get rid of the troublesome dual situation and to abolish all distinction between the two classes of consumers and put them on a parity, in order that there might be removed from controversy this source of friction and trouble. The Commission said:

"Rates fixed herein will, therefore, be on the basis that all service be charged for under a uniform schedule of rates and under application forms which will exclude any consideration of the continuous contract and preclude the making of charges for unirrigated lands under such contracts, as such."

In view of the finding of the Supreme Court that the record does not disclose any substantial evidence which would impeach the findings of the Railroad Commission upon the subject of a fair rate-base and a proper return to the Company, with which we agree, our decision will be limited to a consideration of the charge that the decision here under review is a violation of the Fourteenth Amendment by taking away from the Company its contract rights and depriving it of payment to it for water service for all the lands which under the original contract the land owners were to pay for, whether the water was used or not.

The case made on behalf of the Commission and its decision is that there has been delegated by the State to the Commission the regulation for the public benefit of the

rates and revenue to be received by the public utility for the service it renders to the public; that included in such power of regulation is the modification and qualification of the original contracts held by the public utility corporation in this public service; that in being a public utility under the California Constitution it necessarily submits itself to the police power of the State for the benefit of the public; that the ordinary rules that apply to the protection of contracts as between private persons under the Constitution of the United States, or to the maintenance of due process of law under the Fourteenth Amendment and the rights of property as between individuals, do not apply, but that, by the acquisition of such contracts and property, knowing that the police power controls in their regulation, the owner holds them without the usual sanctions of the Fourteenth Amendment of the Federal Constitution between individuals. This power is said to operate upon property and property rights, including contracts, to the extent necessary for the protection of the public health, safety, morals and welfare, and its exercise has been committed to the Railroad Commission in regulating the public utilities in California.

The State Constitution of 1879, Article 14, § 1, provides:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law. . . ."

Article 12, by § 23, an amendment added in 1911, provides:

"Every private corporation, and every individual or association of individuals, owning, operating, managing or controlling any . . . canal, pipe-line, plant or equipment, or any part of such . . . canal, pipe-line, plant or equipment within this state, . . . for the production, generation, transmission, delivery or furnishing of heat, light,

water or power . . . to or for the public . . . is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the legislature, and every class of private corporations, individuals, or associations of individuals hereafter declared by the legislature to be public utilities, shall likewise be subject to such control and regulation. The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

Section 67 of the Public Utilities Act, enacted in 1911, provides that the exercise of the power thus conferred upon the Railroad Commission is to be reviewed only by the Supreme Court, to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of California. The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the Commission on reasonableness and discrimination. The Commission and each party to the action or proceeding before the Commission shall have the right to appear in the review proceeding, and upon the hearing the Supreme Court shall render judgment either affirming or setting aside the order or decision of the Commission. (Deering's Gen. Laws of 1923, p. 2734.)

Without now affirming or denying all that is claimed for them, we think that the above recited clauses from the constitution and statute are sufficient to subject the contracts in question to the regulating action of the Commission upheld by the decision under review.

The power to increase charges for service had been twice exercised by the Railroad Commission at the behest of the Canal Company, and the times and terms of payment under the contracts had been changed by the same power, and so far as the petitioner was concerned, its privileges and emoluments under the contract had been greatly increased. So far as the consumer was concerned, the contract has slight, if any, benefit to him left in it. The consumer of water who came in last, and who had no contract, was really served with water upon less onerous terms than the contract consumer, and he might satisfy all demands made against him in three years, if not sooner, and be completely released. This the Supreme Court held was a discrimination. It decided that it was within the power of the Commission to remove it. The only provision of the contract which had not been theretofore modified by the Commission or the Court was the one with respect to the duration of the contract. As the contract was necessarily made in view of the power of the Commission to change its terms, to avoid discrimination in dealing with the consumers of water of a public utility, it is very difficult to see why the situation may not be reduced to a uniform one under the power of the Commission, if that body deems it equitable and fair to do so in the interest of the public. The record shows with much clearness the complicated situation that must continue unless the duration of the obligations of the so-called contract and non-contract consumers be made the same. This change would seem to be well within the police power, subject to which these contracts were made, and there is no such difference between the fixing of rates

and the modification of the duration of a contract as would prevent the application of the police power to the one and not to the other. There are a number of authorities that leave no doubt that such an exercise of the police power under the Constitution of 1879 must be sustained. *Limoneira Co.* v. *Railroad Commission,* 174 Cal. 232, 237; *Law* v. *Railroad Commission,* 184 Cal. 737, 740; *In re Murray,* 2 Cal. R. R. Comm. Dec. 465, 494; *Sausalito* v. *Marin Water Co.,* 8 Cal. R. R. Comm. Dec. 252, 261. The same question was before the Supreme Court of the State of Washington in the case of *Raymond Lumber Co* v. *Raymond Light & Water Co.,* 92 Wash. 330. The power of the Commission to abrogate the contract between a utility and its consumers was upheld. An admirable statement of the principle is to be found in *Re Guilford Water Co.'s Service Rates,* 118 Me. 367. The general principle supporting such an exercise of the police power under the Fourteenth Amendment is sustained in *Louisville & Nashville Railroad Co.* v. *Motley,* 219 U. S. 467. In this case it was held that the power of Congress to regulate commerce among the States, which is analogous to the police power of the States in regulating public utilities, extended to rendering impossible enforcement of contracts made between carriers and shippers, although valid when made, because they were all made subject to the possibility that, even if valid when made, Congress might, by exercising its power, render them invalid. That is exactly the situation presented here. Those who made these contracts for water made them subject to the power of the Commission to change them for the benefit of the public, and that is all that has been done in this case by the Commission's order. See also *Manigault* v. *Springs,* 199 U. S. 473, 480; *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 357; *Chicago, B. & Q. R. R. Co.* v. *McGuire,* 219 U. S. 549, 567; *Atlantic Coast Line R. R. Co.* v. *Goldsboro,* 232 U. S. 548, 558; *Union Dry Goods Co.* v. *Georgia Corp.,* 248 U. S.

372, 375; *Producers' Transportation Co.* v. *Railroad Commission,* 251 U. S. 228, 232.

At the bar counsel for the appellant expressed some anxiety lest the Commission might not accept the interpretation put on the order in question by the Supreme Court of the State, and for that reason he asked that we interpret the order independently. But the decision of the Supreme Court of the State is conclusive on us as to the interpretation of the order, that being a state question; and counsel for the Commission announced at the bar that the Commission regarded that decision as binding on them. Thus it is apparent that an independent interpretation by us of the Commission's order cannot and ought not to be attempted.

The judgment of the Supreme Court of California is

Affirmed.

ALBERTO *v.* NICOLAS.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 364. Argued March 6, 1929.—Decided April 8, 1929.

1. A judgment of the Supreme Court of the Philippine Islands based upon a construction of an Act of the Philippine Legislature, which construction was in turn based upon a construction of the Organic Act, is reviewable by this Court under § 7 of the Act of Congress of February 13, 1925, providing that a certiorari may issue to that court in any case "wherein the Constitution or any statute or treaty of the United States is involved." P. 142.
2. The Court takes judicial notice of the fact that the power of the Governor General of the Philippines to remove, suspend or transfer justices of the peace and to merge their districts, is intended for the prevention of abuses of their offices resulting from the ease with which their authority lends itself to the creation of caciques, or local bosses, exercising oppressive control over ignorant neighborhoods. P. 147.

3. Act No. 2768 of the Philippine Legislature, amending § 206 of the Administrative Code by providing "that in case the public interest requires it, a justice of the peace of one municipality may be transferred to another," intends, as its legislative history proves, that such transfer may be made by the Governor General without the advice and consent of the Philippine Senate. P. 147.
4. In view of the plenary legislative powers of the Philippine Legislature respecting justices of the peace, this provision is valid, as applied to a justice of the peace whose appointment was made by the Governor General, and confirmed by the Senate, after its enactment. P. 148.
5. The principle of preserving the independence of the judiciary applies less strictly to justices of the peace than to judges of superior court jurisdiction. P. 150.

Reversed.

CERTIORARI, 278 U. S. 593, to review a judgment of the Supreme Court of the Philippine Islands ousting the present petitioner from his office as justice of the peace of the municipality of Angat, Province of Bulacan, and placing the respondent in possession of it.

Mr. Wm. Cattron Rigby, with whom *Messrs. John A. Hull,* Judge Advocate General, U. S. A., and *Delfin Jaranilla,* Attorney General of the Philippine Islands, were on the brief, for petitioner.

Mr. Henry J. Richardson, with whom *Messrs. Harold R. Young* and *Pedro Guevaro* were on the brief, for respondent.

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

This is a certiorari to the Supreme Court of the Philippine Islands, to bring here for review an order of ouster in *quo warranto* brought by Bonifacio Nicolas against Severino Alberto to test the right of Alberto to hold the office of justice of the peace of the town of Angat, province of Bulacan, in those Islands. The issue is the legal right

of the Governor-General to transfer a justice of the peace from one municipality to another without the consent of the Philippine Senate.

After issue made, the parties, through their counsel, signed a stipulation of facts, from which it appears that on February 9, 1920, the plaintiff was appointed a justice of the peace of Angat, Bulacan, by the Governor-General with the advice and consent of the Philippine Senate; that he qualified, took possession, and exercised the office on and since February 14, 1920, up to August 19, 1927, when he was forced to surrender its possession to the defendant. On February 28, 1918, the defendant was appointed justice of the peace of San José del Monte, Bulacan, by the Governor-General, with the advice and consent of the Senate; he qualified for and exercised the office since then up to August 19, 1927, when, pursuant to an order transferring him to the office of justice of the peace of Angat, Bulacan, he exercised, and has since exercised, the latter office. There was a proceeding by the municipal president of Angat against the plaintiff, which was investigated by the Judge of First Instance of Bulacan, resulting in a report which disclosed unsatisfactory conditions and political partisanship, but with which the president of Angat was not content because the plaintiff was not removed. The matter was appealed to the Secretary of Justice. Thereafter, on July 2, 1927, the Governor-General transferred the plaintiff from Angat to San José del Monte, and also transferred the defendant to the municipality of Angat. There were protests by plaintiff against the transfer, and applications by him for reconsideration; and, finally, through proceedings before the Court of First Instance of Bulacan, the plaintiff yielded up his office under protest, on August 19, 1927, and since that time the defendant has exercised the office of justice of the peace of Angat, excluding the plaintiff therefrom.

The Supreme Court, after the hearing, rendered an opinion by a vote of six judges to three, granting against Alberto a judgment of ouster, to which an application for certiorari to this Court has been duly made and granted. 278 U. S. 593.

Our jurisdiction in this case is questioned. The Act of February 13, 1925, § 7, c. 229, 43 Stat. 940, provides that a certiorari may be issued by this Court to the Supreme Court of the Philippine Islands in any case "wherein the Constitution or any statute or treaty of the United States is involved." The effect of the Philippine Organic Act of Congress, approved August 29, 1916, by § 21, c. 416, 39 Stat. 545, 552, is that an appointment of a justice of the peace by the Governor-General must be consented to by the Senate of the Islands. Section 206 of the Philippine Administrative Code of 1917, as amended by Act 2768, approved March 5, 1918, enacts a proviso that "in case the public interest requires it, a justice of the peace of one municipality may be transferred to another." The point in question is whether that proviso is to be construed as impliedly requiring the consent of the Philippine Senate to the transfer, or whether it was intended to avoid that necessity.

In reaching the conclusion that the proviso of § 206, as properly construed, required the consent of the Senate, the Supreme Court used these words:

"The body of the section sanctions the holding of office by justices of the peace during good behavior. The proviso qualifies this by providing 'That in case the public interest requires it, a justice of the peace of one municipality may be transferred to another.' At once it is noted that the law is silent as to the office or entity which may make the transfer. The law does not say may be transferred 'by the Governor-General.' The insertion of the words 'by the Philippine Senate' would be as justifiable.

The more reasonable inference, indeed the only possible legal inference permissible without violating the constitution, is that the justice of the peace may be transferred by the exercise of the appointing power, and the appointing power consists of the Governor-General acting in conjunction with the Philippine Senate."

In other words, the interpretation that the court gives to the amended law, with the proviso, depends clearly on what the court calls the Constitution, that is, on the Organic Act, and therefore, even if its construction of the proviso of § 206 could be sustained, it still involved the Organic Act. We have jurisdiction.

In order to understand the scope of this case, we should point out that the Organic Act provided, by §§ 6, 7, 8 and 12, that the laws then in force in the Philippines were to remain in effect, except as altered by the Act itself, until altered, amended or repealed by the legislative authority provided in the Act, or by an Act of Congress; that the legislative authority therein provided had power, when not inconsistent with the Act, to amend, alter, modify or repeal any law, civil or criminal, continued in force by the Act as it might see fit; and that the general legislative powers in the Philippines, except as otherwise provided in the Act, were vested in the Philippine Legislature, consisting of an Assembly and a Senate.

Section 21 provided that the Governor-General of the Philippines should be the supreme executive power in the Philippines, and that he should, unless otherwise provided in the Act, appoint, by and with the consent of the Senate, such officers as might then be appointed by the Governor-General, or such as he was authorized by that Act to appoint, or whom he might thereafter be authorized by law to appoint; that he should have general supervision and control of all the departments and bureaus of the government in the Philippine Islands as far as

not inconsistent with the provisions of the Act, and that he should be responsible for the faithful execution of the laws of the Philippine Islands and of the United States operative within those Islands; that all executive functions of the government must be directly under the Governor-General, or within one of the executive departments under the supervision and control of the Governor-General. *Springer* v. *Philippine Islands,* 277 U. S. 189.

After the passage of the Organic Act of 1916, it became necessary to revise the Administrative Code so as to make it conform to the Organic Act, and it is that Code of 1917, with such amendments as have been made by the Legislature, that is now the existing law.

In the Administrative Code of 1916, Act No. 2657, approved February 24, 1916, effective July 1, 1916, provision was made for the appointment and distribution of the justices of the peace as follows:

"Sec. 235. Appointment and distribution of justices of the peace.—One justice of the peace and one auxiliary justice of the peace shall be appointed by the Governor General for the city of Manila, the city of Baguio, and for each municipality, township, and municipal district in the Philippine Islands.

"Sec. 238. Tenure of office.—A justice of the peace having the requisite legal qualifications shall hold office during good behavior unless his office be lawfully abolished or merged in the jurisdiction of some other justice."

Except for the elimination of the provision for justices of the peace in Manila, these sections were reënacted without change in §§ 203 and 206 of the Revised Code of 1917, which also required the consent of the Philippine Senate to the appointment of officers. Section 206 of the 1917 Code was amended by Act No. 2768, approved March 5, 1918, which added to it the proviso now in question in this suit, and its title was also correspondingly changed, so that the section now reads:

"Sec. 206. Tenure of office—transfer from one municipality to another.—A justice of the peace having the requisite legal qualifications shall hold office during good behavior unless his office be lawfully abolished or merged in the jurisdiction of some other justice: Provided, That in case the public interest requires it, a justice of the peace of one municipality may be transferred to another."

Other pertinent provisions of the Revised Code in force when respondent Nicolas was appointed a justice of the peace, and still in force, are:

Sections 220 and 221 provide for salaries of justices of the peace in municipalities of the first class, second class, third class and fourth class, in other places not now specially provided for by law, and in provincial capitals.

Section 222 provides for payment of the salaries of justices of the peace out of insular funds.

Section 228 provides that the judges of the courts of first instance shall at all times exercise a supervision over the justices of the peace within their respective districts, and shall keep themselves informed of the manner in which these justices perform their duties, and during the first five days of the fiscal year the justices shall forward to the judges of their respective districts a report concerning the business done in their courts for the previous year.

Section 229 provides that if at any time the judge of first instance has reason to believe that a justice of the peace is not performing his duties properly, or if complaints are made which, if true, would indicate that the justice is unfit for office, he shall make such investigation of the same as the circumstances may seem to him to warrant, and may, for good cause, reprimand the justice, or may recommend to the Governor-General his removal from office, or his removal and disqualification from holding office, and may suspend him from office pending action by the Governor-General. The Governor-General

may, upon such recommendation or on his own motion, remove from office any justice of the peace or auxiliary justice of the peace.

Section 203, the first half of which has already been quoted, further provides:

"Upon the recommendation of the Department Head, the territorial jurisdiction of any justice and auxiliary justice of the peace may be made to extend over any number of municipalities, townships, municipal districts, or other minor political divisions or places not included in the jurisdiction of a justice of the peace already appointed; and upon like recommendation of the Department Head, the Governor-General may combine the offices of justices of the peace for two or more such jurisdictions already established, and may appoint to the combined jurisdiction one justice of the peace and one auxiliary justice, at a salary not to exceed the total of the salaries of the combined positions."

And, following this, § 204 provides:

"When a new political division affecting the territorial jurisdiction of a justice of the peace is formed or the boundaries limiting the same are changed, the Governor-General, may, in the absence of special provision, designate which of the justices and auxiliary justices within the territory affected by the change shall continue in office; and the powers of any others therein shall cease."

It is to be observed that the Legislature of the Philippines made legislative provision for as close observation of the conduct of justices of the peace as is practicable. They are not like justices of the peace in this country, generally elected by the people. They are selected by the Governor-General and occupy positions of considerable power in these local communities, and exercise a control in the remote districts that makes it of the highest importance that they should be closely under the discipline of the chief executive. They are judicial officers, it is true, but these

provisions indicate how marked a difference there is and must be between the justices of the peace under our system and that of the Philippines. With respect to this matter we may take judicial notice that while the justices of the peace are to be treated as an important force for the preservation of local order and the administration of police court justice, they are subject to restraint by the Governor-General to prevent the abuses of their offices by the ease with which such local official authority lends itself in the Islands to the creation of caciques or local bosses exercising oppressive control over ignorant neighborhoods. This is the reason why their conduct is not only to be closely inquired into by the courts of first instance, but also why the Governor-General is given absolute power of removal or suspension, and the enlargement or restriction of their districts by merging them, and now in this last amendment, by rearranging their jurisdictions by transfer in the public interest.

The objection now is made that while, through the Governor-General, the districts under existing justices of the peace may be merged, combined, increased or decreased, an existing justice of the peace may not be transferred from one district to another, unless there is a new appointment of a justice with a new consent by the Senate.

This brings us to a consideration of the proper construction of the proviso of § 206 here in question. This proviso was the result of an amendment by § 1 of Act No. 2768 in February, 1918. The original bill was Senate Bill No. 163, providing that § 206 of the Administrative Code be amended by adding the proviso, " that a justice of the peace of one municipality may be transferred to another when the government deems it wise." An amendment was offered in the Philippine Senate adding thereto the words, " provided further that his appointment by virtue of the transfer be confirmed by the Senate." With this amend-

ment the bill passed the Senate. When the bill came to the House, the House Committee recommended that the amendment made in the Senate be dropped. It so passed the House, and was then, on February 8, 1918, submitted to the Senate, and the amendment of the House was accepted. A purpose on the part of the Legislature to eliminate from such a transfer the consent of the Senate could hardly be more clearly established.

The majority of the Supreme Court seems to think otherwise. It is sufficient to say that its suggested implication that the consent of the Senate was to be retained, although express provision for it was expressly stricken out, is not convincing. Nor is the significance attached by the majority of the Supreme Court to the silence of the proviso as to the person intended to make the transfer at all impressive. Nor will the suggestion that the Philippine Senate alone might be intended to make the transfer suffice. The history of the legislation as well as the general trend of it with reference to the powers of the Governor-General in the discipline of justices of the peace, their suspension, their removal, the current extension of their jurisdiction by him pending their incumbency, all are convincing that, however invalid the exclusion of the Senate from the consent to the transfer, the purpose of the Legislature was certainly intended to effect that very result.

This brings us therefore to the final issue—whether the consent was necessary to the transfer, even though the Senate and the House, acting together as the Legislature, eliminated it by the proviso. It is to be borne in mind that we are dealing with the Philippine Legislature, which has full power to make legislative provision for the appointment of justices of the peace, to provide for their duties, for the payment of their salaries, for their removal, their suspension, their jurisdiction, and the changes in their jurisdiction, and to vest in the Governor-General,

as the executive, the exercise of the powers it thus creates, or indeed to abolish justices of the peace and substitute some other system. To take a possible example. Suppose that the Philippine Legislature had created the office of justice of the peace, had provided that the Governor-General should appoint forty justices of the peace for certain described districts in the Philippines, and had directed that the Governor-General should designate for them their districts, but that he might change the designation originally fixed by him for their distribution as the public benefit required. It seems to us clear that this would be quite within the power of the Legislature and that the Senate, by consenting to the appointment of each appointee, would be held legally to have confirmed his appointment, not only to act as justice of the peace under his first designation, but would have given him the right to continue to exercise his powers conferred by law in any other district to which he might be transferred, because the Senate would have had full notice as to the powers which he could enjoy and must be held to have consented to his exercise of those broader powers without further consideration and revision. This is the same case. When the Senate confirmed Severino Alberto to be a justice of the peace for San José del Monte, § 206, with the proviso, was in force; and when the Senate confirmed him it confirmed him with the knowledge of the possibility declared in the law that his powers and his functions as a justice of the peace, upon designation of the Governor-General, might be performed and exercised in another jurisdiction, if the Governor-General should think it wise in the public interest in his regulation of the conduct of justices of the peace. There is no such necessary difference between the duties of a justice of the peace in one part of the Islands and those to be performed in another part as to make such enlargement or change of his jurisdiction, already provided for in existing law, unreasonably beyond the scope

of the consent to the original appointment. Such an extension of his duties is of the same kind as those, provided before the proviso was enacted, in respect to the merging of districts, their enlargement, or their combination by uniting one district with another under the existing justice of the peace. See *Shoemaker* v. *United States,* 147 U. S. 282, 301; *Southern Pacific Co.* v. *Bartine,* 170 Fed. 725, 748.

It is constantly to be borne in mind that this whole subject matter, in respect to the institution of justices of the peace as part of the government structure in the Philippines, is wholly within the control of the Legislature. If what they provide results in greater control by the Governor-General than is wise, the Legislature may repeal the provisions tomorrow and substitute some other limitations.

Some general observations were made by the Supreme Court with reference to the necessity of maintaining the independence of the judiciary, and expressions of opinion that this independence should be preserved strictly as it should be with respect to judges of superior court jurisdiction. It has always been recognized that justices of the peace, even in our system, are of less importance in the judiciary, and must be made to conform to greater regulation, than the judges of higher courts. *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 17, 38. Justices of the peace are judicial officers, it is true, but they are much to be differentiated from judges of the courts of record. We do not think, therefore, that the case of *Borromeo* v. *Mariano,* 41 Phil. 322, with reference to the transfer and removal of a judge of the court of first instance, has application here.

The judgment is reversed.

ITHACA TRUST COMPANY, EXECUTOR AND TRUSTEE, *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 267. Argued February 27, 1929.—Decided April 8, 1929.

1. Where a will makes bequests to charities, to be paid after the death of the testator's wife from a residuary estate bequeathed to her for life, and allows the wife to use from the principal any sum "that may be necessary to suitably maintain her in as much comfort as she now enjoys," and the income of the estate at the death of the testator, after paying specific debts and legacies, is more than sufficient to maintain the widow as required, her authority to draw on the principal, being thus limited by a standard fixed in fact and capable of being stated in definite terms of money, does not render the value of the charitable bequests so uncertain as to prevent their deduction from gross income, under § 403 (a) (3) of the Revenue Act of 1918, in computing the estate tax. P. 154.
2. The estate tax being on the act of the testator and not on the receipt of property by legatees, the estate transferred is to be valued as of the time of the testator's death. P. 155.
3. Therefore, the value of a life estate is to be determined on the basis of life expectancy as of that time, even though the life tenant died before the time came for computing and returning the tax. *Id.*

64 Ct. Cls. 686, reversed.

CERTIORARI, 278 U. S. 589, to review a judgment for the United States in a suit brought by the Trust Company to recover money collected as estate taxes.

Mr. A. F. Prescott, Jr., with whom *Messrs. Simon Lyon* and *R. B. H. Lyon* were on the brief, for petitioner.

At the testator's death, the charitable bequests were vested. *First Nat'l Bank* v. *Snead,* 24 F. (2d) 186; *McArthur* v. *Scott,* 113 U. S. 340.

The value of the net estate is to be determined by facts known at the time of the computation rather than by facts known at the time of decedent's death. *Boston Safe Deposit Co.* v. *Nichols,* 18 F. (2d) 660; *Herold* v. *Kahn,* 159

Fed. 608; *Union Trust Co.* v. *Heiner,* 19 F. (2d) 362; *Central Union Trust Co.* v. *United States,* 61 Ct. Cls. 828.

The value of the bequests was not ascertainable upon facts known at the time of death. But the statute and regulations prescribe the period within which to ascertain deductions, and the death of the widow within the period made the value of the bequests definite; and such value was therefore deductible. *First Nat'l Bank* v. *Snead,* 24 F. (2d) 186; *Mercantile Trust Co.* v. *Comm'r of Internal Revenue,* 13 B. T. A. 85. Distinguishing *Mitchell* v. *United States,* 63 Ct. Cls. 613, affirmed, *sub nom. Humes* v. *United States,* 267 U. S. 487.

Solicitor General Mitchell for the United States.

The will, properly construed, placed the residuary estate in the hands of the executrix and the executor, in trust during the widow's life. Such discretion as existed in determining the necessity for drawing on the principal was given not alone to the widow, but to the executor acting with her. The widow did not have the unrestrained use of the principal, but was limited to such use as was necessary to maintain her in her accustomed standard of living. Beyond that she could not go, and these restraints were enforceable in the courts. The findings of fact as to the widow's standard of living and as to the amount of the income took the amount of the residuary bequest out of the field of mere speculation and afforded a reasonable basis for determining its value and amount. On this point our views differ with the Court of Claims and with those of the Bureau of Internal Revenue, as disclosed by its regulations, and accord with those of the Circuit Court of Appeals in *First Nat'l Bank* v. *Snead,* 24 F. (2d) 186.

As a practical matter, there are more uncertainties as to the real value of a bequest to charity in an individual case when determined by mortality tables than there was in this case as to the extent to which the power to use

the principal might operate to diminish the charitable bequest. This point of view is supported by *Herron* v. *Heiner,* 24 F. (2d) 745 and the case first cited. *Kahn* v. *Bowers,* 9 F. (2d) 1018, distinguished; s. c., Vol. 5, Am. Tax Rep. 5888. See also *Dugan* v. *Miles,* 292 Fed. 131.

The case of *Humes* v. *United States,* 276 U. S. 487, bears only indirectly on this case, in that the contingencies were such that there was no basis through the use of mortality tables or any other reasonable method, for ascertaining the value of the bequest to charity.

The rights of the parties in regard to the payment of a tax of this kind are ordinarily to be determined as of the time of the decedent's death. *Howe* v. *Howe,* 179 Mass. 546; *McCurdy* v. *McCurdy,* 197 Mass. 248; *Hooper* v. *Bradford,* 178 Mass. 95; *In re White's Estate,* 208 N. Y. 64. The value of the life estate or remainder interest as of the date of the testator's death was not changed by subsequent events. See cases *supra,* and *United States* v. *Farr's Executor,* 196 Fed. 996.

It is true that in both Massachusetts and New York, the taxing statutes expressly authorize the use of mortality tables, but so do the estate tax regulations of the Treasury Department. See *Simpson* v. *United States,* 252 U. S. 547; *Cochran* v. *United States,* 254 U. S. 387; *Henry* v. *United States,* 251 U. S. 393; *United States* v. *Fidelity Trust Co.,* 222 U. S. 158; Gleason & Otis, Inheritance Taxation (1925), p. 505; *Boston Safe Deposit Co.* v. *Nichols,* 18 F. (2d) 660.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover the amount of taxes alleged to have been illegally collected under the Revenue Act of 1918, February 24, 1919, c. 18, 40 Stat. 1057, in view of the deductions allowed by § 403 (a) (3), 40 Stat. 1098. The Court of Claims denied the claim, 64 C. Cls. 686, and a writ of certiorari was granted by this Court.

On June 15, 1921, Edwin C. Stewart died, appointing his wife and the Ithaca Trust Company executors, and the Ithaca Trust Company trustee of the trusts created by his will. He gave the residue of his estate to his wife for life with authority to use from the principal any sum "that may be necessary to suitably maintain her in as much comfort as she now enjoys." After the death of the wife there were bequests in trust for admitted charities. The case presents two questions the first of which is whether the provision for the maintenance of the wife made the gifts to charity so uncertain that the deduction of the amount of those gifts from the gross estate under § 403 (a) (3), *supra,* in order to ascertain the estate tax, cannot be allowed. *Humes* v. *United States,* 276 U. S. 487, 494. This we are of opinion must be answered in the negative. The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the testator, and even after debts and specific legacies had been paid, was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs.

The second question is raised by the accident of the widow having died within the year granted by the statute, § 404, and regulations, for filing the return showing the deductions allowed by § 403, the value of the net estate and the tax paid or payable thereon. By § 403 (a) (3) the net estate taxed is ascertained by deducting, among other things, gifts to charity such as were made in this case. But as those gifts were subject to the life estate of the widow, of course their value was diminished by the postponement that would last while the widow

lived. The question is whether the amount of the diminution, that is, the length of the postponement, is to be determined by the event as it turned out, of the widow's death within six months, or by mortality tables showing the probabilities as they stood on the day when the testator died. The first impression is that it is absurd to resort to statistical probabilities when you know the fact. But this is due to inaccurate thinking. The estate so far as may be is settled as of the date of the testator's death. See *Hooper* v. *Bradford,* 178 Mass. 95, 97. The tax is on the act of the testator not on the receipt of property by the legatees. *Young Men's Christian Association* v. *Davis,* 264 U. S. 47, 50; *Knowlton* v. *Moore,* 178 U. S. 41, 49, and *passim; New York Trust Co.* v. *Eisner,* 256 U. S. 345, 348, 349; *Edwards* v. *Slocum,* 264 U. S. 61. Therefore the value of the thing to be taxed must be estimated as of the time when the act is done. But the value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market. See *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 222. Like all values, as the word is used by the law, it depends largely on more or less certain prophecies of the future; and the value is no less real at that time if later the prophecy turns out false than when it comes out true. See *Lewellyn* v. *Electric Reduction Co.,* 275 U. S. 243, 247. *New York* v. *Sage,* 239 U. S. 57, 61. Tempting as it is to correct uncertain probabilities by the now certain fact, we are of opinion that it cannot be done, but that the value of the wife's life interest must be estimated by the mortality tables. Our opinion is not changed by the necessary exceptions to the general rule specifically made by the Act.

Judgment reversed.

UNITED STATES PRINTING & LITHOGRAPH COMPANY *v.* GRIGGS, COOPER & COMPANY.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 372. Argued March 6, 1929.—Decided April 8, 1929.

The Trade Mark Act of 1905 provides no remedy where the infringement of a trade mark registered under it is within the limits of a State and does not interfere with interstate or foreign commerce, nor does it enlarge common law rights within a State where the mark has not been used. P. 158.

119 Oh. St. 151, reversed.

CERTIORARI, 278 U. S. 592, to the Supreme Court of Ohio to review a judgment affirming a decree which enjoined petitioner from the printing and selling of labels alleged to infringe respondent's trade mark.

Mr. Walter F. Murray, with whom *Mr. Frank F. Dinsmore* was on the brief, for petitioner.

Trade-mark rights, resting on the laws of the States, are limited to States in which the trade-marks are used. *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 425; *United Drug Co.* v. *Rectanus Co.,* 248 U. S. 100.

Congress has no right to legislate upon the substantive law of trade-marks. *Trade-Mark Cases,* 100 U. S. 93; *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 416.

Registration under the Trade-Mark Act does not extend the rights of the registrant into States in which he has done no business. *General Baking Co.* v. *Gorman,* 3 F. (2d) 893. It confers no rights that the registrant did not have under the common law. *Waldes* v. *International Mfrs. Agency,* 237 Fed. 502; *Robertson* v. *U. S. ex rel. Baldwin Co.,* 287 Fed. 943; *Andrew Jergens Co.* v. *Woodbury,* 273 Fed. 952; *Ammon & Person* v. *Narragansett Dairy Co.,* 262 Fed. 880.

Messrs. E. Howard Morphy and *Carl W. Cummins,* with whom *Messrs. Orris P. Cobb* and *Oliver G. Bailey* were on the brief, for respondent.

The Trade-Mark Act projects the protection afforded by the Act to the owner of registered trade-marks throughout the entire United States in all of the channels of interstate commerce in advance of the sale of merchandise bearing the registered trade-mark. *Standard Brewing Co.* v. *Interboro Brewing Co.*, 229 Fed. 543.

A registered trade-mark owner actually using the mark in interstate commerce is entitled to protection in interstate commerce against any infringer or contributing infringer where it appears that goods bearing the infringing labels move in the channels of interstate commerce.

The common law has no application to the facts in this case, for the reason that the registered trade-mark of respondent was projected by trade into a certain territory in which the customers of petitioner thereafter engaged in business. The petitioner was a common law contributing infringer. *Colman* v. *Crump,* 40 N. Y. Supp. 584, affirmed, 70 N. Y. 573; *Carson* v. *Urg,* 39 Fed. 777; *Hennessy* v. *Herrman,* 89 Fed. 669.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit brought by the respondent, a corporation of Minnesota, against the petitioner, a corporation of Ohio, alleging that the plaintiff has a trade mark 'Home Brand', registered in the Patent Office for various grocers' goods which it sells at wholesale in certain named States of the northwest; and that the defendant is printing and selling labels for similar grocers' goods, containing the word 'Home', which labels are used by the purchasers in States other than those in which the plaintiff has established a market. No interference with interstate or foreign commerce is alleged. The bill seeks an injunction against

printing and selling such labels for any groceries that the plaintiff sells. The trial court found the facts to be as above stated and the Supreme Court held that the "purpose and effect of the [Trade Mark Act of February 20, 1905, c. 592, § 16; 33 Stat. 728, (C., Tit. 15, § 96)] was to project the trade mark rights of the registrant and owner thereof into all the states even in advance of the establishment of trade therein, and to afford full protection to such registrant and owner." It affirmed a judgment for the plaintiff giving the relief prayed and a writ of certiorari was granted by this Court.

In the *Trade Mark Cases,* 100 U. S. 82, it was held that the earlier acts attempting to give these unlimited rights were beyond the power of Congress. Soon after that decision, an Act of March 3, 1881, gave remedies for the wrongful use of a registered trade mark in foreign commerce or commerce with Indian Tribes. It was said that obviously the Act was passed in view of the above mentioned case, that only the trade mark used in such commerce was admitted to registry and that the registered mark could only be infringed when used in that commerce, *Warren* v. *Searle & Hereth Co.,* 191 U. S. 195, 204, (see *United Drug Co.* v. *Theodore Rectanus Co.,* 248 U. S. 90, 99,) and the constitutionality of the Act even when so limited was left open. 191 U. S. 206. The Act of 1905 goes a little farther and gives remedies against reproduction, &c., of the registered trade mark 'in commerce among the several States' as well as in commerce with foreign nations, &c., § 16, *supra.* A remedy for such infringement was given in *Thaddeus Davids Co.* v. *Davids Manufacturing Co.,* 233 U. S. 461, see also *American Steel Foundries* v. *Robertson,* 262 U. S. 209. *Baldwin Co.* v. *Robertson,* 265 U. S. 168. But neither authority nor the plain words of the Act allow a remedy upon it for infringing a trade mark registered under it, within the limits of a State and not affecting the commerce named. More obviously still

it does not enlarge common law rights within a State where the mark has not been used. *General Baking Co.* v. *Gorman,* 3 F. (2d) 891, 894. Some attempt was made to support the decision upon other grounds, but we do not think them presented by the record, and they are not mentioned by the Ohio Court.

Judgment reversed.

GILCHRIST ET AL., CONSTITUTING THE TRANSIT COMMISSION, ET AL. *v.* INTERBOROUGH RAPID TRANSIT COMPANY ET AL.

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

No. 159. Argued October 16, 17, 18, 1928. Reargued January 14, 15, 16, 1929.—Decided April 8, 1929.

A New York street railway corporation, operating in the City of New York (1) subway lines belonging to and leased from the city, and which were part of the city streets, in connection with (2) elevated lines belonging to and leased from another corporation, and (3) extensions of such elevated lines, sought to increase the rate of fare, which had been fixed at five cents for all the lines by the leases and by the agreement under which the extensions had been constructed, and to that end proposed a seven cent fare and applied to the Transit Commission of New York to sanction the change, on the ground that the existing rate was confiscatory. The commission, acting within the time allowed it by statute, made an order denying the application for want of power to change the rate fixed by the subway contracts, and brought proceedings in a state court, as did also the city, to compel the company to observe that rate. On the same day when this formal action was taken, but earlier and when there was merely a consensus among the commission's members that it should be taken, the company filed its original bill in the federal court alleging that the five cent rate had become confiscatory and that the commission had failed to grant relief, and praying an injunction against any attempt on the part of the commission or the city to enforce that rate, or to interfere with the establishment of the one proposed; and thereafter it filed a sup-

plemental bill reciting the action taken by the commission after the filing of the original bill, renewing its prayer for an injunction, and especially asking that further prosecution of the proceedings in the state court be forbidden. The case, involving complex contracts and intricate state statutes, raised questions of state law, particularly as to the binding effect of the contract rate and the power of the commission to grant a higher one, which had not been authoritatively settled by the state courts. It was not shown with fair certainty that the contract rate was so low as to be confiscatory, that the one proposed in lieu was reasonable, or that, before the original bill was filed, the commission had taken, or was about to take, any improper action; the attitude of the commission on the questions presented had been manifested on former occasions; there had been abundant opportunity to test the questions in the state courts, and there was no ground for anticipating undue delay or hardship from having them so decided.

Held that an order of the federal court granting the interlocutory injunction prayed, was improvident and an abuse of discretion. P. 207.

26 F. (2d) 912, reversed.

APPEAL from an order of a district court of three judges granting an interlocutory injunction in a suit brought by the Interborough Rapid Transit Company against Gilchrist and other individuals constituting the Transit Commission, the same being the Metropolitan Division of the Department of Public Service of the City of New York; William A. Prendergast, as Chairman of that Department; The Manhattan Railway Company, and the City of New York. The Manhattan Railway Company filed a cross-bill praying affirmative relief against the other defendants. The order, among other provisions, restrained the commission and the city, pending the suit, from enforcing against the plaintiff a five cent rate of fare upon the rapid transit lines operated by it, part of which were elevated railways leased to it by The Manhattan Company, and from preventing higher charges and from prosecuting actions in the state court. The commission and the city appealed and the Interborough and Manhattan Companies ap-

peared as appellees. An ancillary suit brought in the District Court after the original bill in this case had been filed, also resulted in an injunction. See 25 F. (2d) 164.

*Mr. Irwin Untermyer,** with whom *Messrs. Samuel Untermyer* and *Charles Dickerman Williams* were on the brief, for appellant Transit Commission of New York.

The federal court has no jurisdiction to enjoin the Commission, as a contractual party, from instituting judicial proceedings to enforce the contracts in the state courts, even assuming the contracts to be unenforceable. *St. Paul Gas Light Co.* v. *St. Paul,* 181 U. S. 142; *Des Moines* v. *Des Moines R. Co.,* 214 U. S. 179; *South Covington Ry. Co.* v. *Newport,* 259 U. S. 97; *Western Union* v. *Georgia,* 269 U. S. 67; *Cincinnati* v. *Cincinnati & Hamilton Traction Co.,* 245 U. S. 446; *St. Augustine* v. *St. Johns Electric Co.,* 286 Fed. 474; *American T. & T. Co.* v. *New Decatur,* 176 Fed. 133. Property taken by orderly judicial proceedings, however erroneous the decision may be, is not taken "without due process of law" (*Ross* v. *Oregon,* 227 U. S. 150), and there is no more reason to exercise jurisdiction in cases to which a state contract-making body is a party than there is to review the decision of a state court in any ordinary contract case.

The plaintiff could not at the time it instituted this suit enjoin the Commission in its regulatory capacty from taking action under the Public Service Commission Law with respect to its amendatory schedules, on the theory that the action of the Commission, if taken, would be unconstitutional. The regulatory powers of the Commission here with respect to rates are indisputably legislative

* *Mr. Irwin Untermyer,* for the Transit Commission, *Mr. Charles L. Craig,* for the City of New York, and *Messrs. William L. Ransom* and *George W. Wickersham,* for the Interborough and Manhattan Companies, participated in the first argument of the cause.

since it acts under the rate-making authority of the legislature. *Prentis* v. *Atlantic C. L. R. Co.,* 211 U. S. 210.

If action by the Commission may be enjoined before it is taken, then upon identical principles, action by the legislature may be enjoined before it is taken, on the theory that the legislature intends to enact an unconstitutional statute.

It has been uniformly held that a federal court may not enjoin the enactment of legislation or the exercise of powers of a legislative character on the theory that, if thus exercised, they would be unconstitutional. Such a suit would, moreover, constitute a suit against the State. *Fitts* v. *McGhee,* 172 U. S. 516.

Until a statute has been enacted, or an order made, no injury to anyone is possible, and thereafter any person is in a position, in a proper case, to protect himself from injury by an injunction against its execution. *New Orleans Water Co.* v. *New Orleans,* 164 U. S. 41; *McChord* v. *L & N. R. Co.,* 183 U. S. 483; *Southern Pacific Co.* v. *Bartine,* 170 Fed. 725; *Chicago, B. & Q. R. Co.* v. *Winnett,* 162 Fed. 242; *Alpers* v. *San Francisco,* 32 Fed. 503. Other cases to the same effect are: *Rico* v. *Snyder,* 134 Fed. 953; *Missouri R. Co.* v. *Olathe,* 156 Fed. 624; *Gas & Electric Co.* v. *Manhattan & Queens Corp'n,* 266 Fed. 625; *Stevens* v. *St. Mary's Training School,* 144 Ill. 332.

Under the construction of § 49 of the Public Service Commission Law in *Matter of Quinby* v. *Public Service Comm'n,* 223 N. Y. 244, the Commission, in the absence of contract, would have been authorized to increase, as well as to reduce, the rate stipulated in any "general or special statute," including Chapter 743 of the laws of 1894. Moreover, since the plaintiff is not entitled to any relief except under the Public Service Commission Law, it may secure relief only as provided thereby and not by litigation in the federal courts. *Henderson Water Co.* v. *Corp'n*

Comm'n, 269 U. S. 279; *Galveston, H. & S. A. R. Co.* v. *Wallace,* 233 U. S. 481; *Pollard* v. *Bailey,* 20 Wall. 520; *Farmers' Nat'l Bank* v. *Dearing,* 91 U. S. 29; *United States* v. *Babcock,* 250 U. S. 328.

Since the plaintiff had no cause of action at the time it filed its original bill, that defect cannot be cured by allegations, by supplemental bill, of facts that occurred thereafter. *Chicago Grain Door Co.* v. *Chicago, B. & Q. R. Co.,* 137 Fed. 101; *Mellor* v. *Smither,* 114 Fed. 116; *Putney* v. *Whitmire,* 66 Fed. 385; *N. Y. Security & Trust Co.* v. *Lincoln Street R. Co.,* 74 Fed. 67; *Bernard* v. *Toplitz,* 160 Mass. 162.

It must be admitted, and the District Court concedes, that were it not for the existence of the Public Service Commission Law, the plaintiff would not be entitled to relief from the contractual rate of fare, no matter how unremunerative that rate may be. *Columbus R. & P. Co.* v. *Columbus,* 249 U. S. 399; *Public Service Comm'n* v. *St. Cloud,* 265 U. S. 352; *Paducah* v. *Paducah R. Co.,* 261 U. S. 267; *Georgia R. Co.* v. *Decatur,* 262 U. S. 432; *Southern Utilities Co.* v. *Palatka,* 268 U. S. 232.

Since, therefore, the right to collect a fare in excess of the contract rate is not a right existing under the Constitution, the "right" asserted here involves the enforcement of a statutory right which proceeds exclusively from the Public Service Commission Law. So far as the constitutional rights of the plaintiff are concerned, an increase in the rate is a mere privilege which the State might withhold or grant at its pleasure and with respect to which it could impose whatever conditions it pleased. It must, therefore, be evident that the State was under no obligation to enact, nor has the plaintiff any standing in a federal court to compel the execution of the provisions of the Public Service Commission Law. *Arkansas Gas Co.* v. *R. R. Comm'n,* 261 U. S. 379.

That the legislature has provided for review by certiorari of any order made by the Commission under the statute is merely the grant of an additional privilege, that, under the Constitution, the legislature was not under any obligation to allow.

Inherently this is not a rate case in any accurate sense of that term. It is a case involving contracts from which the plaintiff claims to be entitled to relief only on account of the existence of a state statute, which, the plaintiff contends, is not being properly executed by the administrative agency. For this alleged misconstruction of the statute, not impairing any constitutional right, neither the State nor the agent is responsible to any federal authority. Although under the statute the refusal of the Commission to act might involve the denial of a legal right, yet so far as the Constitution is concerned, the right thus denied is a mere privilege or act of grace, the denial of which presents no federal question. It is therefore no inconsistency to say that a statutory right may be a constitutional privilege. *Brearly School* v. *Ward,* 201 N. Y. 358; *Laird* v. *Carton,* 196 N. Y. 169; *Bull* v. *Conroe,* 13 Wis. 233; *In re Seaholm,* 136 Fed. 144; Cooley, Const. Lim., 7th ed., p. 546; *Henderson Water Co.* v. *Corp'n Comm'n,* 269 U. S. 278; *People* v. *Rosenheimer,* 209 N. Y. 115; *People* v. *Crane,* 214 N. Y. 154, s. c., 239 U. S. 195; *Christ Church* v. *Philadelphia,* 24 How. 300.

Since no right of the plaintiff under the Constitution is involved, it is immaterial whether the denial of relief occurred upon the plaintiff's application under § 29 in 1928, or under § 49 in 1920 and in 1921. It is the nature of the right that must determine the question of federal jurisdiction. *Wichita R. & L. Co.* v. *Public Utilities Comm'n,* 260 U. S. 48.

It has been directly held by this Court that the binding effect of such contracts as between the parties was not impaired because, under state law or constitution,

the legislature retained "unfettered power" at any moment to revise the contract rate. *Southern Utilities Co.* v. *Palatka,* 268 U. S. 232; *Opelika* v. *Opelika Sewer Co.,* 265 U. S. 215.

The delegation of legislative power to revise, even though coupled with the duty, does not constitute an exercise of the rate-making power. The State would not exercise its rate-making power until the Commission exercised that power by making an order increasing, or by approving the increase of, the contract rate. This is evident from a consideration of the provisions of the Public Service Commission Law, which show that the provisions of the Law do not operate directly on the contract or the rate, but operate only by order to be made by the Commission. Indeed, if it had been intended that the provision of the Law that rates should be "just and reasonable" should operate directly on the contract or the rate, what was the Commission established for and why was it required to "determine" the rate whenever "in its opinion" that was necessary and to "fix the same by order to be served upon all common carriers"?

This principle has been sustained and applied by this Court and by the courts of every State in which the question has arisen. *Missouri Pacific R. Co.* v. *Larabee Mills,* 211 U. S. 612; *Manitowoc* v. *Manitowoc & Northern Traction Co.,* 145 Wis. 13; *Milwaukee Electric R. & L. Co.* v. *R. R. Comm'n,* 238 U. S. 174; *Monroe* v. *Detroit M. & T. R. Co.,* 187 Mich. 364; *Lanawee County G. & E. Co.* v. *Adrian,* 209 Mich. 52; *Henrici* v. *South Feather Land Co.,* 177 Cal. 442; *Southern Pacific Co.* v. *Spring Valley Water Co.,* 173 Cal. 291; *Salt Lake City* v. *Utah L. & T. Co.,* 52 Utah 476; *Traverse City* v. *Michigan R. R. Comm'n,* 202 Mich. 575.

This also is the law of New York State. *People ex rel. N. Y. etc. R. Co.* v. *Public Service Comm'n,* 193 App. Div. 445; *Buffalo* v. *Frontier Telephone Co.,* 203 N. Y. 589; *People ex rel. New York* v. *Nixon,* 229 N. Y. 356.

The District Court failed to distinguish between a contract that is void and a contract that is subject to modification under the regulatory power of the State. *Southern Iowa Electric Co.* v. *Chariton,* 255 U. S. 539; *San Antonio* v. *San Antonio Public Service Comm'n,* 255 U. S. 547, are for that reason inapplicable. *Henderson Water Co.* v. *Corp'n Comm'n,* 269 U. S. 278.

The question of whether or not the State, in the exercise of its police power, may reduce or increase the rate, is entirely different from the question of whether the parties may escape the obligations of the contract in the absence of action by the State. Cf. *Opelika* v. *Opelika Sewer Co.,* 265 U. S. 215; *Southern Utilities Co.* v. *Palatka,* 268 U. S. 232.

The contracts prohibited in the *Chariton* and *San Antonio* cases were expressly authorized here by the Rapid Transit Act.

Every presumption is against the jurisdiction of the Commission to demolish the very contracts that were constructed with legislative authority. The rule here applicable is precisely the converse of the rule where the question is whether the legislature has permanently alienated its police power over rates. *Quinby* v. *Public Service Comm'n,* 223 N. Y. 241; *People ex rel. N. Y., etc. R. Co.* v. *Wilcox,* 200 N. Y. 423; *Silver* v. *L. & N. R. Co.,* 213 U. S. 175.

There is a fundamental distinction between rate contracts executed without legislative authority and rate contracts which the legislature has expressly authorized. The conflict here is not between a private contract and the Public Service Commission Law of 1907; it is between the general regulatory provisions of the Public Service Commission Law of 1907 and the special provisions of the Rapid Transit Act of 1912 by which the contracts were authorized to be made. If it be true that the provisions of the Public Service Commission Law were "written

into" the contracts, *People ex rel. City of New York* v. *Nixon,* 229 N. Y. 356, it is likewise true that the provisions of the Rapid Transit Act were to the same extent "written into" them. And, when those provisions are examined, it is found that the legislature expressly authorized the contracts to be made, which is equivalent to declaring that they should be binding during the contract term, unless the word "contract" is without legal significance. This distinction is the test to determine whether or not the contract is entitled to protection under § 10 of Art. I of the Constitution. *Cleveland* v. *Cleveland City R. Co.,* 194 U. S. 517; *Home T. & T. Co.* v. *Los Angeles,* 211 U. S. 265; *Vicksburg* v. *Vicksburg Water Works Co.,* 206 U. S. 496; *Detroit* v. *Detroit Citizens R. Co.,* 184 U. S. 368; *Los Angeles* v. *Los Angeles Water Co.,* 177 U. S. 558; *Superior Water, L. & P. Co.* v. *Superior,* 263 U. S. 125; *St. Cloud Public Service Co.* v. *St. Cloud,* 265 U. S. 352; *Georgia R. & P. Co.* v. *Decatur,* 262 U. S. 432; *New Orleans Gas Co.* v. *Louisiana Light Co.,* 115 U. S. 650.

By the Rapid Transit Act the State delegated to the parties the power to contract concerning the rate of fare both on the subway and elevated lines. The character of these contracts and the direct participation of the State in their execution is evident from the fact that they are required to be executed, not directly between the Interborough and the City of New York, but between the Interborough and the Commission whose action, although taken on behalf of the City, was that of state officials. *Litchfield Construction Co.* v. *City of New York,* 244 N. Y. 251; *Gubner* v. *McClellan,* 130 App. Div. 716. The only limitation upon the action of the Commission is that it shall receive the approval of the Board of Estimate and Apportionment.

The five-cent fare provisions in the certificate and in Contract 3 were authorized by the Rapid Transit Act, §§ 24, 27.

A fare provision is plainly authorized by the broad grant of power contained in § 24 to "fix and determine . . . such other terms, conditions and requirements as to the said boards may appear just and proper." *Cleveland* v. *Cleveland City R. Co.*, 194 U. S. 517; *Columbus R. & P. Co.* v. *Columbus,* 249 U. S. 399; *Omaha Water Co.* v. *Omaha,* 147 Fed. 1.

Section 27, under which Contract 3 was executed and which in part provides "Every such contract shall contain such terms and conditions as to the rates of fare to be charged . . . as said Commission shall deem to be best suited to the public interests," granted unqualified authority to contract for a fixed fare for the entire life of the contract.

On account of the special provisions of the Rapid Transit Act, the fare stipulations in these contracts are withdrawn from the rate-regulatory powers of the Commission. Since a "reasonable" rate of fare as defined by the Public Service Commission Law, will rarely, if ever, coincide with a "contractual" rate as determined by the parties, it follows that the contract made by legislative authority must be supreme, because if not supreme, the authority to contract becomes meaningless and nugatory.

To hold that the contracts concerning rates of fare on the subway and elevated lines did not protect both parties against an increase or reduction in the rate of fare, renders those provisions of the Rapid Transit Act authorizing such contracts to be made meaningless, if not ridiculous. The very purpose of the authority thus delegated to the parties was to permit them to accomplish a result that could not be secured except by contract and that might not be consistent with the limitations and provisions of the Public Service Commission Law.

The case at bar falls directly within *Public Service Co.* v. *St. Cloud,* 265 U. S. 352.

People ex rel. N. Y., N. H. & H. R. Co. v. *Wilcox,* 200 N. Y. 423, and other decisions of the Court of Appeals have established that matters specially authorized by the legislature are withdrawn from the operation of the Public Service Commission Law. *Village of Fort Edward* v. *Hudson Valley R. Co.,* 192 N. Y. 139; *New York City* v. *Brooklyn City R. Co.,* 232 N. Y. 463.

The Rapid Transit Act, amended in 1912 to authorize the contracts here and which deals specially with the subject of rapid transit in cities of over one million inhabitants, withdrew those contracts from the regulatory powers of the Commission with respect to fare. *Parker* v. *Elmira, etc. R. Co.,* 165 N. Y. 274.

The conditions under which the amendments of 1912 were enacted, taken in connection with the decision of the Court of Appeals in the *Admiral Realty Company* case, 206 N. Y. 110, prove that the rates stipulated in the contracts were not intended to be subject to the Public Service Commission Law.

Other considerations which establish that the legislature could not have intended rapid transit contracts to be subject to the jurisdiction of the Commission are to be found in important amendments of 1921, 1922, and 1923, to the Public Service Commission Law; in a memorial to the legislature of 1925 to enact a statute increasing the rate of fare, and the failure of the legislature to do so; the approval of the contracts by the City required by the Rapid Transit Act, together with the amendments of 1925 to the Public Service Commission Law requiring similar approval of any modification thereof, proving that it could not have been intended to permit the rate of fare to be altered against the opposition of the Commission and the City; the amendment of § 7 of the Rapid Transit Act of 1894, which required any franchise privately to construct and operate a rapid transit railway to contain a provision limiting the rate of fare to five cents. Notwith-

standing the enactment of the Public Service Commission Law in 1907, and notwithstanding that the legislature during that period twice amended the Rapid Transit Act, it did not undertake to alter this provision of § 7 until, by the amendments of 1909, it further extended the powers of the Commission by removing this, the only limitation even with respect to privately constructed rapid transit lines.

The consequences of holding that the Commission was under the duty to revise rates in contracts, which it was its duty to enforce, demonstrate that the Commission was not intended to exercise such regulatory authority over these contracts.

The Rapid Transit Act expressly provides for the character of public regulation that may be exercised. It may be such, and only such, as the Interborough and the Commission might agree upon with the approval of the City.

People ex rel. City of New York v. *Nixon,* 229 N. Y. 356, is inapplicable because the provisions of the State Constitution under which the franchise contract there had been granted did not authorize, nor had the legislature authorized, any stipulation with respect to the rate of fare.

By Contract 3 the fare provisions of Contracts 1 and 2 were not superseded. Both Contracts 1 and 2 were made before the enactment of the regulatory provision respecting fares contained in § 49 of the Public Service Commission Law. Hence, as the Court of Appeals has decided, the provisions of § 49 can, in no event, have any relation to those contracts. *Matter of Quinby* v. *Public Service Comm'n,* 223 N. Y. 224, s. c. 227 N. Y. 601; *People ex rel. City of New York* v. *Nixon,* 229 N. Y. 356; *People ex rel. Garrison* v. *Nixon,* 229 N. Y. 645; *Matter of Evans* v. *Public Service Comm'n,* 246 N. Y. 224.

Even if Contract 3 had superseded Contracts 1 and 2, it is " so related to the earlier contracts " as to fall within

the exception stated in the *Nixon* case and applied in the *Garrison* case.

The earnings of the Interborough since 1920, even as alleged in the complaint, have consistently increased, notwithstanding the increased cost of labor and materials. The plaintiff is earning more than a fair return on its property, both subway and elevated, based upon its actual investment therein.

The value upon which the plaintiff is entitled to a fair return is determined by the character of its interest in the property, and that value is limited by the provisions of Contract 3 and of the certificate. The value of the property upon which the plaintiff is entitled to a fair return is exactly the equivalent of the value to which it would be entitled if its property were taken by eminent domain.

On account of the recapture and amortization provisions of Contract 3 and the certificate, the value of the property on which the plaintiff is entitled to earn a fair return can in no event exceed by more than fifteen per cent. its original investment cost.

At a five-cent fare the Interborough is earning a reasonable return upon the present fair value of its property devoted to the public service. On account of the Interborough's preferentials under Contract 3 and the certificate, it is not entitled to a return of eight per cent.

Mr. Charles L. Craig, with whom *Messrs. George P. Nicholson, Joseph A. Devery,* and *Edgar J. Kohler* were on the brief, for appellant City of New York.

The contracts between the City and the Interborough Company are not subject to regulation.

While these contracts contain what is called a "lease," they are, in effect, contracts of employment, or for personal service, by which the Company operates for the City the subway system, constructed at public expense, to effectuate a great city purpose. There is nothing in the Rapid

Transit Act that requires the contractor to be a railroad corporation. *Sun Printing Ass'n* v. *Mayor,* 152 N. Y. 257; *City of New York* v. *Brooklyn City R. Co.,* 232 N. Y. 470. *People ex rel. Interborough Rapid Transit Co.* v. *Tax Comm'rs,* 126 App. Div. 610, affirmed, 195 N. Y. 618; *Interborough Rapid Transit Co.* v. *Sohmer,* 237 U. S. 276.

While the rate of fare was one of the terms and conditions of the first two contracts resulting from the acceptance of a proposal submitted in response to an advertised letting, it was not a matter that the City or the Board ever discussed with the contractor or in which he had any voice any more than in the location of the road.

Chapter 226 of the Laws of 1912, which authorized Contract No. 3 to be made, re-enacted the requirement that the contract contain the "terms and conditions as to the rates of fare to be charged." Amendments of 1909 and 1912 provided for readjustment of operator's compensation, but not by a change of fare.

Moreover the statute provided that any readjustment of compensation was not by regulatory authority under the Public Service Commission Law, but by agreement, arbitration or the court. The Interborough conclusively elected no readjustment of compensation.

In case of municipal operation, changes in the rate of fare were to be made by readjustment from time to time by the Board of Rapid Transit Railroad Commissioners, but always with the public interest in mind, of furnishing service at cost. Laws of 1909, § 34-d, now Rapid Transit Act, § 30; *Matter of Rapid Transit R. Comm'rs,* 197 N. Y. 81.

It is clear, therefore, that the rates of fare, and whether compensatory or not, were no concern of the regulatory authority created by the Public Service Commission Law. Surely, the circumstance that the City employed a contractor to operate, instead of doing so itself, could make no difference.

The Public Service Commission Law does not purport to regulate the compensation of individuals who might constitute any "person" or "firm" performing the service of operation for the City of New York in carrying into effect the City purpose of providing rapid transit facilities for its inhabitants; or of any corporation doing so.

Neither the legislature nor the courts of New York have ever recognized any authority to fix or change the rates on the rapid transit lines owned by the City of New York, other than that exercised by the City of New York through its own Boards. *Matter of Rapid Transit R. Comm'rs,* 197 N. Y. 81; *Sun Printing Ass'n* v. *Mayor,* 8 App. Div. 230, 152 N. Y. 257; Rapid Transit Act, §§ 27, 30, 58; Board of Transportation Act, Laws 1924, c. 573, § 135. Cf. *Arkansas Natural Gas Co.* v. *Arkansas R. R. Comm'n,* 261 U. S. 379.

The power of regulation is never exercised except in the public interest. It is not in the public interest to frustrate the City's plan and policy of distribution of population. The powers and duties of the Municipal Government cannot be transferred to or vested in or subordinated to the Transit Commission, a body of state officers, in disregard of the local self-government provisions in the State Constitution.

Among the important powers and duties of the Board of Estimate and Apportionment, the governing body of the City, are those relating to streets. Under the Constitution and the Rapid Transit Act, its consent and approval is required for the location of all rapid transit railroads, and no appropriation for the construction or operation thereof can be made by any other board or body.

The order appealed from requires state officers—the Transit Commissioners—to exercise dominion over the streets and property of the City, which can only be validly exercised by local elective officers in the manner prescribed

in the State Constitution. Art X, § 2. Cf. *Louisiana Public Service Comm'n* v. *Morgan's Louisiana & Texas R. Co.*, 264 U. S. 393. It makes the Transit Commission the policy determining board of the City.

Now, when according to the contract the Interborough's return and accumulated deficits, with compound interest, have been paid in full, the order appealed from takes away from the Interborough all of the incentive for careful and economic operation, removes all of the elements of contingency, and substitutes coercion for contract right; and decrees virtually immediate discharge of the City's deficits by extra tolls from its inhabitants, so that the contingency of profits to the Interborough may be turned into certainty and cash.

The Interborough is employed by the City to render a service for it, namely, to maintain and operate its rapid transit properties. Its preferential of $6,335,000 covered in part its "services in connection with the operation of the property." Its compensation is a matter of agreement, requiring for its fixation the exercise of discretion by the City's officers. It is something that neither the legislature nor any state officers or agency can do for the City. *People ex rel. Rodgers* v. *Coler*, 166 N. Y. 1.

There is no equity in the Interborough's position. It is being paid in full according to the contract, the terms of which were dictated by it. The counterclaim in the City's answer opens the way for complete relief to the Interborough from existing contracts, upon terms just and equitable, to be fixed by the Court.

If it be assumed that it is a public service corporation, as distinguished from a private corporation rendering a service for the City of New York, valid contracts existing between the City of New York and the Interborough fix the rate of fare at five cents during the term thereof. Such contracts were made under full and express legislative authority. The validity thereof, and the constitutionality

of such legislation, have been adjudicated and sustained by the Court of Appeals of the State of New York. Where there is a contract, there is no confiscation.

The Rapid Transit Act, pursuant to which such contracts and Elevated Railroad Certificates were made, is a comprehensive special statute excluding any possible subordination to the Public Service Commission Law.

The legislature has not at any time empowered the Public Service Commission to regulate the rates of fare agreed upon in contracts made by the City pursuant to the Rapid Transit Act.

The decisions of the state courts in gas and street surface railway cases cited in the opinion, do not sustain the conclusion of the court below, but are contrary thereto. In particular, the decisions in the *Garrison* cases on reargument are fatal to the claims of the Interborough Company based on the *Nixon* case.

Contract No. 3 is not a franchise. Under it the contractor acquires no right, privilege or license in or to the City's streets or any part thereof. It is a contract for equipment, maintenance and operation of a road and equipment wholly owned by the City. The operator is employed to discharge the duties of operation.

The Rapid Transit Act, which alone gave the Public Service Commission power to act in the preparation and execution of Contract No. 3, conferred such power only "subject to the approval of the Board of Estimate and Apportionment." Whatever terms and conditions as to rates of fare and character of service the Commission deemed best suited to the public interests, and whatever supervision, conditions, regulations and requirements were determined upon by the Commission, had to be determined upon prior to the execution of the contract.

The statutory court concedes Contracts Nos. 1 and 2 inviolable unless controlled by Contract No. 3, executed after passage of the Public Service Commission Law.

The entire force of the opinion of the statutory court is lost unless there was a "modification and waiver" notwithstanding the provisions of the contract to the contrary.

The property owned by the City, constituting a part of its streets, is not the subject of confiscation. It is elementary that confiscation relates to private property and not to public property.

So far as the City is concerned, its subways could be operated free of charge, as are its bridges; or it could make such charges as it saw fit and support its subways, partly from such charges and partly from taxation. The Interborough Company has no property in subways and no interest in the cost of reproduction thereof.

The absurdity of the Interborough's claim is illustrated by the fact that, according to it, every time the City, at its own expense, makes an improvement in its facilities, the Interborough would be entitled to 8% per annum on the cost, even though such improvement reduced the Interborough's cost of operation and increased its profits.

It is wholly immaterial to the Interborough Company whether the value of the City's property increases or diminishes. It has no recourse against anything but revenues. From revenues it is entitled to the stipulated rate of interest upon its investment (tax exempt) and the repayment in annual instalments of the principal and profit.

Under Contract No. 3 the Interborough Company pays no rental. While it has a charge upon the revenues, it has no interest in, ownership of, or lien upon any of the property by which such revenues are produced.

The Interborough is being paid in full according to the terms of the contracts and its return on actual investment under Contracts Nos. 1, 2, and 3, is in excess of 8.3 per cent. per annum.

The valuation of $898,793,648 claimed by Interborough Company as the basis of return of eight per cent. is inflated to the extent of at least $600,000,000.

The Elevated Railroad Certificates for additional tracks and extensions are affected by like statutory authority and contract obligations. Section 34 of the Rapid Transit Act, as amended, Laws of 1894, c. 752, had no reference or relation to elevated railroads or their additional tracks or extensions. Section 32–a added by c. 472, Laws of 1906, was renumbered § 24 by c. 498, Laws of 1909, and as amended by the Wagner bill, c. 226, Laws of 1912, authorized the certificates. The Act specifically provided that the acceptance of such certificates should constitute a contract between the City and the grantee according to the terms thereof. § 24, subd. 4.

Messrs. Charles E. Hughes and *William L. Ransom,* with whom *Messrs. James L. Quackenbush, Charles E. Hughes, Jr., Jacob H. Goetz, Harry L. Butler,* and *John Fletcher Caskey* were on the brief, for appellee Interborough Rapid Transit Company.

The federal courts have jurisdiction of this case. The plaintiff is entitled in the federal court to protection against the enforcement of a confiscatory rate. It has not contracted away its right to reasonable compensation. To have such effect, the contract in question must have been duly authorized by the State. Such authority must be clearly and unmistakably conferred. Such authority may not be implied where the legislative policy of the State, as expounded by its highest court, is inconsistent therewith. *Southern Iowa Electric Co.* v. *Chariton,* 255 U. S. 539; *San Antonio* v. *Public Service Co.,* 255 U. S. 547. See also *Railroad and Warehouse Comm'n* v. *Duluth Street R. Co.,* 273 U. S. 625.

The question is not whether the parties have signed a contract providing the amount of the fare, but is

whether, in view of existing legislation, they had authority to make an effective contract for an inflexible fare.

The legislative policy of the State of New York, as embodied in the Public Service Commission Law, is prohibitive of unalterable contract rates. *People ex rel. City of New York* v. *Nixon,* 229 N. Y. 356; *Matter of Quinby* v. *Public Service Comm'n,* 223 N. Y. 244; *People ex rel. South Glen Falls* v. *Public Service Comm'n,* 225 N. Y. 216; *People ex rel. Garrison* v. *Nixon,* 229 N. Y. 575; *Matter of Evens* v. *Public Service Comm'n,* 246 N. Y. 224.

The result of all of the decisions of the New York Court of Appeals under the Public Service Commission Law is that no statute authorizing the making of a contract between a municipality and a utility as to a rate or fare may be deemed, after the passage of that law, to authorize a contract for an unchangeable rate of fare, and, therefore, that no such contract made after that law may be deemed effectively to provide for an unchangeable rate or fare; and that the provisions of the Act providing for continuous regulation of rates and fares applied also to rates and fares prescribed in contracts made prior to the passage of the law, except in the single case of contracts made as conditions of consents of municipalities under § 18 of Art. III of the State Constitution between 1875 and 1907.

No New York case has ever held that any rate or fare prescribed in any contract made prior to the Public Service Commission Law was not thereafter subject to regulation, except where the contract was made in connection with a constitutional consent.

And no New York case has ever held that any such contract made after the passage of the Public Service Commission Law could effectively provide for an unchangeable rate or fare.

Thus the effect of the Public Service Commission Law, as interpreted by the highest court of New York, brings

the contracts here involved squarely within the decisions of this Court in *Southern Iowa Electric Co.* v. *Chariton,* 255 U. S. 539, and *San Antonio* v. *Public Service Comm'n,* 255 U. S. 547, *supra.* The attempt of the defendant Transit Commission to distinguish these decisions on the ground that the contracts there involved were "expressly prohibited" cannot succeed. The question is whether the legislature has authorized a contract for a permanent fare. Such a contract was at least as clearly prohibited by the Public Service Commission Law as were the contracts involved in the *Chariton* and *San Antonio* cases. By that law all rates were to be just and reasonable and were to be fixed by the Commission by orders made in the exercise of its regulatory power; the lawful rates were to be filed, and the charging of "a greater or less or different compensation" than such filed rates was prohibited. Rates which were unreasonable because not compensatory were just as unlawful as those which were unreasonable because excessive.

The Public Service Commission Law applies to rapid transit railroads in New York City. They are within its express definitions and manifest policy.

Every intendment must be against imputing to the legislature an intention to exclude rapid transit railroads from the policy of the Public Service Commission Law.

No interest of the City of New York in rapid transit railroads excludes them from the legislative policy of the State. The lines are in fact being operated by the plaintiff, which was incorporated under the Railroad Law, and is certainly both a "street railroad corporation" and a "common carrier." The traveling public are the "customers" of the plaintiff, not of the City. While rapid transit may be a city purpose, "it is, however, subject to regulation at all times by the power of the State except as the State has divested itself of such power." *Matter of McCabe* v. *Voorhis,* 243 N. Y. 401.

If the City took over the operation, an unremunerative fare supported by taxation would be unlawful. Rapid Transit Act, as amended, Laws 1906, c. 472, § 34–d; § 135, Public Service Commission Law (added by Laws 1924, c. 573).

The state powers reposed in the Commission are not inconsistent with the local self-government provisions of the New York Constitution. Art. X, § 2.

The Public Service Commission Law had been in effect for six years when Contract No. 3 was made and was, in the language of the Court of Appeals, " notice to municipalities that franchises thereafter granted must be coupled with no conditions inconsistent with the jurisdiction thus conferred " on the Public Service Commission. In making Contract No. 3, the City of New York was acting not in any governmental, but purely in a proprietary, capacity. The City, in dealing with the subway, " is a railroad corporation so far as the construction, operation and leasing thereof is concerned." *Matter of Rapid Transit R. Com'rs,* 197 N. Y. 81. Even where a five cent fare was indisputably the chief moving consideration of a contract, it was subject to later regulation, either up or down. *Ortega Co.* v. *Triay,* 260 U. S. 103.

But Contract No. 3 does not support the City's contention that the five cent fare was the primary inducement. The emphasis is upon the operation of the lines already built, in conjunction with those to be built, as a unified system " for a single fare," rather than for a fare of any particular number of cents.

The provisions of the Rapid Transit Act do not exclude contracts regarding the fares of rapid transit railroads from the operation of the Public Service Commission Law. Its language in itself does not import such intention.

Even in the absence of an actual existing statute, such as the Public Service Commission Law, embodying the public policy of continuous supervision of public utilities,

every doubt is to be resolved against the authority of a municipality to contract for an unchangeable rate. *Home Telephone Co.* v. *Los Angeles,* 211 U. S. 265. See, to the same effect, *Freeport Water Co.* v. *Freeport,* 180 U. S. 587; *Milwaukee Electric R. & L. Co.* v. *R. R. Comm'n,* 238 U. S. 174; *Southern Iowa Electric Co.* v. *Chariton,* 255 U. S. 539; *San Antonio* v. *Public Service Co.,* 255 U. S. 547; *Paducah* v. *Paducah R. Co.,* 261 U. S. 267; *St. Cloud Public Service Co.* v. *St. Cloud,* 265 U. S. 352. Tested by this standard, the provisions of the Rapid Transit Act upon which defendants rely are utterly insufficient.

The continuation in the Rapid Transit Act after 1907 of the provisions of §§ 24 and 27, does not import an intention to exclude the fare provisions from the policy of the Public Service Commission Law. The language authorizing a provision regarding fares remained unchanged from the time of its enactment in 1894 through all of the re-enactments by which that section was in other respects amended between then and the year 1913 when Contract No. 3 was executed. These are to be construed as continuations of the prior law modified or amended according to the language employed, and not as new enactments. § 95, General Construction Law of New York. *Matter of Allison* v. *Welde,* 172 N. Y. 421; *People ex rel. City of New York* v. *Nixon,* 229 N. Y. 356.

After the enactment of the Public Service Commission Law, the statutes which had themselves fixed specific fares, including the five-cent fare provision of § 7 of the Rapid Transit Act, as amended by c. 752, Laws of 1894, were for the most part either repealed or amended so as expressly to be made subject to the Public Service Commission Law. But many statutes which had authorized simply the making of contracts were continued, and often "re-enacted" after 1907 without change in this respect. The Court of Appeals of New York has never held that after 1907 a contract for an unchangeable rate or fare

could be made thereunder. It has expressly held that certain of these continued and re-enacted statutes did not, at least after 1907, authorize a contract for a rate or fare which should not be subject to revision up or down. *People ex rel. City of New York* v. *Nixon,* 229 N. Y. 356; *People ex rel. Garrison* v. *Nixon,* 229 N. Y. 575; *Matter of Evens* v. *Public Service Comm'n,* 246 N. Y. 224; *North Hempstead* v. *Public Service Corp'n,* 231 N. Y. 447; *Public Service Comm'n* v. *Pavilion Natural Gas Co.,* 232 N. Y. 146. The statutes under which the rate contracts involved in those cases were made, were just as clear legislative authority therefor as were the provisions of the Rapid Transit Act for Contract No. 3 and the Elevated Extension Certificates.

Amendments to § 49, made in 1921 and 1922, showed clearly that the legislature regarded rapid transit railroads as governed by the provisions of that section, and that, if any special provisions were to be made as to those railroads, they should be embodied in amendments to the Public Service Commission Law. The amendments of 1921 and 1922 are not here material, because in 1923, § 49 was again amended to substantially the same language as had been in force prior to the 1921 amendment. *Matter of Village of Mamaroneck* v. *Public Service Comm'n,* 208 App. Div. 330, affirmed, 238 N. Y. 588, and *Matter of Brownville* v. *Public Service Comm'n,* 209 App. Div. 640, affirmed, 240 N. Y. 586, held that the final result of the legislation which defendants emphasize was to leave the regulatory power over contract rates in exactly the position that it was prior to 1921. The *Nixon* and *Garrison* cases had construed that law as it existed prior to 1921.

The circumstance that the 1912 amendments of the Rapid Transit Act were made with particular reference to proposed Contract No. 3 does not evidence any legislative intention to authorize an unchangeable fare. The lan-

guage of § 27 of the Rapid Transit Act relating to provisions as to the fare had been in the Act since 1894 and was not touched in the statute of 1912. The provisions of proposed Contract No. 3 which necessitated the 1912 amendments were those authorizing both the City and the plaintiff to invest millions of dollars in the building and equipment of subways, repayment of which was to be secured only from the earnings of the roads. *Admiral Realty Co.* v. *City of New York,* 206 N. Y. 110.

See *People ex rel. Bridge Operating Co.* v. *Public Service Comm'n,* 153 N. Y. (App. Div.) 129; *People ex rel. South Glens Falls* v. *Public Service Comm'n,* 225 N. Y. 216.

The fare provisions in Contracts Nos. 1 and 2 do not affect the plaintiff's right to a compensatory fare. Contract No. 3, which applied to all of the subway lines, both those already in existence and those to be thereafter constructed, was executed in 1913, six years after the passage of the Public Service Commission Law. Under all the New York authorities it could not be regarded as effectively embodying a contract for an unchangeable fare.

The fare provisions of Contracts Nos. 1 and 2 were wholly superseded by Contract No. 3. *Admiral Realty Co.* v. *City of New York,* 206 N. Y. 110; *Matter of Evens* v. *Public Service Comm'n,* 246 N. Y. 224; *Matter of Fagal* v. *Public Service Comm'n,* 131 Misc. (N. Y. Sup. Ct.) 398.

The contention that this case is within the "reservation" in the last paragraph of the opinion of the Court of Appeals in the *Nixon* case is wholly inadmissible.

But, whether superseded or not, the fare provisions of Contracts Nos. 1 and 2 were subject to the later exercise by the State of New York of its police power to regulate them. *City of New York* v. *Campbell,* 277 U. S. 573 (involving a contract with the City of New York); *Trenton* v. *New Jersey,* 262 U. S. 182; *Englewood* v. *Denver &*

S. P. R. Co., 248 U. S. 294; *Hunter* v. *Pittsburgh*, 207 U. S. 161; *People* v. *Budd*, 117 N. Y. 1; *People ex rel. N. Y. Electric Lines* v. *Squire*, 107 N. Y. 593; *People ex rel. Bridge Operating Co.* v. *Public Service Comm'n*, 153 N. Y. App. Div. 129. The State of New York did exercise its police power in 1907 by its delegation to the Public Service Commission thereby created of the power to regulate substantially all public utility rates. *People ex rel. City of New York* v. *Nixon*, 229 N. Y. 356. Under the decisions of the Court of Appeals, the only contract rates to which that enactment did not apply retroactively were provisions for stated fares exacted by local authorities under § 18 of Art. III of the Constitution between 1875 and 1907 as conditions for giving their consent to the occupation of public streets. The fare provisions in Contracts Nos. 1 and 2 were not made as conditions of constitutional consents.

Since the enactment of the Public Service Commission Law the Public Service Commission and its successor have fully exercised every other regulatory power over the plaintiff and the railroads operated by it, which that law conferred.

As to the elevated lines, there is even less basis for argument of legislative authority for a contract as to fares. The five-cent fare on them has its origin in c. 743 of the Laws of 1894. Section 27 of the Rapid Transit Act, which was the basis for Contract No. 3, did not apply to the elevated lines. The sole authority for the Elevated Extension Certificate was § 24 of the Rapid Transit Act, which did not authorize any contract with respect to fares.

The decisions of this Court upon which the defendants rely are wholly inapplicable, being all cases interpreting the laws of the several States and holding that particular franchises, contracts or licenses amounted to " contracts " within the meaning of § 10 of Art. I of the Constitution, which protected the utilities involved from impairment

thereof by subsequent action of the municipality or of the legislature. Those cases go off on their own particular facts and statutes, none of which bear sufficient resemblance to the facts and statutes involved in the present case to require discussion. And in *Home T. & T. Co.* v. *Los Angeles,* 211 U. S 265, this Court held that there was not such a contract free from impairment because legislative authority therefor did not " clearly and unmistakably " appear.

No more apposite are the cases particularly relied on by the defendants in which utilities have been denied the protection of the federal courts against alleged confiscation. In none of these was there at the time the contract was made any state-wide regulatory statute like the New York Public Service Commission Law.

The theory that plaintiff was bound by a contract for a fixed fare, subject to a privilege to apply to the Commission for an increase thereof, and that a denial of such increase by the Commission raises no federal question, is contrary to express decisions of this Court. No such meaning may properly be ascribed to the language of this Court in the *Henderson* case, and the contrary has been more recently directly decided. *R. R. Comm'n* v. *Duluth Street R. Co.,* 273 U. S. 625; *Denney* v. *Pacific T. & T. Co.,* 276 U. S. 97.

The action of the Transit Commission was state action enforcing the five-cent fare against the plaintiff. The plaintiff has complied with all the procedural requirements of the Public Service Commission Law and its suit in the federal courts is not premature. *North Hempstead* v. *Public Service Corp'n,* 231 N. Y. 447. When the Commission rejects the new schedules filed by the utility and refuses to allow them, there can be no question but that state action enforcing the old rate has been taken. *Denney* v. *Pacific T. & T. Co.,* 276 U. S. 97; *Banton* v. *Belt Line R. Corp'n,* 268 U. S. 413; *Pacific T. & T. Co.* v.

Kuykendall, 265 U. S. 196; *Augusta-Aiken R. Corp'n* v. *R. R. Comm'n,* 281 Fed. 977.

Nor can there be any question that in this case the Transit Commission did reject the increased rates filed by the plaintiff.

Quite aside from the action of the Commission on plaintiff's application under § 29 in February, 1928, there had already been state action enforcing the five-cent fare. The effect of § 28 of the Public Service Commission Law requiring every common carrier to file with the Commission schedules showings its rates, fares and charges, and the filing of the five-cent fare from time to time pursuant thereto, itself constituted a legislative imposition of that fare. Moreover, as to a substantial part of the elevated lines, the five-cent fare was imposed by the direct statutory requirement of c. 743 of the Laws of 1894, and it may be observed that the plaintiff's first cause of action is directed solely against that state action. The denial by the Commission of the plaintiff's applications in 1920 and 1922 constituted a fixation by the Commission of the five-cent fare as the rate for the future, and hence was legislative action. The effect of the Commission's adverse action on plaintiff's new schedules filed under § 29 was to compel plaintiff to continue the five-cent fare previously fixed. *Banton* v. *Belt Line R. Corp'n,* 268 U. S. 413.

In every substantial respect, the Transit Commission had rejected plaintiff's filed rates several days before the complaint herein was filed and nothing remained to be done but the mere formality of evidencing by a formal order a decision already made.

To pretend, therefore, that the plaintiff has not exhausted its remedies under the state law, but might have had relief by further delay or supplication, is the merest sophistry. To have made further motions looking to consideration of the case by the Transit Commission would have been an utterly vain thing.

This Court has upheld recourse by utilities to the federal courts where the facts showing state action and exhaustion of state remedies were far less clear. *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587; *R. R. Comm'n* v. *Duluth Street R. R. Co.*, 273 U. S. 625; *Prendergast* v. *N. Y. Telephone Co.*, 262 U. S. 43; *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290; *Banton* v. *Belt Line R. Corp'n*, 268 U. S. 413; *Denney* v. *Pacific T. & T. Co.*, 276 U. S. 97; *Pacific T. & T. Co.* v. *Kuykendall*, 265 U. S. 196.

The five-cent fare yields such a low return as to be confiscatory. Plaintiff is entitled to a reasonable return upon all the property used in the public service. The company's application is not for permission to charge a rate of fare which will enable it to pay its rental obligations, interest upon its bonds and dividends on its stock. All it seeks is a fair return upon the value of the property which it uses in the public service. *Darnell* v. *Edwards*, 244 U. S. 564. The figures upon every hypothesis show confiscation.

Messrs. George Welwood Murray and *William Roberts* were on the brief for appellee Manhattan Railway Company.

The elevated railroads owned by the Manhattan Railway Company and leased to the Interborough Company were constructed under their own franchise which does not limit the fare to be charged to five cents a ride. A certificate authorizing the construction of extensions to the elevated railroads was granted to the Interborough Company, as lessee, which purported to limit to five cents a ride the fare on the elevated railroads and on the extensions added thereto. The statute, Rapid Transit Act, 1891, as amended, § 24, under which the certificate was granted did not give the Commission, as grantor, the power to change the fare to be charged on the railroads to which the extensions were added. Without such statutory authority the Com-

mission had no power to change the fare and the purported restriction in the Extension Certificate is invalid. The City relies on a section of the statute which authorizes the construction of extensions, but does not refer to rates of fare and does not apply to the railroads to which the extensions are added. The rule of construction is that, as the power to regulate fares is part of the police power, it cannot be delegated by the legislature except by the use of language which could not fairly and reasonably have any other meaning.

The Constitution of the State required that no law should authorize the construction of a street railway except upon condition that the consent of the local authorities having control of the streets upon which it is proposed to construct the railroad be first obtained. The City urges that the local authorities in consenting to the construction of the extensions conditioned their consent on a change of the fare on the railroads to which the extensions were added. Such a condition, if it was in fact made, is invalid. The constitution merely requires the consent to the construction of the railroad. The statute gives authority to the Commission to authorize the construction of the extensions and prescribes the terms and conditions on which the local authorities must consent or refuse to consent to its construction. Under the terms of the statute, the local authorities had no power to condition their consent to a change of fare on the properties to which the extensions were added.

The statute causes the City to assume a fiduciary relation toward the elevated railroads which is inconsistent with power in the City to regulate the rates of fares on such railroads. The City under the statute and under the Extension Certificate is given the following rights: To share in the profits from the elevated railroads; to purchase the extensions for less than their value, the balance of the compensation, if any, to come out of earnings;

to own easements at the end of the franchise period without payment of any compensation; to compete by city-owned railroads with the elevated railroads in whose profits the City shares; to participate in the management of the elevated railroads in order to protect the right to share in the profits and the right to purchase the extensions for less than their value. The Court will not give an unnatural and strained meaning to language in order to give to the City additional and inconsistent power under such extraordinary circumstances.

The elevated railroads under the restriction of fare contained in the Extension Certificate do not earn the return on their properties which the franchise and the law permit and which the railroads are capable of earning. A part of the properties of the elevated railroads consists of the easements of light, air and access purchased by the company from the owners of properties abutting on the streets where the railroads are located, and of improvements to the elevated railroads made by the Interborough Company as lessee at its own expense after 1913 with Public Service Commission approval. Before the improvements were made the elevated railroads were a complete operating unit which carried 349,000,000 passengers in 1917. The actual net earnings from the elevated railroads under the fare restriction contained in the Extension Certificate are not sufficient to pay a reasonable return even on the combined cost of the easements of light, air and access and the improvements made by the Interborough Company which constitute only a small part of the elevated railways.

Mr. Justice McReynolds delivered the opinion of the Court.

This direct appeal is from an order of May 10, 1928, by the District Court, Southern District of New York, three judges sitting, which authorized an interlocutory injunc-

tion to restrain appellants—the Transit Commission and New York City—from requiring, or attempting to enforce, further acceptance by the Interborough Rapid Transit Company of a five cent passenger fare over the lines operated by it and from seeking to prevent a charge of seven cents. This Court stayed the order pending further hearing. The cause has been twice orally argued before us and helpful briefs are on file.

In support of the action below, appellees maintain:—The five cent fare originally stipulated and long observed had become non-compensatory. Although specified in the agreements with the City under which the transit lines are being operated, that fare was not immutable, since, by implication, provisions of the Public Service Law of 1907 directing that reasonable rates should be granted to subways, elevated and other street railways, were incorporated into the contracts. The Transit Commission in effect denied an application for compensatory rates, insisted upon observance of the five cent one and intended to take immediate steps to secure enforcement of it. This amounted to action by the State which would deprive the Interborough Company of property without due process of law, contrary to the Fourteenth Amendment.

The City of New York is a municipal corporation, whose charter vests control of streets and other executive powers in the Board of Estimate and Apportionment. The Transit Commission of three members created by Chap. 134, New York Laws, 1921, exercises powers theretofore entrusted to the Public Service Commission for the First District (Chap. 429, Laws, 1907) successor to the Board of Rapid Transit Railroad Commissioners organized under the Rapid Transit Act of 1891.

The Interborough Rapid Transit Company, a New York corporation, with $35,000,000 capital stock, operates elevated and subway lines in four boroughs of Greater

New York City. Some of these it owns; some the City owns and lets to it for operation; others—the original elevated lines—it hired in 1903 from the Manhattan Railway Company for 999 years, agreeing to pay therefor interest on $45,000,000 of outstanding bonds, 7% (now 5%) on $60,000,000 capital stock of the lessor and $35,000 annually for administrative expenses. At this time the total yearly payments for use of elevated lines is about $4,900,000.

Greater New York City contains five Boroughs—Manhattan, coterminous with Manhattan Island (ten miles long) with area of 19 square miles; The Bronx, 41 square miles; Queens, 117; Brooklyn, 80; and Richmond (Staten Island), 57. The population of the City in 1910 was 4,785,000 (in 1927, 5,970,000) of whom 2,330,000 resided within Manhattan, in the southern portion of which are located the great business centers of the Metropolitan district. The Bronx, on the mainland north of Harlem River, and Queens and Brooklyn on Long Island, have undergone very rapid development and increased greatly in population since 1900. The expanse of the Greater City, together with its peculiar physical characteristics, render exceedingly difficult any effort to provide rapid and cheap transportation for its residents and the crowds of outsiders who travel therein daily for business or pleasure. See *Sun Publishing Assn.* v. *The Mayor,* 152 N. Y. 257, 273.

Prior to 1903, under franchises dating from 1875, the Manhattan Railway, or its predecessors, constructed, owned and operated the four original elevated railway lines extending northward from South Ferry along Second, Third, Sixth and Ninth Avenues. All these were leased by the Interborough Company in 1903 and now constitute the oldest part of its system. Long before, and ever since, 1913 they have charged five cents per passenger, and from this the lessee for many years derived substantial net

profits. During 1910 and 1911 the average was $1,589,348.

The subway first constructed begins at City Hall, Manhattan, and extends northward to 96th St.—six miles.[1] From the latter point two branches diverge; one continues north across Harlem River to 230th St., in The Bronx—seven miles; the other (West Farms Branch) runs northeast and under Harlem River to 182nd St. at Bronx Park—seven miles. These lines were constructed for the City, became its property and were let to the Interborough's assignor under "Contract No. 1," executed February 21, 1900,[2] and authorized by the Rapid Transit Act of 1891 as amended.

This contract—an elaborate instrument of 125 printed pages—provided with great detail that the lessee should equip and thereafter operate the road at its own expense under direction of the Board of Rapid Transit Railroad Commissioners; and further undertook to secure uninterrupted service. Among other things it declared—"The Contractor [Interborough's assignor] shall during the term of the Lease be entitled to charge for a single fare upon the Railroad the sum of five (5) cents, but not more. The Contractor may provide additional conveniences for such passengers as shall desire the same upon not to exceed one (1) car upon each train, and may collect from each passenger in such car a reasonable charge for such additional convenience furnished him, provided that the amount to be charged therefor and the character of such additional convenience shall from time to time be subject to the approval of the Board. The Contractor may provide not to exceed one (1) car in each train for persons smoking."

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[1] These and similar figures are mere rough approximations.

[2] This and subsequent contracts designate agreements for operation as leases.

The lease was for fifty years (with right of renewal), the rent a sum equal to the annual interest on City bonds issued to secure the necessary funds for construction, plus one per centum for amortization. The lessee retained title to all equipment and the City agreed to purchase this at fair value when the lease ended.

Construction under Contract No. 1 cost the City around $60,000,000.[3]

By " Contract No. 2," dated July 21, 1902, the City contracted with the Interborough's assignor for the construction and operation during thirty-five years (with privilege of renewal) of an extension to the first subway, commencing at City Hall, Manhattan, and extending under East River to Borough Hall and thence to Atlantic Avenue, Brooklyn—4 miles. The lessee undertook to furnish equipment, act under direction of the Board of Rapid Transit Railroad Commissioners, and to pay for use of the lines a sum equal to the interest on bonds issued by the City to meet construction costs, plus one per centum for amortization. Also, to carry out the proposal that passengers should have the right to transportation without change of cars and for a single fare not exceeding five cents for one continuous trip over the Railroad and connecting lines. A clause identical with the one above quoted from Contract No. 1 prescribed a five cent fare; another provision obligated the City to purchase the equipment when the lease terminated.

For the construction of this extension the City paid out $6,600,000.

Under Contracts 1 and 2, ways extending over approximately twenty-four miles (seventy-five of single track) were constructed and then equipped. The longest pos-

[3] These and similarly stated figures are intended only to give a fair idea of the problems presented—they do not indicate adjudication of any disputed question.

sible continuous trip by a passenger was 17.4 miles. For equipping them the lessee claims a capital investment of $60,000,000—but large items are questioned and the true sum may be less than $40,000,000. This equipment, with real estate valued at $300,000 and office sundries, is all the property connected with the subways which the Interborough now owns. The lines were opened for traffic October 27, 1904, and prior to 1919 their operation yielded annually large net profits.

The court below thought that, unless modified by Contract No. 3 (*infra*), Contracts Nos. 1 and 2 established an inflexible five cent fare, and this view has not been seriously questioned here.

In order to meet the insistent demand for quick transportation, after prolonged negotiations, the Public Service Commission, acting for the City with approval of the Board of Estimate (being specially authorized by the Rapid Transit Act as amended in 1912), entered into elaborate separate, but related, agreements (dated March 19, 1913) with the Interborough and Manhattan Companies for (1) the construction and operation of extensions to the old lines and certain new subways—"Contract No. 3;" (2) a third track on the elevated lines—"Third Track Certificate;" (3) extensions to the elevated lines—"Extension Certificate;" (4) for operation of elevated trains over designated portions of the new subways—"Supplementary Agreement."

Contract No. 3—122 printed pages—with great detail provided for immediate (and possible future) extensions of and additions to the subway system then existing, also their equipment and operation until the end of 1967. Under it the following lines were constructed, equipped and put into operation.* (1) From the end of old sub-

* These new lines in Brooklyn, Queens and The Bronx are mostly above ground.

way in Brooklyn eastwardly with two branches—nine miles. (2) From Borough Hall, Brooklyn, northwesterly under East River and lower Manhattan to Seventh Avenue and thence north to 42nd St. (Times Square)—six miles. (3) The Queensboro Bridge Line from Times Square eastward under 42nd St. through Steinway Tunnel under East River to Queensboro Bridge Plaza and beyond—12 miles. (4) From Grand Central Station northward along Lexington Avenue under the Harlem and beyond with two branches—eighteen miles. (5) An extension of West Farms Branch northward—five miles.

Fifty miles of subways were thus added to the original system—146.8 miles of single track. The longest distance between terminals became 26.78 miles. For the construction of these additions and extensions the City expended from its own treasury $113,000,000 and the Interborough Company advanced $58,000,000. For equipment the latter paid not above $62,000,000. Title to both road and equipment vested in the City and both were let to the Interborough Company until December 31, 1967, for operation in conjunction with the older subways. The lessee owns none of the equipment provided under this contract and is not obligated thereby to pay anything to the City as rental for the ways; but it did agree to make certain payments out of the earnings after named deductions are satisfied. The leases under Contracts 1 and 2 were adjusted to expire with 1967.

The following provisions of "Contract No. 3" are of special importance here—

"Article I. . . . The City and the Lessee further agree upon the modification of Contract No. 1 and Contract No. 2 in the respects herein set forth, but nothing in this contract shall be construed as a modification or waiver of any of the rights or obligations of the respective parties under Contract No. 1 and Contract No. 2, except in the respect and to the extent herein specifically set forth."

[Certain modifications of Nos. 1 and 2 are specified but the five cent fare provisions are not mentioned.]

"Article III. This contract is made pursuant to the Rapid Transit Act which is to be deemed a part hereof as if incorporated herein."

"Article XLIX. . . . the gross receipts from whatever source derived directly or indirectly by the Lessee or on its behalf in any manner from, out of or in connection with the operation of the Railroad and the Existing Railroads [old subways] (hereinafter referred to as the 'revenue') shall be combined during the term of this contract and the City shall receive for the use of the Railroad at the intervals provided a specified part or proportion of the income, earnings or profits of the Railroad and the Existing Railroads, . . ." [Broadly speaking, the part payable to the City is to be ascertained as follows: The Interborough Company shall deduct and retain each year sums sufficient to pay rentals on old lines required by Contracts 1 and 2 (say $3,000,000); taxes; operating expenses; maintenance; depreciation; $6,335,000, the estimated average profit derived during the years 1911–1912 from operation of the old lines under Contracts 1 and 2; 6% on $80,000,000 advanced for construction and paid for original equipment under Contract No. 3; interest on other cost of equipment. These are cumulative. Thereafter the City shall receive 8.76% on the cost of construction paid out under Contract No. 3. The remainder will be equally divided between the City and the Interborough.]

"Article LIV. The payment of the rental [to City] for the existing Railroads referred to in paragraph 1 (a) of Article XLIX shall be made as provided in Contract No. 1 and Contract No. 2 for the full term of such contracts as herein modified. . . ."

"Article LIX. The Lessee shall operate the Railroad [to be constructed] and the Existing Railroads [those

constructed under Contracts 1 and 2] as one complete system and shall furnish with respect thereto such service and facilities as shall be safe and adequate and in all respects just and reasonable. Free transfers shall be given, as required by the Commission . . . so as to afford a continuous trip in the same general direction for a single fare."

"Article LXII. The Lessee shall during the term of the contract be entitled to charge for a single fare upon the Railroad [to be constructed] and the Existing Railroads the sum of five (5) cents but not more."

"Article LXXVIII. Upon giving one year's notice in writing to the Lessee the City, acting by the Commission with the approval of the Board of Estimate, may terminate this contract as to all of the Railroad [to be constructed] (including Extensions and Additions) at any time after the expiration of ten (10) years from the date when operation of any part of the Railroad shall actually begin; or the City, acting by the Commission, upon like notice and with like approval may terminate [certain specified] portions thereof: . . ." [In the event of such termination the City agreed to pay the Lessee a varying per centum (never above 115%) of amounts contributed towards cost of construction or for equipment.]

The "Third Track Certificate" authorized the Manhattan Railway Company (owner of original elevated lines), subject to definitely prescribed conditions, terms and requirements, to lay third tracks on the Second, Third and Ninth Avenue Lines for accommodation of express trains.

The "Extension Certificate" authorized the Interborough Company to construct and operate four defined connections between the old elevated and the new subway lines. It carefully specified conditions intended to insure uninterrupted operation and protect the parties and contained the following clause—

"The Interborough Company shall be entitled to charge for a single fare for each passenger for one continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over which the Interborough Company is provided with trackage rights as in this Certificate provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railroad Company bearing even date herewith) and the Manhattan Railroad the sum of five (5) cents but not more. . . ."

There is also a provision for terminating the right to operate elevated trains over the extensions and additions and for taking them by the City upon payment of varying percentages of their cost, never exceeding 115%.

These extensions and connections rendered possible the operation of trains far beyond the original extremities of the old elevated lines over roads in the Boroughs of Queens and The Bronx belonging to the city.

By the "Supplementary Agreement," the City granted to the Interborough Company the right to use certain parts of subways constructed under Contract No. 3 in connection with the elevated roads, extended as above shown, and reserved as possible compensation a named per centum of any increased receipts.

January 1, 1919, all the lines, both elevated and subway, were constructed, equipped and in operation with uniform five cent fare.

The record indicates that when this suit was begun the City had expended from its own treasury for construction of subways $180,000,000; that the Interborough Company had advanced for such construction $58,000,000; and had expended for equipment not above $120,000,000—probably much less. The cost to the Interborough for laying third tracks on the elevated lines and building extensions thereto was $44,000,000. The original cost of the

old elevated lines is not disclosed and perhaps cannot be definitely ascertained; it did not exceed $90,000,000. Expenditures under Contract No. 3 greatly exceeded estimates; and the cost of operation has been much higher. The present values of the above-mentioned properties is very large, but to determine this with fair accuracy would be exceedingly difficult.

The following excerpts from an affidavit offered by the City are enlightening. The record supports the facts and figures used so far as here important; also in general the stated conclusions.

"The operation under Contract No. 3 has been highly profitable to the Interborough, as was the prior operation under Contracts Nos. 1 and 2. For the year ended June 30, 1926, the Interborough realized from the subway operation a net surplus of $6,569,573.03, after the payment of all operating expenses, taxes, interest and other fixed charges, including the rentals of $2,655,186.26 to the City under Contracts Nos. 1 and 2. The surplus is the amount available for the payment of dividends upon the capital stock of the Company so far as subway operation by itself is concerned. The amount of total capital stock outstanding is $35,000,000 . . . The subway earnings alone, therefore, under Contract No. 3, provide for dividend payments of over 18% on the par value of the stock . . .

"For 1927 the surplus amounted to $6,380,017.34. [The decline was due to a strike.]

"For the current fiscal year ended June 30, 1928, the figures for the first six months are available and show a net surplus amounting to $3,687,000, which exceeds the surplus for the corresponding six months of the fiscal year before by $1,609,000.

"These earnings are, of course, enormous and leave no room for claim that the five-cent fare fixed by Contract No. 3 is inadequate to give a fair return upon the investment of the Company in the subway properties, or

that the five cent fare is without due regard of the rights of the Company under the contract. . . .

"The financial difficulties of the Interborough during the past eight years, have been due to the elevated lease from the Manhattan Railroad Company, and not to the subway contract with the City. The terms of the elevated lease provide that the Interborough must pay as rental the interest upon the Manhattan Railway Company bonds outstanding and dividends after an initial period, at 7% upon the capital stock. The dividend rate, however, was adjusted in 1922 so that the Interborough is now paying 5% upon about 94% of the capital stock, only if and as earned by the Interborough, and 7% upon the minority interest. The Manhattan Railway Company bonds outstanding amount to about $45,000,000 and the capital stock to $60,000,000, . . . In 1927, the interest payments on the bonds amounted to $1,808,240 and the dividends on the stock to $3,086,756. In addition to these amounts, however, the Interborough must pay also interest and sinking fund charges on its own bonds and notes issued for the third tracking, the extension of the elevated lines, and other improvements. The total fixed charges resting on the elevated division, including the dividend rentals, amounted for the year ended June 30, 1926, to $8,062,274.85. The income above operating expenses and taxes available for these charges, was only $3,936,396.50. The net revenues from the elevated fell short of earning all charges, including the dividends to the Manhattan Railway stockholders, by $4,125,878.35. For the year ended June 30, 1927, the corresponding shortage amounted to $4,909,129.66.

". . . The elevated and subway operations have been kept financially distinct. The revenues, expenses, taxes and fixed charges have been segregated, so that each system has had its own financial set-up under the contract controlling its operation. . . .

"Notwithstanding the extreme crowding which has existed for several years on the trunk subway lines, the number of passengers has increased steadily upon the subways, while on the elevated it has been decreasing. Since 1920 the transportation revenue [on subways] at a five cent fare has increased from $29,300,000 to $40,731,000 in 1927. For the first six months of the current fiscal year, the subway revenue was $21,433,000, compared with $18,647,000 for the same six months the year before; the growth is still continuing unimpeded.

"On the elevated lines the total transportation revenues in 1920 amounted to $18,450,000 and for the year ended June 30, 1927, to $17,951,000. During the first six months of the current fiscal year the elevated transportation revenues were $8,874,000, compared with $9,098,000 for the same six months the year before. The decline has not stopped. . . ."

In 1891 the Legislature of New York enacted what is known as the "Rapid Transit Act" to "provide for Rapid Transit Railways in cities of over one million inhabitants," intended to meet the special needs of New York City, the only municipality with so large a population. It has been amended some forty times. Originally no provision permitted construction of railways at public expense—only privately-owned lines were contemplated. A Board of Rapid Transit Railroad Commissioners, with general supervisory powers over the construction and operation of rapid transit lines, was authorized and given authority to contract concerning fares; also to issue "extension certificates" upon such terms, conditions, and requirements as might appear just and proper. In 1894 an amendment directed that the question whether the City should construct rapid transit facilities at its own expense be submitted to the voters, and further provided—

"In case it shall be determined by vote of the people, as provided by Sections 12 and 13 of this Act, to construct

by and at the city's expense, then, and in that event, the road or roads so constructed shall be and remain the absolute property of the city so constructing it or them, and shall be and be deemed to be a part of the public streets and highways of said city, to be used and enjoyed by the public upon the payment of such fares and tolls and subject to such reasonable regulations as may be imposed and provided for by the Board of Rapid Transit Railway Commissioners. . . ."

"The said board for and on behalf of said city shall enter into a contract with any person, firm or corporation which in the opinion of said board shall be best qualified to fulfill and carry out said contract for the construction of such road or roads. . . ."

"Such contract shall also provide that the person, firm or corporation so contracting to construct said road or roads shall at his or its own cost and expense equip, maintain and operate said road or roads for a term of years to be specified in said contract not less than thirty-five nor more than fifty years and upon such terms and conditions as to the rates of fare to be charged and the character of service to be furnished and otherwise as said board shall deem to be best suited to the public interests and subject to such public supervision and to such conditions, regulations and requirements as may be determined upon by said board."

The voters approved the proposal. On February 21, 1900, and July 21, 1902, Contracts Nos. 1 and 2 were excuted, and the lines therein specified were constructed and put into operation.

In 1906 the Rapid Transit Act was so amended as to require approval by the Board of Estimate and Apportionment of all contracts for construction, equipment, maintenance or operation of rapid transit railways built at public expense. Another amendment (Chap. 498, Laws of 1909) authorized the termination of operating contracts and the

taking by the City of the equipment upon payment of cost and not exceeding 15%. In 1912, as specially requested by the Board of Estimate and with full knowledge of the circumstances, the Legislature enacted the Wagner Bill which amended the Rapid Transit Act so as definitely to authorize the Contracts and Certificates, finally signed March 19, 1913 and above described, whose provisions, after long negotiations, had been tentatively agreed upon prior to the amendment—*Admiral Realty Co.* v. *City of New York*, 206 N. Y. 110.

Concerning Extension Certificates Sec. 24 of the amended act declares—"4. The certificate or certificates prepared by the commission as aforesaid when delivered and accepted by such person, firm or corporation shall be deemed to constitute a contract between the said city and said person, firm or corporation according to the terms of the said certificate; and such contract shall be enforceable by the commission acting in the name of and in behalf of the said city or by the said person, firm or corporation according to the terms thereof, but subject to the provisions of this act. . . ."

The Public Service Commission Law, entitled "An Act to establish the public service commissions and prescribing their powers and duties, and to provide for the regulation and control of certain public service corporations and making an appropriation therefor," Chap. 429, Laws of 1907, became effective July 1, 1907. It authorized appointment of two commissions and directed: "The jurisdiction, supervision, powers and duties of the public service commission in the first district [New York City] shall extend under this act: 1. To railroads and street railroads lying exclusively within that district, and to the persons or corporations owning, leasing, operating or controlling the same. . . ."

This is a general law relative to regulation and control of public utilities throughout the State. It contains no

words purporting to amend or modify the Rapid Transit Act except:—Those abolishing the Board of Rapid Transit Railroad Commissioners and directing that, in addition to other duties, ". . . the Commission in the First District shall have and exercise all the powers heretofore conferred upon the Board of Rapid Transit Railroad Commissioners under Chapter 4 of the Laws of 1891 entitled 'An Act to provide for rapid transit railways in cities of over one million inhabitants' and the Acts amendatory thereto." And, "All the powers and duties of such Board shall thereupon be exercised and performed by the Public Service Commission of the First District." Among other things it provides—

"SEC. 26. Safe and adequate service; just and reasonable charges.—Every corporation, person or common carrier performing a service designated in the preceding section [Railroads, Street Railroads and Common Carriers] shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such corporation, person or common carrier for the transportation of passengers, freight or property or for any service rendered or to be rendered in connection therewith, as defined in section two of this act, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction and made as authorized by this act . . ."

"SEC. 28. Every common carrier shall file with the commission having jurisdiction and shall print and keep open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property. . . ."

"SEC. 29. Unless the commission otherwise orders no change shall be made in any rate, fare or charge, or joint rate, fare or charge, which shall have been filed and published by a common carrier in compliance with the require-

ments of this chapter, except after thirty days' notice to the commission and publication for thirty days . . . The commission, for good cause shown, may allow changes in rates without requiring the thirty days' notice and publication herein provided for, . . . Whenever there shall be filed with the commission by any common carrier as defined in this act any schedule stating a new individual or joint rate, fare or charge . . . the commission shall have and it is hereby given authority, . . . upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, fare, classification, regulation or practice; and pending such hearing and decision thereon, the commission upon filing with such schedule, and delivering to the carrier or carriers affected thereby, a statement in writing of its reasons for such suspension may suspend the operation of such schedule . . ."

"SEC. 49. 1. Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation . . . , or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall . . . determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by general or special statute, and shall fix the same by order . . ."

No provision of the Rapid Transit Act subjects it to the Public Service Commission Law. An amendment to the Railroad Law (Chap. 481, Laws 1910) does this in respect of that enactment. *People ex rel. Ulster, etc. R. R. Co.* v. *Public Service Commission,* 171 App. Div. 607.

May 28, 1920, the Interborough Company, purporting to proceed under Sec. 49, Public Service Law, complained to the Commission that a five cent fare on the subways was insufficient and asked a higher one. The petition was denied "for want of jurisdiction to determine and fix a rate of fare different from that fixed by Contract No. 3." A proceeding begun in a state court to annul this order was discontinued before final hearing. Another application—March, 1922—for increased fares upon both elevated and subway lines was likewise denied for lack of jurisdiction. No review was sought. In 1925 the Interborough memorialized the Governor and Legislature, set out the result of operations under the five cent fare, the refusal of the Commission to grant any increase, and asked relief. No action was taken upon this application.

February 1, 1928, the Interborough Company, adopting the method prescribed by Sec. 29, Public Service Law, filed with the Transit Commission new schedules which purported to establish, effective March 3, 1928, a seven cent fare upon all its lines and requested permission to put them into effect on five days' notice. Prior to February 14, 1928, the Commission took no official action. But, it appears that counsel for the Commission and the Mayor expressed the opinion that no relief should or would be granted and perhaps used some threatening and ill-advised language; also that the members of the Commission had concluded no relief could be granted and that proceedings should be begun at once in a State court to enforce observance of the contract rate.

At 9:20 A. M. February 14, 1928, the original bill now before us was filed. It alleged the five cent rate had become confiscatory, that the Commission had failed to grant relief; and asked an injunction against any attempt to enforce it, also against any interference with the establishment of a seven cent fare.

Later during the same morning the Transit Commission entered an order which denied its authority to grant

any new rate and rejected the new schedules. It further directed counsel to institute suits in the State court to prevent threatened violation of law by the Interborough Company through failure to observe the contract rate. Thereupon, being already prepared, three proceedings were begun.

On March 3, 1928, the Interborough Company filed a supplemental bill reciting the action taken by the Commission subsequent to the filing of the original bill, renewed the prayer for relief by injunction and especially asked that further prosecution of the proceedings in the State court be forbidden.

Voluminous affidavits were submitted by both sides, and upon these and the pleadings the District Court, three judges sitting, heard the cause and authorized the interlocutory injunction described above.

Considering the entire record, we think the challenged order was improvident and beyond the proper discretion of the Court.

The record is voluminous; the contracts between the parties are complex; the relevant statutes intricate. No decision of this Court or of any court of New York authoritatively determines the questions at issue. The basic one calls for construction of complicated State legislation.

To support the action of the court below it would be necessary to show with fair certainty, first, that before the original bill was filed the commission had taken, or was about to take, some improper action in respect of the Interborough Company's new schedules or its application for leave to discontinue the five cent rate and establish one of seven cents; and secondly, that the five cent fare was so low as to be confiscatory while the proposed charge of seven cents was reasonable. We think neither of these things adequately appears from the record.

At most, prior to the original bill, the Commission's members had accepted the view that it lacked jurisdiction

to permit a new rate because the existing one was irrevocably fixed by lawful contracts, and had determined promptly to seek enforcement of the City's supposed rights by proceedings in the State courts. This was neither arbitrary nor unreasonable. No ground existed for anticipating undue delay or hardship. The purpose of the Commission was in entire accord with rulings announced as early as 1920 and seemingly no longer controverted when, in 1925, the Interborough applied for legislative relief. There had been abundant opportunity to test the point of law by appeal to the State courts.

The power of the City to enter into contracts Nos. 1 and 2 was affirmed in *Sun Publishing Assn.* v. *The Mayor, supra;* likewise the validity of Contract No. 3 was declared in *Admiral Realty Co.* v. *City of New York, supra.* These cases point out that the object of those contracts was to secure the operation of railways properly declared by statute to be part of the public streets and highways and the absolute property of the City.

The statute under which the Interborough undertook to proceed gave thirty days after filing of the new schedules during which the Commission might take action. The effect of the contracts, long the subject of serious disputation, depended upon the proper construction of State statutes—a matter primarily for determination by the local courts. The members of the Commission intended to take official action appropriate to the circumstances, and neither what they did nor what they intended to do gave any adequate cause for complaint. Alleged newspaper stories and unbecoming declarations by counsel or City officials can not be regarded here as of grave importance.

Under the doctrine approved in *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 231, and *Henderson Water Company* v. *Corporation Commission,* 269 U. S. 278, the Interborough Company could not have resorted to a federal court without first applying to the Commission as pre-

scribed by the statute. And having made such an application it could not defeat orderly action by alleging an intent to deny the relief sought.

Both the bill of complaint and the argument of counsel here proceed upon the theory that under the law of New York, as clearly interpreted by definite rulings of her courts, the contracts for operating the transit lines impose no inflexible rate of fare. With this postulate we cannot agree. *People ex rel. City of New York* v. *Nixon,* 229 N. Y. 356, decided July 7, 1920, is especially relied upon; but the circumstances there were radically different from those now presented. The effect of a contract with the City, expressly authorized by amendment to the Rapid Transit Act adopted subsequent to enactment of the Public Service Commission Law, was not involved. The court carefully limited its opinion. And it said: "The conditions of other franchises may supply elements of distinction which cannot be foreseen. Contracts made after the passage of the statute (Consol. Laws, ch. 48) [Public Service Commission Law] may conceivably be so related to earlier contracts either by words of reference or otherwise as to be subject to the same restrictions. We express no opinion upon these and like questions. They are mentioned only to exclude them from the scope of our decision. In deciding this case, we put our ruling upon the single ground that the franchise contract of October, 1912, was subject to the statute, and by the statute may now be changed."

Counsel for appellants refer with confidence to *Parker* v. *Elmira, C. & N. R. R. Co.,* 165 N. Y. 274; *Village of Fort Edwards* v. *Hudson Valley R. R.,* 192 N. Y. 139; *Matter of Quinby* v. *Public Service Commission,* 223 N. Y. 244; *People ex rel. Garrison* v. *Nixon,* 229 N. Y. 575, 645; *City of New York* v. *Brooklyn, etc.,* 232 N. Y. 463.

Although both the elevated and subway lines are operated by the same Company, the two systems have been

treated as separate and upon this record must be so regarded. The receipts from the subways show steady increase. If this continues, the Interborough Company ultimately will receive its entire investment on account of subways, with large profits. The elevated roads, the present value of which for rate making purposes is said to be above $150,000,000, are not prospering; their net receipts are diminishing. Appellees seek a seven cent fare for all lines based upon alleged present values and the requirements of a supposed unified system.

The claim for an eight per cent. return upon the values of subways, which are the property of the City and distinctly declared by statute to be public streets, *Sun Publishing Assn.* v. *The Mayor, supra,* is unprecedented and ought not to be accepted without more cogent support than the present record discloses. The operating equipment supplied under Contracts Nos. 1 and 2, which originally cost not over $60,000,000, real estate valued at $300,000 and office sundries of small value, is the only property connected with the subways to which the Interborough holds title; but it seeks remuneration based upon total values of all these ways and their equipment said to represent investments amounting to $360,000,000 and present value exceeding $600,000,000. At the current rate of return, after paying operating expenses, taxes, and rentals to the City, the Interborough will realize annually from the subways more than $17,000,000. The annual income of the elevated lines, after deducting operating expenses, maintenance, taxes, etc., probably will not hereafter exceed $4,000,000, and as the Interborough must pay rentals therefor amounting to $4,900,000, also interest on bonds, notes, etc., (issued for third tracks, extensions, etc.) in excess of $3,000,000, its loss by reason of this lease is heavy and apparently will increase.

During 1927, passengers carried on the subway lines numbered 814,600,000; on the elevated 359,000,000; total

1,173,600,000. An increase of two cents upon each fare would have added to the subway receipts $16,292,000; to the elevated $7,180,000.

The transit Commission has long held the view that it lacks power to change the five cent rate established by contract; and it intended to test this point of law by an immediate, orderly appeal to the courts of the State. This purpose should not be thwarted by an injunction. Upon the record before us we cannot accept the theory that the subways and elevated roads constitute a unified system for rate-making purposes. Considering the probable fair value of the subways and the current receipts therefrom no adequate basis is shown for claiming that the five cent rate is now confiscatory in respect of them. The action below was based upon supposed values and requirements of all lines operated by the Interborough Company treated as a unit; and the effort to support it here proceeds upon a like assumption.

The interlocutory order must be reversed. The cause will be remanded to the District Court for further proceedings in conformity with this opinion.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER dissent.

PAMPANGA SUGAR MILLS *v.* TRINIDAD.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 325. Argued March 1, 1929.—Decided April 8, 1929.

1. Under § 138 of the Philippine Administrative Code, 1917, which makes a concurrence of five judges necessary for pronouncement of judgment by the Supreme Court in a case involving 10,000 pesos if there is no vacancy, an equal division among eight of the judges when the ninth does not sit because of disqualification, will not operate as an affirmance of the judgment below. P. 214.

2. A judgment of the Supreme Court of the Philippine Islands in a case wherein the value in controversy exceeds $25,000, is reviewable by this Court by certiorari. P. 215.
3. One who is engaged in the Philippine Islands in the business of milling sugar cane grown on land owned and operated by others, under contracts providing that he shall receive as compensation for the milling one-half of the resulting sugar, the other half going to the owners of the cane, and who sells his share of the sugar in the ordinary course of trade, is subject to tax on such sales as a merchant under § 1459 of the Philippine Administrative Code of 1917, which, except as specially provided, includes in the term merchant "manufacturers who sell articles of their own production." P. 216.
4. Such sales are not within either of the exceptions made by § 1460 of the Code, viz., (a) "Things subject to a specific tax,"—sugar not being so subject; or (b) "Agricultural products when sold by the producer or owner of the land where grown, or by any other person other than a merchant or commission merchant, whether in their original state or not,"—the producer there intended being the grower and not the manufacturer. Pp. 216–217.
5. In the absence of express restriction, it may be assumed that a term (here the term "merchant" in §§ 1459 and 1460) is used throughout a statute in the same sense in which it is first defined. P. 217.
6. That a party, if held liable to a sales tax under one section of a code, may be liable in future to double taxation because of another section taxing gross receipts, is not persuasive in the construction of the first provision, where the two are in independent sections, and the second was not made applicable to his business until six years after the enactment of the first and until after his suit was begun. P. 218.

Affirmed.

CERTIORARI, 278 U. S. 590, to review a judgment of the Supreme Court of the Philippine Islands which affirmed a judgment against the Sugar Mills in its action against the Collector of Internal Revenue of the Islands, to recover money paid under protest as taxes.

Mr. Louis Titus, with whom *Messrs Quintin Paredes, Felipe Buencamino, Jr., Oscar Sutro,* and *José Yulo* were on the brief, for petitioner.

Mr. Wm. Cattron Rigby, with whom *Messrs Edward A. Kreger,* Judge Advocate General, U. S. A., and *Delfin Jaranilla,* Attorney General of the Philippine Islands, were on the brief, for respondent.

Mr. Justice Brandeis delivered the opinion of the Court.

Pampanga Sugar Mills, the plaintiff below, was the owner and operator of a sugar mill in the Philippine Island. The business of the corporation consisted of milling sugar cane grown on lands owned and operated by others. The cane was delivered to the corporation by its owners under milling contracts which provided that the corporation should receive, as compensation for milling, one-half of the resulting centrifugal sugar, the other half going to the owners of the cane. The half received by the corporation was sold from time to time in the ordinary course of trade. Upon sales so made in 1920, 1921 and 1922 a tax was assessed as on merchants' sales under § 1459 and § 1460 of Act No. 2711 of the Philippine Legislature, known as the Administrative Code of 1917. Trinidad, the defendant below, was the then Collector of Internal Revenue of the Islands. The tax, which was one per cent on the sales value of the sugar so produced and sold by the corporation, amounted to 60,911.42 pesos.

The corporation claimed that its operations were not within the purview of the statute; paid the tax under protest; and then brought this suit in the Court of First Instance at Manila to recover the amount. The question presented was one solely of statutory construction. Is the corporation a merchant within the meaning of the law? The pertinent provisions of the statute are these:

"Sec. 1459. *Percentage tax on merchants' sales.*—All merchants not herein specifically exempted shall pay a tax of one per centum on the gross value in money of the commodities, goods, wares and merchandise sold, bar-

tered, exchanged, or consigned abroad by them, such tax to be based on the actual selling price or value of the things in question at the time they are disposed of or consigned, whether consisting of raw material or of manufactured or partially manufactured products, and whether of domestic or foreign origin. The tax upon things consigned abroad shall be refunded upon satisfactory proof of the return thereof to the Philippine Islands unsold. . . .

"'Merchant,' as here used, means a person engaged in the sale, barter or exchange of personal property of whatever character. Except as specially provided, the term includes manufacturers who sell articles of their own production, and commission merchants having establishments of their own for the keeping and disposal of goods of which sales or exchanges are effected, but does not include merchandise brokers.

"§ 1460. *Sales not subject to merchants' tax.*—In computing the tax above imposed, transactions in the following commodities shall be excluded:

"(a) Things subject to a specific tax,

"(b) Agricultural products when sold by the producer or owner of the land where grown, or by any other person other than a merchant or commission merchant, whether in their original state or not."

The trial court denied relief. Its judgment was affirmed by the Supreme Court of the Islands under the following circumstances. The case was argued three times and was before the court for three years. Throughout the period one judge was disqualified and the remaining eight were equally divided. Under § 138 of the Philippine Administrative Code of 1917 the concurrence of five judges is necessary for the pronouncement of a judgment where there is no vacancy in the court; and the amount in controversy exceeds 10,000 pesos. Thus,

in this case, the equal division of the appellate court did not operate as an affirmance of the judgment below. Finally, one of the four, who had been consistently of the opinion that the corporation was not subject to the tax, changed his vote and voted with the four who thought the tax had been collected legally. He wrote, at the time of doing so, an opinion in which he stated that he still adhered to his original belief and that he changed his vote solely in order to break the deadlock, and thereby enable the corporation to apply to this Court for a review. A writ of certiorari was granted. 278 U. S. 590. As the amount in controversy exceeds $25,000, there is jurisdiction under § 7 of the Act of February 13, 1925, 43 Stat. 936, 940. We are of opinion that the judgment should be affirmed.

The corporation manufactured and sold the sugar. Section 1459 declares that " except as specially provided, the term [merchants] includes manufacturers who sell articles of their own production." The exceptions are provided in § 1460, and the corporation is not relieved by either of them. The first is: " (a) Things subject to a specific tax." Sugar confessedly is not. The second exception is: " (b) Agricultural products when sold by the producer or owner of the land where grown, or by any other person other than a merchant or commission merchant, whether in their original state or not." Exception (b) affords no immunity to the corporation. Sugar cane is an " agricultural product " and the grower would doubtless have immunity on the sale of his half of the sugar made therefrom provided he sold it himself or through someone other than a merchant (including the manufacturer) or a commission merchant. But the corporation could, in no event, have immunity on the sale of its own half of the sugar; because it is a merchant within the express terms of § 1459—and its sugar is not within either

exception made by § 1460. Such would seem to be the natural reading of the statute. To overcome it several contentions are made.

First. It is contended that the sugar, although physically manufactured by the corporation, was legally manufactured by the grower, the corporation being merely a servant hired by the grower to perform the service; that therefore the corporation is not included in the class taxed of "manufacturers who sell articles of their own production"; and that the fact that the compensation was paid in sugar instead of in cash is immaterial. The corporation is in no sense a servant. It is an independent concern—a contractor. But even if it could be deemed a servant of the producer of the cane, this view would not aid the corporation. It is taxed not on sugar owned by the grower, but on sugar which it acquired and then sold on its own account. The nature of the transaction by which the corporation acquired the sugar is not of legal significance. The tax is solely on the sale. If the sugar be deemed to have been bought by the corporation and then sold, it was a merchant in the common acceptation of the term. If it is treated as a manufacturer of sugar for hire, it is liable under the express provision of the statute which declares that, for the purpose of the tax, the manufacturer shall be deemed a merchant.

Second. It is contended that the clause in § 1459 that "except as specially provided, the term [merchants] includes manufacturers who sell articles of their own production" does not mean to include all manufacturers who do so, but only those whose main business is selling what they buy. No basis is shown for imposing such a limitation upon the plain words of the statute; nor is it shown why this corporation is in respect to the sugar sold in any different position from one who manufactures sugar from cane bought for cash. A concern which sold only sugar which it had manufactured from cane which it bought for

cash would clearly be within the terms of the statute; and no reason is suggested why a concern which manufactures only sugar which it received in exchange for services—and thus acquired by barter—should not be. The corporation was as much engaged in the business of selling sugar as it was in the business of manufacturing it. If it had obtained the sugar by a purchase for cash, it would confessedly have been liable to the tax. If getting the sugar in exchange for the service performed in grinding the other half of the cane for the grower be deemed a barter, the corporation would under the terms of the statute likewise be liable.

Third. It is contended that even if the sales by the corporation would be taxable under § 1459, if that section stood alone, they are specifically exempted by § 1460, because sugar is an "agricultural product" and was sold by "the producer" within clause (b), which excludes from the tax "agricultural products when sold by the producer or owner of the land where grown, or by any other person other than a merchant or commission merchant, whether in their original state or not." Centrifugal sugar may well be considered an agricultural product, but he who produces it, is the agriculturist—the grower—not the manufacturer. That the word "producer" is used in § 1460 in this restrictive sense is made clear by the alternative exemption granted to the "owner of the land where grown." In *Allen* v. *Smith,* 173 U. S. 389, 399, this Court, while holding that under the particular statute before it there was no legal distinction made between "manufacturer" and "producer," observed that the latter term "is more commonly used to denote a person who raises agricultural crops and puts them in a condition for the market."

Fourth. It is contended that centrifugal sugar being an agricultural product, its sale is exempted from the tax by § 1460 unless made by "a merchant or commission merchant," and that § 1460, unlike § 1459, does not provide

that a manufacturer shall be deemed a merchant. There is nothing in § 1459 to suggest that the definition of merchant there given is only to obtain for that section. The two sections were parts of the same statute. They are not to be treated as unrelated enactments. In the absence of express restriction it may be assumed that a term is used throughout a statute in the same sense in which it is first defined. It is urged that if the legislature had intended the word to have the same meaning in both sections, it would not have added " commission merchant " in § 1460, as it had defined merchant as including commission merchant in § 1459. The fact that " commission merchant " is repeated in § 1460, does not show that the word " merchant " is used in the two sections with different meanings.

Fifth. Finally the corporation urges that if it be held liable under §§ 1459 and 1460 for these taxes, which were assessed and paid in 1920, 1921 and 1922, sugar centrals will hereafter be subject to double taxes; since in March, 1923, § 1462—an entirely different section of the Code which imposes a one per cent tax on the gross receipts of public utilities, hotels, restaurant keepers, dress-makers and others—was amended by inserting the words " sugar centrals." This argument is not persuasive as to the construction to be given to the Act of 1917. The amendment was enacted six years later than the Act here in question and six months after this action was begun.

Affirmed.

RIEHLE, RECEIVER, *v.* MARGOLIES.

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

No. 347. Argued March 1, 5, 1929.—Decided April 8, 1929.

1. The appointment by a federal court of a receiver on a creditor's bill gives no right to stay a suit against the debtor then pending in a state court; and a judgment *in personam* thereafter recovered

against the debtor by default in such suit in the state court establishes conclusively the existence and amount of the claim for the purpose of proof in the federal court, and will enable the claimant to participate in the distribution among creditors of the debtor's property, ordered therein. P. 223.

2. The fact that neither the debtor nor the receiver undertook to defend in the state court and that the judgment was entered by default is, in this connection, immaterial. P. 225.

26 F. (2d) 247, affirmed.

CERTIORARI, 278 U. S. 591, to review a judgment of the Circuit Court of Appeals which affirmed an order of the District Court allowing a claim in a receivership. See also, 5 F. (2d) 1015; 19 *id.* 766.

Mr. F. Wright Moxley, with whom *Mr. Harry F. White* was on the brief, for petitioner.

Mr. Sol A. Rosenblatt, with whom *Mr. Nathan Burkan* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This proceeding, commenced in 1923 in the federal court for southern New York, is what is called a friendly receivership. The federal jurisdiction was invoked solely on the ground of diversity of citizenship. The plaintiff, Hatch, a citizen of New York, is the holder of a dishonored check of the sole defendant, the Morosco Holding Company, Inc., a Delaware corporation, apparently with its principal place of business in New York. The bill alleges that the Company has a variety of assets, largely intangible, and many liabilities; and that, although financially embarrassed, it is solvent. The prayers are that the court administer its entire property; appoint for this purpose a receiver; and enjoin all persons from interfering with his possession. An answer presented with the bill admitted its allegations and joined in its prayers. Riehle

was appointed receiver. Thereafter orders were entered restraining the prosecution of suits against the Company and directing creditors to file with the receiver their claims against the Company. So far as appears no order of distribution has been made.

Among the Company's creditors, but not mentioned in the bill, was Margolies. Two months before the institution of this suit in the federal court, he had commenced in the Supreme Court of New York an action against the Company to recover $124,381 for breach of a contract. That action, in which the Company had filed an answer and counterclaim, was pending when the receiver was appointed. It was stayed by the order of the federal court. Margolies did not, so far as appears, challenge the jurisdiction of the federal court. Compare *Harkin* v. *Brundage,* 276 U. S. 36, 51–52; *Lion Bonding & Surety Co.* v. *Karatz,* 262 U. S. 77, 85; *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491, 500. He applied to it for a modification of the order so that he might prosecute his action in the state court; and he sought to have the receiver directed to contest or liquidate the claim there. The denial by the District Court of that motion, and the contention by the receiver that the judgment later recovered in the state court is not to be accepted in the receivership proceedings as conclusive proof of the existence and amount of Margolies' claim, have been the subject of four decisions by the Circuit Court of Appeals for the Second Circuit. The last of them only is here for review; but what happened earlier must be stated. The record of the proceedings is fragmentary, but supplemented by the opinions of the Court of Appeals shows the following:

On the first appeal, *Hatch* v. *Morosco Holding Co.,* 5 F. (2d) 1015, the unanimous court reversed with costs, as "a plain violation of § 265 of the Judicial Code," the refusal of the District Court to permit Margolies to prosecute his claim in the state court. In doing so, the ap-

pellate court said: "A direction will, however, be included in our mandate, and in the order to be entered thereupon, that should any judgment be entered in said action in the State court, such judgment shall not be taken to be a liquidation of any claim filed or capable of being filed under the judgment [*sic*] creditors' bill herein, or as in any way affecting the right of the receiver to contest the claim so reduced to judgment *de novo*. Nothing, however, in our mandate shall be taken to prevent the court below permitting liquidation of Margolies' claim by suit in the state court, should it prefer so to do."

Upon the coming down of the mandate, Margolies moved in the District Court that the receiver be directed to liquidate the claim in the action pending in the state court. The motion was denied. Thereupon, formal notice of trial of that action was served upon both the receiver and the attorney of record of the Company. Neither appeared at the trial. Judgment by default was taken against the Company; and upon an inquest as to the amount of the damages, judgment was entered in the sum of $55,283.88 which included interest and costs. Thereupon, Margolies moved in the Circuit Court of Appeals that its mandate on the first appeal be recalled and corrected, so that the receiver should not be permitted to try *de novo* in the District Court the issue on his claim. This motion was denied by the Circuit Court of Appeals, apparently without an opinion.

Margolies then filed in the District Court his verified proof of claim; and at a hearing thereon had before a special master presented an exemplified copy of the judgment in the state court. The receiver thereupon announced his election "to have the claim tried *de novo*"; the master recommended that the claim be dismissed "upon the authority of the opinion of the Court of Appeals," and the District Court ordered that Margolies' claim be dismissed. This order was the subject of another

appeal by Margolies. *Hatch* v. *Morosco Holding Co., Inc., Appeal of Margolies,* 19 F. (2d) 766. There the court held, by a majority decision, that the direction in the mandate to the effect that any judgment recovered in the state court should not affect the right of the receiver to contest the claim *de novo* in the federal court had been improvidently made. It, therefore, reversed the judgment of the District Court and remanded the cause for further proceedings.

At the hearing then had before the special master Margolies put in evidence the judgment and rested. The receiver offered to prove that the claim was less than the amount of the judgment. The master excluded the evidence and recommended that judgment be entered for the full amount save for a small deduction directed by the Circuit Court of Appeals on the interest allowed by the state court, which is not challenged here. His report was confirmed by the District Court. The receiver appealed to the Circuit Court of Appeals. It affirmed the judgment, *Hatch* v. *Morosco Holding Co., Inc., Ex parte Margolies,* 26 F. (2d) 247; but, in doing so, said: "A majority of the court, as it is now constituted, think that our first decision impairs the jurisdiction of the District Court over assets already in its custody when the judgment of the state court was entered. They believe that liquidation of claims is a part of the distribution of the estate, since it determines how much each creditor shall get, and that the distribution of the estate is part of what is usually understood as jurisdiction over the res. However, the former decision was reached after unusual deliberation and full presentation of all the questions involved. If it is to be changed, only the Supreme Court may do so; in the same case and on the same claim the first ruling must stand." This Court then granted a writ of certiorari. 278 U. S. 591. We are of opinion that the

view there expressed by the majority is erroneous and that the judgment should be affirmed.

The appointment of a receiver of a debtor's property by a federal court confers upon it, regardless of citizenship and of the amount in controversy, federal jurisdiction to decide all questions incident to the preservation, collection and distribution of the assets. It may do this either in the original suit, *Rouse* v. *Letcher,* 156 U. S. 47, 49–50, or by ancillary proceedings, *White* v. *Ewing,* 159 U. S. 36. Compare *Kelley* v. *Gill,* 245 U. S. 116, 119. And it may, despite § 265 of the Judicial Code, issue under § 262 or otherwise, all writs necessary to protect from interference all property in its possession. *Julian* v. *Central Trust Co.,* 193 U. S. 93, 112. But the appointment of the receiver does not necessarily draw to the federal court the exclusive right to determine all questions or rights of action affecting the debtor's estate. *Calhoun* v. *Lanaux,* 127 U. S. 634, 637–639. This is true, *a fortiori,* as to the subject matter of a suit pending in a state court when the receivership suit was begun. Compare *Haines* v. *Carpenter,* 91 U. S. 254. The rule that, when the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached the right cannot be restrained by proceedings in any other court, applies to protect the jurisdiction of the state court unless the case is within some recognized exception to § 265 of the Judicial Code. Compare *Hull* v. *Burr,* 234 U. S. 712, 723; *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175, 182–184; *Essanay Film Co.* v. *Kane,* 258 U. S. 358, 361; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wells,* 265 U. S. 101, 103. Here there is no basis for any such exception.

The contention that the judgment is not conclusive rests upon the argument that, because the appointment of the receiver draws to the appointing court control of the assets, and in the distribution of them among creditors

there is necessarily involved a determination both of the existence of the claim and of the amount of the indebtedness, the federal court must have the exclusive power to make that determination. The argument ignores the fact that an order which results in the distribution of assets among creditors has ordinarily a twofold aspect. In so far as it directs distribution, and fixes the time and manner of distribution, it deals directly with the property. In so far as it determines, or recognizes a prior determination of the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate, it does not deal directly with any of the property. The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam.* Of course, no one can obtain any part of the assets, or enforce a right to specific property in the possession of a receiver, except upon application to the court which appointed him. *Lion Bonding & Surety Co.* v. *Karatz,* 262 U. S. 77, 88–9. But the judgment of the state court does not purport to deal with the property. The sole question involved there was the existence and amount of Margolies' claim against the corporation. And the sole question involved here is the proof of that claim. There is no inherent reason why the adjudication of the liability of the debtor *in personam* may not be had in some court other than that which has control of the *res.* It is only necessary that in the receivership proof of the claim be made in an orderly way, so that it may be established who the creditors are and the amounts due them.

The power to fix the time for distribution may include the power, in the exercise of judicial discretion, to decline to postpone distribution awaiting disposition of litigation in another court over a contested claim. Compare *Wm. Filene's Sons Co.* v. *Weed,* 245 U. S. 597, 602; *Pennsylvania Steel Co.* v. *New York City Ry.,* 229 Fed. 120. But there is no reason why the character of the proof

required in the receivership suit for any purpose should be different from that which would have been required had the judgment in the state court been rendered prior to the appointment of the receiver; or from that which would be required if an independent suit on the judgment were brought in the federal court. It would hardly be doubted that a final judgment, recovered in a state court prior to the commencement of the receivership suit, would establish conclusively the existence and amount of the claim against the debtor, if later a decree were entered in the federal court distributing the funds in the receiver's hands among its creditors. Whether such a judgment recovered in a suit commenced after the appointment of the receiver would operate as *res judicata* we need not consider. For Margolies' suit was begun before. He had, under § 265 of the Judicial Code, the right to prosecute that suit to judgment despite the institution later of the receivership proceedings. He must have, as an incident thereof, the further right to have it accepted therein as an adjudication of the existence of the indebtedness. The fact that neither the Company nor the receiver undertook to defend in the state court is, in this connection, immaterial. A judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judicata,* in the absence of fraud or collusion, even if obtained upon a default. *Last Chance Mining Co.* v. *Tyler Mining Co.,* 157 U. S. 683, 691. Compare *Northern Pacific Ry. Co.* v. *Slaght,* 205 U. S. 122.

The establishment of a claim constituting the basis of the right to participate in the distribution of property in the possession of one court is often conclusively determined by a judgment obtained in another court. Thus, a judgment of a federal court may establish conclusively the fact which entitles one to share in a decedent's estate in course of administration in a state court. *Yonley* v. *Lavender,* 21 Wall. 276; *Hess* v. *Reynolds,* 113 U. S. 73;

Byers v. *McAuley,* 149 U. S. 608, 620; *Waterman* v. *Canal-Louisiana Bank,* 215 U. S. 33. Under the Bankruptcy Act of 1867, a judgment against the debtor rendered in a suit in a state court pending at the time of the commencement of the bankruptcy proceedings established conclusively in bankruptcy the existence and amount of the debt provable against the estate. *Norton* v. *Switzer,* 93 U. S. 355, 363–364. Compare *Hill* v. *Harding,* 107 U. S. 631. A judgment in a state court against a receiver, pursuant to § 66 of the Judicial Code, establishes conclusively the right to payment from the funds of the receivership, although the Act makes the suit in the state court "subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same shall be necessary to the ends of justice." [1] Where a receivership of a national bank is appointed by the Comptroller of the Currency, a judgment entered after the appointment in an action commenced in a state court before the appointment is binding upon the receivers as well as upon the bank. *Speckert* v. *German National Bank,* 98 Fed. 151, 154.

The rule that the appointment by a federal court of a receiver on a creditor's bill gives it no right to stay a suit then pending in a state court and that the judgment *in personam* thereafter recovered therein in the state court against the debtor must be held to have established conclusively the existence and amount of the claim for the purpose of proof in the federal court, and will enable the claimant to participate in a distribution among creditors

[1] *Central Trust Co.* v. *St. Louis, Arkansas & Texas Ry. Co.,* 41 Fed. 551; *Dillingham* v. *Hawk,* 60 Fed. 494; *St. Louis S. W. Ry. Co.* v. *Holbrook,* 73 Fed. 112; *Willcox* v. *Jones,* 177 Fed. 870; *Manhattan Trust Co.* v. *Chicago Electric Traction Co.,* 188 Fed. 1006; *American Brakeshoe & Foundry Co.* v. *Pere Marquette R. R. Co.,* 263 Fed. 237, 278 Fed. 832; *International & Great Northern Ry. Co.* v. *Adkins,* 14 F. (2d) 149.

of the debtor's property ordered therein, has long been applied in some of the lower federal courts.[2] No case has been found in which the right has been denied. A like rule has been applied in state courts.[3] In *Pendleton* v. *Russell,* 144 U. S. 640, 644, it was sought to prove against funds of a dissolved corporation in the hands of a receiver appointed by a court of New York a judgment recovered in Tennessee after the dissolution. The proof was disallowed because the dissolution had operated, like death, as an abatement of the suit. But the court said: "Had the original judgment of the Circuit Court of the United States been affirmed, instead of being reversed, it having been rendered when the insurance company was in existence, it would have stood as a valid claim against the assets of that company after its dissolution."

There are some cases arising under the Bankruptcy Act and some under state insolvency laws in which a judgment recovered in the state court was held not to

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[2] *Mercantile Trust Co.* v. *Pittsburg & Western R. R. Co.,* 29 Fed. 732; *Pine Lake Iron Co.* v. *Lafayette Car Works,* 53 Fed. 853. Compare *Shelby* v. *Bacon,* 10 How. 56, 69–70; *Wilder* v. *City of New Orleans,* 87 Fed. 843, 848; *Anglo-American Land, etc. Co.* v. *Cheshire Provident Institution,* 124 Fed. 464, 466; *Pennsylvania Steel Co.* v. *New York City Ry. Co.,* 161 Fed. 786, 787; *United States* v. *Illinois Surety Co.,* 238 Fed. 840, 846; *International & Great Northern Ry. Co.* v. *Adkins,* 14 F. (2d) 149, 152.

[3] *Pringle* v. *Woolworth,* 90 N. Y. 502; *Taylor* v. *Gray,* 59 N. J. Eq. 621; *St. Louis, B. & M. Ry. Co.* v *Green,* (Texas Civil Appeals) 183 S. W. 829, 833. See "Judgment Claims in Receivership Proceedings" by Judge John K. Beach, 30 Yale Law Journal 674. Compare *Central Trust Co.* v. *D'Arcy,* 238 Mo. 676, where the rule was applied to proof under an assignment for the benefit of creditors; *Matter of Empire State Surety Co.,* 216 N. Y. 273, 283. See *contra Evans* v. *Illinois Surety Co.,* 319 Ill. 105, in which the difference between an equity receivership and receivers under bankruptcy or insolvency laws was not referred to. Cases like *In re New Jersey Refrigerating Co.,* 97 N. J. Eq. 358, where both actions are brought in courts of the same State, depend, of course, upon the local law.

be conclusive in the bankruptcy or insolvency proceedings. Thus, it has been held by some lower federal courts that a judgment recovered after institution of bankruptcy proceedings in an action commenced in a state court prior thereto, on a claim to which the limited power to stay action in a state court conferred by § 11 of the Act of July 1, 1898, c. 541, 30 Stat. 549, applies, is not to be accepted in bankruptcy as conclusive proof of the claim.[4] Similarly it has been held, where a statutory proceeding for the winding up of an insolvent corporation is brought in the State of the incorporation, that the assets will be distributed only among those persons who have been found to be creditors either by that court or elsewhere with its leave; and that a judgment recovered in another State without leave from it will not entitle the plaintiff to share in the assets.[5] These decisions are not inconsistent with the conclusion stated above. They have no application to receiverships in a federal court sitting in equity, which lacks the power to stay an action in the state court. Margolies had the absolute right to prosecute his claim to judgment in the state court; the order of the District Court staying its prosecution was properly dissolved; and the judgment entered there is conclusive as between the parties and their privies in the federal court. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 230, 233.

Affirmed.

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[4] *In re Hoey, Tilden & Co.*, 292 Fed. 269, 271; *In re James A. Brady Foundry Co.*, 3 F. (2d) 437; *In re Barrett & Co.*, 27 F. (2d) 159. Whether that is the correct rule we have no occasion to consider. See *contra In re Buchan's Soap Corp.*, 169 Fed. 1017. Compare *Hobbs* v. *Head & Dowst Co.*, 184 Fed. 409; *In re Benwood* Brewing Co., 202 Fed. 326, 327–8; *In re Havens*, 272 Fed. 975; *In re Rothenstein*, 276 Fed. 704; *In re Kelley*, 297 Fed. 676; *In re Winter*, 17 F. (2d) 153.

[5] *Attorney General* v. *Legion of Honor*, 196 Mass. 151; *Hackett* v. *Legion of Honor*, 206 Mass. 139, 142.

Counsel for Appellees.

ALABAMA ET AL. *v.* UNITED STATES ET AL.

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

No. 166. Argued February 21, 1929.—Decided April 8, 1929.

1. The Interstate Commerce Commission has power, after full inquiry, to establish intrastate rates on commodities, where the maintenance of such rates on a lower basis than those found reasonable would result in unjust discrimination against, and undue prejudice to persons and localities in, interstate commerce. P. 230.
2. The Act of Congress requiring the consideration of applications for interlocutory injunctions in certain cases to be made by three judges and allowing an appeal to this Court (Jud. Code, § 266, as amended), has in no way modified the well-established doctrine that such applications are addressed to the sound discretion of the trial court and that an order granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised. P. 230.

Affirmed.

APPEAL from a decree of the District Court denying an application for a preliminary injunction to set aside orders of the Interstate Commerce Commission establishing intrastate rates on fertilizers and fertilizing material in the State of Alabama.

Mr. Edgar Watkins, with whom *Messrs. Charlie C. McCall,* Attorney General of Alabama, *J. Q. Smith,* Special Assistant Attorney General, and *Hugh White,* President, Alabama Public Service Commission, were on the brief, for appellants.

Mr. E. M. Reidy, with whom *Solicitor General Mitchell,* and *Messrs. Elmer B. Collins,* Special Assistant to the Attorney General, and *Daniel W. Knowlton* were on the brief, for appellees United States and Interstate Commerce Commission.

Mr. Frank W. Gwathmey, with whom *Messrs. W. A. Northcutt, Charles Clark* and *W. N. McGehee* were on the brief, for appellees Alabama Carriers.

Mr. Justice Sutherland delivered the opinion of the Court.

This suit was brought by appellants to set aside an order of the Interstate Commerce Commission establishing intrastate rates on fertilizers and fertilizing material in Alabama; and to enjoin numerous railroad companies from making such rates effective. The ground of the Commission's order was that the maintenance of such intrastate rates on a lower basis than those found reasonable would result in unjust discrimination against, and undue prejudice to persons and localities in, interstate commerce.

The order of the Commission is within its general powers, *Houston & Texas Ry.* v. *United States,* 234 U. S. 342, 354–5, 358; *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.,* 257 U. S. 563, 585, *et seq.;* and was made after a full inquiry. After a review of the record, the court below denied an application for a preliminary injunction. The case is still pending in the court below for final hearing, and the present appeal relates only to the interlocutory order.

Congress has manifested its solicitude that the power to grant writs of injunction against orders of the Interstate Commerce Commission shall be exercised with special care, by requiring the consideration of applications to be made by three judges and by giving an appeal directly to this Court both in the case of interlocutory orders and final decrees. *Virginian Ry.* v. *United States,* 272 U. S. 658, 672. But there is nothing in the legislation to suggest that in the exercise of the judicial power in respect of such writs pertinent principles of equity as theretofore understood, are to be disregarded or modified. It is well-

established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised. *Meccano, Ltd.*, v. *John Wanamaker,* 253 U. S. 136, 141; 2 High on Injunctions (4th Ed.) § 1696. And see *Rice & Adams Corporation* v. *Lathrop,* 278 U. S. 509. The rule generally to be applied in the exercise of that discretion, is stated in our recent decision in *Ohio Oil Co.* v. *Conway, post,* p. 813.

That the doctrine to be followed in reviewing such an order applies in the case of an order of a court of three judges denying an interlocutory injunction does not admit of doubt. *United Fuel Gas Co.* v. *Public Service Commission of West Virginia,* 278 U. S. 322, 326; *Chicago, G. W. Ry.* v. *Kendall,* 266 U. S. 94, 100. The duty of this Court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits but simply to determine whether the discretion of the court below has been abused. See *United States* v. *Balt. & Ohio R. R. Co.,* 225 U. S. 306, 325. An examination of the record here reveals no such abuse, and we must remand the case to the court below for final disposition on the merits.

Decree affirmed.

KARNUTH, DIRECTOR OF IMMIGRATION, ET AL. *v.* UNITED STATES EX REL. ALBRO.

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

No. 198. Argued March 5, 1929.—Decided April 8, 1929.

1. Whether the stipulations of a treaty are annulled by a subsequent war between the parties to it depends upon the intrinsic character of the stipulations. P. 236.

2. The provision in Art. III of the Treaty of 1794 granting to the subjects of Great Britain and the citizens of the United States the right freely to pass and repass into the respective territories of the contracting parties on the continent of America, was abrogated by the War of 1812. Pp. 235–241.
3. In the clause in Article XXVIII of the Treaty providing that its first ten articles shall be "permanent," but that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years, the term "permanent" is employed merely to differentiate the first ten from the subsequent articles and not as a synonym for "perpetual" or "everlasting." P. 242.
4. Long acquiescence by our Government, after the War of 1812, in the continued exercise by inhabitants of Canada of the privilege of passing and repassing the international boundary is not a ground for presuming that a revival of the treaty obligation in that regard was recognized. P. 242.
5. Under the Immigration Act, § 3, any alien coming from any place outside of the United States, who is not within one of the exceptions, is an immigrant, whether he come to reside permanently or for temporary purposes. P. 242.
6. In clause (2) of § 3 of the Act, making an exception in favor of aliens visiting the United States "temporarily for business or pleasure," the term "business" is to be interpreted with regard to the policy of Congress to protect American labor, revealed by the history of the legislation, and does not include labor for hire. P. 243.

24 F. (2d) 649, reversed.

CERTIORARI, 278 U. S. 594, to review a judgment of the Circuit Court of Appeals which reversed, on appeal, a judgment of the District Court dismissing a writ of *habeas corpus*. The writ had been sued out on behalf of two aliens who were detained by immigration officers.

Attorney General Mitchell, with whom *Messrs. Green H. Hackworth*, Solicitor, Department of State, *Richard W. Flournoy, Jr.*, Assistant Solicitor, *Theodore G. Risley*, Solicitor Department of Labor, *B. W. Butler* and *Albert E. Reitzel*, Assistants to the Solicitor, and *Frank M. Parrish* were on the brief, for petitioners.

Mr. Preston M. Albro, with whom *Mr. George W. Offutt* was on the brief, for respondents.

Mr. Justice Sutherland delivered the opinion of the Court.

This case arose under § 3 of the Immigration Act of 1924, c. 190, 43 Stat. 153, 154, U. S. Code, Title 8, § 203, *et seq.,* which provides: "When used in this Act the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except . . . (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, . . ." The complete section, together with other pertinent provisions of the act, are copied in the margin.*

Neither respondent is a native of Canada. Mary Cook is a British subject, born in Scotland, who came to Canada in May, 1924. She is a spinner by occupation and resides at Niagara Falls, Ontario. Antonio Danelon

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* Sec. 3. When used in this Act, the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except (1) a government official, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a bona fide alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

Sec. 4. When used in this Act the term "non-quota immigrant" means—

. . .

(c) An immigrant who was born in the Dominion of Canada, Newfoundland, the Republic of Mexico, the Republic of Cuba, the Re-

is a native of Italy, who came to Canada in 1923. He also resides at Niagara Falls, Ontario. He alleges that he became a Canadian citizen by reason of his father's naturalization. Both sought admission to the United States on December 1, 1927, as non-immigrants under the excepting clause (2) above quoted. Prior thereto, Mary Cook had crossed from Canada to the United States daily for a period of three weeks to engage in work at which she was employed. On the occasion in question, she was out of employment, but desired admission to look for work. Danelon had been at work in the United States for more than a year, crossing daily by the use of an identification card. He sought admission to resume work. Both were denied admission by the immigration authorities, on the ground that they were quota-immigrants within the meaning of the act, and did not come within the excepting clause, § 3 (2). The following departmental regulation, adopted under § 24 of the act, has been in force since September, 1925. "Temporary visits . . . for the purpose of performing labor for hire are not considered to be within

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public of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America, and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him;

. . .

Sec. 5. When used in this Act the term "quota immigrant" means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration.

Sec. 24. The Commissioner General, with the approval of the Secretary of Labor, shall prescribe rules and regulations for the enforcement of the provisions of this Act; but all such rules and regulations, in so far as they relate to the administration of this Act by consular officers, shall be prescribed by the Secretary of State on the recommendation of the Secretary of Labor.

the purview of section 3 (2) of the act." It is not disputed that both aliens were properly excluded if the validity of this regulation is established.

In a habeas corpus proceeding, brought in behalf of the two aliens, the federal district court for the Western District of New York sustained the action of the immigration officials and dismissed the writ. On appeal, this judgment was reversed. The circuit court of appeals held that an alien crossing from Canada to the United States daily to labor for hire was not an immigrant but a visitor for business within the meaning of section 3 (2) of the act. 24 F. (2d) 649. In reaching that conclusion the court seemed of opinion that if the statute were so construed as to exclude the aliens, it would be in conflict with Article III of the Jay Treaty of 1794, 8 Stat. 116, 117, a result, of course, to be avoided if, reasonably, it could be done. *Lem Moon Sing* v. *United States,* 158 U. S. 538, 549.

We granted the writ of certiorari because of the far-reaching importance of the question. The decision below affects not only aliens crossing daily from Canada to labor in the United States, but, if followed, will extend to include those entering the United States for the same purpose from all countries, including Canada, who intend to remain for any period of time embraced within the meaning of the word " temporary." By the immigration rules, this time is defined as a reasonable fixed period to be determined by the examining officer, which may be extended from time to time, though not to exceed one year altogether from the date of original entry. Thus, if the view of the court below prevail, it will result that aliens—not native of Canada or any other American country named in § 4 (c),—whose entry as immigrants is precluded, may land as temporary visitors and remain at work in the United States for weeks or months at a time.

First. The pertinent provision of Article III of the Jay Treaty follows:

"It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's bay Company only excepted) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other. . . ."

The position of the Government is that (1) there is no conflict between the treaty and the statute, but, (2) in any event, the treaty provision relied on was abrogated by the War of 1812. We pass at once to a consideration of the second contention, since if that be sustained the first becomes immaterial and the statute open to construction unembarrassed by the treaty.

The effect of war upon treaties is a subject in respect of which there are widely divergent opinions. The doctrine sometimes asserted, especially by the older writers, that war *ipso facto* annuls treaties of every kind between the warring nations, is repudiated by the great weight of modern authority; and the view now commonly accepted is that "whether the stipulations of a treaty are annulled by war depends upon their intrinsic character." 5 Moore's Digest of International Law, § 779, p. 383. But as to precisely what treaties fall and what survive, under this designation, there is lack of accord. The authorities, as well as the practice of nations, present a great contrariety of views. The law of the subject is still in the making, and, in attempting to formulate principles at all approaching generality, courts must proceed with a good deal of caution. But there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: stipulations in respect of what shall be done in a state of war; treaties of cession, boundary, and the like;

provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other; and, generally, provisions which represent completed acts. On the other hand, treaties of amity, of alliance, and the like, having a political character, the object of which " is to promote relations of harmony between nation and nation," are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war. *Id.*, p. 385, quoting Calvo, Droit Int. (4th Ed.), IV. 65, § 1931.

In *Society, etc.* v. *New Haven*, 8 Wheat. 464, a case involving the right of a British corporation to continue to hold lands in Vermont, this Court was called upon to determine the effects of the War of 1812 upon the Ninth Article of the Jay Treaty which provides " that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens." 8 Stat. 116, 122.

It was held that the title to the property of the Society was protected by the Sixth Article of the Treaty of 1783, 8 Stat. 80, 83; was confirmed by the words of Article IX above quoted; and was not affected by the War of 1812. The applicable rule was stated (p. 494) in the following words:

" But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid

down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning. We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."

The English High Court of Chancery reached the same conclusion in *Sutton* v. *Sutton,* 1 Russ. & M. 663, 675:

"The relations, which had subsisted between Great Britain and America, when they formed one empire, led to the introduction of the ninth section of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that

the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace."

These cases are cited by respondents and relied upon as determinative of the effect of the War of 1812 upon Article III of the treaty. This view we are unable to accept. Article IX and Article III relate to fundamentally different things. Article IX aims at perpetuity and deals with existing rights, vested and permanent in character, in respect of which, by express provision, neither the owners nor their heirs or assigns are to be regarded as aliens. These are rights which, by their very nature, are fixed and continuing, regardless of war or peace. But the privilege accorded by Article III is one created by the treaty, having no obligatory existence apart from that instrument, dictated by considerations of mutual trust and confidence, and resting upon the presumption that the privilege will not be exercised to unneighborly ends. It is, in no sense, a vested right. It is not permanent in its nature. It is wholly promissory and prospective and necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility. See 7 Moore's Digest of International Law, § 1135; 2 Hyde, International Law, § 606. The reasons for the conclusion are obvious—among them, that otherwise the door would be open for treasonable intercourse. And it is easy to see that such freedom of intercourse also may be incompatible with conditions following the termination of the war. Disturbance of peaceful relations between countries occasioned by war, is often so profound that the accompanying bitterness, distrust and hate indefinitely survive the coming of peace. The causes, conduct or result of the war may be such as to render a revival of the privilege inconsistent with a new or altered state of affairs. The grant of the privilege con-

notes the existence of normal peaceful relations. When these are broken by war, it is wholly problematic whether the ensuing peace will be of such character as to justify the neighborly freedom of intercourse which prevailed before the rupture. It follows that the provision belongs to the class of treaties which does not survive war between the high contracting parties, in respect of which, we quote, as apposite, the words of a careful writer on the subject:

"Treaties of the fifth class are necessarily at least suspended by war, many of them are necessarily annulled, and there is nothing in any of them to make them revive as a matter of course on the advent of peace,—frequently in fact a change in the relations of the parties to them effected by the treaty of peace is inconsistent with a renewal of the identical stipulations. It would appear therefore to be simplest to take them to be all annulled, and to adopt the easy course, when it is wished to put them in force again without alteration, of expressly stipulating for their renewal by an article in the treaty of peace." Hall, International Law (5th Ed.), pp. 389–390.

Westlake classifies treaties not affected by war as (1) those providing what is to be done in a state of war, (2) transitory or dispositive treaties, including such as are intended to establish a permanent condition of things, such as treaties of cession, boundary, and recognition of independence, as well as those having no conceivable connection with the causes of war or peace, and (3) treaties establishing arrangements to which third powers are parties such as guarantees and postal and other unions. Westlake, International Law, Part II, pp. 29–32. He then says:

"Outside the exceptions which have been discussed, treaties between belligerents do not survive the outbreak of the war. At the peace there is no presumption that the parties will take the same view as before the war of their interests, political, commercial or other. It is for

them to define on what terms they intend to close their interlude of savage life and to reënter the domain of law."

Fauchille, Traité de Droit International Public, 1921, Vol. II, p. 55, says that "a state of war puts an end to treaties concluded with a view to peaceful relations between the signatories and the object or end of which is to strengthen or maintain such peaceful relations, for example, treaties of alliance, subsidies, guarantees, commerce, navigation, customs union, etc. Those treaties from their very nature are subject to an implicit resolutory condition, namely a break in the state of peace. They cannot survive the outbreak of hostilities between the signatory States. War, to them, is a cause of final extinction and not of mere suspension. When peace is concluded, they do not spontaneously come out of a comatose state; they do not revive unless expressly renewed in the peace treaty."*

These expressions and others of similar import which might be added, confirm our conclusion that the provision of the Jay Treaty now under consideration was brought to an end by the War of 1812, leaving the contracting powers discharged from all obligation in respect thereto, and, in the absence of a renewal, free to deal with the matter as their views of national policy, respectively, might from time to time dictate.

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* . . . *résolus* par l'état de gurre les traités conclus en vue de relations pacifiques entre les signataires et ayant pour objet ou pour but la consolidation ou le maintien de ces relations pacifiques. *Ex.:* les traités d'alliance, de subsides, de garantie, de commerce, de navigation, d'union douanière, etc. Ces traités sont par leur nature même affectés d'une condition résolutoire implicite, la cessation de l'état de paix. Ils ne peuvent survivre à l'ouverture des hostilités entre les Etats signataires. La guerre est pour eux une cause d'extinction définitive, et non une cause de simple suspension. La paix conclue, ils ne sortent pas spontanément, d'un état de léthargie momentané: ils ne revivent pas, à moins qu'ils no soient expressément renouvelés dans le traité de paix.

We are not unmindful of the agreement in Article XXVIII of the Treaty "that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years." It is quite apparent that the word "permanent" as applied to the first ten articles was used to differentiate them from the subsequent articles—that is to say, it was not employed as a synonym for "perpetual" or "everlasting," but in the sense that those articles were not limited to a specific period of time, as was the case in respect of the remaining articles. Having regard to the context, such an interpretation of the word "permanent" is neither strained nor unusual. See *Texas, &c. Railway Co.* v. *Marshall,* 136 U. S. 393, 403; *Bassett* v. *Johnson,* 2 N. J. Eq. 154, 162.

It is true, as respondents assert, that citizens and subjects of the two countries continued after the War of 1812, as before, freely to pass and repass the international boundary line. And so they would have done if there never had been a treaty on the subject. Until a very recent period, the policy of the United States, with certain definitely specified exceptions, had been to open its doors to all comers without regard to their allegiance. This policy sufficiently accounts for the acquiescence of the Government in the continued exercise of the crossing privilege upon the part of the inhabitants of Canada, with whom we have always been upon the most friendly terms; and a presumption that such acquiescence recognized a revival of the treaty obligation cannot be indulged.

Second. In construing § 3 (2) of the Immigration Act, we are not concerned with the ordinary definition of the word "immigrant" as one who comes for permanent residence. The act makes its own definition, which is that "the term 'immigrant' means any alien departing from any place outside the United States destined for the United States." The term thus includes every alien com-

ing to this country either to reside permanently or for temporary purposes, unless he can bring himself within one of the exceptions. The only exception pertinent to the present case is the second, quoted at the beginning of this opinion, namely, an alien visiting the United States "temporarily for business or pleasure." The contention is that respondents were temporary visitors for business; and the case is, therefore, narrowed to the simple inquiry whether the word "business," as used in the statute, includes ordinary work for hire. The word is one of flexibility; and, when used in a statute, its meaning depends upon the context or upon the purposes of the legislation. It may be so used as either to include or exclude labor; "for though labor may be business, it is not necessarily so, and the converse is equally true, that business is not always labor." *Bloom* v. *Richards,* 2 Oh. St. 387, 396. The true sense in which the word was here employed will be best ascertained by considering the policy, necessity and causes which induced the enactment. See *Heydenfeldt* v. *Daney Gold, etc. Co.,* 93 U. S. 634, 638; *Holy Trinity Church* v. *United States,* 143 U. S. 457, 463; *Ozawa* v. *United States,* 260 U. S. 178, 194.

The various acts of Congress since 1916 evince a progressive policy of restricting immigration. The history of this legislation points clearly to the conclusion that one of its great purposes was to protect American labor against the influx of foreign labor. In the report of the House Committee to accompany the bill which became the Quota Act of May 19, 1921 (H. of R. Report 4, 67th Congress, 1st Session), it was stated (p. 3) that one of the causes which called for the immediate passage of an act to restrict immigration was: "2. Large unemployment in the United States, making it impracticable for the United States to accept a heavy immigration." And further (p. 7): "In the opinion of a majority of the members of this commit-

tee the economic aspects of immigration alone call for the passage of this restrictive legislation, if there were no other reasons." In the Senate report upon the same bill (S. Report 17, 67th Congress, 1st Session, p. 4) one of the evils pointed out was that a large part of the new immigration had been of a migratory character, immigrants coming to the United States not so much for the purpose of permanent residence as to seek temporary profitable employment. The report of the House Committee to accompany the bill which afterwards became the Act of 1924, now under consideration, (H. of R. Report 350, 68th Congress, 1st Session) likewise makes clear that protection of American labor was one of the controlling reasons for further restriction of immigration. The committee, after pointing out that various suggested plans for admitting laborers and farmers had been rejected, said (p. 22): "As has been so often said with reference to the demand for the admission of laborers, the present gain is not worth the future cost."

In view of this definite policy, it cannot be supposed that Congress intended, by admitting aliens temporarily for business, to permit their coming to labor for hire in competition with American workmen, whose protection it was one of the main purposes of the legislation to secure.

The word "business," as here used, must be limited in application to intercourse of a commercial character; and we hold that the departmental regulation, to the effect that temporary visits for the purpose of performing labor for hire are not within the purview of § 3 (2) of the act, is in accordance with the Congressional intent.

Judgment reversed.

HELSON AND RANDOLPH, CO-PARTNERS, *v.* KENTUCKY.

ERROR TO THE COURT OF APPEALS OF KENTUCKY.

No. 296. Argued February 27, 28, 1929.—Decided April 8, 1929.

1. The regulation of interstate and foreign commerce is within the exclusive control of Congress, and state legislation which directly burdens such commerce, by taxation or otherwise, is invalid. P. 248.
2. Transportation by ferry from one State to another is interstate commerce and within the protection of the commerce clause. P. 249.
3. The power vested in Congress to regulate commerce embraces within its control all the instrumentalities by which that commerce may be carried on. P. 249.
4. A State cannot "lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on." P. 249.
5. While a State has power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax which is, in effect, a tax for the privilege of transacting such commerce. P. 249.
6. A state statute imposing a tax upon the use of gasoline, in so far as it affects gasoline purchased outside the State for use as fuel upon a ferry engaged in interstate commerce, is in effect a tax upon an instrumentality of commerce, in contravention of the commerce clause of the Constitution, notwithstanding that the tax is confined to such only of the gasoline as is used within the limits of the State. P. 252.

225 Ky. 45, reversed.

ERROR to the Court of Appeals of Kentucky to review a judgment upholding against plaintiffs in error, a ferry company engaged in interstate commerce, the constitutionality of a statute of Kentucky which imposed a tax upon the use of gasoline.

Mr. James G. Wheeler, with whom *Messrs. Charles K. Wheeler* and *D. H. Hughes* were on the brief, for plaintiffs in error.

Mr. James M. Gilbert, Assistant Attorney General of Kentucky, with whom *Mr. J. W. Cammack,* Attorney General, was on the brief, for defendant in error.

The word "commerce" has been defined as "intercourse and traffic between citizens of different States, and includes transportation of persons, property, and navigation of public waters for that purpose as well as purchase, sale and exchange of commodities." *St. Clair Co.* v. *Interstate S. & G. Co.,* 192 U. S. 454.

The gasoline consumed by plaintiffs in error was not an article of "commerce" when bought to be used and while being used in a ferry-boat, and the State does not violate the commerce clause by laying an excise tax upon such gasoline. Congress has not assumed to regulate ferries engaged in interstate commerce (except where connected with a railroad track); therefore, the States are within their rights to tax the ferry company, even though engaged in interstate commerce. 12 C. J. 40, 92, § 120; *Conway* v. *Taylor,* 1 Black 603; *St. Clair Co.* v. *Interstate S. & G. Co.,* 192 U. S. 454; *Penna. Gas Co.* v. *Public Service Comm'n,* 252 U. S. 23; *Mayor* v. *McNeely,* 274 U. S. 630.

The States have power to impose excise, or privilege, taxes for use of their roads for cost of maintenance, construction or improvement without violating the "commerce clause" of the Federal Constitution. This view is shared in the opinions of the highest court of every State where the question has been considered. *Interstate Busses Co.* v. *Holyoke Street R. Co.,* 273 U. S. 45; *Interstate Motor Transit Co.* v. *Kuykendall,* 284 Fed. 882; *Liberty Highway Co.* v. *Public Utilities Co.,* 294 Fed. 703; *Red Ball Transit Co.* v. *Marshall,* 8 F. (2d) 635; *N. Ky. Transportation Co.* v. *Bellevue,* 215 Ky. 514.

It is well settled that a state excise tax which affects interstate commerce, not directly, but only indirectly and remotely, is entirely valid where it is shown it is not imposed with the covert purpose to defeat federal constitutional rights. *Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290; *U. S. Express Co.* v. *Minnesota,* 223 U. S. 355; *Maine* v. *Grand Trunk R. Co.,* 142 U. S. 217.

The gasoline statutes complained of do not contravene the Fourteenth Amendment nor are they taxes on property. *Dawson* v. *Kentucky Distillers,* 225 U. S. 288, distinguished.

The Fourteenth Amendment simply requires that the state legislature treat all alike when passing laws, and where the law operates with uniformity upon all similarly situated, it does not violate the Fourteenth Amendment.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action brought by the Commonwealth of Kentucky against plaintiffs in error to recover an amount levied under § 1, c. 120, Acts 1924,* which imposes a tax of three cents per gallon on all gasoline sold within the Commonwealth at wholesale. The words "sold 'at wholesale,'" as used in the act, are defined to include "any and all sales made for the purpose of resale or distribution or *for use,*" and also to include any person who

*. . . A State tax of Three cents (3¢) per gallon is hereby imposed on all gasoline, as defined herein, sold in this Commonwealth at wholesale, as the words "at wholesale" are hereinafter defined. . . . The words "at wholesale," as used in this act, shall be held and construed to mean and include any and all sales made for the purpose of resale or distribution or for use, and, as well, the gasoline furnished or supplied for distribution within this State, whether the distributor be the same person who so furnished the same, his agent or employer or another person; and also to mean and include any person who shall purchase or obtain such gasoline without the State and sell or distribute or use the same within the State. . . .

shall purchase such gasoline without the state "and sell or distribute *or use* the same within the State." The tax was increased from three cents to five cents a gallon by § 1, c. 169, Acts 1926; and part of the amount sued for was computed at the latter rate.

Plaintiffs in error are engaged in operating a ferry boat on the Ohio River between Kentucky and Illinois. They do an exclusively interstate business. They are citizens and residents of Illinois. Their office and place of business and the situs of all their personal property is in that state. The motive power of the boat is created by the use of gasoline, all of which is purchased and delivered to plaintiffs in error in Illinois. It is stipulated that 75% of this gasoline was actually consumed within the limits of Kentucky, but all of it in the making of interstate journeys. The tax, in question, was computed and imposed upon the use of the gasoline thus consumed.

The trial court rendered judgment for the Commonwealth, which was affirmed by the state court of appeals. 225 Ky. 45. The validity of the statute as applied by the state courts was assailed upon the grounds—(1) that it violated the provisions of the state constitution requiring that taxes should be uniform upon all property of the same class, and (2) that it was in contravention of the commerce clause and other provisions of the federal Constitution. The state court of appeals held that the tax was not a property tax, but an excise, and, therefore, the uniformity clause of the state constitution was not involved. The claim under the commerce clause of the federal Constitution was denied on the ground that the tax was confined to gasoline used within the limits of the state and the commerce clause was not affected. It is with the latter question only that we are here concerned.

Regulation of interstate and foreign commerce is a matter committed exclusively to the control of Congress, and the rule is settled by innumerable decisions of this

Court, unnecessary to be cited, that a state law which directly burdens such commerce by taxation or otherwise, constitutes a regulation beyond the power of the state under the Constitution. It is likewise settled that transportation by ferry from one state to another is interstate commerce and immune from the interference of such state legislation. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 217; *Mayor of Vidalia* v. *McNeely,* 274 U. S. 676, 680. The power vested in Congress to regulate commerce embraces within its control all the instrumentalities by which that commerce may be carried on. *Gloucester Ferry Co.* v. *Pennsylvania, supra,* p. 204. A state cannot "lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on." *Leloup* v. *Port of Mobile,* 117 U. S. 640, 648; *Lyng* v. *Michigan,* 135 U. S. 161, 166; *Ozark Pipe Line* v. *Monier,* 266 U. S. 555, 562. While a state has power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax which is, in effect, a tax for the privilege of transacting such commerce. *Adams Express Company* v. *Ohio,* 166 U. S. 185, 218.

The following are a few of the cases illustrating the many applications of these principles.

A state statute imposing a tax upon freight, taken up within the state and carried out of it, or taken up without the state and brought within it, was held, in the *Case of the State Freight Tax,* 15 Wall. 232, to constitute a regulation of interstate commerce in conflict with the Constitution. The Court said (pp. 275–276):

"Then, why is not a tax upon freight transported from State to State a regulation of interstate transportation, and, therefore, a regulation of commerce among the

States? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the State, and in taking them out? The present case is the best possible illustration. The legislature of Pennsylvania has in effect declared that every ton of freight taken up within the State and carried out, or taken up in other States and brought within her limits, shall pay a specified tax. The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines."

A state or state municipality is without power to impose a tax upon persons for selling or seeking to sell the goods of a nonresident within the state prior to their introduction therein, *Stockard* v. *Morgan,* 185 U. S. 27; or for securing or seeking to secure the transportation of freight or passengers in interstate or foreign commerce. *McCall* v. *California,* 136 U. S. 104; *Texas Transp. Co.* v. *New Orleans,* 264 U. S. 150. Nor can a state impose a tax on alien passengers coming by vessels from foreign countries. *People* v. *Compagnie Gen. Transatlantique,* 107 U. S. 59; and see *Passenger Cases,* 7 How. 283. In *Minot* v. *Philadelphia, W. & B. R. Co.,* 2 Abb. (N. S.) 323, 343; 17 Fed. Cas. 458, 464, it was held that a state law imposing a tax for the use within the state of locomotives, passenger and freight cars, and for the use of rolling stock generally, was a license fee exacted for the privilege of such

use. It appearing that the larger portion of the locomotives, etc., was used for the interstate transportation of persons and property, the court held that the statute constituted a regulation of such commerce. In the course of the opinion, by Mr. Justice Strong, it is said:

"It is of national importance that in regard to such subjects there should be but one regulating power, for if one state can directly tax persons and property passing through it, or indirectly, *by taxing the use of means of transportation,* every other may; thus commercial intercourse between states remote from each other may be destroyed."

To the same effect is a decision by Mr. Justice Matthews, in respect of a similar state statute imposing a tax for the running or using of sleeping cars within the state in the transportation of interstate passengers. *Pullman Southern Car Co.* v. *Nolan,* 22 Fed. 276, 280–281. On error from this Court, the decision was affirmed and the tax condemned as one laid on the right of transit between states. *Sub nom. Pickard* v. *Pullman Southern Car Co.,* 117 U. S. 34, 46. To impose a tax upon the transit of passengers from foreign countries or between states is to regulate commerce and is beyond state power. The doctrine of *Crandall* v. *Nevada,* 6 Wall. 35, so far as it is to the contrary, has not been followed. *Head Money Cases,* 112 U. S. 580, 591–594; *Henderson* v. *Mayor of N. Y.,* 92 U. S. 259, 270; *Pickard* v. *Pullman Southern Car Co., supra,* p. 48. The stamp tax on bills of lading for the transportation of gold and silver from within the state to points outside, which was held invalid (inadvertently on the ground that it was a tax on exports) in *Almy* v. *California,* 24 How. 169, was characterized in *Woodruff* v. *Parham,* 8 Wall. 123, 138, as "a regulation of commerce, a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons between one State

and another, which is within the rule laid down in *Crandall* v. *Nevada,* and with[-in] the authority of Congress to regulate commerce among the States."

The statute here assailed clearly comes within the principle of these and numerous other decisions of like character which might be added. The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. It reasonably cannot be distinguished from a tax for using a locomotive or a car employed in such commerce. A tax laid upon the use of the ferry boat, would present an exact parallel. And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this Court definitely has held, it is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. "All restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States." *Gloucester Ferry Co.* v. *Pennsylvania, supra,* p. 214.

Judgment reversed.

MR. JUSTICE MCREYNOLDS is of opinion that the judgment below should be affirmed.

Concurring opinion of MR. JUSTICE STONE.

In view of earlier decisions of the Court, I acquiesce in the result. But I cannot yield assent to the reasoning by which the present forbidden tax on the use of property in interstate commerce is distinguished from a permissible

tax on property, measured by its use or use value in interstate commerce. *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450, 456; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Backus,* 154 U. S. 439, 445; *Adams Express Co.* v. *Ohio State Auditor,* 165 U. S. 194, 220; *Western Union Tel. Co.* v. *Missouri,* 190 U. S. 412, 422; cf. *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18. Nor can I find any practical justification for this distinction or for an interpretation of the commerce clause which would relieve those engaged in interstate commerce from their fair share of the expense of government of the states in which they operate by exempting them from the payment of a tax of general application, which is neither aimed at nor discriminates against interstate commerce. It " affects commerce among the States and impedes the transit of persons and property from one State to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed." *Delaware Railroad Tax,* 18 Wall. 206, 232.

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

HIGHLAND *v.* RUSSELL CAR & SNOW PLOW COMPANY.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 8. Argued February 23, 24, 1929.—Decided April 8, 1929.

1. An order of the President, under the Lever Act, fixing a maximum price on coal during the late war, when the railroads were under government control and when there was need of such price regulation in the interest of national safety, was a valid exercise of the power of the Government and not a violation of the Fifth Amend-

ment, as applied to one selling coal to a manufacturer of railroad snow-plows, the coal being liable in the circumstances to expropriation by the Government, and the price fixed being such as to afford the just compensation safeguarded by that amendment. Pp. 258, 262.

2. Congress may regulate the making and performance of private contracts when reasonably necessary to effect any of the great purposes for which the National Government was created. P. 261.

3. Congress and the President, in the exercise of the war power, have wide discretion as to the means to be employed; and the measures here challenged are supported by a strong presumption of validity and may not be set aside unless clearly shown to be arbitrary and repugnant to the Constitution. P. 261.

288 Pa. 230, affirmed.

CERTIORARI, 274 U. S. 731, to review a judgment of the Supreme Court of Pennsylvania sustaining a judgment for the defendant—the present respondent—in petitioner's action for a balance alleged to be due on sales of coal. The judgment of the trial court was affirmed by the Superior Court, 87 Pa. Superior Ct. 237, which was affirmed, in turn, by the court below.

Mr. Ira Jewell Williams, with whom *Messrs. Ira Jewell Williams, Jr., Lisle D. McCall,* and *Francis Shunk Brown* were on the brief, for petitioner.

The exercise of the war powers is subject to the Fifth Amendment. *United States* v. *Russell,* 13 Wall. 623; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 155; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81.

Congress has no power to fix the price of coal. Where no right to regulate exists, there can be no burden to show that the regulation is confiscatory. To forbid a seller to sell at prices which the buyer is willing and eager to pay, is confiscation. Price-fixing is necessarily arbitrary and unreasonable, and hence unconstitutional. The very purpose of price-fixing by giving authority to fix a maximum price is to keep the owner of property from selling it for as much as it will bring. If this is done as a measure of

self-protection in wartime and for general governmental purposes, then obviously the nation at large, i. e., the Government, should bear the burden, not the particular industry or person affected. The act of the Government has resulted in a deprivation of the right and power to dispose of one's property for what it will bring. Then the deprivation is really for a public purpose. But, as this Court has held, it is not a taking for a public use. *Morrisdale Coal Co.* v. *United States,* 259 U. S. 188; *Pine Hill Coal Co.* v. *United States,* 259 U. S. 191. The coal-mining business is not affected by a general public interest. *Chas. Wolff Co.* v. *Court,* 262 U. S. 522; *Tyson* v. *Banton,* 273 U. S. 418.

There was no emergency. If there were only so much coal above ground and if it were impossible to continue mining operations and the coal were being hoarded and were needed not only for the use of the Army and Navy, but to protect the lives and health of the citizens, then, if one could permit so fantastic a play of the imagination, an "emergency" might be said to exist. *Wilson* v. *New,* 243 U. S. 332.

If there is power to fix the prices of commodities, there is power to fix wages. This is the *reductio ad absurdum* of the argument for the power; just as, if there is a power to fix a minimum wage, then there is the power to fix a maximum wage.

The basis of "cost plus a reasonable profit" was arbitrary, oppressive and not due process. *United States* v. *New River Collieries Co.,* 262 U. S. 341.

In any aspect, price-fixing is an attempted exercise of legislative power, and the general delegation of such power, uncharted save by "cost plus a reasonable profit," is a complete abdication by Congress and hence void. *Interstate Commerce Comm'n* v. *Cincinnati R. Co.,* 167 U. S. 479; *Kansas C. S. R. Co.* v. *United States,* 231 U. S. 423.

The price fixed was without congressional authority, because prices could be fixed only through and after action by the Federal Trade Commission.

Mr. A. M. Liveright for respondent.

Article I, § 8, Clauses 11 and 18 of the Constitution vest full power in Congress to fix the price of coal during war. *In re Quarles,* 158 U. S. 535; *Prigg* v. *Commonwealth,* 16 Pet. 619; *McCulloch* v. *Maryland,* 4 Wheat. 416.

The means to be employed in the exercise of the power are discretionary with Congress. *Northern Securities Co.* v. *United States,* 193 U. S. 343; *Fairbanks* v. *United States,* 181 U. S. 287; *United States* v. *Sugar,* 243 Fed. 423; *Story* v. *Perkins,* 243 Fed. 997, affirmed in *Jones* v. *Perkins,* 245 U. S. 390.

The Fifth Amendment was not contravened. There was a palpable emergency.

Relations which in time of peace have a purely private aspect, in time of war may be affected with a public interest. *Schenck* v. *United States,* 249 U. S. 47; *Brown Holding Co.* v. *Feldman,* 256 U. S. 170; *Block* v. *Hirsh,* 256 U. S. 135.

Congress did not regard the fixing of prices as a taking. *Pine Hill Coal Co.* v. *United States,* 259 U. S. 191. There was no taking, actual or constructive.

Limitation upon the war power of the United States by the Fifth Amendment is no greater than that imposed by the Fourteenth Amendment upon the police power of a State. As to which, see *Atlantic Coast Line* v. *Goldsboro,* 232 U. S. 548; *Hamilton* v. *Kentucky Distilleries Co., supra; Gundling* v. *Chicago,* 177 U. S. 183; *Crowley* v. *Christensen,* 137 U. S. 186; *Nutting* v. *Massachusetts,* 183 U. S. 553; *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242; *Pacific Gas & Electric Co.* v. *Police Court,* 251 U. S. 22; *Schmidinger* v. *Chicago,* 226 U. S. 578.

Delegation of price fixing power was lawful. *Field* v. *Clark,* 143 U. S. 649; *Buttfield* v. *Stranahan,* 192 U. S. 470; *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320; *United States* v. *Grimaud,* 220 U. S. 506; *Mutual Film Corp'n* v. *Industrial Comm'n,* 236 U. S. 230; *Northern Pacific R. Co.* v. *North Dakota,* 250 U. S. 135.

No preliminary action or findings by the Federal Trade Commission were essential.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner sued respondent in the court of common pleas of Clearfield county, Pennsylvania, to recover a balance of $830.80 alleged to be due on account of coal sold between October 17, 1917, and February 15, 1918.

The complaint shows the following facts. October 2, 1917, plaintiff wrote defendant that he had purchased the output of certain mines and offered coal at $3.60 per ton. Defendant answered that it wanted a carload per week until further notice. Plaintiff replied that he had entered defendant's order for that amount. November 14, after plaintiff had shipped some of the coal, he wrote defendant that, owing to a recent wage agreement made between the miners and operators, the cost of mining had been increased 45 cents per ton; that plaintiff was obliged to pay the additional cost to the producer, and that he was making a price until further notice of $4.05 per ton. He added: "Unless I hear from you to the contrary I shall take it for granted that you wish me to continue shipments on your order at this new price." The amount sued for was based on $3.60 per ton for coal shipped in October and $4.05 per ton for that delivered later. Defendant had paid $1,531.84.

The affidavit of defense admitted the sale and delivery of the coal, denied any agreement as to price; and, among

other averments not here material, alleged that the United States had fixed the prices of the coal and that its value on that basis was $1,322.74.

The trial court held that the plaintiff was bound by the prices fixed by the Government; and, notwithstanding a verdict for the plaintiff, gave defendant judgment, which was affirmed by the superior court and also in the supreme court of the State.

The prices so held applicable were fixed by the President pursuant to § 25 of the Lever Act approved August 10, 1917, c. 53, 40 Stat. 276, 284. An executive order of August 21 specified $2.00 per ton on board cars at the mine; and an order made October 27 added 45 cents per ton.

Plaintiff here insists, as he maintained in the state courts, that Congress had no power to establish or to authorize the President to prescribe prices for coal without providing just compensation for those who, in the absence of such regulation, might have sold their coal for more. And he contends that, in violation of the due process clause of the Fifth Amendment, the Act and orders operate to deprive him of liberty of contract. His coal was not requisitioned for public use. He does not claim that the amount paid by defendant was not compensatory or that it did not give him a reasonable profit or that the value of the coal was greater than the prices fixed by the President. The sole question is whether plaintiff's constitutional rights were infringed by the enforcement of the Act and orders to prevent him from selling his coal for prices in excess of the just compensation he would have been entitled to receive if it had been taken under the sovereign power of eminent domain.

Long before this country became involved in the war, Congress adopted measures for the national defense, and promptly after it entered the conflict there were developed

comprehensive plans for immediate and effective use of military force. An Act of June 3, 1916, 39 Stat. 166, authorized the enlargement, equipment and training of the army. An Act of August 29 following, 39 Stat. 619, 645, empowered the President in time of war to take and utilize systems of transportation for the movement of troops, war material and other purposes; and, December 26, 1917, the President did take over the railroads of the country. 40 Stat. 1733. The Joint Resolution of April 6, 1917, 40 Stat. 1, declaring war with Germany directed the President to employ the entire naval and military forces and pledged all the resources of the country to bring the conflict to a successful termination. An act of June 15, 1917, 40 Stat. 182, authorized the President extensively to exert the power of eminent domain in aid of construction and acquisition of ships.

The Lever Act was broader than its predecessors. It was passed to encourage production, conserve supply and control distribution of foods, fuel and many other things deemed necessary to carry on the war. Hoarding, waste, and manipulations for the enhancement of prices were condemned. The President was empowered to license and regulate production, prices and sales; to requisition coal and other necessaries, to purchase and sell wheat, flour and other staple articles of food, and to take over and operate factories and mines. Section 25 empowered the President to fix the price of coal, to regulate distribution among dealers and consumers, domestic or foreign, and to require producers to sell only to the United States through a designated agency empowered to regulate resale prices. The basis prescribed for the determination of prices to be charged by producers of coal was the cost of production, including the expense of operation, maintenance, depreciation and depletion plus a just and reasonable profit. And prices to be charged by dealers were

to be made by adding to their cost a just and reasonable sum for profit. The Act did not require producers or dealers to sell their coal. It provided for the ascertainment and contemplated the payment of just compensation for all property that it authorized the President to take.

During 1916 and the early months of 1917, the mining and distribution of coal had been greatly disturbed by conditions resulting from the war abroad and the preparations for national defense being made in this country. There was panic among consumers; and, in order to secure adequate supply, they offered prices higher than any theretofore prevailing. The prices of coal for immediate delivery, which previously had been from $1.50 to $2.00, were bid up to $5.00, $6.00, and in exceptional cases as high as $7.50 per ton. In April contracts for the year's delivery could be made only at prices ranging from $3.00 up to $5.00 or $6.00 per ton. In May of that year the Council of National Defense created a committee to deal with the situation. After prolonged negotiation with producers throughout the country an agreement was reached by which a tentative maximum price was fixed at $3.00 per ton at the mines, to which was added twenty-five cents for selling commission to wholesalers. The purpose was to fix a price high enough to stimulate production so that by the operation of the law of supply and demand fair and just prices would result. Final Report of United States Fuel Administrator, p. 20. Report of Engineers Committee 1918–1919, p. 1.

But this arrangement having failed to give assurance of an adequate supply, Congress and the President found it necessary to take the steps here involved. Defendant was engaged in manufacturing snowplows for railroads. Unquestionably, the production of such equipment was in the state of war then prevailing a public use for which coal and other private property might have been taken by exertion of the power of eminent domain. When regard

is had to the condition of the coal industry, plaintiff's control of the product of the mines referred to in his letters and the tone of his price quotations support the view that, in the interest of national safety, there was need of regulation in order to prevent manipulations to enhance prices by those having coal for sale and to lessen apprehension on the part of consumers in respect of their supply and the prices liable to be exacted.

It is everywhere recognized that the freedom of the people to enter into and carry out contracts in respect of their property and private affairs is a matter of great public concern and that such liberty may not lightly be impaired. *Steele* v. *Drummond,* 275 U. S. 199, 205. Generally speaking, that right is protected by the due process clauses of the Fifth and Fourteenth Amendments. *Allgeyer* v. *Louisiana,* 165 U. S. 578, 591. *Adair* v. *United States,* 208 U. S. 161, 174. *Coppage* v. *Kansas,* 236 U. S. 1, 14. *Adkins* v. *Childrens Hospital,* 261 U. S. 525, 546. It is also well-established by the decisions of this court that such liberty is not absolute or universal and that Congress may regulate the making and performance of such contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created. *Frisbie* v. *United States,* 157 U. S. 160, 165. *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 228 et seq. *Ellis* v. *United States,* 206 U. S. 246. *Atlantic Coast Line* v. *Riverside Mills,* 219 U. S. 186, 202. *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467, 482. *Baltimore & Ohio* v. *Interstate Commerce Commission,* 221 U. S. 612, 618. *Second Employers Liability Cases,* 223 U. S. 1, 52. *Gt. Northern Ry.* v. *Sutherland,* 273 U. S. 182, 193.

Under the Constitution and subject to the safeguards there set for the protection of life, liberty and property. (*Ex parte Milligan,* 4 Wall. 2, 121. *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 151. *United States*

v. *Cohen Grocery Co.*, 255 U. S. 81, 88), the Congress and the President exert the war power of the nation, and they have wide discretion as to the means to be employed successfully to carry on. *Miller* v. *Robertson*, 266 U. S. 243, 248. *United States* v. *Chemical Foundation*, 272 U. S. 1, 10. The measures here challenged are supported by a strong presumption of validity, and they may not be set aside unless clearly shown to be arbitrary and repugnant to the Constitution. *Adkins* v. *Childrens Hospital, supra*, 544. The principal purpose of the Lever Act was to enable the President to provide food, fuel and other things necessary to prosecute the war without exposing the government to unreasonable exactions. The authorization of the President to prescribe prices and also to requisition mines and their output made it manifest that, if adequate supplies of coal at just prices could not be obtained by negotiation and price regulation, expropriation would follow. Plaintiff was free to keep his coal, but it would have been liable to seizure by the government. The fixing of just prices was calculated to serve the convenience of producers and dealers as well as of consumers of coal needed to carry on the war. As it does not appear that plaintiff would have been entitled to more if his coal had been requisitioned, the Act and orders will be deemed to have deprived him only of the right or opportunity by negotiation to obtain more than his coal was worth. Such an exaction would have increased the cost of the snowplows and other railroad equipment being manufactured by the defendant and therefore would have been directly opposed to the interest of the government. As applied to the coal in question, the statute and executive orders were not so clearly unreasonable and arbitrary as to require them to be held repugnant to the due process clause of the Fifth Amendment.

Judgment Affirmed.

SINCLAIR *v.* UNITED STATES.

CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 555. Argued February 18, 19, 1929.—Decided April 8, 1929.

1. The chairman and any of the members of the Committee on Public Lands and Surveys of the Senate are empowered to administer oaths to witnesses before the committee. Rev. Stats. § 101. P. 291.
2. Rev. Stats. § 102, prescribing punishment for refusal to answer before congressional committees, includes witnesses who voluntarily appear without being summoned. P. 291.
3. While the power of inquiry of the respective houses of Congress is an essential and appropriate auxiliary to the legislative function, it must be exerted with due regard for the rights of witnesses; a witness may rightfully refuse to answer where the bounds of the power are exceeded or where the questions asked are not pertinent to the matter under inquiry. *McGrain* v. *Daugherty*, 273 U. S. 135. P. 291.
4. A naval petroleum reserve, in charge of the Secretary of the Navy under the Act of June 4, 1920, 41 Stat. 812, was made the subject of an executive order purporting to give the administration and conservation of all oil and gas lands therein to the Secretary of the Interior under the supervision of the President. The two Secretaries, at the procurement of the defendant, leased lands in the reserve to a company of which he owned all the shares. Questions having arisen as to the legality and good faith of the lease and an attendant contract, and of others similar, and also as to the future policy of the Government regarding such matters, the Senate, by resolutions, directed its committee to investigate the entire subject of such leases, with particular reference to the protection of the rights and equities of the United States and the preservation of its natural resources, to ascertain what, if any, other or additional legislation might be advisable, and to report its findings and recommendations to the Senate. Congress, also, by joint resolution, reciting that the lease and contract were illegal and apparently fraudulent, directed the President to cause suit to be instituted for their cancellation, and to prosecute such other actions, civil or criminal, as were warranted. After suit had been begun against

his company pursuant to this resolution, and while criminal action was impending against himself, the defendant appeared before the committee and was asked a question which sought the facts within his knowledge concerning a contract executed by him for his company to pay certain persons for a release of rights in lands embraced in his company's lease. Defendant refused to answer, not upon the ground of self-incrimination, but for the reason that the investigation and the question were unauthorized. He was prosecuted for contumacy, under Rev. Stats. § 102, and convicted. *Held:*

(1) Neither the investigation authorized by the Senate's resolutions nor the question put by the committee related merely to the defendant's private affairs. P. 294.

(2) Under Art. IV, § 3 of the Constitution, Congress had plenary powers to dispose of and make all needful rules and regulations respecting the naval reserves; and the Senate had power to delegate authority to its committee to investigate and report what had been and was being done by executive departments under the leasing Act, the Naval Oil Reserve Act, and the President's order in respect of the reserves, and to make any other inquiry concerning the public domain. P. 294.

(3) The validity of the lease and the means by which it had been obtained under existing law were subjects that properly might be investigated in order to determine what, if any, legislation was necessary or desirable in order to recover the leased lands or to safeguard other parts of the domain. P. 294.

(4) Neither the joint resolution directing legal proceedings, nor the action taken under it, operated to divest the Senate or the committee of further power to investigate the actual administration of the land laws; the authority of Congress, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits. P. 295.

(5) A refusal of the committee to pass a motion that the examination of defendant should not relate to controversies pending in court, and the statement of one of the members that there was nothing else to examine him about, were not enough to show that the committee intended to depart from the purpose to ascertain whether additional legislation might be advisable. Investigation of the matters involved in suits brought, or to be brought, under the joint resolution, might directly aid legislative action. P. 295.

(6) A resolution of the Senate, the purpose of which, as plainly shown by the context and circumstances, was to keep in force

through the next session of Congress an earlier resolution empowering the committee to summon and swear witnesses, should not be denied that effect because of mistakes in its references to the date and number of the earlier resolution. P. 295.

(7) The question propounded by the committee was pertinent to matters it was authorized to investigate, relating (a) to the rights and equities of the United States as owner of the land leased to the defendant, and (b) to the effect of existing laws concerning oil and other mineral lands and the need for further legislation. P. 297.

5. In a prosecution for the offence of refusing to answer a question put to the accused as a witness before a committee of the Senate (R. S. § 102), the burden is upon the United States to show that the question was pertinent to a matter under investigation; any presumption of regularity in that regard is overcome by the presumption of innocence attending the accused at the trial. P. 296.
6. In a prosecution for refusal to answer a question before a committee of the Senate, it is the province of the court, and not of the jury, to decide whether the question was pertinent to the subjects covered by the Senate resolutions authorizing the committee's investigation. P. 298.
7. In such a prosecution, the fact that the accused acted in good faith on the advice of competent counsel in refusing to answer a question put by the committee, is not a defense. P. 299.
8. A judgment imposing a single sentence on several counts of an indictment may be affirmed under one count without considering the others, if the conviction as to that count be sustained, and if the maximum punishment authorized for the offense charged in that count be not exceeded by the sentence. P. 299.

Affirmed.

REVIEW of a judgment of the Supreme Court of the District of Columbia sentencing the defendant, under Rev. Stats. § 102, for refusing to answer questions before a committee of the Senate. The case was appealed from the trial court to the Court of Appeals of the District. That court certified certain questions for instruction, and this Court, by order, brought up the entire record.

Messrs. Martin W. Littleton and *George P. Hoover* for Sinclair.

The indictment is bad for failure to state a crime, and for lack of certainty.

The power to compel testimony is in derogation of the Fourth Amendment. Its possession by the courts is justified upon the grounds of necessity. *Harriman* v. *Interstate Commerce Comm'n,* 211 U. S. 407; *Marshall* v. *Gordon,* 243 U. S. 521; *Boyd* v. *United States,* 116 U. S. 616; *Re Pacific R. Comm'n,* 32 Fed. 241; *Robinson* v. *Philadelphia & R. R. Co.,* 28 Fed. 340; *Matter of Barnes,* 204 N. Y. 108; 4, Wigmore on Evidence, 2d ed., pp. 648, 650, § 2192.

In the *Chapman* case, 166 U. S. 661, it was recognized that there was no general power of investigation, embracing the right to compel testimony, enjoyed by the Senate; that statutes should receive a sensible construction, such as will effectuate the legislative intention, and if possible so as to avoid an unjust or absurd conclusion; that the word "any" in § 102 R. S. refers to matters within the jurisdiction of the two houses of Congress before them for consideration and proper for their action; to questions pertinent thereto and to facts or papers bearing thereon.

The senatorial inquiry in the *Chapman* case related to charges of corruption on the part of Senators, so the investigation was obviously within the judicial functions of the Senate. The questions were obviously pertinent.

In *Kilbourn* v. *Thompson,* 103 U. S. 168, the situation was in many respects parallel to the one here. There were charges in each case concerning improper protection of the rights and interests of the United States, and, although the subject-matter of such charges was in litigation in the courts having jurisdiction to ascertain and determine the "rights and equities of the Government," the respective committees were authorized to investigate those matters.

In the *Kilbourn* case, the Court reached its conclusion not from the terms of the resolution itself, but from the nature of its subject-matter. The presence or absence of a clause similar to that embraced in the resolution of February 7, 1928 (S. R. 147), relating to possible legislation as

an objective, is not controlling, but, instead, the subject matter and nature of the investigation itself.

The resolutions previous to that, by their very tenor, undertake an investigation falling squarely within the class involved in the *Kilbourn* case, namely, a judicial inquiry and an attempt at a determination "of the rights and equities of the United States." Indeed, as shown by Joint Resolution 54, Congress did "adjudicate" the validity of the leases and the charges of corruption, and, realizing that its own adjudication was of no validity, then " directed" the President to take the matters to the proper forums for enforceable adjudication.

Consequently, it is manifest that any proceedings under the resolutions preceding S. R. 147 would be absolutely in excess of the power of the Senate, as held in the *Kilbourn* case, and, so far as any further investigation even under S. R. 147 should be pursued to the same end, the committee would likewise be in excess of its constitutional power, notwithstanding, as was later decided by this Court in *McGrain* v. *Daugherty,* 273 U. S. 135, it had power to compel testimony when necessary for the effective discharge of its legislative function.

The situation in the *Daugherty* case was that the committee was at least dealing with a subject upon which Congress might very properly legislate, and to aid which an investigation of the character ordered might be very useful, whatever may have been the actual design or objective of the investigation. Had Daugherty appeared before the committee and had it attempted to pursue an inquiry of the nature he claimed to apprehend it intended, then he might rightfully have refused to answer, and he would have been protected under the Fourth Amendment.

In *People* v. *Webb,* 5 N. Y. Supp. 585, notwithstanding an avowal of legislative intent, the court, upon examination of the subject-matter sought to be investigated, reached the conclusion—as did this Court in the *Kilbourn*

case—that it clearly concerned "judicial questions," and that it was beyond the power of the Legislature to compel testimony.

It is of course obvious from what has been said by this Court in the *Kilbourn* and *Daugherty* cases, and from the statute itself, that even were the Senate proceeding upon an investigation within its constitutional sphere, not all questions which might be asked, but only "pertinent" questions are required to be answered; and "pertinent," as here used, has a considerably wider application than its technical application in the trial of causes in courts of law. There issues are framed, and the judge can readily determine with exactitude whether a question is pertinent. Here there are no issues; the only guide-post is the subject-matter of the inquiry. In this situation, it is to be recalled that the limits of the power are the necessity of the evidence to the effectual performance of the constitutional function. Obviously no court would compel a witness to answer a question concerning his private affairs over his objection on that ground, however relevant the matter might be, if such matter was already admitted by the answer. For, clearly, there would be no necessity for it, notwithstanding the pertinency. *Matter of Barnes,* 204 N. Y. 108. And because of the very vagueness which enshrouds a legislative inquiry where there are no issues and questions of pertinency are not susceptible of determination by the usual standards; and because the power, where it exists, is exercisable without the usual provision for resort to the courts for judicial determination of the necessity of the evidence, such as is frequently provided by state legislation affecting the same subject; and because the power is in its nature a direct invasion of one of the most sacred liberties of a freeman, it behooves the courts, when the exercise of the power is called in question, zeal-

ously to safeguard the rights of the citizen, to be sure that the power is exercised rightfully and not to allow sentiments of delicacy at interfering with another branch of the Government to intrude in the determination of that question. *Kilbourn* case, 103 U. S. at p. 192.

In a case like this, the indictment must show facts from which the court can determine as a matter of law that the inquiry where the witness refused to testify was one within the authority of the committee before which he appeared.

The indictment alleges that the committee was on March 22, 1924, proceeding under a resolution of February 7, 1924, and other resolutions, and that pursuant to the authority of all the resolutions an oath was administered to the witness December 4, 1923, at a time when there was no resolution in force authorizing the administration of an oath. It is therefore apparent that the indictment does not purport to charge that an oath was administered pursuant to any authority of the Senate.

Inquiries upon which the committee was engaged prior to S. R. 147 of February 7, 1924, were in their nature judicial in character, just as in the *Kilbourn* case, and quite beyond the power of the Senate. Consequently, it does not meet the requirements of a valid indictment to couple together S. R. 282 of April 21, 1922; S. R. 294 of June 5, 1922, and S. R. 434 of February 5, 1923, with S. R. 147 of February 7, 1924, which latter resolution for the first time avowed—along with the continuance of the judicial inquiry—a purpose in aid of legislation, as the source of the authority to require the giving of testimony. An inquiry pursuant to all the resolutions other than S. R. 147 would be clearly beyond the power of the Senate itself, to say nothing of the committee, and the committee itself was without authority to summon witnesses either December 4, 1923, or March 19, 1924, (when the accused

was "again summoned") under the earlier resolutions, although on the latter date it had such authorization pursuant to S. R. 147 of February 7, 1924.

It will be seen from an examination of each of the questions in the four remaining counts of the indictment that on their face there is no apparent pertinency to any conceivable legislation; and it will be further seen that the innuendoes completely fail to show any meaning to the questions which would render them pertinent to any possible legislation on the subject. It will not escape notice, however, that, given certain reasonable probable meanings, the questions would be quite pertinent to the judicial phase of the investigation.

The court erred in overruling the motion of the defendant to direct the jury to return a verdict of not guilty, because the questions propounded to the defendant called for testimony relating solely to his private business and the committee had no jurisdiction to make such an inquiry, and the witness rightfully refused to answer the questions. *Kilbourn* v. *Thompson,* 103 U. S. 168; *McGrain* v. *Daugherty,* 273 U. S. 135; *Re Pacific R. Comm'n,* 32 Fed. 241; *Interstate Commerce Comm'n* v. *Brimson,* 154 U. S. 447; *Harriman* v. *Interstate Commerce Comm'n,* 211 U. S. 407; *Ellis* v. *Interstate Commerce Comm'n,* 237 U. S. 434; *Federal Trade Comm'n* v. *P. Lorillard Tobacco Co.,* 264 U. S. 298.

We maintain that an inadmissible and unlawful object was affirmatively and definitely avowed by the committee. Cf. *McGrain* v. *Daugherty, supra,* at p. 180. It is conceivable that a witness appearing before a committee might be asked questions which, while directly relating to litigation pending in the courts, might at the same time bear upon some discernable contemplated legislation; but in the case here, if we take the unquestioned statement of Mr. Sinclair to the committee which shows his many

appearances and examinations between October, 1923, and March, 1924, with the production of his books and papers, which shows that prior to his appearance and declination to answer in March, 1924, Congress had passed Joint Resolution 54, referring all matters growing out of the lease of Teapot Dome to the courts, civil and criminal, for disposition; if we consider the colloquy between the members of the Committee in the presence of Mr. Sinclair, and the decision of the committee after the colloquy as to the line of inquiry intended and about to be proceeded with, and if we take the questions which followed and for the refusal to answer which Mr. Sinclair was convicted, the conclusion seems irresistible that the questions related to matters beyond the bounds of the committee's power; that the purpose of the committee in propounding the questions was affirmatively and definitely avowed, and the witness rightfully refused to answer.

The court erred in overruling the motion of the defendant to direct the jury to return a verdict of not guilty, because there was no proof of an authorized inquiry, a legal summons, or duly administered oath.

It is not even pretended that there is, by standing rule, or even practice, a general authorization on the part of the Senate to committees to summon witnesses. On the contrary, the uniform practice of the Senate is to adopt a resolution authorizing and instructing a committee to conduct an inquiry; such resolution either expressly authorizing the requiring of testimony, when such may be the will of the Senate, or containing no such authorization, if that may be its will.

The obvious purpose of § 101, R. S., is merely to capacitate the members of Congress to administer oaths. It is elementary that an oath to be legal, must be one authorized by law. The Senate alone cannot make laws. Consequently, it was necessary that a law be enacted by the

two Houses which would simply capacitate a certain class of persons to administer oaths in authorized circumstances.

What is relied upon for proof of the administration of an oath, is the oath administered December 4, 1923; and there is no proof of any summons having been issued or served prior to the administration of that oath. An oath taken before the commencement of a proceeding is extra-judicial as to such proceeding and of no effect.

Senate Resolution 147 broadened the scope of the inquiry directed to be made and absolutely superseded prior resolutions. An oath taken by a witness before the committee under the superseded resolutions would not survive the adoption of Resolution 147.

In order to bring the witness under the condemnation of § 102, R. S., he must have been summoned by the authority of one or the other of the Houses of Congress and must have been sworn as a witness to testify before a committee of one or the other of the Houses. The record is barren of any evidence that he was summoned regularly or irregularly to appear on December 4, 1923, and it is clear that this is the only date and appearance on which it is pretended any oath was administered.

It appears clearly from Senate Resolution 294, agreed to June 5, 1922, which was an amendment to Senate Resolution 282, that the committee then, for the first time, was authorized by the Senate to issue subpœnas for witnesses, compel their attendance and administer oaths. Resolution 294 was not continued in full force and effect, and without the authority conferred by it, the committee could not have summoned witnesses, compelled their appearance and administered oaths on December 4, 1923. The resolution under which it is claimed in the indictment and by the Government elsewhere that the committee continued to enjoy its authority under Resolutions 282 and 294 is Senate Resolution 434, agreed to February 5, 1923, from

which it appears without ambiguity that the Senate resolved "that Senate Resolution 282, agreed to April 21, 1922, and Senate Resolution 292, agreed to May 15, 1922," should be continued in full force and effect.

Nothing appears in the record to show the subject-matter of Senate Resolution 292. The claim that the Senate, in continuing that resolution, fell into a typographical or clerical error, is mere argument and finds no support in the record. This is fundamental.

We scarcely think that the second claim of the Government, that an oath was not necessary to bring the defendant within the operation of § 102, R. S., requires much discussion. There is no compulsion upon the person appearing before such a committee to testify until he has become a witness, and he cannot become a witness until he has been duly sworn.

Standing Rule XXV of the Senate provides (2) that the committee shall continue until their successors are appointed, and (1) that they shall be appointed at the commencement of each Congress (Senate Manual, pp. 27, 30, 67th Congress, 4th Sess., Sen. Docs., Vol. 9, No. 349); thus automatically, by the appointment of the new committee, with the new Congress, the old committee is dissolved. Presumably, resolutions unacted on by a committee at the expiration of the Congress die with the committee, and if it is desired that the result shall be otherwise, it may be so resolved. There is nothing in the holding of this Court in *McGrain* v. *Daugherty,* 273 U. S. 135, that the Senate is a continuing body, that conflicts with the foregoing view.

Even if it were supposed the original purpose of the resolution was legislative (which we deny), that had been completely accomplished, and the further activity of the committee was but in seeking evidence to support the litigation ordered instituted by Joint Resolution 54.

S. R. 147 was co-extensive with S. R. 282 and S. R. 294 combined, an exact duplicate, save for the addition of the avowal of legislative intent. Why would a completely new resolution be passed, thus covering the entire field, instead of a mere amendment to add the legislative avowal, if it were not recognized by the Senate itself that Resolutions 282 and 294, having been acted upon, were no longer alive?

If there is insufficient ground definitely to draw the legal conclusion that these prior resolutions (S. R. 282 and S. R. 294) were still in force March 22, 1924, it follows that there could be no authorized inquiry pending in which the accused had been summoned and sworn as a witness—essential ingredients of the offense—on that date.

The inquiry under S. R. 282 was purely judicial. The rights and equities of the Government in these leases could not be affected by any valid legislation. Only the courts could deal with them. The contracts were executed, delivered, and in effect. If there was fraud in their negotiation; if they were in excess of the authority of the Government officials, the courts, and the courts alone, could remedy that.

One cannot read the debates in the Senate with respect to this inquiry and escape the conclusion that precisely what the Senate was doing was attempting to reach a legal opinion about whether the leases were invalid for want of authority, and attempting to assemble evidence to determine whether corruption had attended their negotiation. Clearly these were not matters that the Senate could adjudicate. It is obvious that the committee had constituted itself a grand jury. When they so far "forgot their high functions" and indulged in "such an utter perversion of their powers," *Kilbourn* v. *Thompson,* 103 U. S. 168, and showed such "an absolute disregard of discretion and a mere exertion of arbitrary power coming

within the reach of constitutional limitations," it is the duty of the courts to interfere. *Marshall* v. *Gordon,* 243 U. S. 521.

The burden of proof is on the prosecution, and the query is: Can this Court say beyond a reasonable doubt that the committee was engaged upon an inquiry in aid of legislation? It will not do to indulge a presumption to that effect. No presumption known to the law is as strong as the presumption of innocence. No presumption can be indulged in the place of proof to establish an essential ingredient of a crime. *Egan* v. *United States,* 52 App. D. C. 384; *Agnew* v. *United States,* 165 U. S. 36; *Clyatt* v. *United States,* 197 U. S. 207; *Lilienthal's Tobacco* v. *United States,* 97 U. S. 237; Underhill's Criminal Evidence, 2d ed., § 23; 3 Blashfield's Instructions to Juries, 2d ed., § 5675, p. 3599; *State* v. *Shelley,* 166 Mo. 616; *West* v. *State,* 1 Wis. 209; *Lucas* v. *United States,* 163 U. S. 612; *State* v. *McDaniel,* 84 N. C. 803; *Commonwealth* v. *Whitaker,* 131 Mass. 234; *People* v. *O'Brien,* 130 Cal. 1; *People* v. *Roderigas,* 49 Cal. 11; *People* v. *Krusick,* 93 Cal. 79; Lawson, Presumptive Evidence, 2d ed., pp. 525, 526; 2 Chamberlayne, Modern Law of Evidence, § 1228, pp. 1557, 1558.

The court erred in overruling the motion of the defendant to direct the jury to return a verdict of not guilty, because there was no proof that the questions propounded were questions of the committee, or were pertinent to any inquiry which the committee was authorized to conduct.

Not a shred of evidence was introduced to establish the innuendoes. With respect to the first count, the Government offered in evidence the contracts referred to by the innuendo, and Senator Walsh testified that the contracts in question had been before the committee, but nothing further in relation to it; nothing about any "facts . . . touching the execution and delivery" of the

contracts which the innuendo alleges were meant to be elicited by the question. The plain, reasonable inference from the situation is that there were no such known facts, but that the Senator was conducting "a fishing expedition . . . upon the chance that something disagreeable might turn up," (Mr. Justice Holmes in *Ellis* v. *Interstate Commerce Comm'n*, 237 U. S. 434,) and manifestly a fishing expedition for evidence to aid in the prosecution of the civil and criminal proceedings then pending and about to be instituted in the courts.

The position confronting the trial court at the close of the evidence was entirely different from that subsisting on demurrer. By the failure to make any proof of the innuendoes, the averment of pertinency then remained unsupported by anything but the naked questions; just as though the innuendoes had been stricken from the indictment. *Searles* case, 25 W. L. R. 384; *Shriver* case, 25 W. L. R. 414.

There would be no authority to presume the pertinency of the questions here involved, for the simple reason that it would violate the very fundamentals of the law of presumptions. Immediately any evidence appears to undermine a presumption, it disappears, and proof must be produced. 5 Wigmore, Evidence, 2d. ed., §§ 2490, 2491, 2493, pp. 448–454.

If we assume that a fact is pertinent only when it is so connected, directly or indirectly, with a fact in issue, that evidence given respecting it may reasonably be expected to assist in proving or disproving the fact in issue, then the question of pertinency is a question of fact, to be determined by logical reasoning and not by legal rules. But, when the question of its pertinency is the essential ingredient of the crime charged, we maintain that the question is one which must be submitted to a jury along with all of the other facts in the case, to the end that the ac-

cused may be afforded a trial by jury under the Sixth Amendment of the essential ingredients of the crime charged.

Distinguishing *Chapman* v. *United States,* 5 App. D. C. 122; and citing Thayer's Preliminary Treatise on Evidence, Part II, pp. 264, 265; Jones' Commentaries on Evidence, 2d ed., p. 1086, *et seq.*

Every essential ingredient of the crime must be proven to the satisfaction of the jury beyond a reasonable doubt. *Egan* case, 52 App. D. C. 384; *Agnew* case, 165 U. S. 36.

Conceding, for the moment, that a situation may exist where an essential ingredient of an offense involves a question of law for determination by the Court, there being no conflict of evidence or other ambiguity attendant upon the facts which are the basis upon which such legal conclusion is predicated, still the court can not legally withdraw from the jury the determination of the ultimate fact upon which rests the question of the guilt or innocence of the accused. In such case the court should instruct the jury that if they believe the facts, the predicate of their conclusion, the legal effect of them is to establish the essential ingredient to which they relate. *Sparf & Hansen* v. *United States,* 156 U. S. 51; 2 Brickwood Sackett's Instructions, 3256–3267; *People* v. *Clemenshaw,* 59 Cal. 385; 3 Thompson on Trials, 2d ed., § 5397, p. 3220; 1 Cooley's Const. Lim., 8th ed., p. 678.

The court erred in excluding evidence offered to prove that the witness rightfully refused to answer the questions.

The decision in *McGrain* v. *Daugherty,* 273 U. S. 135, has, in effect, spelled into § 102, R. S., the element of wilfulness, or, at the very least, of *scienter,* and it must now be given that construction to avoid running afoul of the Fifth and Sixth Amendments.

A statute must not be so vague and uncertain in its terms, lacking in definable standards, as to make it im-

possible for the citizen to know that in doing an act (entirely free of moral turpitude) he is committing a crime or has committed one. *United States* v. *Fox,* 95 U. S. 670; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81.

In an inquiry in aid of legislation, we have no issues and no standard to measure pertinency save the subject matter; perhaps not even any settled tendency, trend or direction of the proposed legislation. There may be vast differences of opinion as to the nature of legislation that should be enacted, which will ultimately be reconciled or settled only long after the inquiry is completed. It may be that there is in a Senator's mind, entirely unexpressed, an idea, a theory for legislation concerning a subject within the competence of Congress, to which a question might be entirely pertinent and legitimate once such theory was disclosed, without which, however, no relevancy could be conjectured by any one other than the particular Senator. Again, much evidence may have been taken before the question was asked, and it may have developed facts pointing very reasonably in the direction of legislation concerning the subject-matter, and to those facts or that state of facts the question now asked might be clearly enough pertinent to one conversant with such antecedent testimony; yet, any indication of relevancy would be entirely wanting to one not conversant therewith. How could the defendant know what was in the Senator's mind—unexpressed by the question—unless it would be through a knowledge of extraneous circumstances referred to that would make the meaning of the question evident?

Under *McGrain* v. *Daugherty, supra,* which announces that " a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry," in what manner may a witness be advised as to whether the questions

asked are beyond the bounds of the power of the committee or are not pertinent to the matter under inquiry? Must he exercise that right without advice and at his peril, and must the jury who are the triers of the ultimate fact of his guilt be denied the evidence that he had endeavored to exercise this right in accordance with the established law?

Where the honesty of purpose and good faith of the defendant is in issue, evidence as to the advice of counsel is proper and should be received and considered. *Williamson* v. *United States,* 207 U. S. 453.

It is submitted that when in *McGrain* v. *Daugherty, supra,* this Court used the words "rightfully refuse," it wrote into this statute the antonym of "rightfully," i. e., "wrongfully" or "wilfully."

Whatever conclusion this Court may reach upon the foregoing contention of the necessity of reading into the statute the word "wilful," in situations such as here present, it will at least recognize the necessity of *scienter* to constitute a crime. And although it is the rule in *malum prohibitum* statutes that, a knowledge of the facts existing, one may be presumed to intend the consequences of his acts, this is not an absolutely irrebuttable presumption. *Lehigh Coal & N. Co.* v. *United States,* 250 U. S. 556.

Messrs. Atlee Pomerene and *Owen J. Roberts* for the United States.

Congress has power to compel the attendance of witnesses and the production of books and papers, in order that it may wisely administer the public domain and pass such legislation as may prove necessary for the protection of the rights of the United States therein. *McGrain* v. *Daugherty,* 273 U. S. 135; *Henry* v. *Henkel,* 207 Fed. 805, s. c. 235 U. S. 219; Const. Art. IV, § 3; *United States* v. *Midwest Oil Co.,* 236 U. S. 459. See also *Light* v.

United States, 220 U. S. 523; *United States* v. *Grimaud,* 220 U. S. 506; *Camfield* v. *United States,* 167 U. S. 518.

The several Senate Resolutions show beyond peradventure that Congress was exercising its proprietary as well as its legislative power over the naval reserves. Congress was interested as a proprietor in obtaining recovery of possession of those portions that had been fraudulently and illegally leased, and as a legislature in the adoption of legislation aimed to prevent a possible recurrence of such fraud and illegality. Insofar as the unleased portions are concerned, Congress was interested as a proprietor in having them properly administered, and as a legislature, in having them protected against possible future frauds and illegality.

We have an express declaration and avowal by Congress that one of the main purposes of the present inquiry was legislative. This declaration is entitled to full faith and credit by this Court. This Court should indulge the presumption that legislation was the real object of the inquiry. It would be an unwarranted invasion of another branch of the Government if our courts were to lay down lines of demarcation beyond which Congress might not advance in the pursuit of facts necessary to achieve the purpose of its existence. Legislative functions are not to be controlled by a capricious, petty analysis of the objects of an inquiry instituted and maintained by Congress.

The demurrer to the indictment was properly overruled. It is difficult to understand how appellant can argue that the indictment discloses on its face that the inquiry was judicial and not legislative. Distinguishing *Kilbourn* v. *Thompson,* 103 U. S. 168.

Under § 101 R. S. the chairman of the committee could lawfully swear appellant, as he did on December 4, 1923, regardless of the several resolutions of Congress authorizing present inquiry.

Although Resolution 147 was not passed until February 7, 1924, yet Resolution 294, passed on June 5, 1922, was still in force and effect, and it specifically provided for the administration of oaths to witnesses by the chairman of the committee or any member thereof.

Counsel for appellant blocked the committee from reswearing his client as a witness by his insistence that appellant had been sworn by the committee, and was "already under oath before the committee." It hardly lies in his mouth now to argue that the indictment was defective because appellant was not properly sworn as a witness.

The questions propounded by the committee were pertinent to possible legislation touching the public domain.

Until the leased lands were recovered by appropriate judicial proceedings, Congress could not legislate in regard thereto. But that did not prevent Congress from adopting in the meantime new and further legislation for the protection of the remaining portions of the public domain from fraud and illegality; nor from enacting legislation to regulate and preserve the leased lands upon their restoration to the United States.

The so-called private business of the witness was impressed with a public interest, since it related to the administration of the naval oil reserves as part of the public domain. The language of the questions which appellant refused to answer shows without other evidence that they relate to all phases of the dealings whereby appellant succeeded in procuring a fraudulent and illegal lease of Naval Petroleum Reserve No. 3.

So long as the information sought to be elicited is pertinent to a legislative inquiry, it is no defense that the information relates to the private business of the witness. *In re Chapman,* 166 U. S. 661, s. c., 8 App. D. C. 313; *McGrain* v. *Daugherty,* 273 U. S. 135.

Reference to the courts of the question of the validity of the leases upon the naval oil reserves did not preclude Congress from investigating further, for legislative purposes, the facts and circumstances attending the negotiation and execution of said leases. Cf. *McDonald* v. *Keeler,* 99 N. Y. 463.

The objection that there was no proof of an authorized inquiry is founded upon the contention that Senate Resolution 434, which was adopted on February 5, 1923, inadvertently referred to the earlier Senate Resolution 294 of June 5, 1922, as Senate Resolution 292, and therefore did not re-enact the earlier resolution. We call attention to the fact that this typographical error does not appear in the original Senate Resolution 434, and is attributable solely to a subsequent error in reprinting. This Court will take judicial notice of the correct wording of the original Senate Resolution.

The enactment of Senate Resolution 147 on February 7, 1924, cured any possible defect in the earlier Resolution 434, since it repeated all the matters contained in Senate Resolutions 282 and 294, and added the further direction that the committee should "ascertain what, if any other or additional legislation may be advisable." A reading of all the resolutions will demonstrate that the insertion of "Resolution 292" in Senate Resolution 434 was a clerical and typographical error; and that what the Senate undoubtedly intended to do was to bring forward "Resolution 294." The manifest intention of Congress was to carry on the investigation and, therefore, the inquiry was a duly authorized one even if the defect had not been corrected by the subsequent Resolution. See *Brunswick-Balke-Collender Co.* v. *Evans,* 228 Fed. 991; *School District* v. *Chapman,* 152 Fed. 887; *Northern Pacific Export Co.* v. *Metschan,* 90 Fed. 80; *Ross* v. *Schooley,* 257 Fed. 290.

Resolution 147, which was in force on March 22, 1924, and pursuant to which appellant was subpœnaed to appear, expressly authorized the committee to "require the attendance of witnesses, by subpœna or otherwise." Furthermore, under a proper interpretation of Senate Resolution 434, Senate Resolution 294 was in full force and effect at the earlier hearing on December 4, 1923, and therefore authorized the service of a subpœna on appellant for that hearing. However, § 102, R. S., does not require a witness to be summoned by subpœna in order to entitle a committee of Congress to compel his testimony.

The record shows that appellant was personally served on March 19, 1924; also that he was served to appear on December 21, 1923; and that he was thus subpœnaed for both hearings.

Resolution 294 was re-enacted by Resolution 434 and there was specific authority in the committee to swear witnesses at the hearing on December 4, 1923, as well as general authority under § 101, R. S.

The uncontradicted evidence showed that the questions propounded were questions of the committee. The proofs clearly establish that they were pertinent to a legislative inquiry respecting the administration of the public domain.

The pertinency of the questions was a question of law for the court. *In re Chapman,* 166 U. S. 661, s. c. 5 App. D. C. 137, 164 U. S. 436.

Almost all perjury statutes make the materiality of the alleged false testimony a substantive part of the offense. The courts have held without exception in a great many cases that the question of the materiality of the alleged false testimony is one of law for the court, and that it is error for the court to submit the question to the jury. *Cothran* v. *State,* 39 Miss. 541. See *Mulane* v. *United States,* 20 F. (2d) 903; *Jones* v. *United States,* 18 F. (2d)

573; *Brown* v. *United States,* 16 F. (2d) 682; *Horning* v. *District of Columbia,* 254 U. S. 135.

The scope of the investigation being conducted by the committee was not an issuable fact. The trial court determined that scope pursuant to its duty of interpreting the four Senate resolutions offered in evidence, and of which it took judicial notice. Having determined the scope of the investigation, it became the further duty of the trial court to determine whether the questions were pertinent to the inquiry. Having answered the question of pertinency in the affirmative, an issue of fact for the jury was presented, *viz,* were the questions propounded by the committee, and did appellant refuse to answer them? This issue of fact was left to the jury in the present case together with the other issues of fact.

No error was committed in excluding evidence of appellant's alleged lack of wilfulness in refusing to answer the questions of the committee. The same argument was unsuccessfully made in the *Chapman* case, and the Court of Appeals there held that proof of wilfulness in the sense of bad faith or evil intent was unnecessary.

Mr. Justice Butler delivered the opinion of the Court.

Appellant was found guilty of violating R. S., § 102; U. S. C., Tit. 2, § 192. He was sentenced to jail for three months and to pay a fine of $500. The case was taken to the Court of Appeals of the District of Columbia; that court certified to this court certain questions of law upon which it desired instruction for the proper decision of the case. We directed the entire record to be sent up. Judicial Code, § 239, U. S. C., Tit. 28, § 346.

Section 102 follows: "Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any

committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months."

By way of inducement the indictment set forth the circumstances leading up to the offense, which in brief substance are as follows:

For many years, there had been progressive diminution of petroleum necessary for the operation of naval vessels; consequently the Government was interested to conserve the supply and especially that in the public domain.

Pursuant to the Act of June 25, 1910, 36 Stat. 847, the President, by executive orders dated September 2, 1912, December 13, 1912, and April 30, 1915, ordered that certain oil and gas bearing lands in California and Wyoming be held for the exclusive use of the navy. These areas were designated Naval Petroleum Reserves 1, 2 and 3, respectively.

The Act of February 25, 1920, 41 Stat. 437, provided for the leasing of public lands containing oil and other minerals. And the Act of June 4, 1920, 41 Stat. 812, directed the Secretary of the Navy to take possession of all properties in the naval reserves " on which there are no pending claims or applications for permits or leases under the " Leasing Act of February 25, 1920, " or pending applications for United States patent under any law," to conserve, develop, use and operate the same by contract, lease or otherwise, and to use, store, exchange or sell the oil and gas products thereof for the benefit of the United States. And it was declared that the rights of any claimants under the Leasing Act were not thereby adversely affected.

May 31, 1921, the President promulgated an executive order purporting to give the administration and conservation of all oil and gas bearing lands in the naval reserves to the Secretary of the Interior subject to supervision by the President.

April 7, 1922, the Secretary of the Navy and the Secretary of the Interior made a lease of lands in Reserve No. 3 to the Mammoth Oil Company. This was done by the procurement of the appellant acting as the president of the company. The lease purported to grant to the company the right to take oil and gas and contained a provision selling royalty oils to the company. And February 9, 1923, a supplemental contract was made by which the company agreed to furnish storage facilities for the Navy. [*Mammoth Oil Company* v. *United States,* 275 U. S. 313.]

April 25, 1922, the same Secretaries made a contract with the Pan American Petroleum and Transport Company for the sale to it of royalty oils from Reserves 1 and 2. December 11, 1922, another contract was made by them. The purpose of these agreements was to arrange that the company furnish storage facilities for the Navy in exchange for royalty oils to be received by the United States under leases then in force and thereafter to be made. December 11, 1922, the same Secretaries made a lease to the Pan American Petroleum Company purporting to grant to it the right to take oil and gas from Reserve No. 1. [*Pan American Co.* v. *United States,* 273 U. S. 456.]

The lease to the Mammoth Company and the contract with the Transport Company came to the attention of the Senate, and it was charged that there had been fraud and bad faith in the making of them. Questions arose as to their legality, the future policy of the Government as to them and similar leases and contracts, and as to the necessity and desirability of legislation upon the subject.

April 29, 1922, the Senate adopted Resolution 282, calling upon the Secretary of the Interior for information and containing the following: "That the Committee on Public Lands and Surveys be authorized to investigate this entire subject of leases upon naval oil reserves with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources, and to report its findings and recommendations to the Senate."

June 5, 1922, Resolution 282 was amended by Resolution 294 by adding a provision that the committee "is hereby authorized . . . to require the attendance of witnesses by subpoenas or otherwise; to require the production of books, papers and documents . . . The chairman of the committee, or any member thereof, may administer oaths to witnesses and sign subpoenas for witnesses."

February 5, 1923, the Senate passed Resolution 434, which continued in force and effect until the end of the Sixty-eighth Congress and until otherwise ordered, "Senate Resolution 282 agreed to April 21 [29], 1922, and Senate Resolution 292, agreed to May 15, 1922." [The Government suggests that, instead of the resolution last mentioned there was meant Resolution 294 adopted June 5, 1922.]

February 7, 1924, the Senate passed Resolution 147, directing in substance the same as it had theretofore done by the two resolutions first above mentioned and also that the committee "ascertain what, if any, other or additional legislation may be advisable, and to report its findings and recommendations to the Senate."

The committee proceeded to exercise the authority conferred upon it and for that purpose held hearings at which witnesses were examined and documents produced. Appellant was summoned, appeared and was sworn December 4, 1923.

And the indictment charges that, on March 22, 1924, the matters referred to in these resolutions being under inquiry, and appellant having been summoned to give testimony and having been sworn as aforesaid did appear before the committee as a witness. The first count alleges that Senator Walsh, a member of the committee, propounded to him a question which appellant knew was pertinent to the matters under inquiry: "Mr. Sinclair, I desire to interrogate you about a matter concerning which the committee had no knowledge or reliable information at any time when you had heretofore appeared before the committee and with respect to which you must then have had knowledge. I refer to the testimony given by Mr. Bonfils concerning a contract that you made with him touching the Teapot Dome. I wish you would tell us about that."

And, to explain that question, the indictment states: "said Hon. Thomas J. Walsh thereby meaning and intending, as said Harry F. Sinclair then and there well knew and understood, to elicit from him the said Harry F. Sinclair, facts, which then were within his knowledge, touching the execution and delivery of a certain contract bearing date September 25, 1922, made and executed by and between said Mammoth Oil Company, one F. G. Bonfils and one John Leo Stack, which was executed on behalf of said Mammoth Oil Company by said Harry F. Sinclair as President of said Mammoth Oil Company, and which, among other things, provided for the payment, by said Mammoth Oil Company, unto said F. G. Bonfils and said John Leo Stack, of the sum of $250,000.00, on or before October 15, 1922, in consideration of the release, by said F. G. Bonfils and said John Leo Stack, of rights to lands described in said Executive Order of April 30, 1915, and embraced in the aforesaid lease of April 7, 1922." And that count concluded: "and that said Harry

F. Sinclair then and there unlawfully did refuse to answer said question . . ."

Senate Joint Resolution 54 was approved February 8, 1924. 43 Stat. 5. It recited that the leases and contracts above mentioned were executed under circumstances indicating fraud and corruption, that they were without authority, contrary to law, and in defiance of the settled policy of the Government; and the resolution declared that the lands embraced therein should be recovered and held for the purposes to which they were dedicated. It directed the President to cause suit to be instituted for the cancellation of the leases and contracts, to prosecute such other actions or proceedings, civil and criminal, as were warranted by the facts, and authorized the appointment of special counsel to have charge of the matter.

Prior to March 22, 1924, appellant, at the request of the committee, appeared five times before it, and was sworn as alleged. March 19, 1924, a United States marshal at New York served upon him a telegram, which was in form a subpoena signed by the chairman of the committee, requiring him to appear as a witness; and he did appear on March 22. Before any questions were put, he submitted a statement.

He disclaimed any purpose to invoke protection against self-incrimination and asserted there was nothing in the transaction which could incriminate him. He emphasized his earlier appearances, testimony, production of papers and discharge from further attendance. He called attention to Joint Resolution 54, discussed its provisions, and stated that a suit charging conspiracy and fraud had been commenced against the Mammoth Company and others and that the Government's motion for injunction and receivers had been granted, and that application had been made for a special grand jury to investigate the making

of the lease. He asserted that the committee could not then investigate the matters covered by the authorization because the Senate by the adoption of the joint resolution had exhausted its power and Congress and the President had made the whole matter a judicial question which was determinable only in the courts. The statement concluded: "I shall reserve any evidence I may be able to give for those courts to which you and your colleagues have deliberately referred all questions of which you had any jurisdiction and shall respectfully decline to answer any questions propounded by your committee."

After appellant's statement, his counsel asked the privilege of presenting to the committee reasons why it did not have authority further to take testimony of appellant. In the course of his remarks he said: "Mr. Sinclair is already under oath before the committee. . . . He is on the stand now in every sense of the word, and the objection really is to any further examination of him on the subjects involved in this resolution." Discussion followed, and a motion was made: "That in the examination the inquiry shall not relate to pending controversies before any of the Federal courts in which Mr. Sinclair is a defendant, and which questions would involve his defense." During a colloquy that followed, one of the members said: "Of course we will vote it [the motion] down. . . . If we do not examine Mr. Sinclair about those matters, there is not anything else to examine him about." The motion was voted down. Then the appellant was asked the question set forth in the first count, and he said: "I decline to answer on the advice of counsel on the same ground."

Appellant contends that his demurrer to the several counts of the indictment should have been sustained and that a verdict of not guilty should have been directed. To support that contention he argues that the questions related to his private affairs and to matters cognizable only in the courts wherein they were pending, and that

the committee avowedly had departed from any inquiry in aid of legislation.

He maintains that there was no proof of any authorized inquiry by the committee or that he was legally summoned or sworn or that the questions propounded were pertinent to any inquiry it was authorized to make, and that because of such failure he was entitled to have a verdict directed in his favor.

He insists that the court erred in holding that the question of pertinency was one of law for the court and in not submitting it to the jury and also erred in excluding evidence offered to sustain his refusal to answer.

1. The Committee on Public Lands and Surveys is one of the standing committees of the Senate. No question is raised as to the validity of its organization and existence. Under § 101 of the Revised Statutes, U. S. C., Tit. 2, § 191, its chairman and any of its members are empowered to administer oaths to witnesses before it. Section 102 plainly extends to a case where a person voluntarily appears as a witness without being summoned as well as to the case of one required to attend.

By our opinion in *McGrain* v. *Daugherty,* 273 U. S. 135, 173, decided since the indictment now before us was found, two propositions are definitely laid down: "One, that the two houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and, the other, that neither house is invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied." And that case shows that, while the power of inquiry is an essential and appropriate auxiliary to the legislative function, it must be exerted with due regard

for the rights of witnesses, and that a witness rightfully may refuse to answer where the bounds of the power are exceeded or where the questions asked are not pertinent to the matter under inquiry.

It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs. In order to illustrate the purpose of the courts well to uphold the right of privacy, we quote from some of their decisions.

In *Kilbourn* v. *Thompson,* 103 U. S. 168, this court, speaking through Mr. Justice Miller, said (p. 190): ". . . we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen." And referring to the failure of the authorizing resolution there under consideration to state the purpose of the inquiry (p. 195): "Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country. By 'fruitless' we mean that it could result in no valid legislation on the subject to which the inquiry referred."

In *Re Pacific Railway Commission,* (Circuit Court, N. D., California) 32 Fed. 241, Mr. Justice Field, announcing the opinion of the court, said (p. 250): "Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protec-

tion of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value." And the learned Justice, referring to *Kilbourn* v. *Thompson, supra,* said (p. 253): "This case will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a congressional committee." And see concurring opinions of Circuit Judge Sawyer, p. 259 at p. 263, and of District Judge Sabin, p. 268 at p. 269.

In *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, Mr. Justice Harlan, speaking for the court said (p. 478): "We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen. . . . We said in *Boyd* v. *United States,* 116 U. S. 616, 630,—and it cannot be too often repeated,—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of his life."

Harriman v. *Interstate Commerce Commission,* 211 U. S. 407, illustrates the unwillingness of this court to construe an Act of Congress to authorize any examination of witnesses in respect of their personal affairs. And see *United States* v. *Louisville & Nashville R. R.,* 236 U. S. 318, 335.

In *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298, this court said (pp. 305-306): "Anyone who respects the spirit as well as the letter of the Fourth

Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. . . . It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."

2. But it is clear that neither the investigation authorized by the Senate resolutions above mentioned nor the question under consideration related merely to appellant's private or personal affairs. Under the Constitution (Art. IV, § 3) Congress has plenary power to dispose of and to make all needful rules and regulations respecting the naval oil reserves, other public lands and property of the United States. And undoubtedly the Senate had power to delegate authority to its committee to investigate and report what had been and was being done by executive departments under the Leasing Act, the Naval Oil Reserve Act, and the President's order in respect of the reserves, and to make any other inquiry concerning the public domain.

While appellant caused the Mammoth Oil Company to be organized and owned all its shares, the transaction purporting to lease to it the lands within the reserve can not be said to be merely or principally the personal or private affair of appellant. It was a matter of concern to the United States. The title to valuable government lands was involved. The validity of the lease and the means by which it had been obtained under existing law were subjects that properly might be investigated in order

to determine what if any legislation was necessary or desirable in order to recover the leased lands or to safeguard other parts of the public domain.

Neither Senate Joint Resolution 54 nor the action taken under it operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws. It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits.

The record does not sustain appellant's contention that the investigation was avowedly not in aid of legislation. He relies on the refusal of the committee to pass the motion directing that the inquiry should not relate to controversies pending in court, and the statement of one of the members that there was nothing else to examine appellant about. But these are not enough to show that the committee intended to depart from the purpose to ascertain whether additional legislation might be advisable. It is plain that investigation of the matters involved in suits brought or to be commenced under Senate Joint Resolution 54 might directly aid in respect of legislative action.

3. There is no merit in appellant's contention that a verdict should have been directed for him because the evidence failed to show that the committee was authorized to make the inquiry, summon witnesses and administer oaths. Resolutions 282 and 294 were sufficient until the expiration of the Sixty-seventh Congress during which they were adopted, but it is argued that Resolution 434 was not effective to extend the power of the committee. As set out in the indictment and shown by the record,

Resolution 434 does not mention 294 or refer to the date of its adoption. The former so far as material follows: "Resolved, That Senate Resolution 282, agreed to April 21, 1922, and Senate Resolution 292, agreed to May 15, 1922, authorizing and directing the Committee on Public Lands and Surveys to investigate the entire subject of leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources, and to report its findings and recommendations to the Senate . . . be . . . continued in full force and effect until the end of the Sixty-eighth Congress. The committee . . . is authorized to sit . . . after the expiration of the present Congress until the assembling of the Sixty-eighth Congress and until otherwise ordered by the Senate."

There is enough in that resolution to show that where "292" appears 294 was meant. The subject of the investigation is specifically mentioned. That is the only matter dealt with. The sole purpose was to authorize the committee to carry on the inquiry. It would be quite unreasonable, if not indeed absurd, for the Senate to direct investigation by the committee and to allow its power to summon and swear witnesses to lapse. The context and circumstances show that Resolution 294 was intended to be kept in force. See *School District No. 11* v. *Chapman*, 152 Fed. 887, 893-894.

4. Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and show that the question

pertained to some matter under investigation. Appellant makes no claim that the evidence was not sufficient to establish the innuendo alleged in respect of the question; the record discloses that the proof on that point was ample.

Congress, in addition to its general legislative power over the public domain, had all the powers of a proprietor and was authorized to deal with it as a private individual may deal with lands owned by him. *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474. The committee's authority to investigate extended to matters affecting the interest of the United States as owner as well as to those having relation to the legislative function.

Before the hearing at which appellant refused to answer, the committee had discovered and reported facts tending to warrant the passage of Senate Joint Resolution 54 and the institution of suits for the cancellation of the naval oil reserve leases. Undoubtedly it had authority further to investigate concerning the validity of such leases, and to discover whether persons, other than those who had been made defendants in the suit against the Mammoth Oil Company, had or might assert a right or claim in respect of the lands covered by the lease to that company.

The contract and release made and given by Bonfils and Stack related directly to the title to the lands covered by the lease which had been reported by the committee as unauthorized and fraudulent. The United States proposed to recover and hold such lands as a source of supply of oil for the Navy. S. J. Res. 54. It is clear that the question so propounded to appellant was pertinent to the committee's investigation touching the rights and equities of the United States as owner.

Moreover, it was pertinent for the Senate to ascertain the practical effect of recent changes that had been made

in the laws relating to oil and other mineral lands in the public domain. The leases and contracts charged to have been unauthorized and fraudulent were made soon after the executive order of May 31, 1921. The title to the lands in the reserves could not be cleared without ascertaining whether there were outstanding any claims or applications for permits, leases or patents under the Leasing Act or other laws. It was necessary for the Government to take into account the rights, if any there were, of such claimants. The reference in the testimony of Bonfils to the contract referred to in the question propounded was sufficient to put the committee on inquiry concerning outstanding claims possibly adverse and superior to the Mammoth Oil Company's lease. The question propounded was within the authorization of the committee and the legitimate scope of investigation to enable the Senate to determine whether the powers granted to or assumed by the Secretary of the Interior and the Secretary of the Navy should be withdrawn, limited, or allowed to remain unchanged.

5. The question of pertinency under § 102 was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law. Greenleaf on Evidence (13th ed.) § 49. Wigmore on Evidence, §§ 2549, 2550. And the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court. *Carroll* v. *United States,* 16 F. (2d) 948, 950. *United States* v. *Singleton,* 54 Fed. 488. *Cothran* v. *State,* 39 Miss. 541, 547.

The reasons for holding relevancy and materiality to be questions of law in cases such as those above referred to apply with equal force to the determination of pertinency arising under § 102. The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be "pertinent to the question under inquiry." It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury. *Interstate Commerce Commission* v. *Brimson, supra,* 489. *Horning* v. *District of Columbia,* 254 U. S. 135.

6. There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and § 102 made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of the law is no defense. *Armour Packing Co.* v. *United States,* 209 U. S. 56, 85. *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 49.

7. The conviction on the first count must be affirmed. There were ten counts, demurrer was sustained as to four, *nolle prosequi* was entered in respect of two, and conviction was had on the first, fourth, fifth and ninth counts. As the sentence does not exceed the maximum authorized as punishment for the offense charged in the first count, we need not consider any other count. *Abrams* v. *United States,* 250 U. S. 616, 619.

Judgment affirmed.

GRAYSON ET AL. *v.* HARRIS ET AL.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 116. Argued January 10, 1929.—Decided April 8, 1929.

1. The extension to the Indian Territory by Act of Congress (Act of May 2, 1890, § 31, c. 182, 26 Stat. 81, 94) of § 4471 of Mansfield's Digest of the Statutes of Arkansas, a seven year statute of limitations, operated to make that statute, with the settled construction placed upon it by the Arkansas courts, a law of the United States as though originally enacted by Congress, and its construction and effect present federal questions to be determined on review by this Court in the exercise of its independent judgment. P. 303.
2. Under § 4471 of Mansfield's Digest of the Statutes of Arkansas (extended to the Indian Territory by the Act of May 2, 1890, § 31, c. 182, 26 Stat. 81, 94) requiring suits for the recovery of land to be brought within seven years "after title or cause of action accrued," the period of limitations does not begin to run against an heir from the date of the acquisition of title by inheritance, where no cause of action had at that time accrued, as where no one was in adverse possession or claiming any title thereby. P. 304.

129 Okla. 281, 285, reversed.

CERTIORARI, 278 U. S. 555, to the Supreme Court of Oklahoma to review a decision reversing a judgment which confirmed title of petitioners to certain lands claimed by respondents by adverse possession.

Mr. Streeter B. Flynn, with whom *Messrs. Robert M. Rainey, William Neff, Louis E. Neff, Jess W. Watts,* and *Calvin Jones* were on the brief, for petitioners.

Mr. Robert F. Blair for respondents.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case was before us at an earlier stage in *Grayson* v. *Harris,* 267 U. S. 352.

In August, 1917, the petitioners brought an action against the respondents in the district court of Creek County, Oklahoma, to recover an undivided half interest in certain lands in that county lying within the former Creek Nation in the Indian Territory. These lands had been allotted on July 9, 1906, in the names of two freedmen, Creek citizens, who had previously died; and the title to an undivided half interest in the lands had thereupon passed to Gertrude Grayson, a Creek citizen, who was an heir of each of the allottees. She died, intestate, and without issue, in April, 1907, leaving as her next of kin certain remote kindred who were Creeks, and a maternal grandmother who was not a Creek. On November 16, 1907, Oklahoma was admitted as a State.[1]

The plaintiffs alleged that upon the death of Gertrude Grayson the undivided half interest in the lands of which she had died possessed vested in fee in them as her surviving Creek heirs; and that when the suit was brought they were entitled to the possession thereof but were being kept out of possession by the defendants who were then in possession under some claim of ownership. The defendants, answering, denied the plaintiffs' title and alleged that the title to Gertrude Grayson's half interest had upon her death descended to her grandmother, from whom the defendants derived title by mesne conveyances; that they and those through whom they claimed had been in adverse possession of the lands from the year 1906; and that the plaintiffs' cause of action was barred by the statute of limitations of seven years. The plaintiffs, replying, denied these allegations.

The case was tried by the court without a jury, which was waived. The court held that upon the death of Gertrude Grayson her undivided half interest had descended

[1] President's Proclamation, 35 Stat. 2160; *Oklahoma* v. *Texas,* 272 U. S. 21, 36; *Joines* v. *Patterson,* 274 U. S. 544, 549.

to her surviving Creek kindred under § 6 of the Supplemental Creek Agreement, ratified and confirmed by the Act of June 30, 1902, c. 1323;[2] found that the evidence failed to show an adverse possession in the defendants and their predecessors prior to November 17, 1907, and that neither the defendants nor those under whom they claimed "took any possession whatever of said land until some time in 1912"; and adjudged that,—with certain exceptions not here material,—the plaintiffs were the owners of the undivided half interest in suit.

On an appeal the Supreme Court of Oklahoma filed in 1922 an opinion to the effect that the plaintiffs' action was barred by the statute of limitations; but later, on a petition for rehearing, in 1923 withdrew the original opinion and substituted another opinion holding, without reference to the statute of limitations, that under the Supplemental Creek Agreement the undivided half interest of Gertrude Grayson had been inherited by her maternal grandmother; and accordingly reversed the judgment of the trial court, with instructions to enter judgment quieting the title of the defendants. 90 Okla. 147.

On a writ of certiorari this Court, holding that under the Supplemental Creek Agreement the undivided half interest of Gertrude Grayson had been inherited by her Creek kindred and not by her grandmother, without passing on the question of the statute of limitations, which as we stated was not then open to our consideration, reversed the judgment of the Supreme Court of Oklahoma, and remanded the cause for further proceedings not inconsistent with our opinion. *Grayson* v. *Harris,* 267 U. S. 352.

Thereafter the Supreme Court of Oklahoma readopted the withdrawn opinion of 1922 on the question of the statute of limitations, and ordered it filed as the opinion

[2] 32 Stat. 500, 501.

of the court, 129 Okla. 285; and holding, as therein set out, that the plaintiffs' action was barred under § 4471 of Mansfield's Digest of the Statutes of Arkansas—which, as a part of Chapter 97 relating to limitations, had been extended over and put in force in the Indian Territory by § 31 of the Act of May 2, 1890, c. 182 [3]—again entered judgment reversing the judgment of the trial court and remanding the cause with instructions to confirm the defendants' title. 129 Okla. 281. And this final judgment has been brought here for review under a second writ of certiorari. 278 U. S. 555.

Sec. 4471 of Mansfield's Digest, when extended over the Indian Territory by the Act of Congress, became, in effect, with the settled construction placed upon it by the Arkansas courts, a law of the United States as though originally enacted by Congress. *Joines* v. *Patterson,* 274 U. S. 544, 549. Therefore its construction and effect present federal questions that are to be determined by this Court in the exercise of its own independent judgment.

This section provides—subject to a saving clause in favor of minors, married women and persons *non compos mentis*—that: "No person or persons, or their heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within seven years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued; and all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments shall be had and sued within seven years next after title or cause of action accrued, and no time after said seven years shall have passed."

The Supreme Court of Oklahoma—without referring to the finding of the trial court that the defendants and those through whom they claimed had not taken any

[3] 26 Stat. 81, 94.

possession of the land until some time in 1912—held that, although § 4471 provided that a suit for the recovery of land should be brought within seven years "after title or cause of action accrued," it might be read by leaving out the words "or cause of action," that is, as if it provided that the suit should be brought within seven years after the title accrued; that the title of Gertrude Grayson accrued on July 9, 1906, when she acquired her title by inheritance; that the statute then commenced to run, and, as this was before Oklahoma was admitted as a State, remained the controlling statute; that under its provisions, neither Gertrude Grayson nor her heirs could sue or maintain any action for the recovery of the lands except within seven years after her title so accrued, that is, within seven years after July 9, 1906; and that, as the suit was not brought until August, 1917, eleven years thereafter, and the plaintiffs had not pleaded or proven any disabilities or other facts which relieved them from the operation of the statute, their action was barred.

The construction thus placed upon § 4471 and the effect given to it as applied to the facts in this case, are in our judgment erroneous. The first clause requires a suit for land to be brought within seven years after the "right to commence, have or maintain such suit shall have come, fallen or accrued." Under the entire section it is clear that the statute does not begin to run until the plaintiff's cause of action accrues, even although his title had been previously acquired. While under some circumstances there may be a cause of action when the title is acquired, as where the land is then adversely held—obviously the mere acquisition of title cannot of itself give the owner of land a cause of action against persons who have not asserted an adverse claim under circumstances constituting an invasion of his justiciable rights. A different construction of the statute would lead to the anomalous result that an owner of land whose title appeared to be

unquestioned would be prevented from recovering it if he did not bring suit within seven years after he acquired title against persons who during such seven years had neither asserted any claim to the land nor held adverse possession of it nor otherwise invaded his rights; that is, that his suit would be barred before any cause of action had accrued on which he could have brought suit. This, manifestly, was not intended.

Here it does not appear that the defendants or their predecessors had asserted any claim to the undivided one-half interest before taking possession of it in 1912. Upon the facts found by the trial court—which were not questioned by the Supreme Court—the plaintiffs' cause of action against the defendants did not accrue until that time. And as the suit was brought within less than seven years thereafter it was not barred by the statute of limitations.

We find no decision of the Supreme Court of Arkansas that gives to § 4471 the construction placed upon it by the Oklahoma court. And, on the contrary, it was said by this Court in *Joines* v. *Patterson, supra,* at p. 533, that: "Under the settled construction given to the seven-year statute of limitations by the courts of Arkansas, it began to run against (the plaintiff) when (the defendant) took possession." And see *Shearman* v. *Irvine's Lessee,* 4 Cranch 367, 369, involving the construction of a similar Georgia statute.

In view of our conclusion as to the construction and effect of § 4471, the controlling federal question remaining in the case, it is unnecessary to deal in detail with other contentions urged in behalf of the defendants, which, in so far as they may bear upon the federal question, are insufficient to sustain the judgment.

The judgment will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

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COMPAÑIA GENERAL DE TABACOS DE FILIPINAS *v.* COLLECTOR OF INTERNAL REVENUE.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 335. Argued March 1, 1929.—Decided April 8, 1929.

1. Under § 10 of the Philippine Income Tax Law (Act 2833, March 7, 1919, as amended by Act 2926, March 20, 1920) imposing a tax upon income received from sources within the Philippine Islands by foreign corporations doing business there, income derived from the sale of goods exported from the Islands and sold in the United States is "from sources within the Philippine Islands" and properly taxed as such, where the sales are made subject to confirmation and absolute control as to price and other terms and conditions by the Philippine office, and the confirmation is given by that office direct to the buyer or is otherwise the final act consummating the sales. P. 308.
2. In a suit to recover income taxes alleged to have been illegally exacted under § 10 of the Philippine Income Tax Law, imposing a tax upon income derived from sources within the Philippine Islands by foreign corporations doing business there, this Court will not construe a stipulation reciting that the income in question was from goods "sold" in the United States to mean that the income was not from sources within the Philippines and not subject to tax, where the phraseology of the stipulation is ambiguous and fails to disclose precisely how the business was done. P. 309.
3. The burden is on him who seeks the recovery of a tax already paid to establish those facts which show its invalidity. P. 310.
4. The judgment of a territorial court on questions of fact or of local law will be reversed only upon a clear showing of error. P. 310.

Affirmed.

CERTIORARI, 278 U. S. 591, to the Supreme Court of the Philippine Islands to review a decision which reversed a judgment for petitioner allowing recovery of income taxes alleged to have been illegally exacted.

Mr. Lawrence H. Cake, with whom *Messrs. Francis W. Clements, Clyde A. Dewitt, Eugene A. Perkins,* and *Wm. C. Brady* were on the brief, for petitioner.

Mr. William Cattron Rigby, Judge Advocate, with whom *Messrs. Edward A. Kreger,* Judge Advocate General, U. S. A., and *Delfin Jaranilla,* Attorney General of the Philippine Islands, were on the brief, for respondent.

Mr. Justice Stone delivered the opinion of the Court.

Petitioner, a Spanish corporation, brought suit in the Court of First Instance of the City of Manila, to recover income taxes alleged to have been illegally exacted. Judgment for petitioner was reversed by the Supreme Court of the Philippine Islands. Vol. XXVI, Philippine Official Gazette, No. 65, May 31, 1928, p. 1712. This Court granted certiorari October 22, 1928, 278 U. S. 591, under § 7 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940.

The tax was assessed under § 10 of the Philippine Income Tax Law of March 7, 1919, Act 2833, 14 Pub. Laws, P. I. 221, as amended by Act 2926, March 20, 15 Pub. Laws, P. I. 260, which imposed a tax of 3% annually ". . . upon the total net income received in the preceding calendar year from all sources within the Philippine Islands by every corporation . . . organized . . . under the laws of any foreign country . . ." The case was tried on an agreed statement of facts and the question presented is whether the profit or income, upon which the tax now in question was assessed, was received from "sources within the Philippine Islands" within the meaning of the statute.

The stipulated facts are: That petitioner, a foreign corporation, was licensed to do business in the Philippine Islands and there maintained its principal office and did most of its business; that it owned in the Islands various sugar and oil mills and tobacco factories and was there engaged in buying, selling and exporting these products; that, acting through its Philippine branch, petitioner from time to time during 1922 exported from the Philippine

Islands to the United States tobacco, sugar, copra and cocoanut oil, produced, manufactured or purchased by it in the Philippine Islands; that this merchandise ". . . was sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch; and that from such transactions . . . the plaintiff made a profit . . . ," which was ". . . accounted for by the plaintiff on its books of account kept in the Philippine Islands as earnings made by and accruing to the Philippine branch . . ." It was this net profit on which the tax was levied.

Petitioner insists that, as the stipulation recites that the merchandise was "sold" in the United States, the profit derived from the sales was not from sources within the Philippine Islands and was, therefore, not subject to the tax. Section 10 of the Philippine Act is substantially similar to the corresponding section of the United States Revenue Act of September 8, 1916, c. 463, § 10, 39 Stat. 756, 765, and, in support of its position, petitioner cites opinions of the Attorney General of the United States ruling that a profit made by a foreign corporation from the sale in other countries, of merchandise produced or purchased in the United States was not taxable income "from sources within the United States" under the latter Act, and the similar provisions of the Revenue Acts of 1917, October 3, 1917, c. 63, § 1206, 40 Stat. 300, 333, and of 1918, February 24, 1919, c. 18, § 233, 40 Stat. 1057, 1077. See opinions of the Attorney General of January 21, 1924, 34 Ops. A. G. 93, and of November 3, 1920, 32 Ops. A. G. 336. These opinions were accepted and applied by Treasury Decision 3576, Cum. Bull. III–1–211, and Treasury Decision 3111, 4 Cum. Bull. 280. See also *Birkin* v. *Commissioner,* 5 B. T. A. 402; *Appeal of Yokohama Ki-Ito Kwaisha, Ltd.,* 5 B. T. A. 1248; *Billwiller* v.

Commissioner, 11 B. T. A. 841; *R. J. Dorn & Co.* v. *Commissioner,* 12 B. T. A. 1102, O. D. 651, 3 Cum. Bull. 265.

While the stipulation states that the merchandise was "sold" in the United States by petitioner's agency there, this statement cannot be taken without qualification; it must be read with the limitation immediately following, that such sales were "subject to confirmation and absolute control as to price and other terms and conditions" by petitioner's Philippine branch. It does not appear whether the confirmation was, in each case, given by the Philippine branch direct to the buyer or was otherwise the final act consummating the sales within the Philippine Islands, or whether, as the trial court and petitioner seem to have assumed, it was a mere approval or ratification of the negotiations had by petitioner's American agent, and authority to him to confirm or otherwise complete the sales in the United States. Certainly, if the former, the final acts of petitioner making effective the sales, which were the source of the profit, took place in the Philippine Islands as an incident to and part of its business conducted there. See *Holder* v. *Aultman,* 169 U. S. 81, 89; *Lloyd Thomas Co.* v. *Grosvenor,* 144 Tenn. 349; *Charles A. Stickney Co.* v. *Lynch,* 163 Wis. 353; *Shuenfeldt* v. *Junkermann,* 20 Fed. 357.

If, in fact, the sales were thus made in the Philippine Islands, we think it unimportant whether the merchandise sold was exported before or after its sale; it could not be seriously contended, and indeed petitioner does not contend, that a profit derived from such transactions would not be subject to the tax. For, in such a case, the entire transaction resulting in a profit, with the exception of the negotiations in the United States preceding the sale, would have taken place in the Philippines. Instead, petitioner asks us to construe the stipulation so as to bring it within the ruling of the Attorney General applied to a state of facts where every act effecting the sale took place

outside the taxing jurisdiction. The ambiguous phraseology of the stipulation failing to disclose precisely how the business was done, we may not speculate as to its actual character. See *Cochran* v. *United States,* 254 U. S. 387, 393.

The burden is on him who seeks the recovery of a tax already paid to establish those facts which show its invalidity. *United States* v. *Anderson,* 269 U. S. 422, 428; *Fidelity Title Co.* v. *United States,* 259 U. S. 304, 306. Further, in the absence of a clear showing of error, this Court should be slow to reverse the judgment of a territorial court on questions of fact or of local law. *Villanueva* v. *Villanueva,* 239 U. S. 293, 298; *Fox* v. *Haarstick,* 156 U. S. 674, 679. For the reason indicated, the stipulation here does not sustain the burden resting on petitioner.

We need not consider petitioner's contention that the taxing act, when applied to sales outside the Philippine Islands, conflicts with the "equal protection" clause of the Philippine Organic Law. This argument presupposes that the sales were so made, an assumption which, as already stated, we cannot make.

Affirmed.

NEW YORK CENTRAL RAILROAD COMPANY *v.* EDWARD H. JOHNSON.

SAME *v.* MYRTLE J. JOHNSON.

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

Nos. 455 and 456. Argued March 8, 1929.—Decided April 8, 1929.

1. In an action against a railroad company to recover damages for personal injuries alleged to have resulted from negligence in the operation of its train, it is competent for the defendant to show, in

defense, that the plaintiff's physical condition was attributable to disease as an independent cause; and this defense may be established as well by cross-examination of plaintiff's witnesses as by direct testimony of witnesses for the defendant. P. 316.

2. Where, in an action in damages against a railroad for personal injuries, counsel for the defendant attempted to develop, by cross-examination of plaintiff's witnesses, evidence which would support a defense that the physical condition of the plaintiff was due to syphilis as an independent cause, but formally abandoned this defense at the close of the case, the conduct of counsel for the plaintiff in repeating before the jury that syphilis was the defense in the case, and the use of vituperative language in denouncing the defendant for charging the plaintiff with indecency—although plaintiff's own witness had testified that the disease was frequently transmitted to innocent parties—was calculated improperly to influence the verdict by appealing to passion and prejudice, and is ground for reversal. P. 317.
3. Defense counsel's want of good judgment or good taste, or even misconduct, in following a line of inquiry on cross-examination which might be availed of to establish a valid defense, but one which was formally abandoned at the close of the case, was not an issue for the jury and could not excuse misconduct on the part of opposing counsel. P. 317.
4. A bitter and passionate attack on opposing counsel's conduct of the case, under circumstances tending to stir the resentment and arouse the prejudice of the jury, should be promptly suppressed by the trial court, and failure to sustain an objection to the misconduct or otherwise to make certain that the jury would disregard it, enhances its prejudicial effect. P. 318.
5. The public interest requires that litigation be fairly and impartially conducted, and it is the duty of the court to protect suitors in their rights to a verdict uninfluenced by the appeals of counsel to passion and prejudice. P. 318.
6. Failure of counsel to particularize an exception will not preclude the court from correcting error in a case involving a verdict influenced by passion or prejudice. P. 318.
7. In an action against a railroad company to recover damages for personal injuries, the repeated assertion by plaintiff's counsel, without supporting evidence, that the defense was a "claim agent defense"; references to defendant as an "eastern railroad"; and statements that the railroad had "come into this town" and that witnesses and records had been "sent on from New York" for the trial

of the cause; all tending to create an atmosphere of hostility towards the defendant as a railroad company located in another section of the country, should have been condemned as an improper appeal to sectional or local prejudice. P. 319.

8. It is the duty of counsel presenting cases to this Court to be adequately prepared and to be fair and candid in the argument. P. 319.

27 F. (2d) 699, reversed.

WRITS OF CERTIORARI, 278 U. S. 590, to the Circuit Court of Appeals to review a decision affirming judgments against the petitioner on causes of action arising out of the alleged negligent operation of one of its trains. The cases had been removed from a state court to the District Court upon the ground of diversity of citizenship.

Messrs. Sidney C. Murray and *Albert S. Marley,* with whom *Mr. Marvin A. Jersild* was on the brief, for petitioner.

Mr. Price Wickersham, with whom *Messrs. John H. Atwood, Oscar S. Hill,* and *Clarence C. Chilcott* were on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent in No. 456 brought suit in the Circuit Court of Jackson County, Missouri, to recover for personal injuries alleged to have been caused by the negligent operation of one of petitioner's trains. The suit in No. 455 was brought in the same court by the husband of respondent in No. 456, to recover for the loss of her services. Both cases were removed to the District Court for Western Missouri, where they were tried together. Judgment there on a verdict for respondents was affirmed by the Court of Appeals for the Eighth Circuit. 27 F. (2d) 699. This Court granted certiorari October 15, 1928, 278 U. S. 590, the order allowing the writ directing

that the argument in this Court "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."

At the trial, there was evidence that respondent, while a passenger on petitioner's train, was thrown to the floor by a sudden and unusual motion of the train, receiving a blow on her head which caused paralysis of one side of the body, impaired locomotion and other physical disabilities. All material allegations of the complaint were denied, including those specially setting up the cause and nature of respondent's injuries. In the course of the cross-examination of respondents' witnesses, petitioner's counsel elicited the fact that, following the accident, one of respondent's physicians had administered a treatment usually given for syphilis. He asked other questions tending to show, had favorable answers been received, that she had exhibited symptoms recognized to be those of this disease; that the Wasserman test for syphilis, which had been applied to her by her physician with negative results, was not necessarily conclusive as to its non-existence; that other more reliable tests had not been applied; that the disease might cause the paralysis complained of and the treatment for it produce the other symptoms exhibited by respondent.

The opening statement for petitioner to the jury had contained no suggestion that the alleged condition of respondent was due to syphilis. No evidence to that effect was offered in its behalf, counsel contenting himself with calling witnesses to disprove only the negligence and the occurrence of the accident. In the closing argument petitioner's counsel denied any belief that respondent was afflicted with the disease and disclaimed any purpose to show that her present condition was due to it. He then for the first time suggested, although there was no

evidence to support it, that her condition was caused by the administration, by one of her physicians, of a specific for syphilis in consequence of a mistaken diagnosis.

Two counsel for respondents participated in the closing argument. The first, who preceded counsel for petitioner, made the following statements to the jury, to which, at several points, objection was made, overruled and an exception noted:

"But, gentlemen, the vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had syphilis.

. . . . . .

"Gentlemen of the jury, they would charge her with a disease which would brand her as bad as a leper and exclude her from the society of decent people. That is the kind of a defense that is in this case, and I resent it. I resent the New York Central coming into this town and saying that that girl has the syphilis and trying to make this jury believe that she has the syphilis.

. . . . . .

"She will be a misery to herself; every time she attempts to take a step and is unable to do so, she suffers mental anguish; every time she sees people watching her, and knowning what she is doing, she suffers mental anguish. And gentlemen, it is sought to say that that is the result of syphilis. Syphilis, one of the most—the worst disease that is known in human history, a disease that can never be freed from the body; a disease that is worse than leprosy. That is the defense in this case. And, gentlemen, with not one, not one scintilla of evidence in this case to justify it."

The second counsel for respondents, whose argument followed that of petitioner's counsel and his disclaimer

already mentioned, was permitted, over objection and exception, to say to the jury:

"You mean to tell me he [petitioner's counsel] didn't talk to those doctors about it? . . . That he wasn't aware of that, and he wasn't trying to put the stigma of indecency upon this young woman in his defense? You mean to say that he wasn't aware of that situation?

"Oh, I have been too long in this business of trying law suits not to know that. So I immediately came to the front and exposed him, and proved it to the hilt; so much so that they stopped . . . Never again will you ever dare to put that letter of syphilis upon the brow of a decent woman—"

The Circuit Court of Appeals, in affirming the judgment for respondent, said, p. 702:

"Both counsel for the plaintiff who addressed the jury stated that . . .

"'The vilest defense made in this case, a defense which would bar that girl from all society, intimated in this case that she had the syphilis. That is the defense in this case, that she had the syphilis.' And then proceeded to dilate on and exploit this text. We find no justification for this assumption, or for the verbal pyrotechnics that counsel were permitted to indulge in over the objections of the attorneys for the defendant. The defense put no witnesses on the stand to controvert the plaintiff's evidence that the plaintiff did not have syphilis. The only evidence counsel for the plaintiff cites as justifying their argument was the cross-examination of some of plaintiff's witnesses; but an affirmative defense of this character can not ordinarily be proved by cross-examination. Moreover, defendant's interrogatories along this line were no more than a continuation of similar questions propounded on the direct examination. We therefore deem it proper to

observe that this line of argument was likely to create prejudice, and did not aid the court or jury in the performance of their duties."

Petitioner argues, as the court below stated, that there was no defense in the case that respondent's condition was due to syphilis, that the quoted remarks of counsel were without foundation in the record and that they were so prejudicial as to deprive petitioner of a fair trial.

From what has been said, it is apparent, as respondents assert, that in a strict sense the court of appeals did not, by the remarks quoted, correctly interpret the record or characterize with accuracy the issue which had been raised under the pleadings by the evidence. The burden was on respondents to prove that the physical condition complained of was caused by injuries received on petitioner's train. It was open to petitioner, if so advised, to seek in good faith to show that respondent's condition was not due to the accident, but was attributable to disease as an independent cause. This was a matter of defense which, under petitioner's general denial, might have been established either by the cross-examination of respondents' witnesses or by the testimony of its own.

Examination of the record discloses that counsel for petitioner took the initiative in attempting to develop, by cross-examination of respondents' witnesses, evidence whose only apparent purpose was to support this defense, and this course was continued by him through a considerable portion of the trial. He first directed the inquiry to the symptoms of respondent which, if they existed, would have indicated that she was suffering from the disease. He first brought out that she had been subjected by her own physicians to the Wasserman test. But whatever motive inspired this course of conduct, it was evident that this line of defense came to nothing. The cross-examina-

tion developed little of moment and no witnesses were called by petitioner to support it. At the close of the case it was apparent that the attempted or suggested defense that respondent's condition was due to syphilis was without substance, and it was formally abandoned by petitioner's counsel in his address to the jury.

In this condition of the record, the repeated statements of counsel that syphilis was the defense, coupled with the vituperative language which we have quoted and the statements that the petitioner had charged respondent with indecency, made in the face of testimony of respondents' own witness that the disease was frequently transmitted by the use of drinking cups or other innocent means, was not fair comment on the evidence or justified by the record. Cf. *Cherry Creek Nat. Bank* v. *Fidelity & Casualty Co.*, 207 App. Div. (N. Y.) 787; *Grabowsky* v. *Baumgart*, 128 Mich. 267, 272; *Fisher* v. *Weinholzer*, 91 Minn. 22, 25; *Strudgeon* v. *Village of Sand Beach*, 107 Mich. 496, 504. Their obvious purpose and effect were improperly to influence the verdict by their appeal to passion and prejudice.

However ill advised, counsel for petitioner was within his rights in following this line of inquiry, and even if it be assumed that the situation was one calling for comment on the evidence so elicited, neither petitioner nor its counsel was on trial for pursuing it. Want of good judgment or good taste, or even misconduct on the part of either, was not an issue in the case for the jury, nor could it excuse like conduct on the part of respondents' counsel. See *Tucker* v. *Henniker*, 41 N. H. 317, 322; *Mittleman* v. *Bartikowsky*, 283 Pa. 485, 488; *Mitchum* v. *Georgia*, 11 Ga. 615, 629; *Welch* v. *Union Central Life Ins. Co.*, 117 Iowa 394, 404. An exhibition of any or all of these faults was not ground for a verdict in respondents' favor or for enhancing it.

Such a bitter and passionate attack on petitioner's conduct of the case, under circumstances tending to stir the resentment and arouse the prejudice of the jury, should have been promptly suppressed. See *Masterson* v. *Chicago & N. W. Ry. Co.*, 102 Wis. 571, 574; *Gulf, Colorado & S. F. Ry. Co.* v. *Butcher,* 83 Tex. 309, 316; *Tucker* v. *Henniker, supra,* at 322; *Monroe* v. *Chicago & Alton R. R. Co.,* 297 Mo. 633, 644. The failure of the trial judge to sustain petitioner's objection or otherwise to make certain that the jury would disregard the appeal, could only have left them with the impression that they might properly be influenced by it in rendering their verdict, and thus its prejudicial effect was enhanced. See *Hall* v. *United States,* 150 U. S. 76, 81; *Graves* v. *United States,* 150 U .S. 118, 121; *Wilson* v. *United States,* 149 U. S. 60, 68. That the quoted remarks of respondents' counsel so plainly tended to excite prejudice as to be ground for reversal, is, we think, not open to argument. The judgments must be reversed with instructions to grant a new trial.

Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, "purely a private controversy . . . of no importance to the public." The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. See *Union Pac. Ry. Co.* v. *Field,* 137 Fed. 14, 15; *Brown* v. *Swineford,* 44 Wis. 282, 293. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this Court from

correcting the error. *Brasfield* v. *United States,* 272 U. S. 448, 450.

As there must be a new trial, attention should be directed to other objectionable conduct by respondents' counsel in the course of the trial; their repeated assertion, without supporting evidence, that the defense was a "claim agent defense"; references to petitioner as an "eastern railroad"; and statements that the railroad had "come into this town" and that witnesses and records had been "sent on from New York" for the trial of the cause. Such remarks of counsel, and others of similar character, all tending to create an atmosphere of hostility toward petitioner as a railroad corporation located in another section of the country, have been so often condemned as an appeal to sectional or local prejudice as to require no comment. See *Cherry Creek Nat. Bk.* v. *Fidelity & Casualty Co., supra; Dolph* v. *Lake Shore etc. Ry. Co.,* 149 Mich. 278, 280; *Southern Ry. Co.* v. *Simmons,* 105 Va. 651, 665.

These writs of certiorari were granted on a petition signed by counsel for petitioner who did not participate in the trial. It stated that the cases were of importance and were such a departure "from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision." But his argument here was so inadequately prepared and exhibited such lack of familiarity with the record as not to be of assistance to the Court, and in the argument of counsel on both sides, who had participated in the trial below, there was a want of that candor which is essential to the proper and adequate presentation of a cause in this Court. The occasion seems appropriate to remind counsel that the attempted presentation of cases without adequate preparation and with want of fairness and candor discredits the bar and obstructs the administration of justice.

Reversed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* CHATTERS.

SOUTHERN RAILWAY COMPANY ET AL. *v.* SAME.

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

Nos. 414 and 415. Argued March 7, 1929.—Decided April 15, 1929.

1. A foreign corporation is not amenable, without its consent, to suit upon a transitory cause of action arising outside of the State and not connected with any act or business of the corporation within the State. P. 324.
2. In the absence of an authoritative state decision giving a narrower scope to a power of attorney filed by a railroad company, pursuant to a statute requiring foreign corporations doing business within the State to designate an agent there to receive service of "lawful process," the power will be held to operate as a consent by the company, which was otherwise present and doing business within the State, to a suit upon a cause of action arising out of the breach, in another State, of a contract for passenger transportation, which contract was evidenced by a through coupon ticket sold within the State to the plaintiff by an initial carrier under a joint tariff agreement as agent and for account of the defendant company, and which was accepted by the latter for transportation over its lines in the State where the breach occurred. P. 325.
3. Where a carrier renders service in interstate commerce under published tariffs, the attendant limitation of liability in the tariff becomes the lawful condition of the carriage, binding alike on the carrier and its patron, and is not subject to waiver. P. 331.
4. In the absence of evidence of joint liability on the part of connecting carriers, there can be no liability of either for injury to a through passenger occurring beyond its own line except on the theory that its own negligence caused or contributed to the injury, and a charge to the jury authorizing them to find a verdict inconsistent with such a theory is erroneous. P. 329.
5. In a suit for personal injuries, resulting from a defect in the condition of a passenger car, the doctrine of *res ipsa loquitur* cannot be invoked against an initial carrier, where the accident, out of which the cause of action arose, occurred after the car in which

the plaintiff was injured had passed from its control and that of an intermediate carrier to the lines of a second connecting carrier. P. 332.

6. In a suit for personal injuries against connecting carriers, a charge to the jury authorizing a verdict against both the initial and the connecting carrier, even though they find that the initial carrier alone was negligent, is prejudicial to the connecting carrier and erroneous. P. 332.

26 F. (2d) 403, reversed.

WRITS OF CERTIORARI, 278 U. S. 590, to the Circuit Court of Appeals to review a decision affirming a judgment of the District Court on a verdict for respondent against both petitioners in a suit for personal injuries.

Mr. Harry McCall, with whom *Messrs. A. M. Warren, George Denegre, Victor Leovy, Henry H. Chaffe,* and *Jas. Hy. Bruns* were on the brief, for Louisville & Nashville R. Co.

Under the circumstances, the initial carrier is not liable. *Missouri Pacific R. Co.* v. *Prude,* 265 U. S. 99; *Chicago & A. R. Co.* v. *Kirby,* 225 U. S. 155; *Davis* v. *Cornwell,* 264 U. S. 560; *Davis* v. *Henderson,* 266 U. S. 92.

The initial carrier did not waive the provisions of its contract with the passenger limiting its liability to its own line. *Georgia, F. & A. R. Co.* v. *Blish Milling Co.,* 241 U. S. 190; *Keogh* v. *Chicago & N. W. R. Co.,* 260 U. S. 163; *Davis* v. *Cornwell,* 264 U. S. 560; *Davis* v. *Henderson,* 266 U. S. 92; *Railroad Co.* v. *Manufacturing Co.,* 16 Wall. 318; *Ins. Co.* v. *Railroad Co.,* 104 U. S. 146; *Chicago, R. I. & P. R. Co.* v. *Maucher,* 248 U. S. 359. Its liability must depend wholly on its alleged negligence in furnishing a defective car to the succeeding and connecting carriers. The only possible basis for liability on this theory would be through the doctrine of *res ipsa loquitur.* But this doctrine can only be invoked against the party having control of the instrumentality causing the accident. *Louis-*

ville & Nashville R. Co. v. *Mink,* 189 Ky. 394; *Stephens* v. *Kitchen Lumber Co.,* 222 Ky. 736; *Glynn* v. *Central R. Co.,* 175 Mass. 510; *Missouri, K. & T. R. Co.* v. *Merrill,* 65 Kans. 436; *McNamara* v. *Boston & Maine R. Co.,* 202 Mass. 491.

There was no joint obligation. *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co.,* 269 U. S. 217.

Mr. J. Blanc Monroe, with whom *Messrs. Monte M. Lemann, Walter J. Suthon, Jr., L. E. Jeffries, S. R. Prince,* and *H. O'B. Cooper* were on the brief, for the Southern Ry. Co. et al.

It is clear that, *quoad* the Southern, the plaintiff's cause of action arises out of business done by that corporation outside of Louisiana, and not out of any business done by it within Louisiana. *Peterson* v. *Chicago, R. I. & P. R. Co.,* 205 U. S. 364; *Phila. & Reading R. Co.* v. *McKibben,* 243 U. S. 264; *General Investment Co.* v. *Lake Shore & M. S. Ry. Co.,* 256 Fed. 160, affirmed 260 U. S. 261; *Cancelmo* v. *Seaboard Air Line,* 12 F. (2d) 166; *Allen* v. *Yellowstone Park Transportation Co.,* 154 Fed. 504; *Maxwell* v. *Atchison R. Co.,* 34 Fed. 286.

The charge embodying the theory of joint liability was clearly erroneous and this error was prejudicial to the Southern. *Peterson* v. *Chicago, R. I. & P. R. Co.,* 205 U. S. 364; *Phila. & Reading Co.* v. *McKibben,* 243 U. S. 264; *General Investment Co.* v. *Lake Shore & M. S. R. Co.,* 260 U. S. 261.

Mr. George Piazza, with whom *Mr. St. Clair Adams* was on the brief, for respondent.

Mr. Justice Stone delivered the opinion of the Court.

Respondent, a citizen of Louisiana, brought suit in the District Court for Eastern Louisiana against the Southern

Railway Company, a Virginia corporation, and the Louisville & Nashville Railroad Company, a Kentucky corporation, to recover for personal injuries suffered while traveling in a car of the Southern Railway in a through train from New Orleans, Louisiana, to Washington, D. C. At the time of the accident, the train was being operated by the Southern over its tracks in Virginia.

Respondent purchased a through coupon ticket for the journey at the office of the Louisville & Nashville in New Orleans, which entitled him to passage over the line of the Louisville & Nashville from New Orleans to Montgomery, Alabama, over the Atlanta & West Point Railroad from Montgomery to Atlanta, Georgia, and thence to Washington over the line of the Southern. He took passage in New Orleans on a car of the Southern and proceeded in it on his journey until, while on the line of the Southern in Virginia, a window screen, attached to the outside of the car, became loosened and swung backward on its hinges so as to strike and break the car window behind it and injure respondent with pieces of flying glass. The train was made up by the Louisville & Nashville in New Orleans, and was operated under an agreement among the three carriers concerned, which was not offered in evidence. But it appeared that the cars composing the train were furnished by the three carriers on the basis of their respective mileage; that each furnished locomotive power and train crews over its own line; and that each, while in possession of the train, was in exclusive control of it.

Process against both petitioners was served on their respective agents in Louisiana, designated by them to receive service of process as required by a state law exacting formal consent by the corporation that any "lawful process" served on the designated agent should be "valid

service" upon the corporation. Act No. 184 of 1924.[1] The Southern, appearing specially before answer, excepted to the jurisdiction on the ground that the cause of action, which was transitory, arose outside Louisiana and not out of any business done by the Southern within that state. After a hearing, in which evidence was introduced, the exception was overruled. 17 F. (2d) 305. On the trial the district court gave judgment on a verdict for respondent against both petitioners, which was affirmed by the Court of Appeals for the Fifth Circuit. 26 F. (2d) 403. This Court granted certiorari. 278 U. S. 590.

The Southern alone seeks a review of the order overruling its exception to the jurisdiction. The Louisville & Nashville assigns as error the refusal of the trial court to give a requested instruction to the jury. Both petitioners raise for consideration here exceptions to the charge of the court to the jury and to the admission of certain testimony.

1. The Southern insists that the case as to it should have been dismissed on its exception for want of jurisdiction of the person of the corporation upon a suit in Louisiana on a cause of action arising outside that state. A foreign corporation is amenable to suit to enforce a personal liability if it is doing business within the juris-

[1] The scope of the designation is defined by the state statute as follows:

"Section 2. The appointment of the agent or agents or officer upon whom service of process may be made shall be contained in a written power of attorney accompanied by a duly certified copy of the resolution of the Board of Directors of said corporation consenting and agreeing on the part of the said corporation that any lawful process against the same which is served upon the said agent or officer shall be a valid service upon said corporation and that the authority shall continue in force and be maintained as long as any liability remains outstanding against said corporation growing out of or connected with the business done by said corporation in this State."

diction in such manner and to such extent as to warrant the inference that it is present there. *Lafayette Insurance Co.* v. *French,* 18 How. 404; *Mutual Life Ins. Co.* v. *Spratley,* 172 U. S. 602; *St. Louis Southwestern Ry.* v. *Alexander,* 227 U. S. 218. Even when present and amenable to suit it may not, unless it has consented, *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co.,* 243 U. S. 93; *Smolik* v. *Phila. & Reading Coal Co.,* 222 Fed. 148, be sued on transitory causes of action arising elsewhere which are unconnected with any corporate action by it within the jurisdiction. *Old Wayne Mut. Life Ass'n* v. *McDonough,* 204 U. S. 8; *Simon* v. *Southern Ry. Co.,* 236 U. S. 115.

It is urged by the Southern that compliance with the Louisiana statute requiring a foreign corporation doing business within the state to designate an agent to receive service of process is, under the state decisions, a consent to suit only upon causes of action arising out of business conducted within the state, *Watkins* v. *North American Land & Timber* Co., 106 La. 621; *Delatour & Marmouget* v. *Southern Ry. Co.,* 4 La. App. 658; *Buscher* v. *Southern Ry. Co.,* 4 La. App. 653; see *Missouri Pac. R. R. Co.* v. *Clarendon Boat Oar Co.,* 257 U. S. 533, which, it is insisted this is not, and that in any case, in the absence of an authoritative decision by the state court, this Court will give a like effect to the designation under the statute. *Mitchell Furniture Co.* v. *Selden Breck Const. Co.,* 257 U. S. 213. For present purposes we may assume that the effect of the designation of the statutory agent by the Southern is, as the state decisions cited seem to show, that a cause of action arising wholly outside and wholly unconnected with any act or business of the corporation within the state may not be sued upon there, and we address ourselves to the question, decisive of this branch of the case, whether the Southern, being present within the state of Louisiana, is amenable to suit, on this cause

of action as one arising out of business done within the state, or from such action of the corporation within the state as to subject it to liability there.

The Southern does not deny that it is carrying on some business within Louisiana or that it is subject to suit there on some causes of action. Its relation to the through train service originating in New Orleans, so far as disclosed, has already been detailed. It carries on in the state, through an office and agents of its own there located, continuous solicitation of freight and passenger traffic. See *International Harvester Co.* v. *Kentucky,* 234 U. S. 579; *International Textbook Co.* v. *Pigg,* 217 U. S. 91, 103; *Block* v. *Atchison, Topeka & S. F. R. R. Co.,* 21 Fed. 529; *Walsh* v. *Atlantic Coast Line R. R. Co.,* 256 Fed. 47; but see *Green* v. *C. B. & Q. Ry.,* 205 U. S. 530; *People's Tobacco Co.* v. *American Tobacco Co.,* 246 U. S. 79. It maintains its own office there for the sale of tickets for passage over its own and connecting lines. Cf. *International Harvester Co.* v. *Kentucky, supra,* at p. 585. It has designated an agent there to receive service of "lawful process," which fact, being of significance in determining the extent of the jurisdiction when the corporation is doing business within the state, *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co., supra,* is, we think, also of decisive weight in determining its presence for purposes of suit when coupled with its other corporate activities within the state. It is, therefore, as petitioner concedes, so far present in the state as to be amenable to suit there for some purposes. *St. Louis Southwestern Ry.* v. *Alexander, supra.* We disregard the fact that the Southern owns the stock, or most of it, of the New Orleans Railroad Company and the New Orleans Terminal Company, Louisiana corporations owning real estate and railroad equipment there, and that its officers and theirs are the same. *Peterson* v. *Chicago, R. I. & Pac. Ry.,* 205 U. S. 364; *Phila. & Reading Ry. Co.* v. *McKibbin,* 243, U. S. 264.

The cause of action here asserted is one arising out of a contract for transportation, evidenced by the through ticket sold to respondent in New Orleans and accepted by the Southern for transportation over its line. It purported on its face to be sold by the Louisville & Nashville as agent and was sold under a joint tariff agreed to by the carriers concerned and filed by them with the Interstate Commerce Commission providing that the carrier selling the ticket acted as agent of the others. Had the ticket been sold to respondent by the Southern at its own ticket office in New Orleans, we may assume that it would not have been seriously contended that the cause of action did not arise out of the business of the Southern in Louisiana, or that the present suit could not have been maintained there, even though the wrongful act complained of took place elsewhere. But it is said that as the ticket was sold by the Louisville & Nashville, that transaction alone, under the decisions of this Court, would not constitute doing business within the jurisdiction so as to make the Southern amenable to suit there. *Peterson* v. *Chicago, R. I. & Pac. Ry. Co., supra; Phila. & Reading Ry. Co.* v. *McKibbin, supra; General Inv. Co.* v. *Lake Shore & M. S. Ry. Co.*, 250 Fed. 160. From this it is argued that the sale of the ticket cannot be considered any part of the business carried on within the state by the Southern and that the present cause of action is therefore not within the consent to suit given by its designation of an agent, or to be implied from its presence and transaction of business within the state.

But the sale in Louisiana of the ticket for transportation over the Southern was made by the Louisville & Nashville under the filed joint tariff as the agent and for account of the Southern. In its legal effect it was the act of the Southern within the jurisdiction by which its obligation to respondent on the contract of carriage over its own lines became complete. It was out of this

action within the state that the present obligation of the Southern arose, although the alleged breach of it occurred elsewhere.

This was none the less the case because such a transaction would not of itself have been regarded as a doing of business within the state sufficient to establish the presence of the Southern there for the purpose of suit. Cf. *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516. Since the Southern was present and subject to suit in Louisiana, we are concerned, not with the question whether the sale of the ticket was sufficient to bring it there, but only with the question whether, being there, its liability extended to all causes of action arising out of its corporate acts within the state, including this one. No case, either in the Louisiana courts or in this Court, has held that it did not. Where jurisdiction has been denied, the cause of action not only arose outside the state, but it was not shown to have arisen out of any business conducted by the corporation within it or to have had any relation to any corporate act there. Cf. *Old Wayne Mutual Life Ass'n* v. *McDonough, supra; Simon* v. *Southern Ry. Co., supra; Mitchell Furniture Co.* v. *Selden Breck Const. Co., supra.* In such a case, whether the jurisdiction invoked be deemed to depend upon the presence of the corporation within the state through the doing of business there, or on its consent by the designation of an agent, the implication is that the liability to suit does not extend to causes of action which have nothing to do with any act of the corporation within the state. *Mitchell Furniture Co.* v. *Selden Breck Const. Co.*, at p. 216. But where the cause of action does arise out of a corporate act within the jurisdiction, the presumption would seem necessarily to be the other way.

In the absence of express language limiting the authority of the designated agent, there would certainly be no

ground for assuming that the consent extends to causes of action growing out of some of its acts within the jurisdiction and not others—that respondent here might maintain an action if the ticket had been sold at the office of the Southern, but not if sold at the office of its authorized agent in the same city. Once established that the foreign corporation is within the state for purposes of suit, its presence for that purpose would seem to be co-extensive with its presence for the purpose of carrying on any corporate transaction within the jurisdiction and, granted the former, its liability to suit on causes of action growing out of the latter should follow. To say that not every corporate act within the jurisdiction is sufficient to establish its presence there for the purpose of suit is very different from saying that a suit founded upon such an act may not be maintained there, once its presence and consent to suit are established.

We decide only that, in the absence of an authoritative state decision giving a narrower scope to the power of attorney filed under the state statute, it operates as a consent to suit upon a cause of action like the present arising out of an obligation incurred within the state although the breach occurred without. See *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining Co., supra.*

2. The requested instruction to the jury of the Louisville & Nashville, which was refused, and the actual charge complained of, related to the alleged joint liability of the petitioners. The complaint contained no allegation that respondent's injury was due to the negligence of the Louisville & Nashville. He contented himself with alleging and proving at the trial the accident and injury while he was traveling over the line of the Southern on a through ticket purchased of the Louisville & Nashville. As already indicated, it appeared that the Louisville & Nashville had no control of the train after

it left its own tracks and each carrier furnished its own locomotive power and train crew. Each inspected, cleaned, washed and repaired the equipment of the train. It also appeared that the ticket sold by the Louisville & Nashville contained a clause reading: "In selling this ticket and checking baggage thereon the selling carrier acts only as agent and is not responsible beyond its own line." The through tariff filed by petitioners with the Interstate Commerce Commission under § 6 of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, 380, as amended by Act of February 28, 1920, c. 91, 41 Stat. 456, 483, contained a similar provision.

At the close of the whole case, the Louisville & Nashville moved for a directed verdict, which was denied. The trial judge also denied its request for an instruction that if the jury found the ticket contained the clause referred to, the accident did not occur on the line of the Louisville & Nashville, and its negligence did not cause or contribute to the accident, the verdict should be for that carrier. The court also charged, in a variety of ways, that the liability of petitioners for the safe delivery of the respondent at his destination was joint and that if petitioners "failed to satisfactorily explain the accident, then negligence will be presumed and they will therefore be liable to the passenger for whatever damage he sustained."

But there was no basis, either in pleading or proof, for a joint liability of both petitioners for the negligence of one. Neither of them, as a common carrier, was under any duty, either by the common law or statute, to transport or assume any responsibility for the transportation of respondent beyond its own line. *Insurance Company* v. *Railroad Company,* 104 U. S. 146, 157; see *Railroad Company* v. *Manufacturing Co.,* 16 Wall. 318, 324. The Louisville & Nashville, therefore, might, by stipulation on the through ticket, provide that it should not be so responsible, *Missouri*

Pac. R. R. Co. v. *Prude,* 265 U. S. 99; cf. *Western Union Tel. Co.* v. *Czizek,* 264 U. S. 281; and in any case, the transportation service to be performed was that of a common carrier in interstate commerce under published tariffs and the attendant limitation of liability in the tariff became the lawful condition upon which the service was rendered, binding alike on the carrier and its patron, cf. *American Ry. Express Co.* v. *Daniel,* 269 U. S. 40; *Western Union Tel. Co.* v. *Priester,* 276 U. S. 252, 259; *Chicago & Alton R. R. Co.* v. *Kirby,* 225 U. S. 155; *Davis* v. *Cornwell,* 264 U. S. 560, and was not subject to waiver. Cf. *Davis* v. *Henderson,* 266 U. S. 92; see *Georgia, Fla. & Ala. Ry.* v. *Blish Milling Co.,* 241 U. S. 190, 197. There was, therefore, no evidence of joint liability of the petitioners in the case, and there could be no liability of either for injury to respondent occurring beyond its own line except on the theory that its own negligence caused or contributed to the injury.

The court of appeals, in commenting on petitioner's requested charge, to which we have referred, said that such a charge would not have been proper because it was calculated to divert the jury from the consideration of the question whether the accident was attributable to the negligence of the Louisville & Nashville. Even if for this reason the requested instruction should have been refused, the charge, to which proper exception was taken, that petitioners were jointly liable and that on this theory the jury might find a verdict against the Louisville & Nashville for an accident occurring on the line of the Southern, was plainly erroneous, as it indicated to the jury that they might find a verdict for respondent against the Louisville & Nashville, even though it had exercised due care in the preparation and inspection of the train while on its own line.

We think also there was no evidence for the jury of negligence of the Louisville & Nashville and that the motion

for a directed verdict in favor of that railroad should have been granted. There was no evidence of the precise cause of the loosening of the screen which caused the injury. Whether the screw which fastened it was improperly replaced by the employees of the Louisville & Nashville after cleaning the window, or whether it broke or otherwise became loosened on account of some hidden or unascertainable defect, or was loosened by others than the employees of either petitioner, does not appear. There was evidence of an inspection of the car by the Louisville & Nashville before it left New Orleans. After the car left the line of the Louisville & Nashville it came into the custody of the Atlanta & West Point Railroad Company. The occurrence of the accident after the car passed beyond the control of the Louisville & Nashville and that of the intermediate carrier to the tracks of the Southern does not admit of the application of the doctrine of *res ipsa loquitur,* so far as concerns the Louisville & Nashville. *McNamara* v. *Boston & Maine R. R.,* 202 Mass. 491, 499; *L. & N. R. R. Co.* v. *Mink,* 168 Ky. 394; cf. *Glynn* v. *Central Railroad,* 175 Mass. 510; *Missouri, Kansas & Texas Ry. Co.* v. *Merrill,* 65 Kan. 436. Without resort to this doctrine, the cause of the accident and the relation of the Louisville & Nashville to it are matters of mere speculation and conjecture which should have been withdrawn from the consideration of the jury. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Coogan,* 271 U. S. 472, 478; *St. Louis-San Francisco Ry. Co.* v. *Mills,* 271 U. S. 344, 347.

The charge as to the joint liability of petitioners was also excepted to by the Southern " in so far as it makes the Southern Railway Company responsible for the negligence of the Louisville & Nashville." To that extent it was clearly erroneous and prejudicial to the Southern. The jury was in effect told to return a verdict against both petitioners on a finding of negligence on the part of either.

As there was evidence of repeated inspections of the window screens by the Southern after the car reached its line and before the accident, from which the jury might have found that there was no want of care on the part of the Southern, the jury may have found that the accident was due to the negligence of the Louisville & Nashville and so have returned a verdict against both. Even though the issue of the Southern's own negligence was for the jury, it was entitled to have the issue submitted unprejudiced by the erroneous instruction which authorized a verdict against the Southern on the theory of joint liability if the jury should conclude that the Louisville & Nashville alone was negligent.

3. As there must be a new trial, it is unnecessary to consider the rulings on the evidence which the court below thought erroneous, but not prejudicial. The order overruling the Southern's exception to the jurisdiction is affirmed. The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

WEISS, COLLECTOR OF INTERNAL REVENUE, *v.* WIENER.

ROUTZAHN, COLLECTOR OF INTERNAL REVENUE, *v.* SAME.

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

Nos. 482 and 483. Argued April 12, 1929.—Decided April 22, 1929.

The provision of § 214 (a) (8) of the Revenue Act of 1918, granting a deduction from income tax of "a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business,

including a reasonable allowance for obsolescence," does not authorize a deduction by a lessee for estimated obsolescence of buildings, where he had made no expenditure on this account, notwithstanding that the property was used by him in his business and held under long term leases such as were treated by the local law as in many respects equivalent to conveyances of the fee, and the lessee was under obligation to keep up the buildings and to pay rent even if they were destroyed. P. 335.

27 F. (2d) 200, reversed; 17 F. (2d) 650, affirmed.

WRITS OF CERTIORARI, 278 U. S. 594, to the Circuit Court of Appeals to review judgments which reversed judgments of the District Court recovered by the present petitioners in actions brought by Wiener to recover money collected as income taxes.

Mr. T. H. Lewis, Jr., with whom *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Clarence M. Charest,* General Counsel, Bureau of Internal Revenue, and *Millar E. McGilchrist,* Special Assistant to the Attorney General, were on the brief, for petitioners.

Messrs. Edward W. Browse and *James S. Y. Ivins* for respondent.

Messrs. Herman A. Fischer, Jr., and *E. Barrett Prettyman,* on behalf of The Brevoort Hotel Company, filed a brief as *amici curiae* by special leave of Court.

MR. JUSTICE HOLMES delivered the opinion of the Court.

These are suits brought by Wiener, the respondent, to recover amounts that he says should have been allowed as deductions from his income taxes but that were disallowed. The petitioners, the defendants, prevailed in the District Court, 17 F. (2d) 650; but the judgment was reversed by the Circuit Court of Appeals, 27 F. (2d) 200, and a writ of certiorari was granted by this Court.

Wiener was in the business of taking long leases of property and subletting. He held thirteen leases for ninety-nine years, renewable forever. He claimed the right to make an annual deduction from his income tax for estimated depreciation of the buildings, relying upon § 214 (a) (8) of the taxing act; Revenue Act of 1918, c. 18; 40 Stat. 1057, 1066, 1067; which granted deduction of " a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence." He was allowed all sums paid for repairs but nothing for the estimated obsolescence for which he had not paid. It may be taken for the purposes of decision that Wiener undertook to keep the buildings up to their present condition, to pay rent even if the buildings were destroyed and that his obligations were sanctioned by a liability to forfeiture. It is argued with much elaboration that not only covenants but economic necessity required the respondent to keep the buildings up to the mark and that the amount needed for this purpose should be allowed.

The income tax laws do not profess to embody perfect economic theory. They ignore some things that either a theorist or a business man would take into account in determining the pecuniary condition of the taxpayer. They do not charge for appreciation of property or allow a loss from a fall in market value unless realized in money by a sale. *United States* v. *S. S. White Dental Co.*, 274 U. S. 398, 401. A stockholder does not pay for accumulated profits of his corporation unless he receives a dividend. That is the general principle upon which these laws go. It is true that they allow for obsolescence of buildings, &c., where the loss is of materials, not of money; but there as elsewhere the loss must be actual and present, not merely contemplated as more or less sure to occur in the future. If the taxpayer owns the property the loss actually has

taken place. But with Wiener it had not, and it might never fall on him, as was pointed out by the District Judge. Some of the leases were assigned and others surrendered to the lessor. In such cases it would be a mere speculation to suppose that depreciation was taken into account in the transactions. Probably other and dominant considerations induced the acts. The event showed that in those cases there was no true basis for Wiener's claim.

The Circuit Court of Appeals, interpreting *United States* v. *Ludey,* 274 U. S. 295, said that the purpose of the revenue act is to tax only gain, and that the amount thus allowed to be set aside is not gain, but is capital that has gone into gross income. But it is very clear that as yet the capital of the lessee has not gone into it, and upon the considerations just mentioned it is not enough that he has made a contract that very possibly may not be carried out to replace that capital at some future time. If, as we think, such a contract is not enough to cause the lessee a present loss by wear and tear, the fact, which may be assumed, that the property was used by him in his business, does not matter. Of course he must show an interest in the property and a present loss to him to make the statute apply.

In *Lynch* v. *Alworth-Stephens Company,* 267 U. S. 364, a statutory provision for deducting from gross income a reasonable allowance for depletions of mines was held applicable to a lessee bound to mine a minimum tonnage and to pay a stated royalty. In such a case the whole value of the lease is in the right to remove the ore, that is to destroy as rapidly as may be the real object of the lease. But in the case of a house or shop the value is not in the right to destroy and the destruction is only an undesired, gradual and subordinate incident of the use. The diminution in the value of a mine to the lessee is conspicuous, necessary, and intended, and is the very source of the gross income of

the lessee from which it is deducted, whereas the wear and tear of a house or shop in any given year may be only recognizable by theory and, as has happened in this case, may cost the lessee nothing while the premises are in his hands.

It does not matter that in Ohio, where the properties lie, these long leases are treated as in many respects like conveyances of the fee. The Act of Congress has its own criteria, irrespective of local law, that look to certain rather severe tests of liability and exemption and that do not allow the deductions demanded whatever the lessees may be called. We understand this to be the view taken by the Department for a long time and we are of opinion that it should not be disturbed.

Judgment of Circuit Court of Appeals reversed.
Judgment of District Court affirmed.

ROSCHEN *v.* WARD, ATTORNEY GENERAL OF NEW YORK, ET AL.

S. S. KRESGE COMPANY *v.* SAME.

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

Nos. 667 and 668. Argued April 10, 1929.—Decided April 22, 1929.

1. A state statute making it unlawful to sell at retail in any store or established place of business any spectacles, eye glasses, or lenses for correction of vision, unless a physician or optometrist is in charge of the place of sale and in personal attendance at it, though not providing specifically for an examination by the specialist, is valid. P. 339.
2. A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce. P. 339.
3. It being obvious that much good will be accomplished by a statute requiring the attendance of a physician or optometrist at any place

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where spectacles or eye glasses are sold at retail, the question of the expediency of such legislation is not for the courts, and no presumption will be indulged that the benefits are a pretence and a cloak for establishing a monopoly. P. 339.

29 F. (2d) 762, affirmed.

APPEALS from decrees of the District Court, three judges sitting, denying preliminary injunctions and dismissing the bills in suits to restrain state officers from enforcing a statute requiring the attendance of a physician or optometrist at places where spectacles, eye glasses, or lenses for the correction of vision are sold at retail. The opinion below was reported *sub nom. S. S. Kresge Co.* v. *Ottinger.*

Mr. Walter N. Seligsberg, with whom *Mr. I. Maurice Wormser* was on the brief, for appellants.

Messrs. Hamilton Ward, Attorney General of New York, and *Henry S. Manley,* Assistant Attorney General, were on the brief for appellees.

MR. JUSTICE HOLMES delivered the opinion of the Court.

These are suits brought by dealers in eye glasses for an injunction prohibiting the enforcement of chapter 379 of the New York Laws of 1928, which amends the Education Law by inserting two sections, of which the material portion makes it unlawful to sell at retail in any store or established place of business 'any spectacles, eye glasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and [in] personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business.' The complainants moved for a preliminary injunction, a statutory court of three judges was convened and after a hearing the injunction was refused and the bills were dismissed on

the ground that no cause of action was shown. 29 F. (2d) 762.

The complainants sell only ordinary spectacles with convex spherical lenses, which merely magnify and which it is said can do no harm. The customers select for themselves without being examined and buy glasses for a relatively small sum. It is said that the cost of employing an optometrist would make the complainants' business impossible, and that in the common case of eyes only grown weaker by age the requirement is unreasonable. But the argument most pressed is that the statute does not provide for an examination by the optometrist in charge of the counter. This as it is presented seems to us a perversion of the Act. When the statute requires a physician or optometrist to be in charge of the place of sale and in personal attendance at it, obviously it means in charge of it by reason of and in the exercise of his professional capacity. If we assume that an examination of the eye is not required in every case, it plainly is the duty of the specialist to make up his mind whether one is necessary and, if he thinks it necessary, to make it. We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean. Moreover, as pointed out below, wherever the requirements of the Act stop, there can be no doubt that the presence and superintendence of the specialist tend to diminish an evil. A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce.

Of course we cannot suppose the Act to have been passed for sinister motives. We will assume that there are strong reasons against interference with the business as now done—but it is obvious that much good would be ac-

complished if eyes were examined in a great many cases where hitherto they have not been, and the balancing of the considerations of advantage and disadvantage is for the legislature not for the Courts. We cannot say, as the complainants would have us say, that the supposed benefits are a cloak for establishing a monopoly and a pretence.

Decree affirmed.

POSADOS, COLLECTOR OF INTERNAL REVENUE, *v.* WARNER, BARNES & COMPANY, LTD.

POSADOS, COLLECTOR OF INTERNAL REVENUE, *v.* MENZI.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

Nos. 251 and 252. Argued February 26, 1929.—Decided April 22, 1929.

1. The graduated tax rates on stock dividends imposed by Act 2833 of the Philippine Islands, as amended, apply only to individuals; and the objection that they infringe the rule of uniformity prescribed by the Organic Act is not available to a corporation which has been taxed only at the flat rate. P. 343.
2. Neither can this objection be maintained by an individual who fails to show the rate at which he was assessed or any facts to support the suggestion that the required uniformity was lacking. P. 346.
3. The provision of the Organic Act that no bill shall embrace more than one subject, which shall be expressed in the title, is not violated by including in a bill entitled as establishing an income tax, a tax on stock dividends, which is not strictly an income tax. P. 343.
4. A former decision of the Supreme Court of the Philippine Islands that stock dividends were not taxable as income under the Act here under consideration, *held* not binding in this case as a rule of property. P. 345.
5. The doctrine of *stare decisis* does not apply with full force prior to decision in the court of last resort, e. g., not to a decision of

the Supreme Court of the Philippines which was reviewable by this Court. P. 345.

6. The Philippine Legislature has power to lay a tax in respect of the advantage resulting to recipients from the allotment and delivery of stock dividends. P. 345.

Reversed.

CERTIORARI, 278 U. S. 588, to review judgments of the Supreme Court of the Philippine Islands sustaining recoveries of money collected from the plaintiffs, respondents here, as taxes on stock dividends.

Mr. Wm. Cattron Rigby, Judge Advocate, with whom *Messrs. Edward A. Kreger,* Judge Advocate General, U. S. A., and *Delfin Jaranilla,* Attorney General of the Philippine Islands, were on the brief, for petitioner.

Mr. Martin Taylor presented the oral argument for respondents, and *Messrs. Clyde Alton DeWitt* and *Eugene Arthur Perkins* submitted a brief in behalf of respondent Warner, Barnes & Co., Ltd.

MR. JUSTICE BUTLER delivered the opinion of the Court.

No. 251.

Respondent sued petitioner in the court of first instance of Manila to recover a tax alleged to have been illegally imposed on a stock dividend. The tax was levied under Act 2833 of the Philippine Islands, approved March 7, 1919, as amended by Act 2926, March 26, 1920. The provision here involved is substantially like that in § 2(a) of the Revenue Act of 1916 for the United States, which was held invalid in *Eisner* v. *Macomber,* 252 U. S. 189. The trial court deemed that and other decisions of this Court authoritative, held the stock dividend was not income, and gave judgment for plaintiff. Defendant appealed to the supreme court. One of the justices was

disqualified because as Attorney General he had acted for the defendant in this case. The appeal was submitted to the court consisting of eight justices who divided evenly. Then the case was referred to the first division consisting of five justices. § 138, Revised Administrative Code of 1917. The opinion of the division, four justices concurring and one dissenting, upheld the lower court, and thereupon the supreme court affirmed the judgment.

There was an agreed statement of facts, the substance of which follows. Respondent is a British corporation authorized to carry on business in the Philippine Islands. In 1923, it owned stock in a domestic corporation and received a dividend of profits accruing since March 1, 1913, which was paid by the company in its shares having a par value of 43,500 pesos. Petitioner, as Collector of Internal Revenue, included the amount in respondent's income for 1923 and levied thereon the tax in question. Respondent paid under protest, requested petitioner to refund the amount and, that being refused, brought this suit.

Section 1 (a) imposes an annual normal tax of three per cent. upon the net income of individuals; and § 1 (b) provides that, in addition to such tax there shall be levied and paid upon such income graduated surtaxes at specified rates.

Section 2 (a) provides: ". . . The taxable net income of a person shall include gains, profits, and income derived from salaries . . . also from . . . dividends . . . or gains, profits and income derived from any source whatever."

Section 10 (a) provides: "There shall be . . . paid annually upon the total net income received in the preceding calendar year from all sources by every corporation . . . a tax of three per centum upon such income . . . including the income derived from dividends. . . ."

Section 25 (a) provides: "The term 'dividends' as used in this Law shall be held to mean any distribution made or ordered to be made by a corporation . . . out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation . . . Stock dividend shall be considered income, to the amount of the earnings or profits distributed."

The petitioner admits that, strictly speaking, a stock dividend is not income. But he insists, and respondent concedes, that, in the absence of constitutional restriction, such dividends may be taxed. And the parties agree that the tax in question is within the scope and intent of the statute.

The supreme court held that the tax on stock dividends is a property tax and that the graduated rates infringe the provision of § 3 of the organic act of August 9, 1916, c. 416, 39 Stat. 545, which declares that the rule of taxation in the Islands shall be uniform. But in this case that point has no foundation in fact. The graduated rates are applied and imposed only upon individuals. § 1 (b). Corporations such as respondent are subject only to a flat rate of three per cent. § 10(a). And that rate applied to the stock dividend produced 1305 pesos, the tax paid. The rule of uniformity was not transgressed.

And in support of the judgment below it is insisted that the provision imposing a tax upon stock dividends violates that clause of § 3 of the Organic Act which declares: "That no bill which may be enacted into law shall embrace more than one subject, and that subject shall be expressed in the title of the bill."

Act 2833 is entitled: "An Act establishing the income tax, making other provisions relating to said tax, and amending certain sections of Act Numbered Twenty-seven hundred and eleven." The insular supreme court held

that the subject of the Act was not adequately expressed because a tax on stock dividends is one upon capital, while the title specified only the income tax. But in our opinion that is too strict a construction. Provisions in substance the same as that above quoted are found in many state constitutions. The purpose is to prevent the inclusion of incongruous and unrelated matters in the same measure and to guard against inadvertence, stealth and fraud in legislation. When bills conform to such requirements, their titles serve conveniently to apprise legislators and the public of the subjects under consideration. Courts strictly enforce such provisions in cases that fall within the reasons on which they rest. But, as freedom required or convenient for the effective exertion of the legislative power ought not unnecessarily or lightly to be interfered with, the courts disregard mere verbal inaccuracies, resolve doubts in favor of validity, and hold that, in order to warrant the setting aside of enactments for failure to comply with the rule, the violation must be substantial and plain. *Louisiana* v. *Pilsbury,* 105 U. S. 278, 289. *Montclair* v. *Ramsdell,* 107 U. S. 147, 153. *Read* v. *Plattsmouth,* 107 U. S. 568, 578. *City of South St. Paul* v. *Lamprecht Bros. Co.,* 88 Fed. 449, 451. *Johnson* v. *Harrison,* 47 Minn. 575. Cooley's Constitutional Limitations (7th ed.) p. 202 *et seq.* Sutherland, Statutory Construction (2d ed.) §§ 111, 115–118. The Philippine income tax law was passed before our decision in *Eisner* v. *Macomber, supra.* The Revenue Acts of 1916 and 1918, after which that measure was patterned, treated stock dividends as income. It was then well known by those giving attention to that sort of taxation that Congress treated stock dividends as taxable income. The inclusion of such distributions within the meaning of "income" as used in taxing statutes was not calculated or likely to mislead. The title was sufficient to notify legislators and others interested that the bill might include

and tax stock dividends. *Tax Commissioner* v. *Putnam,* 227 Mass. 522, 531. And that form of property was not so unrelated to the subject of the bill as expressed in the title that its inclusion was within the mischief which the quoted provision of the Organic Act was intended to prevent. The point cannot be sustained.

In *Fisher* v. *Trinidad,* 43 Phil. 973, the insular supreme court held that stock dividends are not taxable as income under the Act hereunder considered. The opinion of the first division in this case cites that decision and states that it has become a rule of property. Respondent supports that view, argues that the shareholders and the corporation had a right to rely on that decision, and asserts that it disposes of the issues here presented.

The question in that case arose upon demurrer to the complaint. The decision was announced October 30, 1922. Subsequently, the taxpayer withdrew his protest and the case was dismissed as moot six months before this suit was commenced. 45 Phil. 751. The even division of the eight justices and the opinion of the first division in this case make it clear that the supreme court itself did not consider the question of the taxability of stock dividends as income to be foreclosed. The decisions of the highest court of the Philippines on such questions are reviewable here. The doctrine of *stare decisis* does not apply with full force prior to decision in the court of last resort. The circumstances negative the claim that the case established any "rule of property." *Calhoun G. M. Co.* v. *Ajax G. M. Co.,* 27 Colo. 1, 11.

Moreover, *Fisher* v. *Trinidad* merely decided that "stock dividends" are not taxable as "income" under the Act. Petitioner does not combat that view or claim that such distributions do constitute income. The Philippine Legislature has power to lay a tax in respect of the advantage resulting to recipients from the allotment and delivery of such dividend shares. *Swan Brewing Co.* v.

Rex, [1914] A. C. 231. Respondent rightly concedes that, there being no constitutional restriction, such dividends may be taxed and that the statute discloses a purpose to tax them. The decision of this Court in *Eisner* v. *Macomber* rested on constitutional provisions not applicable to the Philippine Islands.

Respondent suggests no ground on which the judgment of the lower court can be sustained.

No. 252.

Respondent sued petitioner in the court of first instance of Manila to recover a tax on a stock dividend. That court held the tax valid but the supreme court reversed, following its decision in No. 251.

Respondent owned capital stock in Menzi & Company, Inc., a corporation organized under the laws of the Philippines. In 1923, that company paid to respondent out of profits made after March 1, 1913, a dividend in stock of the par value of 50,000 pesos. The collector included that amount in respondent's income for that year; and, by reason of such inclusion, assessed and collected from him a tax of 637.87 pesos.

This case differs from No. 251 in that here the taxpayer is an individual subject to surtaxes on income while corporations are subject to a flat rate. The supreme court held that, as stock dividends do not constitute income, the tax is on property and that therefore the specified graduated rates violate the rule of uniformity. But the record does not disclose the rate at which the tax was assessed or show any facts to support the suggestion that the required equality was lacking.

In other respects, this case is the same as No. 251.

Judgments reversed.

EX PARTE WORCESTER COUNTY NATIONAL BANK OF WORCESTER.

APPEAL FROM THE PROBATE COURT FOR WORCESTER COUNTY, STATE OF MASSACHUSETTS.

No. 469. Argued April 11, 1929.—Decided May 13, 1929.

The Act of February 25, 1927, provides that any national bank may be consolidated with any state bank or trust company under the charter of the national bank; that, upon such consolidation, all the rights, franchises and interests in property of the state corporation shall be deemed transferred to and vested in the national bank; that the consolidated national bank "shall hold and enjoy the same and all rights of property, franchises and interests including the right of succession as trustee, executor, or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed" by the state corporation; but that no such consolidation shall be in contravention of the law of the State under which such state bank or trust company was incorporated. *Held:*

1. That the Act enjoins upon a consolidated national bank complete conformity with the state law in its conduct of estates of deceased persons when acting as trustee or administrator thereof. P. 360.

2. Where the highest state court decided that, under the state law, a national bank with which a local trust company had been consolidated under the Act did not succeed to an executorship held by the trust company and could not render an account of the estate, except as executor *de son tort*, because the consolidation had ended the existence of the trust company and the bank, being a different entity, could not rightfully represent the estate without a new appointment from the probate court, this decision, as to the state law, should be followed by the Court. P. 359.

3. To conform with the state law, under the Act of Congress, the bank, in order to represent and administer the estate, should apply for an appointment by the probate court. P. 359.

263 Mass. 444, affirmed.

APPEAL from a judgment entered by the Probate Court for Worcester County, Massachusetts, in accordance with

a rescript from the Supreme Judicial Court, dismissing the appellant's petition for allowance of its account as executor under a will.

Mr. Newton D. Baker, with whom *Mr. William T. Forbes* was on the brief, for appellant.

The legitimate congressional purpose of preserving the federal fiscal instrumentalities involved both the enlargement of the corporate powers of national banks to meet modern banking conditions and the creation of authority for the consolidation of state banks with national banks, under federal charter, upon conditions which would preserve, in the consolidated national bank, all of the powers, rights and privileges held by the state institution, to the end that the federal instrumentalities might be sustained as against the competition created by the States through the authorization of the consolidation of state banks on favorable terms, to the extent of the power of Congress to create national banks and endow them with private functions. *McCulloch* v. *Maryland,* 4 Wheat. 316; *First Nat'l Bank* v. *Fellows,* 244 U. S. 416; *Fidelity Nat'l Bank* v. *Enright,* 264 Fed 236.

If the necessities of the situation justified it, Congress would have power to require all banks to take out national charters and thus to bring the whole business of banking under national control. *Veazie Bank* v. *Fenno,* 8 Wall. 533. Congress would have the power to provide generally that the national banks should have in each State, in addition to the powers specifically granted in national charters, all the powers given in that State to state banks.

The power of Congress to create federal fiscal agencies and endow them with relevant and appropriate functions, or to protect them against state created competition, by transmutation, is as plenary as the congressional power

to create such instrumentalities by initial organization. *Casey* v. *Galli,* 94 U. S. 673.

Congress may constitutionally provide for succession by a consolidated corporation, as an incident of the consolidation, to all rights as trustee, executor or administrator which were held by the constituent or absorbed corporations. *Iowa Light Co.* v. *First Nat'l Bank,* 250 Mass. 353; *Mercantile Trust Co.* v. *San Joaquin Agricultural Corp'n,* 265 Pac. 583; *McElwain* v. *Primavera,* 167 N. Y. S. 815; *Chicago Title Co.* v. *Zinser,* 264 Ill. 31; *In re Bergdorf's Will,* 206 N. Y. 309; *In re Turner's Estate,* 277 Pa. St. 110; *Petition of Bank,* 249 Mass. 240.

Transmutation of a state bank into a national bank pursuant to congressional authority, does not destroy the bank's identity or its corporate existence. *Metropolitan Nat'l Bank* v. *Claggett,* 141 U. S. 520; *Michigan Ins. Bank* v. *Eldred,* 143 U. S. 293; *Atlantic Nat'l Bank* v. *Harris,* 118 Mass. 147; *City Nat'l Bank* v. *Phelps,* 97 N. Y. 44.

Massachusetts General Laws, c. 172, § 44, provides that upon any consolidation of a Massachusetts Trust Company, its charter " shall be void except for the purpose of discharging existing obligations and liabilities." It is difficult to see why the duty to discharge an accepted trust as an executor or administrator is not an existing obligation. Hence, under the specific terms of the Massachusetts statute, the corporate identity of the Trust Company may well be considered to continue in the absorbing corporation, so far as is necessary, until the obligation is fully discharged. The discharge of the office of administrator has been specifically held to be a duty and obligation of the appointed corporation. *Ex parte Worcester County Nat'l Bank,* 161 N. E. 797.

The conclusion of the Supreme Judicial Court is that the appointment of an executor is an exercise of judicial power which it is incompetent for the legislature to per-

form. It is not claimed that this contravenes any statute of Massachusetts. Part 1 of Article 30 of the Bill of Rights prohibits the Legislative Department from exercising judicial power. In reply to this, it may be observed that the statute under examination deals with the powers of consolidated corporations; and while it provides for succession, it still leaves the executor subject to removal by the court in proper cases, so that the judicial power is not in any way interfered with. As a matter of fact, courts do not appoint executors. *In re Bergdorf's Will,* 206 N. Y. 309; *Parker* v. *Sears,* 117 Mass. 513; *Nat'l Bank* v. *Eldridge,* 115 Mass. 424. The right to act as executor or administrator is not a natural right, but resides first in the State, and the State may place the administration in the hands of its own officials and not leave them to administrators appointed by the courts. *In re McWhirter's Estate,* 235 Ill. 607. This policy has been followed in several States and it is not always required that the probate court should be consulted in such matters. *Leever* v. *Taylor,* 111 Mo. 312; *Brinckwirth's Estate* v. *Troll,* 266 Mo. 473. Even in Massachusetts, under § 17, c. 194 of Public Statutes, the public administrator proceeds summarily in estates under $100.00 in value without procuring letters of administration. The power of legislatures to deal with trusts without infringing judicial power is illustrated in *Suydam* v. *Williamson,* 24 How. 427; *Hoyt* v. *Sprague,* 103 U. S. 613; *Watkins* v. *Holman,* 16 Pet. 25.

The Legislature of Massachusetts by an Act approved March 11, 1911, has exercised the very power with regard to state institutions which Congress has sought to exercise in the Act under examination.

Even the power of removal as to executors or administrators has been made the subject of statutory regulations. *Haddick* v. *District Court,* 160 Ia. 487; *Dunlap* v. *Kennedy,* 10 Bush (Ky.) 539.

The constitutionality of the Act is likewise sustained by the contemporaneous interpretation and application of the Act by the federal agencies entrusted with its administration. Ann. Rep. Fed. Res. Bd., 1927, pp. 267–271, 287.

Mr. F. Delano Putnam, Assistant Attorney General of Massachusetts, with whom *Messrs. Joseph E. Warner,* Attorney General, and *R. Ammi Cutter,* Assistant Attorney General, were on the brief, as *amici curiae,* by special leave of Court, on behalf of the Commonwealth of Massachusetts, the Attorney General and the First Judge of Probate of Worcester County.

So long as the state law applicable to the appointment of successor fiduciaries provides for the appointment of consolidated national banks as successors in the same manner and upon the same terms as consolidated state banks, the state law and § 1 of the Act are not in conflict.

Despite the exhaustive examination by the court below, it is submitted with great deference that its construction of § 1 was incorrect. This Court is not bound by that construction. *Pacheco* v. *New York, N. H. & H. R. Co.,* 15 F. (2d) 467; *Knight* v. *Carter Oil Co.,* 23 F. (2d) 481.

In view of the decision below, it must be said at least that there is grave doubt as to the constitutional validity of a portion of § 1 as construed by it. Therefore this Court should be astute to adopt the construction which leaves no room for any holding or argument that the legislative department has exceeded its powers. *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331; *Blodgett* v. *Holden,* 275 U. S. 142.

The appellant should be permitted to account only as executor *de son tort.*

The language and legislative history of § 1 of the Act do not indicate that Congress intended to authorize consoli-

dated national banks to succeed state trust companies as fiduciaries without new appointment by the probate court, where state law requires such new appointment. The legislative history shows that it was intended only to simplify the procedure attendant upon the consolidation of state and national banks. The language of the whole section indicates that Congress did not intend that the consolidation authorized should result in any violation of state laws.

The statutes under which national banks are authorized to act as fiduciaries by state court appointment, do not purport to relieve national banks from court supervision to which state banks acting as fiduciaries are subjected. Section 1 of the Act should be construed so as to be consistent with this earlier legislation.

The pertinent provisions of the Massachusetts law governing the conduct by fiduciaries of estates under direction of a Massachusetts court, in no sense discriminate against national banks in favor of any other person.

If § 1 of the Act be construed to require a state probate court to recognize as executor a consolidated national bank in the place of the court's original appointee without new appointment, it is *pro tanto* unconstitutional.

The construction of the disputed words taken by the Supreme Judicial Court probably rested in large part upon the construction taken by the Comptroller of the Currency. Ann. Rep. Fed. Res. Bd., 1927, pp. 267–271. A departmental construction cannot be given the force of law when the construction is challenged in the courts almost as soon as known. *Iselin* v. *United States,* 270 U. S. 245.

The power of Congress with respect to the incidental powers of national banks is limited to the protection of the exercise of those powers from discriminatory state legislation or action and to the preservation of equal

opportunity to compete with state banks. Non-discriminatory state laws regulating the administration of estates are beyond congressional interference under the Constitution. *First Nat'l Bank* v. *Fellows ex rel. Union Trust Co.,* 244 U. S. 416; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; *Knowlton* v. *Moore,* 178 U. S. 41; *Burnes Nat'l Bank* v. *Duncan,* 265 U. S. 17; *Child Labor Tax Case,* 259 U. S. 20.

Messrs. George P. Barse and *F. G. Awalt* filed a brief on behalf of Mr. John W. Pole, Comptroller of the Currency, as *amicus curiae,* by special leave of Court.

Messrs. Walter Wyatt and *George B. Vest* filed a brief on behalf of the Federal Reserve Board, as *amicus curiae,* by special leave of Court.

Mr. Robert F. Cogswell filed the brief of *Mr. Carl Meyer* on behalf of the Continental National Bank and Trust Company of Chicago, as *amicus curiae,* by special leave of Court.

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

The Worcester County National Bank is a consolidated banking corporation formed by uniting, on June 27, 1927, the Fitchburg Bank & Trust Company, a state institution of Massachusetts, and the Merchants National Bank of Worcester, a national bank of Worcester County, Massachusetts, under the Act of Congress of February 25, 1927, c. 191, 44 Stat. 1224, amending the Act of November 7, 1918, c. 209, 40 Stat. 1044. The amendment added a new section, 3, and this case turns chiefly on the construction, effect and validity of that new section.

The consolidated bank filed in the Probate Court of Worcester County a first and final account of the Fitch-

burg Bank & Trust Company, executor of the last will and testament of Julia A. Legnard, late of Fitchburg in the county of Worcester. The account was for the period beginning April 21, 1926, and ending February 9, 1928. The account was rendered by the Worcester County National Bank for the Fitchburg Bank & Trust Company to June 27, 1927, and thereafter as its own account.

The Fitchburg Bank & Trust Company had been appointed by the Probate Court executor of the will of Julia A Legnard on April 21, 1926, and qualified by giving bond approved on that day.

The consolidated bank claimed that, in view of the proceedings, its right and duty was to render the account presented for allowance; and as all the parties interested had assented to it, that it should be allowed by the court.

The Probate Court found that the account was in proper form for allowance and should be allowed as rendered, if the said Worcester County National Bank, as successor or otherwise, was executor of said will or had the right to render the account.

The Probate Judge reported a certificate from the Comptroller of the Currency that the two banks had complied with all the provisions of the Acts of Congress and had been consolidated under the charter of the Merchants National Bank with the capital stock of $1,875,000; that the consolidation had been approved, and that pursuant to the Federal Reserve Act, enacted December 23, 1913, § 11 (k), c. 6, 38 Stat. 251, 262, the consolidated bank had permission to act as executor.

He further reported that many estates were being administered by the consolidated bank under a claim of right where the Fitchburg Bank had been appointed administrator, executor or in some other fiduciary capacity, and no new appointment of the consolidated bank in place of the Fitchburg Bank had been made by decree of the Probate Court.

He concluded the report as follows:

"Without action upon said account, I report the above facts and the question of law involved, for the consideration and determination of the Full Court, as to whether the petitioner is entitled to render said account.

"Fredk. H. Chamberlain,
Judge of Probate Court."

After a hearing on the report, a rescript of the Supreme Judicial Court was as follows:

"Ordered that the register of probate and insolvency in said county make the following entry under said case in the docket of said court, viz: The question reported, namely, 'Whether the petitioner is entitled to render said account,' is answered in the negative. Probate Court instructed accordingly."

Following the rescript, the Probate Court made the following entry:

"The foregoing account having been presented for allowance, after rescript from the Supreme Judicial Court (Full Court) and pursuant to the terms of said rescript, it appearing that the Worcester County National Bank of Worcester, the accountant and petitioner in this case, has not succeeded the Fitchburg Bank & Trust Company as executor of the will of said testatrix and is not entitled to render this account, this petition for the allowance of the same is hereby dismissed."

A petition for appeal to this Court, with an assignment of errors, was filed, and an appeal was allowed under § 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 937.

The Supreme Judicial Court stated its reasons for the conclusion reached, in an elaborate opinion. 263 Mass. 444.

The court began with a statement of the substance of § 3, in the Act of February 25, 1927, c. 191, 44 Stat. 1224, 1225, providing that any bank, including a trust company

incorporated under the laws of any State, may be consolidated with a national bank located in the same county under the charter of the national bank, on such terms and conditions as may lawfully be agreed upon in the manner specified; that all the rights, franchises, and interests of the state bank in and to every species of property, real, personal and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such national bank into which it is consolidated, without any deed or transfer; and that the national bank shall hold and enjoy all this property, franchises and interests, including the right of succession as trustee, executor, or in any other fiduciary capacity, in the same manner and to the same extent as was held and enjoyed by the state bank. The section closes with the limitation: "No such consolidation shall be in contravention of the law of the State under which such bank is incorporated."

The court examined the question whether there was any statute of Massachusetts or any policy declared in its statutes which prevented or forbade such consolidation, and found that there was none, but pointed out that there was a provision in the General Laws of Massachusetts, c. 172, § 44, as amended by Stat. 1922, c. 292, which should be regarded as a limitation upon such consolidation, as follows:

"The charter of a trust company, the business of which shall, on or after July 1, 1922, be consolidated or merged with, or absorbed by, another bank or trust company, shall be void except for the purpose of discharging existing obligations and liabilities."

With this qualification, the court found the field to be left open, under Massachusetts law, to the exercise by Congress of whatever power it possessed over the subject. The court then considered the Congressional power, and cited the case of *Casey* v. *Galli*, 94 U. S. 673, to show that

under § 44 of the Banking Act of Congress, c. 106, 13 Stat. 99, 112, a state bank could change its organization into that of a national bank without any authority given by the State in its charter or otherwise to make the change. The Supreme Judicial Court could not find any distinction between the power of Congress to authorize the conversion of a state bank into a national bank and its power to authorize the consolidation of a state bank with a national bank under the charter of the national bank, and concluded that if no state legislation was necessary to accomplish the conversion, there was no legislation necessary to accomplish consolidation, and that the consolidation of a Massachusetts trust company with a national bank under the § 3 in the Act of Congress of February 25, 1927, was permissible and valid.

The court then considered what was the legal effect of the consolidation of the trust company and the national bank, and emphasized the explicit provision of § 3 that the consolidation was to be under the charter of the national bank. It referred again to the provision of the state law that upon the consolidation, the charter of the trust company should be "void except for the purpose of discharging existing obligations and liabilities." It held that the word "franchises" directed to be transferred to the national bank by virtue of § 3 did not mean its charter or its right to be a corporation, for that would be in contravention of the law of the Commonwealth; that it was only the national bank that retained its corporate identity; that the certificate of the Comptroller did not constitute a charter, but only his approval of the consolidation; that the trust company had gone out of existence and all its property had become the property of the consolidated bank; and that the latter was not a newly-created organization, but an enlargement of the continuously existing national bank. Thus the court found that the

identity of the trust company had not been continued in a national bank, but had been extinguished. The court distinguished this case from cases of union where contract obligations had been held to pass from one of the uniting corporations to the other. Such cases were held not to be applicable to sustain the view that positions of trust like executor, administrator and other fiduciaries could be transferred to the national bank by the mere consolidation under Massachusetts law.

The court then set out at some length the reasons why under the Constitution and practice of Massachusetts the appointment of an executor was a judicial act, and that in the case before the court no one could succeed to the void and defunct State Trust Company as executor except by appointment by the Probate Court. The trust involved was highly personal. The court said:

"To treat the national banking association into which the State trust company has been consolidated as preserving the identity of the trust company in this particular would be contrary to the juridical conception and practice touching the appointment of such fiduciaries under the law of this Commonwealth."

The third question the court discussed and decided was the validity and binding effect on courts of Massachusetts of the declaration in § 3 of the Act of Congress that the right of succession as trustee, executor or in any other fiduciary capacity, would follow to the same extent as it was held and enjoyed by such state bank. It first inquired what was its meaning, and held that it meant that the original appointment of the state bank was to continue wholly unaffected by the fact that the state bank had ceased to be, and that another and different corporation, whose credit, standing and competency had never been the subject of judicial inquiry for this purpose must be substituted by virtue of § 3. The court found that

this result was in contravention of the law of the Commonwealth and contrary to the state and federal Constitutions.

The court found, however, that this provision was not the dominant part of § 3, that the clause was separable and distinct, that the rest of the section could stand independently and that there was no such connection between the two as to indicate that Congress would not have enacted the valid part without the other.

The court, therefore, held that the Worcester County National Bank of Worcester, the accountant and petitioner in the case at bar, had not succeeded the Fitchburg Bank & Trust Company as executor of the will of the testatrix and was not entitled to render an account as such executor; that it could only account as executor *de son tort,* and that the question of the Probate Court must be answered in the negative.

In passing on this appeal, we must observe that, in determining the policy of a State from its statutes and their construction, we of course follow the opinion of the state court except as it may be affected by the federal constitution. When, therefore, the state court holds that an executor, to act as such in the State, must be appointed by the Probate Court, this Court must respect that conclusion and act accordingly. But when the question arises as to what is the proper interpretation and construction of federal legislation, this Court adopts its own view.

It is very clear to us that Congress in the enactment of § 3 in the Act of February 25, 1927, was anxious even to the point of repetition to show that it wished to avoid any provision in contravention of the law of the State in which the state trust company and the national bank to be consolidated were located. So strongly manifest is this purpose that we do not hesitate to construe the effect of § 3 in Massachusetts to be only to transfer the property

and estate from the trust company to the national bank, to be managed and preserved as the state law provides, for administration of estates, and not to transfer the office of executor from the state trust company to the succeeding national bank. As this requires another judicial appointment by a probate court, it would become the duty of a consolidated national bank, after the union, immediately to apply for the appointment of itself as administrator, subject to the examination and approval of the proper probate court. Because of the interest of the national bank in all of the assets of the trust company, including the estate at bar, transferred to its custody, the bank would seem to have a right to make such an application to the Probate Court and await the action of that court. If, on the other hand, it assumed improperly that it was made an executor by the mere consolidation, and held the transferred property as such, it must be held to have become an executor *de son tort* and should bring the assets before the Probate Court and proceed by proper application to secure the appointment of a legal representative by the court, as pointed out by the Supreme Judicial Court in this case and in *Commonwealth-Atlantic National Bank,* 261 Mass. 217, and *Commonwealth-Atlantic National Bank,* 249 Mass. 440.

These views lead us to agree with the conclusions of the Supreme Judicial Court in respect to the legality of the consolidation of the trust company and the national bank and only to differ from it in its construction of § 3, by which it would hold that section unconstitutional under the Constitution of Massachusetts, and so under the Constitution of the United States.

We think § 3 enjoins upon the national bank complete conformity with the Massachusetts law in its conduct of estates of deceased persons when acting as trustee or administrator thereof.

The Supreme Judicial Court refers in its opinion in this case to that of *Commonwealth-Atlantic National Bank of Boston,* 261 Mass. 217, as showing that the consolidated bank in this case could not act as executor. In that case a state trust company was appointed by the probate court as trustee under wills in two cases and as conservator of property in a third. It qualified by giving bond and for some time held and administered the property as fiduciary. Thereafter it was converted into a national bank, which still later was consolidated with another national bank. No new appointment as trustee was made by the probate court. The consolidated national bank petitioned for allowance of accounts as fiduciary. The court held that while the accounts were accurate and complete, the consolidated bank was not a duly appointed fiduciary merely by virtue of the original appointment of the state trust company, and could only account *de son tort.* The court relied on *Commonwealth-Atlantic National Bank of Boston,* 249 Mass. 440. There a state trust company was named as executor in a will. Thereafter it became converted into a national bank, which still later was consolidated with another national bank. The testator having died, the consolidated national bank petitioned for the issuance of letters testamentary to it as the executor named in the will. The court held that it was not the executor named therein, and that the designation of the state trust company as executor did not confer on it a property right passing to its successor, the consolidated national bank.

The court in both *Commonwealth-Atlantic Bank* cases accepted the effect of the decisions in *First National Bank of Bay City* v. *Fellows,* 244 U. S. 416, and *Burnes National Bank of St. Joseph* v. *Duncan,* 265 U. S. 17, the latter holding that national banks may act as executors in a State where state trust companies have that privi-

lege. The court in 249 Mass. said, "We accept, as we are bound to accept, that principle in all its amplitude and with all its implications," but said that "that principle does not reach to the facts here presented." There was similar language in 261 Mass. The Supreme Judicial Court did not then hold, and has not held, that a Probate Court of Massachusetts may not appoint a national bank, otherwise qualified, to be executor, administrator or trustee, if it approves one as such. In construing § 3, we think it to be in conformity therewith for the national bank, after consolidation, to apply to the Massachusetts Probate Court for appointment as a succeeding fiduciary to carry on the duties. In the present case, no such appointment has been made by the Probate Court.

Under the Massachusetts authorities, as already cited, the bank in attempting in this case to act as executor has become an executor *de son tort,* and that situation must be disposed of in accordance with the laws applicable in Massachusetts to such a situation. *Clabborn* v. *Phillips,* 245 Mass. 47. When the executor *de son tort* has been released, it would seem that application might be made to the Probate Court for appointment of the national bank as administrator to close the estate. It seems to us that our construction of the Act of 1927, in differing from that of the Supreme Judicial Court of Massachusetts, makes it possible by the appointment of the Probate Judge, if he approves, to enforce the requirements which the laws of that State impose in the execution of such trusts, and still preserve the constitutional effectiveness of § 3.

This result requires us to affirm the dismissal of the petition of the Worcester County National Bank in seeking to render the first and final account of the Fitchburg Bank & Trust Company as executor of the last will and

testament of Julia A. Legnard, deceased, and its own account as executor of her will; but to remand the cause to the Probate Court for a proceeding by the petitioner as executor *de son tort,* and for such further proceedings as it may be advised and as are permissible by the laws of Massachusetts and the statutes of the United States, not inconsistent with this opinion.

And it is so ordered.

UNITED STATES *v.* THE FRUIT GROWERS EXPRESS COMPANY.

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

No. 305. Argued December 3, 1928.—Decided May 13, 1929.

The defendant, a corporation performing the service of icing refrigerator cars under contract with a railroad company, made out and delivered to the railroad company false reports concerning the quantity of ice used, which reports were kept by the railroad company as required under the Interstate Commerce Act, and were made the basis of icing charges rendered by it in its bills to shippers. The railroad company was innocent. *Held* that the defendant was not punishable under § 20 (7) of the Interstate Commerce Act as a person who wilfully makes a false entry in a record kept by a carrier. P. 368.

Affirmed.

APPEAL under the Criminal Appeals Act from a judgment of the District Court quashing an indictment.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell,* and *Messrs. Elmer B. Collins,* Special Assistant to the Attorney General, *William H. Bonneville* and *William J. Flood,* Special Assistants to the United States Attorney, were on the brief, for the United States.

Refrigeration is a transportation service regulated by the Interstate Commerce Act, and in performing that service appellee was a person employed by and acting for the railroad company, and as such it was bound to observe the statutes regulating the service. *Chicago Refrigeration Co.* v. *Interstate Commerce Comm'n,* 265 U. S. 292; *Atchison R. Co.* v. *United States,* 232 U. S. 199; *Interstate Commerce Comm'n* v. *Diffenbaugh,* 222 U. S. 42; *Spencer Kellogg & Sons* v. *United States,* 20 F. (2d) 459, certiorari denied 275 U. S. 566.

Section 20 (7) of the Interstate Commerce Act is not limited to common carriers and their employees, but includes and punishes all persons and corporations who commit the act therein declared to be unlawful. *United States* v. *Tippitt,* 298 Fed. 495; *Interstate Commerce Comm'n* v. *Goodrich Transit Co.,* 224 U. S. 194; *Kennedy* v. *United States,* 275 Fed. 182.

The falsified icing reports described in counts 1 to 50 are records "kept" by the railroad company within the meaning of § 20 (7), and preserved in its files for three years, in compliance with the order of the Interstate Commerce Commission, and it is immaterial whether the railroad company compiled or wrote the records so kept. *United States* v. *Tippitt,* 298 Fed. 495; *Atchison, T. & S. F. R. Co.* v. *United States,* 244 U. S. 336.

Through the device of making false entries in the icing reports, which were accepted in good faith and relied upon by the railroad company in writing its freight bills, appellee falsified the freight bills described in counts 51 to 65, inclusive, within the meaning of § 20 (7). *United States* v. *Koenig Coal Co.,* 270 U. S. 512; *Armour Packing Co.* v. *United States,* 209 U. S. 56; *Grand Rapids & Indiana R. Co.* v. *United States,* 212 Fed. 577; *Kennedy* v. *United States,* 275 Fed. 182; *Spencer Kellogg & Sons* v.

United States, 20 F. (2d) 459, certiorari denied, 275 U. S. 566.

The indictment is not invalid for failure to allege collusion between appellee and the railroad company, for collusion or conspiracy is not an element of the crime defined by § 20 (7).

Mr. William S. Dalzell, with whom *Mr. William G. Brantley* was on the brief, for appellee.

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

The case is brought here under par. 2 of § 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229; 43 Stat. 936, 938. The paragraph was originally enacted in the Act of March 2, 1907, c. 2564; 34 Stat. 1246. It provides for appeals in criminal cases where the decision of the District Court is adverse to the United States and the defendant has not been put in jeopardy.

This review is of an indictment of 75 counts against the Fruit Growers Express Company, a corporation of Delaware, engaged in icing and re-icing refrigerator cars containing shipments of perishable commodities transported to Pittsburgh by the Pennsylvania Railroad, for misreporting ice furnished and falsifying the official records of the Railroad Company showing expenditures made in those shipments. By a contract executed by the two companies on May 1, 1925, the Express Company agreed to perform the icing and other service which the Railroad Company by and through its published schedules and tariffs had stipulated to perform with the shippers of such shipments. The Express Company, as provided in the contract, made and furnished written reports

of the quantity of ice placed by it in the bunkers of the cars for the Railroad Company at Pittsburgh. These reports were received and kept by the Railroad Company, and from them the Railroad Company prepared its reports of ice delivered, and rendered bills to the consignees of the shipments at Pittsburgh in accordance with its tariffs and schedules. In the performance of the contract, as the recitals of the counts of the indictment show, the agent of the Express Company in 59 instances delivered less ice in each car, and in 16 instances more ice in each car, than he reported to the Railroad Company, knowing that his report would be accepted by the Railroad Company as a true and accurate statement of the deliveries. The making of 50 falsified ice reports by defendant's agent was charged in counts 1 to 50. Counts 51 to 65 charged that by falsifying ice reports defendant made and caused to be made false entries in freight bills. Counts 65 to 75 were not urged by the Government as valid. Each count of the indictment involved a separate carload shipment of a perishable commodity, and the falsification by the Express Company was charged to be of an official record " kept by the Railroad Company " under the law. We have inserted in the margin the applicable parts of sections of the Interstate Commerce Act which are here involved.*

* Section 10 (1). "Any common carrier subject to the provisions of this Act or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any

On behalf of the defendant, a motion was made and granted by the District Court, to quash the indictment in all its counts, on the ground, first, that the quoted §§ 10 and 20 relied on to support the indictment are really intended only to apply to common carriers, their directors, officers, agents and employees, or others acting for and in the interest of carriers or in collusion with them, and not to persons whose only relation to a carrier is that of an independent contractor acting adversely to the carrier's interest, in fraud of it and without its knowledge or acquiescence; and second, that the counts of the indictment only denounce the keeping of false or inaccurate official "records kept by the carrier" and do not include records not kept by the carrier, like bills, memoranda, and other data furnished by an independent contractor, intentionally misleading the carrier or its agents in keeping its official records.

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infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense. . . ." C. 104, 24 Stat. 379, 382.

Section 20 (7). "Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term of not less than one year nor more than three years, or both such fine and imprisonment. . . ." C. 3591, 34 Stat. 584, 594.

The question is really one of the construction of the two sections of the statute quoted in the margin and the intent of their penal provisions. The general object of the statute was to require that common carriers should keep reliable records of the receipts and expenditures of and for each shipment which was the subject of transportation. They were intended to be an ultimate protection, not to the carriers but to the shippers, to secure a proper accounting of the expenditures that might properly be charged to each shipper on the basis of the tariff published in accordance with law. Their importance is shown in *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 211, and *United States* v. *Louisville & Nashville R. R.*, 236 U. S. 318, 334, 336.

It was the duty of the common carrier to provide for the icing and also to furnish reports as to the amount delivered, in a record kept by it for the information of shippers and of the Interstate Commerce Commission. But there is no reason why this duty with respect to the furnishing of ice might not be performed by an independent contractor. *Cincinnati, New Orleans & T. P. Ry.* v. *Interstate Commerce Commission,* 162 U. S. 184, 197; *Express Cases,* 117 U. S. 1, 24; *Baltimore & Ohio S. W. Ry.* v. *Voigt,* 176 U. S. 498, 504; *Chicago, St. Louis & New Orleans R. R.* v. *Pullman Southern Car Co.,* 139 U. S. 79, 89; *Berwind-White Coal Mining Co.* v. *United States,* 9 F. (2d) 429, 439; *Ellis* v. *Interstate Commerce Commission,* 237 U. S. 434, 443. Such contracts, unless forbidden, are legal; but what their civil consequences are is often a question. If the duty performed is one which the common carrier is obliged to perform, the latter is civilly liable for the failure of the independent contractor to perform the carrier's duty. Whether a breach of the duty in such case will lead to criminal liability on the part of the contractor is a question of construction of the statute. Of course, if

the common carrier were privy to the furnishing of short ice, or to the making of false preliminary data by the independent contractor, both the carrier and the independent contractor would become criminally responsible for the shortage and for the misrepresentation of the official record. But that is not the case we have here. The Railroad Company having certain duties to perform in respect of the shipments, attempts to perform them by contract with an outside person not an agent of the carrier, and is itself deceived and defrauded by the contractor and outsider in his failure to perform his contract, so that by the falsification the carrier is led into the making of the erroneous report. In such circumstances, is the outsider to be held guilty of criminality under the above statutory provisions? Congress of course could render these false statements by the defendant a crime; but has it done so in the absence of any collusion by the Railroad Company? It is a nice question, but the statute is a criminal one, and may lead to heavy penalties. A defendant under such circumstances is entitled to a reasonably strict construction of the language used to effect the particular purpose that Congress has in mind. We do not think that Congress was looking to protect an independent contractor against his servants or a common carrier against its independent contractor. A fraud as between them was a matter collateral to the intent and object of the legislation in holding the common carrier and all its agents to strict responsibility to the shipper and the Commission.

If the independent contractor colludes with the common carrier by the false data it furnishes, and the common carrier knowingly uses them, of course the contractor is nothing but an aider and abettor, and so a principal, in the keeping of the false official records; but otherwise not.

The result is, therefore, that while the independent contractor might well be penalized by a different statute for

the fraud he has committed on the common carrier, we do not think that the present statutes bring them within the scope of the crime denounced, when the common carrier and its servants are innocent of offense.

It is clear to us that the words "record or memoranda kept by a carrier" contained in § 20 mean the official record kept by the carrier and do not refer to bills or memoranda kept by the contractor as a basis on which the carrier keeps its records. The defendant's bills or memoranda are not in that sense a record at all under § 20. They are not subject to the supervision of the Interstate Commerce Commission; and it would seem that if the data proved to be dishonest and incorrect, the punishment for that, unless with the complicity of the common carrier, must be found elsewhere than in the provisions of the present Interstate Commerce Act.

This leads us necessarily to affirm the ruling of the District Court.

Affirmed.

UNITED STATES *v.* THE JOHN BARTH COMPANY ET AL.

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

No. 526. Argued April 18, 1929.—Decided May 13, 1929.

1. A limitation of five years declared by §§ 250 (d) of the Revenue Acts of 1918 and 1921, and § 277 (a)(2) of the Revenue Act of 1924, upon the time within which income and profits taxes may be assessed and suits begun to collect them, is inapplicable to a suit on a bond given within that time under par. 14 (a), § 234 (a), of the Revenue Act of 1918, to secure payment, with interest, of taxes which have been returned and assessed but payment of which has been postponed pending decision of a claim for abatement submitted by the taxpayer. P. 374.

2. The making of the bond in such case gives the United States a cause of action separate and distinct from the already existing cause of action to collect the taxes; and the taxpayer, by thus securing postponement of collection, waives the limitation of five years that would have applied had no bond been given. P. 375.
3. Section 1106 (a) of the Revenue Act of 1926, providing that the bar of the statute of limitations against the United States in respect of any internal revenue taxes shall not only bar the remedy, but shall extinguish the liability, does not affect an action on a bond given *ut supra*. P. 376.

27 F. (2d) 782, reversed.

CERTIORARI, 278 U. S. 597, to review a judgment of the Circuit Court of Appeals, which affirmed a judgment of the District Court dismissing the complaint in an action to enforce a bond given by The John Barth Company and its surety to secure payment of taxes. See also 276 U. S. 606.

Assistant Attorney General Willebrandt, with whom *Attorney General Mitchell,* and *Messrs. Sewall Key* and *J. Louis Monarch,* Special Assistants to the Attorney General, were on the brief, for the United States.

Messrs. Louis Quarles and *Walter H. Moses,* with whom *Messrs. Malcolm K. Whyte, S. Sidney Stein,* and *Richard S. Doyle* were on the brief, for respondents.

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

This was a suit by the United States, through its District Attorney for the Eastern District of Wisconsin, against the John Barth Company, a corporation of Wisconsin, and the United States Fidelity & Guaranty Company, a corporation of Maryland. The subject matter of the suit is the recovery of the amount due on a bond in the sum of $60,000 whereby the respondents bound them-

selves jointly and severally to pay to the United States the sum therein named under the following circumstances and conditions.

On June 25, 1919, the United States Commissioner of Internal Revenue assessed income and profits taxes against the Barth Company for the year 1918 in the sum of $126,182.81, and of this sum the company paid $74,764.40. On September 15, 1919, and March 17, 1925, the company filed claims for the abatement of $39,501.58 of the taxes thus assessed. The Barth Company as principal, and the United States Fidelity & Guaranty Company as surety, in consideration of the United States' refraining from and suspending the collection of taxes thus outstanding against the Barth Company for the year 1918, pending consideration and adjudication of the foregoing claims for abatement, executed and delivered a bond on September 20, 1919, binding them to pay "on notice and demand by the collector . . . any part of such tax found by the Commissioner to be due, with interest at the rate of twelve per cent. per annum from the time such tax would have been due, had no such claim been filed."

The Barth Company filed its claim of abatement on the ground that it had sustained a substantial loss, resulting from a material reduction of the value of its inventory for the taxable year and from actual payment after the close of the taxable year of rebates, in pursuance of contracts entered into during such year upon sales made during the year.

On March 25, 1926, the Commissioner considered the claims, allowed about $10,000, and rejected the rest in the sum of $29,842.32. The Barth Company was notified and payment under the bond of the tax as determined, with interest thereon, requested, on February 27, 1926, and on April 5 and 20, 1926, but the Barth Company refused to pay. On August 10 and 27, 1926, the Guaranty Com-

pany was notified of the rejection of the abatement claims in the sum above stated, and of the amount and interest due, but that company also refused payment. The suit was authorized by the Commissioner of Internal Revenue.

To the petition respondents filed a demurrer "for the reason that . . . the action was not commenced within the time limited by law which time is prescribed by Sections 205d [250d] of the Revenue Acts of 1918 and 1921, and Sections 277a-2, 278d and 278e of the Revenue Act of 1924, and Sections 277a-3, 278d, 278e, and 1106a of the Revenue Act of 1926."

The District Court sustained the demurrer, the United States elected to stand on its complaint, and judgment was entered dismissing the complaint.

The United States carried the judgment on writ of error to the Circuit Court of Appeals, which, after an unsuccessful effort to certify to this Court certain questions, which were dismissed (276 U. S. 606), heard the writ of error and affirmed the judgment of the District Court. 27 F. (2d) 782. The case is now here on writ of certiorari.

Par. 14 (a), § 234 (a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, provides that:

"At the time of filing return for the taxable year 1918 a taxpayer may file a claim in abatement, based on the fact that he has sustained a substantial loss . . . resulting from any material reduction . . . of the value of the inventory for such taxable year, or from the actual payment, after the close of such taxable year, of rebates in pursuance of contracts entered into during such year upon sales made during such year. In such case, payment of the amount of tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with sureties satisfactory to the

Commissioner, conditioned for the payment of any part of such tax found to be due, with interest. If any part of such claim is disallowed then the remainder of the tax due shall on notice and demand by the collector be paid by the taxpayer with interest at the rate of 1 per cent. per month from the time the tax would have been due had no such claim been filed."

In § 250 (d) the provision is:

" 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."

Section 250 (d) refers to a failure of the Commissioner of Internal Revenue to pass upon the return made by the taxpayer and to assess the tax. It is the determination preceding the assessment that is referred to in that section. If there is no determination and assessment within five years after the return is made, or after the return should have been made, then the statute bars an assessment and the collection of the tax due. But § 250 (d) does not apply to the proceeding under par. 14 (a), which relates to a case in which there is a return with a resulting assessment, as there was here, and the taxpayer seeks to reduce the assessed tax by presenting a claim for an abatement of part of it, and to avoid the collection of that part, pending action on the claim for abatement, by giving a bond. In this case there was a return and there was an assessment, but the bond was given well within the five years after the return, and when the bond was given it required the obligees, if the abatement was not allowed, to pay interest from the time such tax would have been due, had no such claim been filed. In other words, the limi-

tation of § 250 (d) has no application to a situation following a claim of abatement and the giving of bond.

The plain purpose of par. 14 (a) was to effect a substitution for the obligation arising under the return and assessment to pay the tax, of the contract entered into in the bond to pay any part of the tax found to be due upon the subsequent determination of the Commissioner, and this with interest at the rate of 1 per cent. per month from the time the tax would have been due, had no such claim been filed. Of course, it is not difficult in the somewhat complicated provisions to suggest, as on behalf of respondent it has been suggested, that some other than the ordinary inference to be given to this set of facts should be drawn; but the common sense view of the return and the delay in the payment due after the claim of abatement and the giving of the bond, is as already stated. The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had. The statutes now pleaded to bar the suit can not be extended by implication to a suit upon a subsequent and substituted contract. The postponement of the collection of the taxes returned was a waiver of the statutory limitation of five years that would have applied had the voluntary return of the taxpayer stood and no bond been given. If there is any limitation applicable to a suit on the bond, it is conceded that it has not yet become effective.

Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, repeats the limitation of 1918, adding thereto " unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax," and like § 250 (d) of the Act of 1918 has no relevancy or effect here. The Revenue Act of 1924, § 277 (a) (2), c. 234, 43 Stat. 253, repeats a similar limitation of five years. Section 1106 (a) of the

Revenue Act of 1926, c. 27, 44 Stat. 9, 113, provides that the bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability. This last Act was repealed as of the date of its enactment. See § 612, c. 852, 45 Stat. 791, 875.

The Government contends that this restores and gives life to the tax retroactively. It is not necessary for us to examine this claim, for the reason that the Act of 1926 does not affect, and was not intended to affect, the obligation arising out of the bond. Such bonds are not referred to in the amendments of 1921 or 1924 or 1926, nor in any way is the taxpayer expressly or impliedly relieved from such contracts. To avoid the result usually ensuing from the return which he himself made, the taxpayer was permitted by a bond temporarily to postpone the collection and to substitute for his tax liability his contract under the bond. The object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the Government. The taxpayer has obtained his object by the use of the bond, and he should not object to making good the contract by which he obtained the delay he sought.

It is hardly necessary to refer to authority to justify this conclusion, but it is sustained by *United States* v. *Onken Brothers,* 23 F. (2d) 367; *Gray Motor Co.* v. *United* States, 16 F. (2d) 367; *United States* v. *Rennolds,* 27 F. (2d) 902; *McCaughn* v. *Philadelphia Barge Co.,* 27 F. (2d) 628; *United States* v. *United States Fidelity & Guaranty Co.* 221 Fed. 27; *Raymond* v. *United States,* Fed. Cas. No. 11596.

The judgment of the Circuit Court of Appeals should be reversed and the cause remanded for further proceedings.

Reversed.

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

CERTIORARI TO THE SUPREME COURT OF NEW YORK, NINTH DISTRICT.

No. 312. Argued January 16, 1929. Reargued April 15, 16, 1929.—Decided May 13, 1929.

1. In determining whether the privileges and immunities clause of the Constitution, or an Act of Congress, is contravened by a state statute, the purport established for the state statute by the highest court of the State is accepted here. P. 385.
2. Where a state law is susceptible of two constructions, one of which might put it in conflict with the Federal Constitution, it is to be presumed that the other construction, rendering it valid, would be adopted by the state courts. P. 386.
3. In § 1780 of the New York Code of Civil Procedure, under which as locally construed actions by non-residents against foreign corporations doing business in the State are subject to dismissal at the discretion of the court, the term "non-resident" should be interpreted as embracing citizens of the State who do not actually live in the State at the time of bringing such actions. P. 386.
4. A state law under which citizens of the State who actually reside there have the right to maintain actions in the state courts against foreign corporations doing business there on causes of action arising from foreign torts, but under which such actions when brought by non-residents, whether citizens of that State or of other States, are subject to dismissal at the discretion of the court, makes a distinction based on rational considerations and does not violate the privileges and immunities clause, Art. IV, § 2, of the Constitution. P. 387.
5. The Federal Employers' Liability Act does not purport to require state courts to entertain actions under it as against an otherwise valid excuse under the state law. P. 387.

248 N. Y. 580, affirmed.

CERTIORARI, 278 U. S. 590, to review a judgment of the Supreme Court of New York, entered on a rescript from the Court of Appeals affirming the dismissal of an action

brought under the Federal Employers' Liability Act. See also 223 App. Div. (N. Y.) 782. The Attorney General of New York was given leave to file a brief and take part in the reargument, because of the importance of the case.

Messrs. Thomas J. O'Neill and *Charles D. Lewis,* with whom *Messrs. John Ambrose Goodwin, Leonard F. Fish,* and *L. Daniel Danziger* were on the brief, for petitioner.

The state statute, as it now reads, is neither in conflict with natural justice nor the Federal Constitution. The difficulty is, that New York courts have interpreted it to mean what the judges privately seem to believe the law should be, based on principles of state comity, *Murnan* v. *Wabash R. Co.,* 246 N. Y. 244, and not according to the intent of Art. VI of the Federal Constitution in view of Art. IV, § 2, of that instrument and the rights of residents of New York to resort to state courts.

It is this conflict that we ask this Court to overrule, since in the exercise of its appellate jurisdiction it is not bound by the decision of a final state court establishing state law when that decision makes that which is constitutional unconstitutional within the plain intent of the Federal Constitution. *Ward & Gow* v. *Krinsky,* 259 U. S. 503; *Fiske* v. *Kansas,* 274 U. S. 385; *Southwestern Telephone Co.* v. *Danaher,* 238 U. S. 482; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292.

Great stress has been placed by the New York courts on the words "may be maintained" as used in § 47. They have been construed to vest a discretion in the court to entertain or decline an action. The same words, however, are used in § 46 of the same statute enacted at the same time, and as to their use in the latter section they have always been held mandatory. *Gregonis* v. *P. & R. Coal Co.,* 204 N. Y. 478. By what legal principle, we ask, do the same words command obligatory jurisdiction as matter of right in the case of a resident and give discretionary

jurisdiction in the case of a non-resident in the same kind of an action in tort?

The principle of comity, perhaps, justifies certain classes of discrimination. But this principle has no application to the present action under our constitutional form of government, *Murray* v. *C. & N. W. R. Co.,* 62 Fed. 24, since the present action involves the enforcement of the Federal Constitution and an Act of Congress, and not the applicability of a statute of a sister State.

This Court has dealt with the use of the word "residents" in *LaTourette* v. *McMaster,* 248 U. S. 465.

If New York allows its "residents" the absolute right to resort to its courts, it must also allow its "citizens" the same privilege, for "residents" must of necessity, under our constitutional form of government at least include "citizens." Section 1, Fourteenth Amendment. To refuse a like absolute right to non-residents, when the non-resident is a citizen of the United States, of necessity must violate § 2 of Art. IV of the Federal Constitution. *Chambers* v. *B. & O. R. Co.,* 207 U. S. 142; *Missouri Pacific R. Co.* v. *Clarendon Boat Oar Co.,* 247 U. S. 533; *Cole* v. *Cunningham,* 133 U. S. 107; *State ex rel. Watkins* v. *North American Lumber Co.,* 106 La. 621; *State ex rel. Prall* v. *District Court,* 126 Minn. 501; *Corfrila* v. *Coryell,* 4 W. C. C. 380.

Distinguishing *Walton* v. *Pryor,* 276 Ill. 563, 245 U. S. 675; *Loftus* v. *Pennsylvania R. Co.,* 107 Oh. St. 352; *Chambers* v. *B. & O. R. Co.,* 207 U. S. 142; *Missouri Pacific R. Co.* v. *Clarendon,* 257 U. S. 533.

Congress emphasized its intent to provide that an injured employee of a common carrier railroad might sue under the Federal Employers' Liability Act either in the District Court of the United States, or in any state court of competent jurisdiction in the district of the residence of the defendant, or in which the cause of action arose,

or in which the defendant does business at the time of the commencement of the action. Congress had the right to confer this jurisdiction upon the state courts, and the provisions of its Act are supreme. *Matter of Taylor,* 232 U. S. 263; *Toledo, St. L. & W. R. Co.* v. *Allen,* 276 U. S. 165; *Mondou* v. *N. Y., N. H. & H. R. Co.,* 223 U. S. 1; *Missouri* v. *Taylor,* 266 U. S. 200.

That Congress, when regulating interstate commerce, may compel the several state courts to take jurisdiction of civil actions authorized by such legislation, whenever said "state courts' ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws," is too well settled to dispute. Cases *supra;* U. S. Constitution, Art. I, § 8, Art. VI; *Robb* v. *Conley,* 111 U. S. 637; *Tennessee* v. *Davis,* 100 U. S. 257; *Taylor* v. *Carryl,* 20 How. 595; *Covell* v. *Heyman,* 111 U. S. 182; *Teal* v. *Fulton,* 22 How. 292; *Defiance Water Co.* v. *Defiance,* 191 U. S. 194. If the court exists and has jurisdiction, Congress may enforce the exercise of its jurisdiction. Art. VI; Art. I, § 8, U. S. Constitution.

Mr. Edward R. Brumley, with whom *Messrs. John M. Gibbons, Frederick J. Rock,* and *J. Howland Gardner, Jr.,* were on the brief, for respondent.

The order and judgment do not violate § 2 of Article IV of the Constitution of the United States.

Both § 46 and § 47 of the General Corporation Law of New York contain the word "may," but the opinion in *Gregonis* v. *P. & R. Coal Co.,* 235 N. Y. 152, says that the courts have never refused to entertain jurisdiction over a foreign corporation in behalf of a resident for a transitory cause of action such as contract and tort cases arising outside of the State. This is somewhat negatived by *Pietraroia* v. *N. J. & H. R. R. & F. Co.,* 197 N. Y. 434, but is in

line with *Palmer* v. *Phoenix Ins. Co.,* 84 N. Y. 63; *Grant* v. *Cananea Copper Co.,* 189 N. Y. 241; and *McCauley* v. *Georgia Bank,* 239 N. Y. 514.

While there is no statutory or constitutional reason, we submit, why this should be so, this is the situation as it obtains in New York State at the present time. The opinion in *Gregonis* v. *P. & R. Coal Co., supra,* admits rejection of litigation even by residents where it is futile and useless to assume jurisdiction. There is some indication that if plaintiff had been a citizen, jurisdiction would be compulsory, but this is *dictum,* and throughout emphasis is laid upon residence. A further limitation of the broad ruling of *Gregonis* v. *P. & R. Coal Co., supra,* is made in *Swift & Co.* v. *Obcanska Zalozna V. Karline,* 245 N. Y. 570.

See *Adams* v. *Penn Bank,* 35 Hun. 393; *Robinson* v. *Navigation Co.,* 112 N. Y. 315; *Klotz* v. *Angle,* 220 N. Y. 347. See *Canadian Northern R. Co.* v. *Eggen,* 252 U. S. 553; *Barrow Steamship Co.* v. *Kane,* 170 U. S. 100; *Duquesne Club* v. *Penn Bank,* 35 Hun. 390; *Frost* v. *Brisbin,* 19 Wend. 11.

The so-called discrimination is not between citizens and non-citizens, but between residents and non-residents. *Robinson* v. *Oceanic Steam Navigation Co., supra; Johnson* v. *Victoria Copper Co.,* 150 App. Div. 653.

It has been the unanimous opinion of the Court of Appeals that § 1780 of the Code did not conflict with any provision of the Federal Constitution or with the federal authorities upon the subject. *Grant* v. *Cananea Copper Co.,* 189 N. Y. 241. See also *Fairclough* v. *Southern Pacific Co.,* 171 App. Div. 496, affirmed, 219 N. Y. 657.

Residence and citizenship are wholly different things within the meaning of the Constitution. *Steigleder* v. *McQuesten,* 198 U. S. 141; *LaTourette* v. *McMaster,* 248 U. S. 465; *Maxwell* v. *Bugbee,* 250 U. S. 525; *Travis* v.

Y. & T. Mfg. Co., 252 U. S. 60; *Canadian N. R. Co.* v. *Eggen*, 252 U. S. 553; *Union Hotel Co.* v. *Hersee*, 79 N. Y. 454; *Cummings* v. *Wingo*, 31 S. C. 427; *Central R. Co.* v. *Georgia Co.*, 32 S. C. 319; *Loftus* v. *Pennsylvania R. Co.*, 107 Oh. St. 352; distinguishing *Blake* v. *McClung*, 172 U. S. 239. See Paxton Blair, Doctrine of *Forum Non Conveniens* in Anglo-American Law, Columbia L. R., Vol. XXIX, p. 18.

The Fourteenth Amendment does not make a resident in a State a citizen of such State unless he intends by residence therein to become a citizen. *Sharon* v. *Hill*, 26 Fed. 337; *Penfield* v. *C. & O. R. Co.*, 134 U. S. 351.

A discrimination is not unconstitutional, even as between citizens of different States, if there is a reasonable ground for the diversity of treatment. The constitutional question does not arise in this case because of the circumstances.

The cause of action did not arise in New York out of business done by the defendant therein. The immaterial fact that the defendant was doing some business in New York can hardly serve as the basis for the invocation by petitioner of a constitutional privilege. The discrimination is not directed against plaintiff because he is a non-resident. Non-residents are capable of separate identification from residents by facts and circumstances other than that they are non-residents. This goes further than is required for permissive classification. *Central Loan & Trust Co.* v. *Campbell*, 173 U. S. 84.

LaTourette v. *McMaster*, 248 U. S. 465, is authority for the proposition that the discrimination under the New York statute is not between citizens and non-citizens, but between residents and non-residents. But the case is also authority for the proposition that discrimination may be made if we have "practical justifications." Cf. *Minor* v. *Happersett*, 21 Wall. 162; *Chemung Canal Bank* v. *Lowery*, 93 U. S. 72; *McCready* v. *Virginia*, 94 U. S. 391;

Central Loan & Trust Co. v. *Campbell,* 173 U. S. 84; *Travellers' Ins. Co.* v. *Connecticut,* 185 U. S. 364; *Ballard* v. *Hunter,* 204 U. S. 241; *Heim* v. *McCall,* 239 U. S. 175; *Canadian N. R. Co.* v. *Eggen,* 252 U. S. 553; *Ferry* v. *Spokane, P. & S. R. Co.,* 258 U. S. 315; *Kentucky* v. *Paramount Exchange,* 262 U. S. 544, at p. 551.

"Literal and precise equality in respect of this matter is not attainable; it is not required." *Hess* v. *Pawlowski,* 274 U. S. 352, at p. 356.

New York's judicial policy in the treatment of non-residents is reasonable.

To exercise discretionary jurisdiction has become a matter of public policy. *Payne* v. *N. Y., S. & W. R. Co.,* 157 App. Div. 302; *Colorado State Bank* v. *Gallagher,* 76 Hun. 310; *Collard* v. *Beach,* 81 App. Div. 582.

Only in tort cases, arising outside of New York, between non-residents, do New York courts make it a rule to exercise a reasonable discretion, based upon all the circumstances. Mere non-residence is never controlling. Because of non-residence, other circumstances may come in making reasonable the refusal of jurisdiction.

Because the exercise of jurisdiction would be a burden on interestate commerce, the refusal to exercise jurisdiction is at least reasonable, and, therefore, not a violation of § 2 of Art. IV of the Constitution.

For general treatment of this subject matter see Yale L. J., V. XXXVII, p. 983; Harvard L. R., V. XLI, p. 387; Columbia L. R., V. XXIX, p. 1.

The courts of New York are invested with discretion to decline jurisdiction of an action under the Federal Employers' Liability Act such as this one. *Douglas* v. *N. Y., N. H. & H. R. Co.,* 246 N. Y. 422.

Congress has not attempted to enlarge state jurisdiction by the Federal Employers' Liability Act. In the first place, this is indicated by the wording of the statute itself.

In the second place, the effect of the use of the word "concurrent" is analogous to its use in the Eighteenth Amendment of the Constitution. It does not mean joint jurisdiction any more than "concurrent power" in the Eighteenth Amendment means joint power. *National Prohibition Cases,* 253 U. S. 350. Furthermore, neither the statute nor the Amendment is the "source of the power of the States." *United States* v. *Lanza,* 260 U. S. 377; *Hebert* v. *Louisiana,* 272 U. S. 312.

In the third place, in the Act we find the words " competent jurisdiction," referring to the state courts. Manifestly Congress intended not to enlarge state jurisdiction, for otherwise the phrasing would be totally unnecessary. The decisions of this and of other courts bear out this statutory interpretation. *Chambers* v. *B. & O. R. Co.,* 207 U. S. 142; *Second Employers' Liability Cases,* 223 U. S. 1; *Walton* v. *Pryor,* 276 Ill. 563, s. c. 245 U. S. 675; *Loftus* v. *Pennsylvania R. Co.,* 107 Oh. St. 352, s. c. 266 U. S. 639.

Congress can not enlarge state jurisdiction. *Martin* v. *Hunter,* 1 Wheat. 304; *Houston* v. *Moore,* 5 Wheat. 1; *Rushworth* v. *Judge,* 58 N. J. L. 97; *Murnan* v. *Wabash R. Co.,* 246 N. Y. 244.

But this Act does not impose jurisdiction except upon the federal courts. The laws of the State must determine whether "the State has cognizance of the cause of action and may acquire jurisdiction of the parties." *Trapp* v. *B. & O. R. Co.,* 283 Fed. 655. Each State decides for itself the jurisdictional limitations of its courts.

A State may refuse to entertain jurisdiction, notwithstanding the effect is to exclude an action under a federal statute. *Walton* v. *Pryor, supra; Anglo-American Co.* v. *Davis Provision Co.,* 191 U. S. 373. New York, having concurrent jurisdiction, is " free to adopt such remedies, and to attach to them such incidents as it sees fit." *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109. See also

Engel v. *Davenport,* 271 U. S. 33; *St. Louis & I. M. R. Co.* v. *Taylor,* 210 U. S. 281; Harvard L. R., V. 38, pp. 545, 546.

Mr. Hamilton Ward, Attorney General of New York, participated in the oral argument, and with *Mr. Wendell P. Brown,* Assistant Attorney General, filed a brief, as *amicus curiae,* by special leave of Court.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit under the Employers' Liability Act for personal injuries. The injuries were inflicted in Connecticut, the plaintiff, the petitioner, is a citizen and resident of Connecticut, and the defendant, the respondent, is a Connecticut corporation, although doing business in New York where the suit was brought. Upon motion the trial Court dismissed the action, assuming that the statutes of the State gave it a discretion in the matter, and its action was affirmed by the Appellate Division, 223 App. Div. 782, and by the Court of Appeals, 248 N. Y. 580. Thus it is established that the statute purports to give to the Court the power that it exercised. But the plaintiff says that the Act as construed is void under Article IV, Section 2, of the Constitution of the United States: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." A subordinate argument is added that the jurisdiction is imposed by the Employers' Liability Act when as here the Court has authority to entertain the suit. C., Title 45, § 56. Acts of April 22, 1908, c. 149, § 6, 35 Stat. 66, April 5, 1910, c. 143, § 1, 36 Stat. 291. That section gives concurrent jurisdiction to the Courts of the United States and the States and forbids removal if the suit is brought in a State court.

The language of the New York statute, Laws of 1913, c. 60, amending § 1780 of the Code of Civil Procedure is: "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only; . . . 4. When a foreign corporation is doing business within this State." Laws of 1920, c. 916, § 47. The argument for the petitioner is that, construed as it is, it makes a discrimination between citizens of New York and citizens of other States, because it authorizes the Court in its discretion to dismiss an action by a citizen of another State but not an action brought by a citizen of New York, which last it cannot do. *Gregonis* v. *Philadelphia & Reading Coal & Iron Co.* 235 N. Y. 152. It is said that a citizen of New York is a resident of New York wherever he may be living in fact, and thus that all citizens of New York can bring these actions, whereas citizens of other States can not unless they are actually living in the State. But however often the word resident may have been used as equivalent to citizen, and for whatever purposes residence may have been assumed to follow citizenship, there is nothing to prohibit the legislature from using 'resident' in the strict primary sense of one actually living in the place for the time, irrespective even of domicile. If that word in this statute must be so construed in order to uphold the act or even to avoid serious doubts of its constitutionality, we presume that the Courts of New York would construe it in that way; as indeed the Supreme Court has done already in so many words. *Adams* v. *Penn Bank of Pittsburgh,* 35 Hun. 393 *Duquesne Club* v. *Penn Bank of Pittsburgh,* 35 Hun. 390. *Robinson* v. *Oceanic Steam Navigation Co.,* 112 N. Y. 315, 324. *Klotz* v. *Angle,* 220 N. Y. 347, 358. See *Canadian Northern Ry. Co.* v. *Eggen,* 252 U. S. 553, 562, 563. The same meaning seems to be assumed in *Gregonis*

v. *Philadelphia & Reading Coal & Iron Co.,* 235 N. Y. 152. We cannot presume, against this evidence and in order to overthrow a statute, that the Courts of New York would adopt a different rule from that which is well settled here. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, 390.

Construed as it has been, and we believe will be construed, the statute applies to citizens of New York as well as to others and puts them on the same footing. There is no discrimination between citizens as such, and none between non-residents with regard to these foreign causes of action. A distinction of privileges according to residence may be based upon rational considerations and has been upheld by this Court, emphasizing the difference between citizenship and residence, in *La Tourette* v. *McMaster,* 248 U. S. 465. Followed in *Maxwell* v. *Bugbee,* 250 U. S. 525, 539. It is true that in *Blake* v. *McClung,* 172 U. S. 239, 247, 'residents' was taken to mean citizens in a Tennessee statute of a wholly different scope, but whatever else may be said of the argument in that opinion (compare p. 262, *ibid.*) it cannot prevail over the later decision in *La Tourette* v. *McMaster,* and the plain intimations of the New York cases to which we have referred. There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.

As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned. It may very well be that if the Supreme Court of New York were given no discretion, being otherwise competent, it would be subject to a

duty. But there is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse. *Second Employers' Liability Cases*, 223 U. S. 1, 56, 57.

Judgment affirmed.

THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE BUTLER dissent.

BECHER *v.* CONTOURE LABORATORIES, INCORPORATED, ET AL.

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

No. 559. Argued April 24, 1929.—Decided May 13, 1929.

1. An undisclosed invention does not need a patent to protect it from disclosure by breach of trust. P. 391.
2. O, being the inventor of a machine, employed B as a machinist to construct it, B agreeing to keep secret the information concerning the invention imparted to him by O and not to make use of it for the benefit of himself or any other than O. B, in breach of his trust, surreptitiously obtained a patent for the invention as his own, and O, in a suit in a state court, obtained a decree holding B a trustee *ex maleficio* of the invention and patent, commanding him to assign the patent to O and forbidding him to use, make or sell, etc., such machines or to transfer any rights under the patent. *Held:*

   (1) That the suit was not one arising under the patent laws and was within the jurisdiction of the state court. P. 390.

   (2) That the decree of the state court was an estoppel against B in a suit brought by him in the federal court to enjoin O from infringing the patent. P. 391.

29 F. (2d) 31, affirmed.

CERTIORARI, 278 U. S. 597, to review a decree of the Circuit Court of Appeals, which affirmed a decree of the District Court refusing a preliminary injunction in a suit for infringement of a patent, and dismissed the bill.

Mr. Floyd M. Sheffield presented the oral argument, and *Mr. O. Ellery Edwards* filed a brief for petitioner.

The complaint on its face shows that Oppenheimer and not Becher was the inventor of the subject matter of the Becher patent. Becher denies this, thereby raising an issue which the state court proceeded to try and determine. This issue is the dominant one in the case, and the only one which had to be decided. Clearly, under the rule laid down in *Pratt* v. *Paris Gas Co.,* 168 U. S. 255, and in view of the earlier case of *Oliver* v. *Rumford,* 109 U. S. 75, and yet the earlier case of *Henry T. Slemmer's Appeal,* 58 Penn. 162, it appears that the state court had no jurisdiction in the premises. The reasoning of these cases fully supports the position taken by Judge Manton in his dissenting opinion in the case at bar.

See Sec. 256, Jud. Code; Robinson on Patents, Vol. 3, p. 21, § 865; *Oliver* v. *Rumford, supra.*

Distinguishing *Irving Iron Works* v. *Kerlow Steel Flooring Co.,* 96 N. J. Eq. 702; *Smith* v. *Webster,* 87 Conn. 74.

Mr. Charles S. Rosenschein, with whom *Mr. Robert Moers* was on the brief, for respondents.

Mr. Justice Holmes delivered the opinion of the Court.

In September, 1927, the respondents brought an action in the Supreme Court of the State of New York in which they obtained a judgment that the defendant, the petitioner, was trustee *ex maleficio* for Oppenheimer of an invention and letters patent issued to the defendant; that the defendant deliver to the plaintiffs an assignment of the letters patent and give up instruments similar to the invention; that he be enjoined from using, manufacturing, selling, &c., such instruments, and from transferring any rights under the patent, and that he pay costs. The judg-

ment was based on the facts alleged and found, that Oppenheimer, having made the invention in question, employed Becher as a machinist to construct the invented machine and improvements made by Oppenheimer from time to time, and that Becher agreed to keep secret and confidential the information thus obtained and not to use it for the benefit of himself or of any other than Oppenheimer. It was found further, that while engaged in making instruments for Oppenheimer and after having learned from him all the facts, Becher without the knowledge of the plaintiffs and in violation of his agreement and of the confidential relation existing, applied for and obtained a patent, of which Oppenheimer knew nothing until after it had been issued, and while Becher was still making for him the Oppenheimer machine.

The judgment was entered on July 5, 1928, and at about the same time the present suit was brought in the District Court for the Southern District of New York, in which the parties are reversed. Becher sets up his patent, alleges infringement of it and prays an injunction. He also states the earlier proceedings in the State Court, and, although not in very distinct terms, seems to deny the jurisdiction of that Court inasmuch as the allegations of Oppenheimer if sustained, as they were, would show the Becher patent to be invalid; a question, it is said, for the Patent Office and the Courts of the United States alone. An injunction was asked restraining the defendants from further prosecuting their suit in the State Court. A preliminary injunction was denied by the District Court and on appeal the decree was affirmed, and the appellant's counsel consenting if the Court decided that the State Court had jurisdiction, the bill was dismissed. 29 F. (2d) 31.

It is not denied that the jurisdiction of the Courts of the United States is exclusive in the case of suits arising under the patent laws, but it was held below that the

suit in the State Court did not arise under those laws. It is plain that that suit had for its cause of action the breach of a contract or wrongful disregard of confidential relations, both matters independent of the patent law, and that the subject matter of Oppenheimer's claim was an undisclosed invention which did not need a patent to protect it from disclosure by breach of trust. *Irving Iron Works* v. *Kerlow Steel Flooring Co.*, 96 N. J. Eq. 702. *Du Pont de Nemours Powder Co.* v. *Masland,* 244 U. S. 100. Oppenheimer's right was independent of and prior to any arising out of the patent law, and it seems a strange suggestion that the assertion of that right can be removed from the cognizance of the tribunals established to protect it by its opponent going into the patent office for a later title. It is said that to establish Oppenheimer's claim is to invalidate Becher's patent. But, even if mistakenly, the attempt was not to invalidate that patent but to get an assignment of it, and an assignment was decreed. Suits against one who has received a patent of land to make him a trustee for the plaintiff on the ground of some paramount equity are well known. Again, even if the logical conclusion from the establishing of Oppenheimer's claim is that Becher's patent is void, that is not the effect of the judgment. Establishing a fact and giving a specific effect to it by judgment are quite distinct. A judgment *in rem* binds all the world, but the facts on which it necessarily proceeds are not established against all the world, *Manson* v. *Williams,* 213 U. S. 453, 455, and conversely establishing the facts is not equivalent to a judgment *in rem.*

That decrees validating or invalidating patents belong to the Courts of the United States does not give sacrosanctity to facts that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that

if it is true an important patent is void— and, although there is language here and there that seems to suggest it, we can see no ground for giving less effect to proof of such a fact than to any other. A party may go into a suit estopped as to a vital fact by a covenant. We see no sufficient reason for denying that he may be equally estopped by a judgment. See *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U. S. 255. *Smith & Egge Manufacturing Co.* v. *Webster,* 87 Conn. 74, 85.

Decree affirmed.

LEONARD & LEONARD, CO-PARTNERS, *v.* EARLE, CONSERVATION COMMISSIONER OF MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 260. Argued February 26, 27, 1929.—Decided May 13, 1929.

1. The business of buying oysters and preparing them for marketing is one upon which the State may impose a reasonable privilege or license tax. P. 396.
2. As a part of such tax, the State may require that the licensee turn over to it a portion (in this case 10%) of the empty oyster shells resulting from the operations of his business, or, at the election of the State, pay the equivalent of their market value in money, the shells being but ordinary articles of commerce and desired by the State for use in supporting and maintaining the producing oyster beds within her limits and preventing their exhaustion. P. 396.
3. The exaction of the tax in shells is not a taking of private property for public use without compensation, in violation of the Fourteenth Amendment. P. 397.
4. Nor is it a violation of the commerce clause though some of the oysters come from other States. P. 397.
5. Placing oyster-packers in a separate class for taxation purposes does not deny them the equal protection of the laws. P. 398.

6. A requirement that the quota of empty shells exacted be retained by the licensee for a reasonable time until removed by the State is not an unconstitutional deprivation of the use of his premises. P. 398.
7. An action in mandamus to compel a state officer to license plaintiff's business for the next ensuing year without his complying with statutory conditions which he deemed unconstitutional, *held* not to have become moot with the expiration of that year, in view of the nature of the controversy and of a stipulation of the parties showing plaintiff's purpose to continue in business. P. 398.

155 Md. 252, affirmed.

APPEAL from a judgment of the Court of Appeals of Maryland, which affirmed a judgment of the Baltimore City Court dismissing a petition for mandamus.

Mr. William L. Rawls for appellants.

Messrs. Thomas H. Robinson, Attorney General of Maryland, and *Robert H. Archer,* Assistant Attorney General, with whom *Mr. Henry H. Johnson* was on the brief, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

In Maryland, the business of oyster packing is important and for many years has been licensed and taxed as a privilege. Most of the live oysters having been taken by tongs or dredges from bottoms in Maryland—a small per cent. come from Virginia and New Jersey—are sold to packers. At some convenient place on shore, they are shucked; the edible portion is placed in containers and shipped to points throughout the Union. Formerly, the detached shells had no commercial value and often were disposed of by dumping into the Bay. Later they came into demand and were commonly sold for use in road-making, manufacture of fertilizer, chicken feed, etc.

Investigation disclosed that the producing beds were being rapidly exhausted. A Committee of Experts re-

ported to the Legislature that the only practicable method of preventing their destruction was to place empty shells upon them and thus furnish the support and lime essential to growth of spat.

Thereupon, Chap. 119, Act of 1927—the statute here in question and printed below*—was enacted. This re-

* Section 1. Be It Enacted by the General Assembly of Maryland, That Section 91 of Article 72 of the Code of Public General Laws of Maryland, title "Oysters," sub-title "Packing Oysters," providing for licensing of oyster packers be and is hereby repealed and re-enacted with amendments, to read as follows:

91. It shall be unlawful for any person, firm or corporation having a fixed place of business, buying oysters and employing labor to prepare them for market to engage in the business of buying, selling, marketing, packing or canning oysters without first taking out a license to engage in such business by application to the Conservation Department of Maryland. Where any such person, firm or corporation operates more than one house for the buying, selling, marketing, packing or canning of oysters, a separate license shall be obtained for each house in which oysters are shucked or otherwise prepared for market; such license to be in the nature and form of a contract between the State of Maryland and the applicant and shall provide for the payment of a license fee of twenty-five dollars, and shall further provide that the licensee must turn over to the State of Maryland at least ten per cent. of the shells from the oysters shucked in his establishment for the current season, said shells to be removed on or before the twentieth day of August of said season; or at the discretion of the Conservation Department its equivalent in money, the value thereof being determined at the market value of shells as of the first day of May following the close of the season. The Conservation Department shall notify each packer or canner on or before the said first day of May whether it is its intention to take the ten per centum of the shells from oysters shucked as aforesaid, or its equivalent in money. Said license shall have effect from the first day of September in the year in which it may have been obtained until the twenty-fifth day of April, inclusive, next succeeding.

Sec. 2. And Be It Further Enacted, That a new section to be known as 91–A be added to Article 72 of the Code of Public General Laws of Maryland, title "Oysters," to follow immediately after Section 91 of said Article, be and is hereby added to read as follows:

quires those who buy oysters and prepare them for market at a fixed place to take out a license "in the nature and form of a contract between the State of Maryland and the applicant" which shall provide for payment of $25.00; also that the "licensee must turn over to the State of Maryland at least ten per cent. of the shells from the oysters shucked in his establishment for the current season," to be removed by August 20th, or, at the discretion of the Conservation Department, to pay their equivalent in money.

Appellants own land and buildings in Dorchester County used by them in the packing business "for several years last past," and they intend to continue in the business. During the season of 1926 they packed fifty thousand bushels. At the proper time—August 30, 1927—they duly applied to defendant for a license to conduct operations during the season following and offered to pay the designated fee of $25.00. But they refused to agree to deliver to the State 10% of the empty shells or to pay their market value, upon the ground that the statutory

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91–A. All moneys derived from said license fee of twenty-five dollars shall be paid over to the Comptroller to be credited to the Conservation Fund, and one-half of the shells received by the Conservation Department shall be transplanted upon such natural beds or bars as may be reserved by the Conservation Commissioner as provided for elsewhere in this Article, and the other one-half of said shells shall be planted on such seed areas as may be set aside by the Conservation Commissioner for seed oysters. In case money is paid in lieu of the ten per cent. of shells, the Conservation Commissioner shall convert same into shells or seed oysters to be transplanted in like manner.

Sec. 3. And Be It Further Enacted, That all laws or parts of laws of the State of Maryland, general or local, inconsistent with the provisions of this Act be and the same are hereby repealed to the extent of such inconsistency.

Sec. 4. And Be It Further Enacted, That this Act shall take effect June 1st, 1927.

provision requiring this was contrary to state and federal constitutions. Upon refusal of the application they asked the state court for an appropriate writ of mandamus. Judgment went against them and was affirmed by the Court of Appeals.

Here appellants do not deny the power of the State to declare their business a privilege and to demand therefor reasonable payment of money. Their main insistence is that exaction of 10% of the empty shells, or equivalent market value at the election of the Commission, would be a taking of their property for public use without compensation. They also suggest that this would unduly burden interstate commerce; would deny them equal protection of the laws; and finally, that to compel storage of the shells until taken by the State would unlawfully deprive them of the use of their premises.

We find no reason to doubt the power of the State to exact of each oyster packer a privilege tax equal to 10% of the market value of the empty shells resulting from his operations. This, we understand, is not questioned by counsel. And as the packer lawfully could be required to pay that sum in money, we think nothing in the Federal Constitution prevents the State from demanding that he give up the same per cent. of such shells. The result to him is not materially different. From the packer's standpoint empty shells are but ordinary articles of commerce, desirable because convertible into money. Their value is not large and the part taken by the State will be so used as greatly to advantage the business of packing. The purpose in view is highly beneficent and the means adopted are neither arbitrary nor oppressive. The Federal Constitution may not be successfully invoked by selfish packers who seek to escape an entirely reasonable contribution and thereby to thwart a great conservation measure generally approved.

In *Lane County* v. *Oregon*, 7 Wallace 71, 77, this Court, through Mr. Chief Justice Chase, said:

"The extent to which it [the power to tax] shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. . . . If, therefore, the condition of any State, in the judgment of its legislature, requires the collection of taxes in kind, that is to say, by the delivery to the proper officers of a certain proportion of products, or in gold and silver bullion, or in gold and silver coin, it is not easy to see upon what principle the national legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered."

Cooley on Taxation, 4th ed., Vol. 1, § 23, p. 92—

"Taxes are generally demanded in money, and any tax law will be understood to require money when a different intent is not expressed. But if the condition of any state, in the judgment of its legislature, shall require the collection of taxes in kind—that is to say, by the delivery to the proper officers of a certain proportion of products—or in gold or silver bullion, or in anything different from the legal tender currency of the country, the right to make the requirement is unquestionable, being in conflict with no principle of government, and with no provision of the Federal Constitution. Instances of taxes in kind occurred in the colonial period."

And see *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 329.

Appellants' business is local in character; and has no such intimate connection with interstate commerce as to exempt it from control by the State. The mere fact that some of the live oysters come from other States does not change the character of the enterprise. *Browning* v. *Way-*

cross, 233 U. S. 16; *Askren* v. *Continental Oil Co.,* 252 U. S. 444, 449; *Wagner* v. *City of Covington,* 251 U. S. 95, 102.

There was abundant reason for placing oyster packers in a separate class for taxation purposes. Appellants' claim that equal protection of the laws will be denied them is groundless.

The requirement concerning storage for a limited time of 10% of the empty shells imposes no serious burden, is but part of the general scheme for taxing the privilege, and is no heavier than demands to which taxpayers are often subjected. It is neither oppressive nor arbitrary. *Pierce Oil Corp.* v. *Hopkins,* 264 U. S. 137, 139

Considering the nature of the controversy and the agreement between the parties touching appellants' purpose to continue in the packing business, it can not be said that the cause has become moot. *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290, 307, 308; *Southern Pacific Company* v. *Interstate Commerce Commission,* 219 U. S. 433, 452; *Southern Pacific Terminal Company* v. *Interstate Commerce Commission,* 219 U. S. 498, 514, 516; *McGrain* v. *Daugherty,* 273 U. S. 135, 182.

The judgment of the Court of Appeals is

Affirmed.

UNITED STATES EX REL. CLAUSSEN *v.* DAY, COMMISSIONER OF IMMIGRATION.

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

No. 416. Argued April 10, 1929.—Decided May 13, 1929.

1. Section 19 of the Naturalization Act, which makes liable to arrest and deportation " any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction of a crime involving moral turpitude, committed within five years after

entry of the alien to the United States," extends to an alien who has declared his intention to become a citizen. § 1. P. 400.

2. An alien who, after coming to this country, went to a foreign port and back as a seaman on an American vessel shipped for the round voyage, made an entry into the United States, within the meaning of § 19, when he returned here. P. 401.

3. An American vessel on the high seas or in foreign waters is not a place included within the United States as defined by the Naturalization Act. *Id.*

4. In order that there may be an entry within the meaning of the Act, there must be an arrival from some foreign port or place. *Id.*

16 F. (2d) 15, affirmed.

CERTIORARI, 278 U. S. 592, to review a judgment of the Circuit Court of Appeals affirming an order of the District Court dismissing a writ of *habeas corpus*. The merits of the case were first passed on by the courts below in an earlier proceeding against the predecessor in office of the present respondent, which abated in this Court for want of a timely substitution. See 16 F. (2d) 15; 273 U. S. 688; 276 U. S. 590.

Messrs. Silas B. Axtell and *Charles A. Ellis* submitted for petitioner.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Attorney General Mitchell* and *Mr. W. Marvin Smith* were on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner is an alien held upon a warrant issued by the Assistant Secretary of Labor for deportation under § 19 of the Immigration Act of 1917, U. S. C., Tit. 8, § 155. On his petition, the district court for the southern district of New York issued a writ of habeas corpus. Respondent made return and after a hearing the writ was dismissed. The Circuit Court of Appeals affirmed.

Section 19 contains the following: "At any time within five years after entry . . . any alien who is hereafter sen-

tenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, . . . shall, upon warrant of the Secretary of Labor, be taken into custody and deported."

The facts are not in controversy. Petitioner is a native and subject of Denmark. He came to this country as a member of the crew of a British ship and landed at Norfolk January 22, 1912. He shipped the next day on an American schooner and subsequently served as a seaman on other American ships. October 19, 1917, he shipped from New York on the *Elisha Atkins* for a voyage to South America and return by way of Cuba; he landed at Boston, March 26, 1918. That was his last voyage from foreign ports to the United States. He was subsequently employed in American coastwise trade and resided for a time on land as representative of a seamen's labor union. In June, 1919, he petitioned for naturalization and declared his intention to become a citizen of the United States. June 17, 1921, in the Cumberland county court in the State of Maine, he pleaded guilty to a charge of manslaughter, the killing of James Walker at Portland on May 21, 1921, and was sentenced to imprisonment for more than one year. Subsequently a warrant of the Department of Labor was served upon him and after a hearing he was ordered to be deported to Denmark upon the termination of his imprisonment.

The question for decision is whether petitioner was sentenced within five years after his entry into the United States.

The provision extends to all aliens, that is, every person not a native-born or naturalized citizen. § 1; U. S. C., Tit. 8, § 173. It is immaterial whether he was entitled to admission or whether he lawfully entered. The cause for which his deportation was ordered arose after entry.

Lapina v. *Williams*, 232 U. S. 78, 91. *Lewis* v. *Frick*, 233 U. S. 291. His declared purpose to naturalize does not serve him here as he had not become a citizen. If his landing at Boston in 1918 was an entry he is rightly held.

Section 1 provides that "United States" as used in the Act shall be construed to mean the United States and any waters, territory or other place subject to the jurisdiction thereof except the Isthmian Canal Zone. An entry into the United States is not effected by embarking on an American vessel in a foreign port. Such a vessel outside the United States whether on the high seas or in foreign waters is not a place included within the United States as defined by the Act. See *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 122. *Scharrenberg* v. *Dollar S. S. Co.*, 245 U. S. 122, 127. The word "entry" by its own force implies a coming from outside. The context shows that in order that there be an entry within the meaning of the Act there must be an arrival from some foreign port or place. There is no such entry where one goes to sea on board an American vessel from a port of the United States and returns to the same or another port of this country without having been in any foreign port or place. See §§ 19, 32, 33, 35.

And it is clear that petitioner departed from the United States on the *Elisha Atkins* and that, when he landed at Boston on his return from South American and Cuban ports, he made an entry into the United States within the meaning of the Act.

Judgment affirmed.

UNITED STATES *v.* GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY.

CERTIORARI TO THE COURT OF CLAIMS.

No. 440. Argued April 10, 1929.—Decided May 13, 1929.

1. The obligation of railroads, under the land grant acts, to transport property of the United States at less than commercial rates, is to

be fairly and sensibly read according to the words employed and not expanded or restricted by construction. P. 404.

2. Authorized mounts furnished by army officers and transported at the expense of the United States, are not property of the United States within the meaning of the land grant acts. P. 405.

66 Ct. Cls. 739, affirmed.

CERTIORARI, 278 U. S. 593, to review a judgment of the Court of Claims allowing a claim for railroad transportation.

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

Mr. Charles H. Bates, with whom *Mr. Wm. R. Harr* was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The Quartermaster Corps of the Army shipped on government bills of lading over the lines of respondent and connecting carriers a number of authorized private mounts of army officers ordered to change stations. Respondent was the last carrier and presented bills based on tariff rates applicable for the transportation of private property. The charges have been paid less $475.17, withheld by the Government on the ground that it is entitled to land grant deductions. This writ brings up for review a judgment of the Court of Claims for that amount.

The question for decision is whether the United States is entitled to land grant rates for the transportation of such mounts.

The United States concedes that it is liable for such transportation; but it insists that applicable statutory provisions and army regulations show that it has a property interest in the horses and the right to require the officers to use them in discharge of their duties; that they

are the property of the United States within the meaning of the land grant Acts, and that therefore it is entitled to the reduced rates.

Respondent was not aided by government land grant. Some of the carriers so aided are bound to transport "property or troops of the United States" for less than commercial rates.[1] By what is known as the equalization agreement, railroad carriers, including respondent and its connections, severally agreed with the Government to accept for transportation, where the Government is entitled to reduced rates on lines so aided, the lowest rates available as derived through deductions on account of land grants from the regular tariff rates.[2]

The authorized number of mounts for which maintenance is allowed to each officer is fixed by statute.[3] And that number is also authorized for the purpose of transportation. It is assumed, as stated in the briefs of the parties, that officers of and above the grade of major are required to furnish their own mounts. The Government will furnish mounts and equipment for officers below that rank; but, if any such officer provides mounts for himself, he is allowed additional pay.[4] When the cost of transportation exceeds the sum allowed in army regulations, the Secretary of War may permit the purchase of such horses by the Quartermaster.[5] And the Secretary may have the authorized mounts of an officer who dies in service transported at government expense from his last duty station to the home of his family; or such horses may be disposed of as directed by representa-

[1] § 3, Act of March 3, 1863, 12 Stat. 773. § 5, Act of July 25, 1866, 14 Stat. 240. And see § 11, Act of July 27, 1866, 14 Stat. 297.

[2] Appendix No. 9 to Manual for Quartermaster Corps, 1916, Vol. II, pp. 223, 228–230.

[3] U. S. C., Tit. 10, § 801.

[4] U. S. C., Tit. 10 §§ 802, 803.

[5] U. S. C., Tit. 10, § 811.

tives of the deceased.[6] The army regulations state that authorized mounts shall be transported at government expense "provided the horses are owned by the officer, are intended to be used by him at his new station, and are suitable mounts."

The right of the United States to have the concessions and allowances in respect of transportation made by the carriers in consideration of the aid given is a continuing one. It is of great value to the Government and of course correspondingly burdensome to the carriers. The terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction. When considering another question arising under a like provision in a land grant Act, this Court said: "It might be very convenient for the government to have more rights than it has stipulated for; but we are on a question of construction, and on this question the *usus loquendi* is a far more valuable aid than the inquiry what might be desirable." *Lake Superior & Mississippi R. R. Co.* v. *United States,* 93 U. S. 442, 454.

In *Alabama Great Southern R. R.* v. *United States,* 49 C. Cls. 522, it was held that when not actually in the service of the United States the men in the national guard of a State transported upon proper government requisition for participation by authority of the Secretary of War in the encampment, maneuvers and field instruction of a part of the regular army, are not "troops of the United States." And see *United States* v. *Union Pacific R. R. Co.,* 249 U. S. 354. In *Oregon-Washington R. R. & Nav. Co.* v. *United States,* 58 C. Cls. 645, the court held that the effects, household goods, etc., and authorized mounts of army officers on change of stations are not government property within the purview of such Acts.

[6] U. S. C., Tit. 10, § 810.

And in *Oregon-Washington R. R. Co.* v. *United States,* 255 U. S. 339, 345, this Court held that the personal baggage of an officer is not property of the United States entitled to transportation at land grant rates.

We are of opinion that the principle of these decisions is controlling here. The United States demands service from its army officers which requires the use of things furnished by them. But it does not own and, as between it and them, it does not claim to own, hold or have any property rights in the uniforms, manuals, clothes, private mounts or other things by them furnished and used in the service. It would be unreasonable to hold valid the Government's claim of ownership asserted merely to secure land grant rates for the transportation of such mounts. The construction contended for is without support and cannot be sustained.

Judgment affirmed.

MORRIS & COMPANY ET AL. *v.* SKANDINAVIA INSURANCE COMPANY.

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

No. 450. Argued March 7, 1929.—Decided May 13, 1929.

1. A foreign corporation *held* not suable without its consent in a State wherein it had done no business. P. 408.
2. In making compacts of reinsurance in one State with insurers of property situate in another State, a foreign insurance company is not doing business in the second State. *Id.*
3. A Danish insurance company, whose business in this country was confined to reinsurance contracts made in New York, in order to comply with the law of Mississippi (Hemingway's Code, 1927, § 5864) where property covered by some of the insured risks was situate, appointed the Mississippi insurance commissioner its attorney upon whom process might be served, the authorization stating that service upon him should be deemed valid personal service upon the company and that such authority should continue so long as

any liability of the company remained outstanding in Mississippi, whether incurred before or after such appointment. *Held* that the statute and the appointment should not be construed as empowering the Mississippi courts to entertain an action brought against the company by a Louisiana corporation on a contract of marine insurance entered into abroad and unrelated to any matter in Mississippi. P. 408.

4. A defendant does not waive objection to jurisdiction over his person by removing the case from the state to the federal court; nor by joining his plea to the jurisdiction with a plea in abatement because of another action pending, as permitted by the local practice and the Conformity Act. P. 409.

27 F. (2d) 329, affirmed.

CERTIORARI, 278 U. S. 592, to review a judgment of the Circuit Court of Appeals, which affirmed a judgment of the District Court dismissing the action for want of jurisdiction.

Mr. Garner Wynn Green, with whom *Messrs. John M. Lee, Marcellus Green, Chalmers Potter,* and *Sidney Mize* were on the brief, for petitioners.

Mr. Oscar R. Houston, with whom *Messrs. Palmer Pillans* and *James A. Leathers* were on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

In April, 1925, petitioner filed its declaration in the circuit court of Harris county, Mississippi, in an action to recover $50,000 from respondent, a Danish corporation, on an insurance policy. Thereupon the sheriff served a summons upon the state insurance commissioner, and the clerk of the court mailed a copy addressed to respondent at its home office in Copenhagen. There being diversity of citizenship, respondent removed the case to the United States district court for the Southern District of Mississippi, and filed a motion to quash and plea to the jurisdiction on the ground that respondent was not doing business in the State and had not authorized or consented to

such service. Issue was joined, there was a trial at which much evidence was heard, the district court found for respondent, held the service invalid, sustained the plea and dismissed the case. The Circuit Court of Appeals affirmed. 27 F. (2d) 329.

Petitioner was incorporated under the laws of Louisiana and engaged in the business of packing and shipping meats in the United States and other countries. Respondent was incorporated in Denmark and engaged in the insurance business. Neither of the parties was a resident or citizen of Mississippi; and, as found by both courts, respondent was not doing business in that State. In 1918 at Buenos Aires, Argentina, respondent issued to petitioner the policy on which this action was brought. It covered a shipment of beef belonging to petitioner in a vessel at Montevideo, Uruguay, to be carried to Havana, Cuba. The declaration alleged a total loss and prayed judgment for the full amount of the policy.

In March, 1923, respondent, conformably to § 5864, Hemingway's Code, 1927, appointed the state insurance commissioner its attorney upon whom process might be served. The authorization states that service upon him shall be deemed to be valid personal service upon the company, and that such authority shall continue "so long as any liability of the company remains outstanding" in Mississippi, whether incurred before or after such appointment. And respondent, in accordance with the same section,* appointed a resident of the State for trans-

* The provisions of § 5864 so far as material follow:

"No foreign insurance, indemnity or guaranty company shall be admitted and authorized to do business in this state until:

. . .

"Third. It shall, by a duly executed instrument filed in his office, constitute and appoint the commissioner of insurance . . . its true and lawful attorney, upon whom all process in any action . . . against it may be served, and therein shall agree that any process

action of the business of reinsurance therein. It also annually reported such business and paid a license fee. §§ 5866, 5877, 5888. It made a deposit with an officer of the State of New York for the security of its policy holders in the United States and so complied with Mississippi law. § 5868.

Respondent's business in the United States was confined to reinsurance, and all such contracts were made in New York City. Some of the reinsured risks covered property in Mississippi, and that made the above-mentioned appointments necessary in order to comply with the laws of the State. § 5865.

Reinsurance involves no transaction or privity between the reinsurer and those originally assured. The lower courts rightly held that the making of the reinsurance compacts in New York between respondent and insurers of property in Mississippi was not the doing of business in that State. And, as its consent to be sued there cannot be implied from any transaction within the State, there is no jurisdiction unless respondent's authorization in respect of service is broad enough to extend to this case. *Phila. & Reading Co.* v. *McKibbin,* 243 U. S. 264.

The policy sued on was issued and the loss occurred in South America. The importation of such controversies would not serve any interest of Mississippi. The purpose of state statutes requiring the appointment by for-

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against it which may be served upon its said attorney shall be of the same force and validity as if served on the company, and the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this state. . . .

"Fourth. It shall appoint as its agent or agents in this state some resident or residents thereof other than the said commissioner, . . . authorizing the agent to acknowledge service of process for and on behalf of the company, and consenting that service of process on the agent shall be as valid as if served upon the company, according to the laws of this state, and waiving all claim of error by reason of such service."

eign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies growing out of transactions within the State. *Old Wayne Life Ass'n* v. *McDonough,* 204 U. S. 8, 18, 21. *Simon* v. *Southern Railway,* 236 U. S. 115, 130. *Mitchell Furniture Co.* v. *Selden Breck Co.,* 257 U. S. 213, 215. *Louisville & Nashville R. R. Co.* v. *Chatters, ante,* p. 320. The language of the appointment and of the statute under which it was made plainly implies that the scope of the agency is intended to be so limited. By the terms of both, the authority continues only so long as any liability of the company remains outstanding in Mississippi. No decision of the state supreme court supports the construction for which petitioner contends. And, in the absence of language compelling it, such a statute ought not to be construed to impose upon the courts of the State the duty, or to give them power, to take cases arising out of transactions so foreign to its interests. The service of the summons cannot be sustained.

Petitioner suggests that by removal of the case to the federal court, objection to jurisdiction over the person of respondent was waived. Our decisions are to the contrary. *General Investment Co.* v. *Lake Shore Ry.,* 260 U. S. 261, 268. *Lee* v. *Chesapeake & Ohio Ry.,* 260 U. S. 653. *Hassler* v. *Shaw,* 271 U. S. 195, 199. And petitioner asserts that, by joining its plea to the jurisdiction for lack of service with a plea in abatement because of another action pending, respondent appeared generally and submitted itself to the jurisdiction of the court. But the pleas were authorized by state practice which, under the Conformity Act, is adopted in the federal court. § 537, Hemingway's Code. U. S. C., Tit. 28, § 724. *Southern Pacific Co.* v. *Denton,* 146 U. S. 202, 209.

Judgment affirmed.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY *v.* ROCK.

CERTIORARI TO THE APPELLATE COURT OF THE FIRST DISTRICT, STATE OF ILLINOIS.

No. 454. Argued March 8, 1929.—Decided May 13, 1929.

1. A judgment of the Appellate Court of Illinois which the Supreme Court of the State may review by certiorari, becomes final when the latter court denies the writ, and, if it involve a federal question, is thereupon reviewable here. The defeated party need not first apply to the judges of the Appellate Court for a certificate of importance and to grant appeal to the State Supreme Court. Cahill's Rev. Stats. Ill., c. 110, § 120. P. 411.
2. One who obtains a job as switchman by fraudulently evading the company's rule for physical examination, and who is injured in the course of his employment while the company remains unaware of the deception, is not of right an employee within the meaning of the Federal Employers' Liability Act, and so can not maintain an action for the injury under that statute. P. 412.

247 Ill. App. 600, reversed.

CERTIORARI, 278 U. S. 593, to review a judgment of the Appellate Court of Illinois affirming a recovery under the Federal Employers' Liability Act. The Supreme Court of the State denied a petition for review by certiorari.

Mr. Henry S. Mitchell, with whom *Messrs. John E. Palmer, John L. McInerney,* and *James L. Hetland* were on the brief, for petitioner.

Mr. Herbert H. Patterson for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondent sued petitioner in the circuit court of Cook County, Illinois, under the Federal Employers' Liability Act, U. S. C., Tit. 45, §§ 51–59, to recover damages for personal injuries sustained by him while employed in petitioner's railroad yard at Kolze in that State. There

was a verdict for $15,000 in favor of respondent, and the judgment entered thereon was affirmed by the Appellate Court of the First District. 247 Ill. App. 600. Petitioner applied to the state Supreme Court to have the case certified to it for review and determination, but the application was denied.

Respondent asserts that the judgment is not one of the highest court of the State in which a decision in the suit could be had and that therefore this Court has no jurisdiction.

Section 120, c. 110, Cahill's Revised Statutes of Illinois, the material parts of which are printed in the margin,* makes judgments of the Appellate Courts final in all cases except those reviewable in the Supreme Court as a matter of right under the state constitution, those in which a majority of the judges of the Appellate Court make certificates of importance and grant appeals, and those brought up on writ of certiorari issued by the Supreme Court. This case is one in which the Supreme Court may issue writ of certiorari. *Kenna* v. *Calumet &c. R. Co.*,

* In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals and writs of error are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case . . . decided by them involves a question of such importance . . . that it should be passed upon by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court. . . ."

206 Ill. App. 17, 44. The statute does not require one seeking review to apply to the judges of the lower court before presenting petition for certiorari to the Supreme Court. It is held by the state courts that a denial of petition for certiorari in a case where a certificate of importance has not been granted makes the judgment of the Appellate Court final. While such denial is not an approval of the reasons on which the Appellate Court rests its judgment, it is an approval of the conclusion reached by it "and is therefore, in effect, an affirmance of the judgment." *Soden* v. *Claney,* 269 Ill. 98, 102. *People* v. *Grant,* 283 Ill. 391, 397. It would be unreasonable to require a defeated party to apply to the judges of the lower court for a certificate of importance and appeal after the Supreme Court had so approved the judgment.

The judgment is reviewable here. "Whenever the highest court of a State by any form of decision affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involves a Federal question, will, upon a proper proceeding, attach." *Williams* v. *Bruffy,* 102 U. S. 248, 255. And see *Gregory* v. *McVeigh,* 23 Wall. 294, 306.

We come to the merits. Respondent was an impostor. His true name is Joe Rock. He obtained employment and remained at work by means of deception and fraud. October 1, 1923, he applied for employment as a switchman in petitioner's yard at Kolze. In accordance with a rule and the practice of petitioner, respondent was sent to the company's physician for physical examination. It was found that he had been treated surgically for ulcer of the stomach and removal of the appendix and that at the time of the examination he had a rupture. His application was rejected because of his condition. A few days later, respondent under the name of *John* Rock, representing that he had not theretofore applied, again made

application for such employment. Petitioner's superintendent was deceived as to respondent's identity and accepted him, subject to examination to ascertain whether he was physically fit for such work, and sent him to the physician to be examined. Then respondent procured one Lenhart to impersonate him and in his place to submit to the required examination. The physician found Lenhart's condition satisfactory; and, believing that he was the applicant, reported favorably on the application. As a result of the deception petitioner gave respondent employment and it did not learn of the fraud until after December 24, 1924, the date on which respondent was injured.

We are called upon to decide whether, notwithstanding the means by which he got employment and retained his position, respondent may maintain an action under the Federal Employers' Liability Act.

The Act abrogates the fellow-servant rule, restricts the defenses of contributory negligence and assumption of risk, and extends liability to cases of death. And respondent in this action seeks, in virtue of its provisions and despite the rules of the common law, to hold petitioner liable for negligence of his fellow servants and notwithstanding his own negligence may have contributed to cause his injuries. Since the decision of this Court in the *Second Employers' Liability Cases,* 223 U. S. 1, 48, 51, it has been well understood that the protection of interstate commerce and the safety of those employed therein have direct relation to the public interests which Congress by that Act intended to promote. *Phila., Balt. & Wash. R. R.* v. *Schubert,* 224 U. S. 603, 614. *Watson* v. *St. Louis, I. M. & S. Ry. Co.,* 169 Fed. 942, 950. And see *McNamara* v. *Washington Terminal Co.,* 37 App. D. C. 384, 393.

The carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take

care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. The enforcement of the Act is calculated to stimulate them to proper performance of that duty. Petitioner had a right to require applicants for work on its railroad to pass appropriate physical examinations. Respondent's physical condition was an adequate cause for the rejection of his application. The deception by which he subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest because calculated to embarrass and hinder the carrier in the performance of its duties and to defeat important purposes sought to be advanced by the Act.

The evils and disadvantages likely to flow from such impostures are the same in kind as those which invalidate attempts of common carriers by contract stipulations to escape liability for their own negligence in respect of duties essential to their public calling. In *Railroad Company* v. *Lockwood,* 17 Wall. 357, an action to recover damages by one injured while being transported on a railroad train in pursuance of an agreement purporting to exempt the carrier from responsibility for the negligence of itself or its employees, the court said (p. 377): "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. . . . It is obvious . . . that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment."

Respondent's position as employee is essential to his right to recover under the Act. He in fact performed the work of a switchman for petitioner but he was not of right

its employee, within the meaning of the Act. He obtained and held his place through fraudulent means. While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and physical condition to petitioner. His failure so to do was a continuing wrong in the nature of a cheat. The misrepresentation and injury may not be regarded as unrelated contemporary facts. As a result of his concealment his status was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and its other employees. Right to recover may not justify or reasonably be rested on a foundation so abhorrent to public policy. *Railway Company* v. *Lockwood, supra. Great Northern Ry.* v. *Wiles,* 240 U. S. 444, 448. *Stafford* v. *Baltimore & Ohio R. R. Co.,* 262 Fed. 807.

We need not consider any other question.

Judgment reversed.

CENTRAL NEW ENGLAND RAILWAY COMPANY *v.* BOSTON & ALBANY RAILROAD COMPANY, ASSIGNOR.

CERTIORARI TO THE SUPERIOR COURT FOR THE COUNTY OF SUFFOLK, STATE OF MASSACHUSETTS.

No. 532. Argued April 19, 1929.—Decided May 13, 1929.

1. The writ of certiorari is properly directed to an intermediate state court when the judgment entered by it is, under the local practice, a final decision of the highest court of the State in which the decision could be had. P. 417.
2. An interstate carrier which enjoyed trackage rights beyond the terminus of its branch line over a line of another interstate carrier under an agreement for a term of years obligating the first carrier to make annual payments to the second for the privilege, abandoned a section of the branch, including the trackage connection, pursuant to a certificate of public convenience and necessity issued

under § 1, par. 18 of the amended Interstate Commerce Act upon the ground that that part of the branch was being operated at a loss. *Held:*

(1) Assuming that the Interstate Commerce Commission had power to relieve the first carrier of its obligation to make further payments under the agreement, the certificate did not have that effect, since the second carrier was not a party to, nor notified of, the proceeding in which it was granted, and the certificate and the report of the Commission did not purport to deal with that subject. P. 417.

(2) The state court had jurisdiction of an action on the agreement to enforce the payments, and therein, subject to the power of revision by this Court, could construe the order of the Commission. P. 420.

264 Mass. 128, affirmed.

CERTIORARI, 278 U. S. 596, to review a judgment of the Superior Court of Massachusetts, entered on a rescript from the Supreme Judicial Court, in favor of the present respondent in its action to enforce payments by the petitioner under a trackage contract.

Mr. John L. Hall, with whom *Mr. Marcien Jenckes* was on the brief, for petitioner.

Messrs. Lowell A. Mayberry and *George H. Fernald, Jr.,* were on the brief for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner is an interstate rail carrier having a branch line, a portion of which formerly extended a distance of 1.87 miles from Feeding Hills to Agawam Junction, Massachusetts, where it connected with the line of respondent. In order to secure an entrance to Springfield, Massachusetts, petitioner, on October 25, 1899, entered into a contract which provided that until August 30, 1940, it should have the right to operate a limited number of trains per day over the line of respondent from Agawam Junction to Springfield, for which it agreed to pay the sum of

$15,000 annually. In 1921, purporting to act under a certificate of public necessity issued by the Interstate Commerce Commission, petitioner abandoned this section of its branch line, notified respondent that it would no longer meet its obligations under the contract and proceeded to sever the connection between their lines.

This suit was brought by the New York Central Railroad, lessee of the present respondent, in the Superior Court for Suffolk County, Massachusetts, to recover from petitioner the annual payments due under the contract; and a verdict was returned in favor of the plaintiff. Exceptions to rulings on the trial in the superior court were overruled by the Supreme Judicial Court of Massachusetts on condition that the present respondent be substituted as plaintiff. The superior court entered judgment for respondent in accordance with the rescript of the higher court. The judgment of the superior court was thus, under local practice, a final decision of the highest court of the state in which the decision could be had and the writ of certiorari, 278 U. S. 596, was properly directed to that court. See *Davis* v. *Cohen Co.*, 268 U. S. 638, 639; *Myers* v. *International Trust Co.*, 273 U. S. 380, 381.

Petitioner offered several defenses to the suit in the state court, only two of which involve federal questions, and which alone may be considered here.

1. In June, 1921, petitioner made application to the Interstate Commerce Commission, as required by § 1, paragraph 18, of the Interstate Commerce Act, as amended by the Transportation Act of 1920, 41 Stat. 456, 474, "for a certificate of public convenience and necessity . . . permitting the abandonment of operation of its line between Feeding Hills . . . and Agawam Junction . . ." on the grounds that it could not be operated except at a large annual loss and other available transportation facilities had rendered its continuance unnecessary. The Commis-

sion issued its certificate accordingly, authorizing petitioner to abandon the designated section of its branch line.

It is contended by petitioner that the effect of the order was to relieve it from making any further annual payments under its contract. It is said that the provisions of the Transportation Act conferring broad powers on the Interstate Commerce Commission, and designed to secure to interstate carriers an adequate return and the segregation from surplus earnings of a revolving fund for their benefit, see *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 478, taken in conjunction with its authority to permit the abandonment by a carrier of a part of its line, evidence a purpose to grant to the Commission power to relieve the carrier from the further performance of obligations already incurred which are incidental to the operation of the abandoned section. From this it is concluded that, as the abandonment of the branch line by which alone petitioner could reach the tracks of respondent, made it impossible for petitioner to exercise its trackage rights over the lines of respondent, the order permitting the abandonment must be taken to have relieved petitioner from its obligation to make further payments which served but to reduce its revenues and so to burden its other commerce.

Respondent argues, with persuasive force, that the purpose of § 1, paragraphs 18, 19, 20 of the Transportation Act, was merely to protect the public from ill advised or improper abandonment of its line by an interstate carrier, *Colorado* v. *United States,* 271 U. S. 153, and that it conferred no authority upon the Commission to relieve a carrier of its contractual obligations either past or prospective, with respect to an abandoned line. But we need not pass on this contention. It suffices, for present purposes, that the certificate and the accompanying report of the Commission did not purport to exercise such a power.

The former certified only that the present and future public convenience and necessity permitted the abandonment of the designated section of petitioner's branch line and that petitioner was authorized to abandon it. No reference was made in it to the present or any other contractual obligation of petitioner, and respondent, whose rights were vitally affected by the order, if petitioner's contention is to be supported, was not notified of the proceeding before the Commission nor a party to it.

The report mentioned the fact that petitioner's trains entered Springfield over the tracks of the Boston & Albany, for which privilege it paid $15,000 annually, and included a finding that the operating loss for the abandoned section for the year 1920 was $38,832.58. But even though it be possible to spell out of this finding as to revenue the conclusion that the net loss included the annual rental of $15,000, the findings did not so state, nor was the trackage agreement otherwise mentioned. The omission from the certificate of any reference to the contract thus brought to the attention of the Commission, plainly evidences an absence of intention to deal with it. Even if the broad purposes ascribed to the Act be assumed, it is not to be supposed that the Commission intended to do more than was stated in its order or to deprive respondent of income to which it was entitled under its contract for the purpose of lightening the financial burden of petitioner, both of whom were interstate carriers, without giving respondent an opportunity to be heard and without dealing with the question specifically.

To the suggestion of petitioner that, by force of the statute, the permission to abandon its line necessarily operated to cancel its obligation, regardless of the intention of the Commission, we need only say that the statute contains no such provision nor any language suggesting it. We need not decide whether such may be the effect of a proper order of the Commission on contracts previously

entered into by the carrier and not expressly mentioned in the order, where the contract and the order necessarily conflict. See *Colorado* v. *United States,* 271 U. S. 153, 165; *New York* v. *United States,* 257 U. S. 591, 601; cf. *New England Divisions Case,* 261 U. S. 184. But without such a conflict, there could be no justification for holding that the order would also operate *sub silentio* to release a carrier from a contract merely because it has ceased to be of value through compliance with the order. This is especially the case where the other party to the contract is another common carrier with whose financial condition the Commission is equally concerned.

2. Petitioner also challenged the jurisdiction of the state court. As the suit is upon contract and does not assail the order of the Commission, it is not one to "enjoin, set aside, annul or suspend" an order of the Commission of which the federal district courts are given exclusive jurisdiction under § 208 of the Judicial Code. Hence the state court retained its jurisdiction to give "remedies now existing at common law," preserved by § 22 of the Interstate Commerce Act, *Pennsylvania R. R.* v. *Puritan Coal Co.,* 237 U. S. 121; *Pennsylvania R. R.* v. *Sonman Coal Co.,* 242 U. S. 120, and subject to the power of revision by this Court, it could construe the order of the Commission. *Great Northern Ry. Co.* v. *Merchants Elevator Co.,* 259 U. S. 285.

In *Lambert Co.* v. *Baltimore & Ohio R. R. Co.,* 258 U. S. 377; *Venner* v. *Michigan Central R. R. Co.,* 271 U. S. 127; *North Dakota* v. *Chicago & Northwestern Ry. Co.,* 257 U. S. 485; *Illinois Central R. R. Co.* v. *Public Util. Comm.,* 245 U. S. 493, relied upon by petitioner, affirmative relief was prayed directing either that the order be set aside, or that the carrier do or refrain from doing acts in a manner inconsistent with the order of the Commission directing or permitting certain administrative acts to be per-

formed, relief which, it was held, would operate practically to set aside the order of the Commission. Here respondent does not ask that the order be set aside or that it be regarded as illegal and void; it insists only that the order did not purport to deal with the contract between the carriers, and so cannot have the effect, attributed to it by petitioner, of annulling the contract. The question is merely one of the legal effect of the order. Neither party contests its validity or asks that the carrier be compelled to do anything inconsistent with its terms.

Affirmed.

PEOPLE OF THE STATE OF NEW YORK *v.* GAMBLE LATROBE, JR., ET AL., TRUSTEES IN BANKRUPTCY OF THE THERMIODYNE RADIO CORPORATION.

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

No. 601. Argued April 10, 1929.—Decided May 13, 1929.

1. The issued capital stock of a foreign corporation may constitutionally be made the basis of a state franchise or license tax at a flat rate per share, when apportioned to the property and business of the corporation within the State. P. 426.
2. The kind and number of shares with which a foreign corporation is permitted to carry on its business within the State is a part of the privilege which the State extends to it and is a proper element to be taken into account in fixing a tax on the privilege. *Id.*
3. The measurement of such a tax upon a foreign corporation at a flat rate upon its issued stock, either par or non-par, used within the State, is reasonably related to the privilege granted by the State and to the protection of its own interest in the maintenance of its similar policy of taxation with respect to domestic corporations and so does not infringe any constitutional immunity. P. 427.
4. Measurement of the tax at a flat rate per share on non-par value stock and at a fixed percentage of par value on par-value stock is based on a reasonable classification because of the different char-

acteristics of the two kinds of shares, and is therefore consistent with the equal protection clause of the Fourteenth Amendment. P. 428.

28 F. (2d) 1017, reversed.

APPEAL from a judgment of the Circuit Court of Appeals, affirming an order of the District Court rejecting a claim for taxes made by the State of New York in a bankruptcy proceeding. The court below adopted the opinion of the District Court. 26 F. (2d) 713.

Mr. Wendell P. Brown, Third Assistant Attorney General, with whom *Messrs. Hamilton Ward,* Attorney General of New York, and *Robert P. Beyer,* Deputy Assistant Attorney General, were on the brief, for appellants.

Mr. Ralph Montgomery Arkush, with whom *Mr. James I. Boyce* was on the brief, for appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

This is an appeal under § 240 of the Judicial Code from a judgment of the Court of Appeals for the Third Circuit affirming, on the opinion of the court below, 26 F. (2d) 713, an order of the District Court for Delaware expunging the claim in bankruptcy of appellant, the State of New York, for unpaid taxes assessed by it against the bankrupt corporation.

Section 181, Article 9, of the Tax Law of New York, c. 62, Laws of 1909, as amended, imposes on every foreign corporation doing business in that state a tax computed upon the basis of the capital stock employed by it within the state during the first year it does business there; the amount of its stock so employed being that proportion of its total issued capital stock which its gross assets employed within the state bear to its gross assets wherever employed. In the case of stock having a par value, the tax is fixed at ⅛ of 1% of the par value of its stock so

employed; for stock of no par value the fee is 6 cents per share. The tax, denominated a "license fee," is paid but once, purports to be imposed on the corporation "for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state," and the obligation to pay it is made a prerequisite to obtaining a certificate of authority from the state and to the continuance of business there. *People ex rel. Griffith* v. *Loughman,* 249 N. Y. 369. But the foreign corporation is permitted to transact business and make valid contracts within the state prior to payment of the tax, which of necessity cannot be computed or paid until after the first year has elapsed. The tax is evidently the complement of the organization fee, computed in like fashion on the authorized capital stock of domestic corporations by Chapter 143 of the Laws of 1886. See *People ex rel Elliott-Fischer Co.* v. *Sohmer,* 148 App. Div. 514, aff'd 206 N. Y. 634.

The bankrupt is a Delaware corporation whose authorized capital stock consists of 250,000 shares without par value, all of which has been issued at an average price of $2.32 per share. It commenced doing business in New York in November, 1924, and its total assets were used in its business in that state during the following year. The value of its tangible assets is alleged to have been but $280,000, or about $1.12 per share, and its intangible property to have been of no value. A tax of $15,000, computed at 6 cents per share, was assessed against it, and is the basis of the present claim.

The rejection of the claim by the referee was upheld by the district court on the sole ground that the tax on the bankrupt's non-par stock at the fixed rate of 6 cents per share, without regard to its true value or the amount paid into the corporation upon its issue, infringed the equal protection clause of the Fourteenth Amendment. The

court thought that, as the tax could not be regarded as a true admission fee imposed as a condition of entrance into the state and the corporation was thus in a position to invoke the equal protection clause, see *Hanover Ins. Co.* v. *Harding,* 272 U. S. 494, 510, the invalidity of the taxing statute was established by the decision of this Court in *Air-Way Electric Appliance Corp.* v. *Day,* 266 U. S. 71, 83, since foreign corporations having the same amount of business and property both within and without the state, but with a different number of issued non-par shares, might be required to pay a tax differing from each other and from other foreign corporations with par value stock having like property within and without the state. The Court of Appeals of New York has since reached the opposite conclusion both as to the nature of the tax and its constitutionality. *People ex rel. Griffith* v. *Loughman, supra.*

For present purposes we need not determine whether the tax may be sustained because imposed as a condition of entrance into the state, for, assuming that the bankrupt corporation was within the state and thus entitled to equal protection, *Hanover Ins. Co.* v. *Harding, supra; Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 417, we do not deem the decision in the *Air-Way* case controlling, nor the tax so unreasonable or discriminatory as to deprive the bankrupt of any constitutional immunity.

The question presented in the *Air-Way* case was whether a state franchise tax imposed on a foreign corporation, based upon its total authorized non-par shares, only a small part of which had been issued, was forbidden. In holding that the tax infringed the equal protection clause, the Court was careful to point out that it was a tax computed upon the number of authorized shares of such a corporation, whether or not subscribed for or issued, and so had no relation to the value of the privilege exercised by the foreign corporation within the state and was

not a reasonable measure of the tax imposed on such a privilege. And in *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50, in upholding a franchise tax similar to that here involved upon a domestic corporation having non-par shares, whose entire authorized stock had been issued, this Court, in speaking of the decision in the *Air-Way* case, said (p. 54):

"While one factor in the computation of the tax was properly the proportion of the corporation's business done and property owned within the State, the other factor was the amount of its authorized capital stock, only a part of which had actually been issued. The authority to issue its capital stock was a privilege conferred by another State and bore no relation to any franchise granted to it by the State of Ohio or to its business and property within that State. When authorized capital stock is taken as the basis of the tax, variations in the amount of the tax are obtained, according as the corporation has a large or small amount of unissued capital stock. This was held, in the *Air-Way Case,* to be an unconstitutional discrimination, since it resulted in a tax larger than the tax imposed on other corporations with like privileges and like business and property within the State, but with a smaller capital authorized under the laws of the State of their creation."

But the computation of the present tax is not, as in the *Air-Way* case, based upon the mere authority of the corporation to issue stock, a privilege conferred by another state and not fully exercised. Instead it is calculated on the number of shares of stock actually issued and used by the corporation in carrying on its business within the state. There is no complaint of discrimination between foreign and domestic corporations and no attempt to tax property outside the state, since the tax is apportioned to the property used within it. See *International Shoe Co.* v. *Shartel, post,* p. 429. So we come to different questions from any presented in the *Air-Way* case: Whether issued

capital stock of foreign corporations may be made the basis of a franchise or license tax at a flat rate per share when apportioned to the property and business of the corporation within the state, and whether the taxing act may discriminate by placing in one class corporations having par value stock and in another corporations having stock without par value.

1. It is said that the tax computed on the number of non-par shares at a flat rate may bear little relation to the property and business of the corporation within the state and consequently corporations having like property and business within the state, but with a different non-par capitalization, may be required to pay a different tax. But this is equally true of corporations having par value stock, even though full value be paid in on its issue. Par value and actual value of issued stock are not synonymous and there is often a wide disparity between them. Par value has long been a familiar basis of computing a franchise tax upon foreign corporations, and when otherwise unobjectionable has been repeatedly upheld by this Court. See *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350; *Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290; *Cheney Brothers Co.* v. *Massachusetts,* 246 U. S. 147.

We have likewise sustained a state franchise tax on foreign corporations, measured by a fixed percentage of its non-par stock valued, as required by the statute, at $25 per share, and apportioned to the property and business of the corporation within the state. *Margay Oil Corporation* v. *Applegate,* 273 U. S. 666; aff'g 167 Ark. 614; *Gilliland Oil Co.* v. *Arkansas,* 274 U. S. 717, aff'g 171 Ark. 415.

The kind and number of shares with which a foreign corporation is permitted to carry on its business within the state is a part of the privilege which the state extends to it and is a proper element to be taken into account in fixing a tax on the privilege. It may be assumed that if the doing of business with a greater number of non-par shares

is not deemed by the taxpayer to be a valuable privilege, it will reduce the number of shares as the statute permits. A state which has adopted a permissible scheme of franchise tax for domestic corporations, based on capital stock, *Roberts & Schaefer Co.* v. *Emmerson, supra,* has a legitimate interest in imposing a like burden on foreign corporations which it permits to carry on business there, and we can perceive no constitutional objection to its protecting that interest by such a tax where, as here, it is limited to shares actually issued, is not assailed as confiscatory, does not reach either directly or indirectly property beyond the state and does not discriminate between foreign and domestic corporations, or between foreign corporations of like organization and property.

There is nothing in the Constitution which requires a state to adopt the best possible system of taxation. *Southwestern Oil Company* v. *Texas,* 217 U. S. 114, 126; *Delaware Railroad Tax Cases,* 18 Wall. 206, 231. Although permissible, a franchise tax need not be based solely on the amount of business done or property owned within the state. It may be rested on the nature of the business. *Southwestern Oil Company* v. *Texas, supra; Quong Wing* v. *Kirkendall,* 223 U. S. 59; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89; *Williams* v. *Fears,* 179 U. S. 270, 275; see *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 562, or the particular form in which it is carried on, see *Home Insurance Co.* v. *New York,* 134 U. S. 594, 606, so long as it bears some real and reasonable relation to the privilege granted or to the protection of the interests of the state. See *Roberts & Schaefer Co.* v. *Emmerson, supra,* at p. 57.

We think that the measurement of such a tax upon a foreign corporation at a flat rate upon its corporate stock, either par or non-par, used within the state, is likewise reasonably related to the privilege granted by the state and to the protection of its own interest in the mainte-

nance of its similar policy of taxation with respect to domestic corporations and so does not infringe any constitutional immunity.

2. Nor is such a tax to be deemed a denial of equal protection because a different measure or method of computing the tax is applied to corporations having non-par stock from that applied to corporations having stock of par value. In *Roberts & Schaefer Co.* v. *Emmerson, supra,* at p. 56, it was pointed out that there were such differences between par and non-par shares, both in their legal incidents and their actual use, and such practical difficulties in measuring a tax by the latter except by assigning to them an artificial or fixed value or assessing them at a flat rate, as to justify the classification for purposes of a franchise tax on domestic corporations. It was accordingly held that such a tax may be based on the par value of shares of corporations having par value stock, and on a fixed value assigned to non-par shares, regardless of their actual value or the varying amounts paid in upon them.

But these differences between the two classes of stock, and especially the difference in the rights of creditors of the two classes or corporations,[1] equally justify classification and discrimination between them in fixing a franchise tax based on corporate stock of foreign corporations. The inequalities in the tax result from a classification founded upon real differences, hence the resulting

[1] The use of non-par stock which may be issued at any price deemed wise, at the particular time, by the directors or stockholders, see New York Stock Corporation Law, § 69; Missouri Stock Corporation Law, § 5, or in many cases for property without fixing a price, and which has no fixed or designated amount dedicated to capital or surplus respectively, makes difficult the determination of the true capital of the corporation which it is required to keep intact and the amount which any particular stockholder is bound to pay for his stock. See Berle, Problems of Non-Par Stock, 25 Columbia Law

discrimination is not arbitrary or prohibited by the Fourteenth Amendment.

Reversed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER concur in the result.

INTERNATIONAL SHOE COMPANY *v.* SHARTEL, ATTORNEY GENERAL OF MISSOURI, ET AL.

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

No. 579. Argued April 25, 1929.—Decided May 13, 1929.

1. In assessing an annual franchise tax upon foreign and domestic corporations, on the basis of the value of outstanding capital stock employed in business within the State, the amount of the tax against a corporation having shares of stock without nominal or par value, may be ascertained by assigning a specific value to such shares and applying to it the rate applicable to the par-value stock; and a statute so providing does not operate as a denial of the equal protection of the laws. P. 432.
2. This method does not operate to tax the property or franchise of a foreign corporation without the State, even though the value so assigned to its non-par shares that are apportioned to the State exceed their present worth or the present value of its assets within the State. Giving to the shares a specified value by which the tax is measured, only affects the rate of tax on the privilege taxed. P. 432.

Rev. 43; Ballantine, Corporations (1927) § 217; cf. *Johnson* v. *Louisville Trust Co.*, 293 Fed. 857. Resulting difficulties in the enforcement by creditors of the liability of directors for improper diversion of capital or of stockholders for unpaid subscriptions, have been often urged as arguments against any use of non-par stock. 1 Cook, Corporations (1923) § 45d; Bonbright, Dangers of Shares without Par Value, 24 Columbia Law Rev. 449; Ripley, Railroads-Finance & Organization (1915) 91; Cook, Stock without Par Value, 19 Michigan Law Rev. 583.

3. A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the State, is not invalid under the commerce clause merely because a part of the property or capital included in computing the tax is used by it in interstate commerce. P. 433.
4. The Constitution of Missouri, § 28, Art. IV, which provides that "no bill . . . shall contain more than one subject, which shall be expressed in its title," is not violated by the Stock Corporation Act of 1921, the title of which describes it as "regulating" corporations having non-par stock and as "prescribing the method of determining . . . the capital of corporations" issuing such shares, although § 12 of the Act operates, by reference to the Franchise Tax Law, to change the tax on corporations having non-par stock. P. 434.
5. The purpose of this constitutional provision is to prevent the inclusion of incongruous and unrelated matters in the same measure and to guard against inadvertence, stealth and fraud in legislation. It is sufficiently complied with when the title of an Act indicates the subject so as to give notice of the general character of the legislation, without entering into minute details. *Id.*

29 F. (2d) 604, affirmed.

APPEAL from a decree of a District Court of three judges denying an interlocutory injunction to restrain state officials from levying and collecting franchise taxes on the plaintiff corporation.

Messrs. Guy A. Thompson and *James D. Williamson,* with whom *Messrs. Frank A. Thompson* and *R. E. Blake* were on the brief, for appellant.

Mr. Walter E. Sloat, pro hac vice, by special leave of Court, with whom *Messrs. Stratton Shartel,* Attorney General of Missouri, *Lieutellus Cunningham,* and *Smith B. Atwood,* Assistant Attorneys General, were on the brief, for respondents.

Mr. Guy A. Thompson filed the brief of *Mr. John F. Green,* as *amicus curiae,* by special leave of Court.

MR. JUSTICE STONE delivered the opinion of the Court.

This is a direct appeal under § 266 of the Judicial Code from an order of a district court of three judges for the Western District of Missouri, denying an interlocutory injunction restraining the appellees, state tax officials, from levying and collecting certain franchise taxes assessed under the Corporation Annual Franchise Tax of Missouri, 29 F. (2d) 604. The case involves, among others, the questions this day decided in *New York* v. *Latrobe, ante,* p. 421.

Section 9836 of the Missouri Revised Statutes imposes an annual franchise tax upon both foreign and domestic corporations of 1/20th of 1% of the par value of their outstanding capital stock and surplus employed in business within the state. For the purpose of ascertaining the tax every corporation subject to it is "deemed to have employed" within the state "that proportion of its entire [outstanding] capital stock and surplus that its property and assets in this state bears to all its property and assets wherever located."

The Stock Corporation Act of the Missouri Laws of 1921, p. 661, first provided for the formation and regulation of corporations with stock of no par value. By § 12 of that act it was enacted that for the purpose of ascertaining any organization taxes imposed by the laws of the state, computed on the basis of the par value of shares of stock, each share of stock without nominal or par value should be considered the equivalent of a share having a par value of $100. In *State of Missouri* v. *Pierce Petroleum Corporation,* 318 Mo. 1020, the Supreme Court of Missouri held that this section supplemented and amended the earlier provisions of the franchise tax law of the state by prescribing the method of computing the tax, imposed by § 9836, in the case of corporations having non-par stock.

The tax was thus fixed in effect at the rate of not less than 5 cents on each share of non-par stock employed within the state regardless of its actual value.

Appellant is engaged in the business of manufacturing and selling shoes in both intrastate and interstate commerce. It has gross assets of more than $97,000,000, of which 54% are located in Missouri. It has 100,000 shares of preferred stock of the par value of $100 and 3,760,000 shares of non-par stock, for which latter it received $9.60 per share. The total paid in capital was thus $46,082,-631.09. Appellant alleges that prior to the enactment of § 12, its non-par stock was assessed on the basis of the amount paid for it. Cf. *State* v. *Freehold Investment Co.*, 305 Mo. 88, 103. But, applying the statute as interpreted by the state court in *State* v. *Pierce Petroleum Corp., supra,* the taxing authorities have assigned to appellant's outstanding non-par stock a value of $376,000,000, resulting in an increase of appellant's annual franchise tax from approximately $25,000 to a sum in excess of $100,000.

The market value of appellant's stock does not appear and no foundation is laid for assailing the tax as so excessive as to be a denial of due process, but appellant argues, as did respondent in *New York* v. *Latrobe, supra,* that the tax is a denial of the equal protection of the laws. For reasons, stated more at length in our opinion in that case, we conclude that the present statute does not infringe that clause of the Fourteenth Amendment. Although it directs that the tax be ascertained by assigning a specific value to the non-par stock, and applying to it the rate applicable to par value stock, the resultant inequalities do not differ from those complained of in that case where the tax was computed at a flat rate on non-par stock, used in the state, without assigning to it any value.

The assignment to the shares of a value in excess of their present worth or of the present value of the assets

within the state does not operate to tax property or business without the state. The tax is a privilege and not a property tax. Giving to the shares a specified value by which the tax is measured, only affects the rate of tax on the privilege and does not give the statute an extra-territorial effect. The result is the same as if a flat tax of 5 cents per share upon that part of the capital which is justly apportioned to the state had been imposed. So apportioned the tax cannot be said to reach the property or the franchise of the corporation without the state.

Other objections to the tax require but brief comment. The mere fact that a corporation is engaged in interstate commerce does not relieve it of local tax burdens in respect of its property within the state or its intrastate business. *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688, 696. Appellant does a substantial amount of local commerce. A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the state, is not invalid under the commerce clause merely because a part of the property or capital included in computing the tax is used by it in interstate commerce. *St. Louis-San Francisco Ry.* v. *Middlekamp,* 256 U. S. 226, 231 (ruling on the Missouri franchise tax); *Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290; *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 119; *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350; *Kansas City, &c. Railway Co.* v. *Botkin,* 240 U. S. 227; *Kansas City, &c. R. R. Co.* v. *Stiles,* 242 U. S. 111; *Southern Railway Co.* v. *Watts,* 260 U. S. 519; cf. *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Shaffer* v. *Carter,* 252 U. S. 37. The tax is distinguishable from those considered in *Air-Way Electric Appliance Corporation* v. *Day,* 266 U. S. 71, *Looney* v. *Crane Co.,* 245 U. S. 178, and *Cudahy Packing Co.* v. *Hinkle,* 278 U. S. 460, which either

were measured by authorized instead of issued capital stock or were not limited to the part of the capital stock justly apportioned to the taxing state.

It is urged also that the Stock Corporation Act of 1921 violates § 28 of Article IV of the Missouri constitution, which provides that "no bill . . . shall contain more than one subject, which shall be clearly expressed in its title." The title of the Act in terms described it as authorizing corporations to make provision ". . . for the issue of either or both preferred or common shares without nominal or par value; regulating the same and such corporations; and prescribing the method of determining the number of shares and capital of corporations issuing shares in such manner."

It is said that as § 12 operates, by reference to the Franchise Tax Law, to change the tax on corporations having non-par stock, it is in effect a taxing act and hence its title does not clearly express the subject of the legislation. But its subject was the method of ascertaining the value of non-par shares for taxation and other statutory purposes, a subject matter clearly embraced in the title which described the legislation as "regulating" corporations having non-par stock and as "prescribing the method of determining . . . the capital of corporations" issuing such shares. The purpose of the constitutional provision is "to prevent the inclusion of incongruous and unrelated matters in the same measure and to guard against inadvertence, stealth and fraud in legislation," see *Posados* v. *Warner, Barnes & Co., ante*, p. 340; *Dickason* v. *County Court,* 128 Mo. 427, 441, and it is only necessary that the title indicate the subject so as to give notice of the general character of the legislation without entering into minute details. *Dickason* v. *County Court, supra,* at p. 441; *Garesche* v. *Roach,* 258 Mo. 541, 560; *Coca Cola Bottling Co.* v. *Mosby,* 289 Mo. 462, 472; *Barrett* v. *Imhof,* 291 Mo. 603, 619; *State* v. *Mullinix,* 301 Mo. 385, 389; *Missouri*

Pacific R. R. Co. v. *Danuser*, 6 S. W. (2d) 907. The title of the present act satisfies these requirements. One having but slight familiarity with earlier Missouri legislation would have known that upon the enactment of legislation dealing with corporations having a non-par stock, some method of assigning a value to such stock might appropriately be adopted in order to adapt and subject the new type of corporation to existing legislation. This purpose was plainly and sufficiently anticipated in the title of the present act. It was not necessary that the title should go further and indicate the earlier laws which were thus made applicable to the new type of corporation.

Affirmed.

MR. JUSTICE MCREYNOLDS thinks the effect of the statute is to tax property beyond the state.

UNITED STATES *v.* AMERICAN LIVESTOCK COMMISSION COMPANY ET AL.

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

No. 513. Argued March 5, 1929.—Decided May 20, 1929.

1. A boycott of one by others of the dealers or market agencies on a live-stock exchange may be an unfair practice within the meaning of the Packers & Stockyards Act. P. 436.
2. Though part of the dealings of a duly registered co-operative market agency may have been ultra vires, the maintenance of a general boycott against it on this account by other associations is not justified; and, under the Packers and Stockyards Act, the Secretary of Agriculture has authority to order the discontinuance of the discriminatory practice, to the extent at least that it applied to the legitimate business of the complainant. P. 437.
3. A co-operative association organized under the state laws and found by the Secretary of Agriculture to be duly registered as a market agency under the Packers & Stockyards Act is within the

protection of that Act, notwithstanding that its powers are limited to the handling of the live-stock of its members. P. 438.
28 F. (2d) 63, reversed.

APPEAL by the United States from a decree of a District Court of three judges, which granted an injunction restraining the enforcement of an order of the Secretary of Agriculture requiring the discontinuance by respondents of a boycott of the Producers Commission Association at the Oklahoma National Stockyards.

Attorney General Mitchell, with whom *Assistant to the Attorney General Donovan* and *Mr. H. B. Teegarden,* Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. C. E. Hall, with whom *Mr. Fred E. Suits* was on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a proceeding under the Packers & Stockyards Act, 1921, Act of August 15, 1921, c. 64, § 316, 42 Stat. 159, 168. U. S. Code, Title 7, § 217. The American Livestock Association and others seek an injunction against the carrying out of an order of the Secretary of Agriculture requiring them to discontinue a boycott by which they refused dealings with the Producers Commission Association at the Oklahoma National Stock Yards. A District Court of three judges granted the injunction. 28 F. (2d) 63. The United States appealed.

The Secretary found the existence of the boycott, the persistent refusal to buy or sell live stock from or to the Producers Commission Association, and that the American Livestock Association and its fellow conspirators thereby restrained commerce and discriminated unfairly against the Producers Commission Association contrary

to the statute. The appellees urge that there is nothing to prevent their dealing or refusing to deal with whom they choose. But we think that it does not need argument to show that a boycott of a dealer in a stockyard may be an unfair practice under the Act as it is found to have been in this case. *Eastern States Retail Lumber Dealers' Association* v. *United States,* 234 U. S. 600. We pass at once to the only real question in debate.

The Producers Commission Association is a coöperative association for mutual help under the laws of Oklahoma and is forbidden to "handle the agricultural or horticultural product of any non-member except for storage." It is agreed that "the record contains no evidence as to whether the live stock which the Producers Commission Association bought or sold or attempted to buy or sell upon the Oklahoma City Stockyards was or was not the live stock of its members." It is said so far as appears all the sales were *ultra vires* and that the appellees should not be enjoined from refusing to coöperate in an illegal act. But apart from the presumption that the corporation was acting only within its powers and from the burden resting on the doer of a *prima facie* illegal act, the boycott, to justify it, we agree with the Government that it would be absurd to suppose that a coöperative society organized for the special purpose of aiding its members should confine its business to the illegal sale of the products of non-members. If not all, we must assume that some at least of its business was legitimate and that to some extent it might sell live stock that its members produced. But the boycott was general, intended it would seem to drive the Producers Commission Association out of business. That association was a competitor of the appellees and the suggestion that it was acting *ultra vires* sounds like an afterthought and cannot be supposed to have been the motive for the act. It is said that motive does not matter, but motive may be very material when

it is sought to justify what until justified is a wrong. But, whatever the motive, nothing is shown or suggested by the evidence to justify the general boycott that the Secretary's order forbade. The Secretary's order should be enforced, but without prejudice to the right of the appellees to refuse to deal with the Producers Commission Association in matters beyond its power.

A suggestion was made that the last named association was not within the protection of the Act of Congress. We see nothing in the limitation of its powers to prevent it, the statute seems to recognize it, § 306 (f), and the corporation was found by the Secretary to be a market agency duly registered as such.

Decree reversed.

EX PARTE BAKELITE CORPORATION.

PETITION FOR WRIT OF PROHIBITION.

No. 17 Original. Argued January 2, 3, 1929.—Decided May 20, 1929.

1. The power of this Court to issue a writ of prohibition need not be determined in a case where, assuming the power to exist, there is no basis for exercising it. P. 448.
2. Article III of the Constitution does not express the full authority of Congress to create courts. Other Articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying these powers into execution. P. 449.
3. Courts established under the specific power given in § 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. *Id.*
4. Courts created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of § 2 of Article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior. *Id.*

5. A duty to give decisions which are advisory only, and so without force as judicial judgments, may be laid on a legislative court, but not on a constitutional court established under Article III. P. 454.
6. In *Miles* v. *Graham,* 268 U. S. 501, the question whether the Court of Claims is a statutory or a constitutional court was not mooted; and the decision is not to be taken as attributing to that court a constitutional status contrary to earlier rulings. P. 455.
7. A court may be a court of the United States within the meaning of § 375 of Title 28, U. S. C., Jud. Code § 260, and yet not be a constitutional court. *Id.*
8. The Court of Customs Appeals is a legislative court. P. 458.
9. The matter involved in this case—an appeal under § 316 of the Tariff Act of 1922 from findings of the Tariff Commission sustaining a charge of unfair competition and from the recommendation of the Commission to the President that the articles to which the findings relate shall be excluded from entry,—is within the jurisdiction of the Court of Customs Appeals, whether or not it be a case or controversy within the meaning of Article III, § 2, of the Constitution. P. 460.

Prohibition denied.

PETITION for a writ of prohibition to the Court of Customs Appeals prohibiting it from entertaining an appeal from findings of the Tariff Commission. See also 16 Ct. Cust. App. 191; 53 T. D. 716.

Mr. Samuel M. Richardson, with whom *Mr. Albert MacC. Barnes, Jr.,* was on the brief, for petitioner.

The Act and its legislative history, the congressional debates, and the reports of the Senate Committee on Finance, which committee initiated the legislation, indicate that Congress intended to create an inferior court under Article III of the Constitution.

The matters to be heard by the Court of Customs Appeals are cases and controversies, within *Liberty Warehouse* v. *Grannis,* 273 U. S. 70; *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693.

Other relevant legislative acts indicate that Congress regards the Court of Customs Appeals as a constitutional

court under Article III. See *Keller* v. *Potomac Electric Co.,* 261 U. S. 428.

The Court of Claims, by analogy similar to the Court of Customs Appeals, is an inferior court of the United States under Article III of the Constitution. *United States* v. *Klein,* 13 Wall. 128; *Miles* v. *Graham,* 268 U. S. 501. The inquiry presents itself: If a judge of the Court of Claims is exempt from income tax, how can he be thus exempt except under Article III of the Constitution?

Congress, in creating courts, can only do so where especially authorized by the Constitution. There is no extra-constitutional power to create courts. All constitutional courts of the United States are courts of limited jurisdiction. *Hodgson & Thompson* v. *Bowerbank,* 5 Cranch 303; *Scott* v. *Sandford,* 19 How. 393; *McAllister* v. *United States,* 141 U. S. 174; *American Ins. Co.* v. *Canter,* 1 Pet. 511.

It has been suggested that courts of the United States might be established, without regard to the provisions of the Constitution, by virtue of the right of sovereignty which exists in the Government of the United States. The answer is that the United States Government has no sovereign power over the States or the people of the United States, except that which has been conferred by the Constitution. And as to the States and the people thereof, the judicial power of the United States was expressly conferred and limited, both as to courts and as to jurisdiction, by Article III of the Constitution. Accordingly, there can be no sovereign or inherent power in the Government of the United States superior to that conferred by Article III.

The Court of Customs Appeals is a court of limited, not of general, jurisdiction, and this is true of every federal court. The courts in England and in the several States of the United States, however, are courts of general jurisdiction. *Scott* v. *Sandford,* 19 How. 393. Not only

is the jurisdiction of the federal courts limited by the Constitution, but that jurisdiction has been further limited by the failure of Congress to confer upon the courts all of the jurisdiction provided for in the Constitution. *Turner* v. *Bank,* 4 Dall. 6. This being so, there is no reason for suggesting that, because a court established by Congress is given a jurisdiction over a special class of justiciable questions, it is not an inferior court of the United States.

The term "inferior courts" relates to United States Courts established by Congress pursuant to Article III, § 1, of the Constitution, and means those courts inferior to the Supreme Court of the United States. *Turner* v. *Bank, supra; McCormick* v. *Sullivant,* 10 Wheat. 192.

Special courts, such as the Court of Private Land Claims, etc., are clearly distinguishable from the Court of Customs Appeals. *United States* v. *Coe,* 155 U. S. 76; *Hornbuckle* v. *Toombs,* 18 Wall. 648; *United States* v. *Klein, supra.*

For nineteen years, the Court of Customs Appeals has been functioning as a useful and respected part of the judicial system of the country. During that time, its presiding and associate judges have been commissioned by the President, with the approval of the Department of Justice, during good behavior. One of its judges, after eighteen years of service, has been retired, under the general retirement act, and is now drawing his compensation, by approval of the Department of Justice. Another such judge now serving on the District of Columbia Court of Appeals is eligible for retirement. If the Court of Customs Appeals be not an inferior constitutional court of the United States, then its judges are not entitled to retirement, as they were not given statutory life tenure, *James* v. *United States,* 202 U. S. 401, their salaries may be decreased at any time and themselves be removed from office, for partisan or other purposes. There is much

doubt as to whether judges of other inferior constitutional courts of the United States may sit with them and supply vacancies. The practical effect of such a construction is to destroy the court that Congress so carefully provided for in the act creating it.

Attorney General Mitchell, with whom *Mr. Robert P. Reeder,* of the Department of Justice, was on the brief, for respondent.

The principal question in this case is whether an appeal by an importer to the Court of Customs Appeals under § 316 of the Tariff Act of 1922, to review the findings of the Commission that imported articles come into unfair competition with domestic industries, presents a judicial case or controversy under § 2 of Article III of the Constitution. In this connection, the feature of this case requiring particular scrutiny is that judicial review of the findings of the Tariff Commission occurs before final administrative action by the President, who is at liberty to refrain from further action because of disagreement with the findings of the Commission, and the question thus arises whether at an intermediate stage of administrative action a judicial review of the administrative proceedings presents a case or controversy if, following the judicial action, the findings reviewed and approved by the court may be disapproved by administrative action and further proceedings discontinued.

This Court may also have occasion to consider whether the Court of Customs Appeals is an inferior court of the United States organized pursuant to Article III of the Constitution.

The question whether the appeal presented a case or controversy should be considered first, because this Court may not find it necessary to go further. In order to decide that question, it is necessary to determine the meaning, operation, and effect of § 316, and particularly

whether the findings of the Commission are conclusive on the President or merely advisory. The action of the Commission and the President in raising duties or excluding importations under § 316 is not entirely legislative or administrative as under § 315. Its provisions are penal in their nature, imposing increased duties or exclusion of importations because of unfair competition. Because of this and the possible necessity of due process, the provision for judicial review was made. Here the judicial review comes not after administrative action is finished, but midway in the administrative proceedings. Although the provisions of the section are somewhat conflicting and ambiguous, their fair meaning is that if the Commission finds there is no unfair competition, its finding is binding on the President and he may not adopt a different conclusion and raise duties or exclude articles; that if the Commission finds that there is unfair competition and recommends action by the President, he is at liberty to reach a different conclusion and refuse to act. The result is that the findings of the Commission are controlling on the President in the sense that if he acts, it must be in accordance with the Commission's findings. The case, therefore, is that the findings of the Commission form a final and indisputable basis of action by the President, if he acts, but he has the power to disapprove the findings and take no action, and the question is whether this prevents the appeal from the Tariff Commission's findings constituting a case or controversy.

It has been held that where the law provides that action of an administrative body, although reviewed and approved by a court, is merely advisory or subject to later revision by administrative officers, the application for judicial review does not present a case or controversy under the Constitution. In *Fidelity Nat'l Bank* v. *Swope,* 274 U. S. 123, this Court held that an intermediate judi-

cial review of administrative proceedings to be followed by further administrative action constituted a case or controversy where the decision formed a final basis for further administrative action, although the administrative officials were at liberty to discontinue all proceedings. If we may accept that decision as authority for the rule that application for judicial review of administrative action does not fail to present a case or controversy merely because the administrative officers may do nothing further, the fact that the President may decline to approve the findings of the Tariff Commission is not fatal to the contention that the appeal to the Court of Customs Appeals presented a judicial case.

As to what constitutes a "case" or "controversy," see *Hayburn's Case,* 2 Dall. 409; *Osborn* v. *Bank,* 9 Wheat. 738; *Kendall* v. *United States,* 12 Pet. 524; *United States* v. *Ferreira,* 13 How. 39; *Murray's Lessee* v. *Hoboken Land Co.,* 18 How. 272; *Gordon* v. *United States,* 117 U. S. 697; *United States* v. *O'Grady,* 22 Wall. 641; *United States* v. *Jones,* 119 U. S. 477; *Smith* v. *Adams,* 130 U. S. 167; *In re Sanborn,* 148 U. S. 222; *I. C. C.* v. *Brimson,* 154 U. S. 447; *Stephens* v. *Cherokee Nation,* 174 U. S. 445; *Pacific Whaling Co.* v. *United States,* 187 U. S. 447; *Alexander* v. *United States,* 201 U. S. 117; *Frasch* v. *Moore,* 211 U. S. 1; *Muskrat* v. *United States,* 219 U. S. 346; *Fairchild* v. *Hughes,* 258 U. S. 126; *Keller* v. *Potomac Electric Co.,* 261 U. S. 428; *New Jersey* v. *Sargent,* 269 U. S. 328; *Tutun* v. *United States,* 270 U. S. 568; *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70; *Fidelity Nat'l Bank* v. *Swope,* 274 U. S. 123; *Federal Trade Comm'n* v. *Eastman Kodak Co.,* 274 U. S. 619.

If the Court holds that there was no case or controversy, it need not inquire whether the Court of Customs Appeals is a constitutional court, because § 316 confers jurisdiction

on this Court to review by certiorari, and that provision is void if there is no case or controversy, and we can not assume that Congress would have granted these powers to the Tariff Commission without review by this Court. The result would be that all the provisions of § 316 must stand or fall together. If it is concluded that there was a case of controversy, there may be no occasion to inquire whether the Court of Customs Appeals is a constitutional court.

The Court of Customs Appeals is a constitutional court. If the intention of Congress is a test, that intention is fully disclosed by its treatment of the subject, including its assumption that the judges have life tenure. If the jurisdiction conferred on the court is the test, it is fulfilled, because its jurisdiction has been limited to reviewing decisions of the Customs Court as to classification of imported merchandise and raising of duty under the Tariff Acts, and these are questions arising under the laws of the United States and within the judicial power defined in Article III of the Constitution. Its jurisdiction is not limited to cases arising in Territories or the District of Columbia, but extends throughout the States. The addition to its jurisdiction of appeals from the Tariff Commission would still leave it with jurisdiction only of cases arising under the laws of the United States.

The difference between constitutional courts, and legislative courts established pursuant to those clauses in the Constitution authorizing Congress to govern the territories and the District of Columbia, has been dealt with in the following cases: *Keller* v. *Potomac Electric Co.,* 261 U. S. 428; *Kendall* v. *United States,* 12 Pet. 524; *The City of Panama,* 101 U. S. 453; *Clinton* v. *Englebrecht,* 13 Wall. 434; *American Ins. Co.* v. *Canter,* 1 Pet. 511; *McAllister* v. *United States,* 141 U. S. 174.

The United States Court of Customs Appeals is an inferior court of the United States organized pursuant to

Article III of the Constitution, with jurisdiction limited to cases within the federal judicial power.

Mr. Meyer Kraushaar participated in the oral argument and filed a brief on behalf of Frischer & Co., Inc., Randes Importing Co., Transatlantic Clock & Watch Co., Inc., and Western Briar Pipe Company, interveners, by special leave of Court.

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

This is a petition for a writ of prohibition to the Court of Customs Appeals prohibiting it from entertaining an appeal from findings of the Tariff Commission in a proceeding begun and conducted under § 316 of the Tariff Act of 1922, c. 356, 42 Stat. 858, 943; §§ 174–179, Title 19, U. S. C. A rule to show cause was issued; return was made to the rule; and a hearing has been had on the petition and return.

Section 316 of the Tariff Act is long and not happily drafted. A summary of it will suffice for present purposes. It is designed to protect domestic industry and trade against "unfair methods of competition and unfair acts" in the importation of articles into the United States, and in their sale after importation. To that end it empowers the President, whenever the existence of any such unfair methods or acts is established to his satisfaction, to deal with them by fixing an additional duty upon the importation of the articles to which the unfair practice relates, or, if he is satisfied the unfairness is extreme, by directing that the articles be excluded from entry.

The section provides that, "to assist the President" in making decisions thereunder, the Tariff Commission shall investigate allegations of unfair practice, conduct hearings, receive evidence, and make findings and recommendations, subject to a right in the importer or con-

signee, if the findings be against him, to appeal to the Court of Customs Appeals on questions of law affecting the findings. There is also a provision purporting to subject the decision of that court to review by this Court upon certiorari. Ultimately the commission is required to transmit its findings and recommendations, with a transcript of the evidence, to the President so that he may consider the matter and act thereon.

A further provision declares that " any additional duty or any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to the assessment of such additional duty or refusal of entry no longer exist."

The present petitioner, the Bakelite Corporation, desiring to invoke action under that section, filed with the Tariff Commission a sworn complaint charging unfair methods and acts in the importation and subsequent sale of certain articles and alleging a resulting injury to its domestic business of manufacturing and selling similar articles. The commission entertained the complaint, gave public notice thereof and conducted a hearing, in which interested importers appeared and presented evidence claimed to be in refutation of the charge. The commission made findings sustaining the charge and recommended that the articles to which the unfair practice related be excluded from entry. The importers appealed to the Court of Customs Appeals, where the Bakelite Corporation challenged the court's jurisdiction on constitutional grounds. The court upheld its jurisdiction and announced its purpose to entertain the appeal. Thereupon the Bakelite Corporation presented to this Court its petition for a writ of prohibition. Pending a decision on the petition further proceedings on the appeal have been suspended.

The grounds on which the jurisdiction of the Court of Customs Appeals was challenged in that court, and on which a writ of prohibition is sought here, are:

1. That the Court of Customs Appeals is an inferior court created by Congress under section 1 of Article III of the Constitution, and as such it can have no jurisdiction of any proceeding which is not a case or controversy within the meaning of section 2 of the same Article.

2. That the proceeding presented by the appeal from the Tariff Commission is not a case or controversy in the sense of that section, but is merely an advisory proceeding in aid of executive action.

The Court of Customs Appeals considered these grounds in the order just stated and by its ruling sustained the first and rejected the second. 16 Ct. Cust. Appls. 191, 53 Treasury Decisions 716.

In this Court counsel have addressed arguments not only to the two questions bearing on the jurisdiction of the Court of Customs Appeals, but also to the question whether, if that court be exceeding its jurisdiction, this Court has power to issue to it a writ of prohibition to arrest the unauthorized proceedings.

The power of this Court to issue writs of prohibition never has been clearly defined by statute [1] or by decisions.[2] And the existence of the power in a situation like the present is not free from doubt. But the doubt need not be resolved now, for, assuming that the power exists, there is here, as will appear later on, no tenable basis for exercising it. In such a case it is admissible, and is common practice, to pass the question of power and to deny the writ because without warrant in other respects.[3]

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[1] See Rev. Stat. §§ 688, 716; U. S. C., Title 28, §§ 342, 377.

[2] See *Ex parte City Bank of New Orleans,* 3 How. 292, 311, 322; *Ex parte Joins,* 191 U. S. 93, 102, and cases cited; *Ex parte United States,* 226 U. S. 420.

[3] *Ex parte City Bank of New Orleans,* 3 How. 292, 311, 322; *Smith* v. *Whitney,* 116 U. S. 167, 175–176; *Ex parte Joins,* 191 U. S.

While Article III of the Constitution declares, in section 1, that the judicial power of the United States shall be vested in one Supreme Court and in "such inferior courts as the Congress may from time to time ordain and establish," and prescribes, in section 2, that this power shall extend to cases and controversies of certain enumerated classes, it long has been settled that Article III does not express the full authority of Congress to create courts, and that other Articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes of courts. Those established under the specific power given in section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of Article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior.

The first pronouncement on the subject by this Court was in *American Insurance Co.* v. *Canter,* 1 Pet. 511, where the status and jurisdiction of courts created by Congress for the Territory of Florida were drawn in ques-

93, 102; *In re Rice,* 155 U. S. 396; *In re Huguley Manufacturing Co.,* 184 U. S. 297; *Ex parte Oklahoma,* 220 U. S. 191; *Ex parte Oklahoma (No. 2),* 220 U. S. 210; *Ex parte Southwestern Surety Insurance Co.,* 247 U. S. 19; *Ex parte Tiffany,* 252 U. S. 32; *Ex parte Peterson,* 253 U. S. 300; *Ex parte Chicago, Rock Island & Pacific Ry. Co.,* 255 U. S. 273; *Ex parte United States,* 263 U. S. 389.

tion. Chief Justice Marshall, speaking for the court, said, p. 546:

"These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States."

That ruling has been accepted and applied from that time to the present in cases relating to territorial courts.[4]

A like view has been taken of the status and jurisdiction of the courts provided by Congress for the District of Columbia. These courts, this Court has held, are created in virtue of the power of Congress "to exercise exclusive legislation" over the district made the seat of the government of the United States, are legislative rather than constitutional courts, and may be clothed with the authority and charged with the duty of giving advisory decisions in proceedings which are not cases or controversies within the meaning of Article III, but are merely in aid of legislative or executive action, and therefore outside the admissible jurisdiction of courts established under that Article.[5]

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[4] *Benner* v. *Porter,* 9 How. 235, 242; *Clinton* v. *Englebrecht,* 13 Wall. 434, 447; *Hornbuckle* v. *Toombs,* 18 Wall. 648, 655; *Good* v. *Martin,* 95 U. S. 90, 98; *Reynolds* v. *United States,* 98 U. S. 145, 154; *The City of Panama,* 101 U. S. 453, 460; *McAllister* v. *United States,* 141 U. S. 174, 180 *et seq.; Romeu* v. *Todd,* 206 U. S. 358, 368.

[5] *Keller* v. *Potomac Electric Power Co.,* 261 U. S. 428, 442–444; *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693, 700.

The United States Court for China and the consular courts are legislative courts created as a means of carrying into effect powers conferred by the Constitution respecting treaties and commerce with foreign countries. They exercise their functions within particular districts in foreign territory and are invested with a large measure of jurisdiction over American citizens in those districts.[6] The authority of Congress to create them and to clothe them with such jurisdiction has been upheld by this Court and is well recognized.[7]

Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.[8]

And see *Butterworth* v. *Hoe*, 112 U. S. 50, 60; *United States* v. *Duell*, 172 U. S. 576, 582–583.

[6] See Title 19, chapters 2 and 3, U. S. C.

[7] *In re Ross*, 140 U. S. 453; *American China Development Co.* v. *Boyd*, 148 Fed. 258; *Biddle* v. *United States*, 156 Fed. 759; *Cunningham* v. *Rodgers*, 171 Fed. 835; *Swayne & Hoyt* v. *Everett*, 255 Fed. 71; *Fleming* v. *United States*, 279 Fed. 613; *Wulfsohn* v. *Russo-Asiatic Bank*, 11 F. (2d) 715; 2 Moore's Digest International Law, § 262; 1 Hyde International Law, § 264.

[8] *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 280, 284; *Grisar* v. *McDowell*, 6 Wall. 363, 379; *Auffmordt* v. *Hedden*, 137 U. S. 310, 329; *In re Fassett*, 142 U. S. 479, 486-487; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659-660; *Astiazaran* v. *Santa Rita Land & Mining Co.*, 148 U. S. 80, 81–83; *Passavant* v. *United States*, 148 U. S. 214, 219; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 714–715; *United States* v. *Coe*, 155 U. S. 76, 84; *Wallace* v. *Adams*, 204 U. S. 415, 423; *Gordon* v. *United States*, 117 U. S. 697, 699; *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, 459-461; *United States* v. *Babcock*, 250 U. S. 328, 331; *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 536.

Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.[9]

The Court of Claims is such a court. It was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies.

For sixty-five years following the adoption of the Constitution Congress made it a practice not only to determine various claims itself but also to commit the determination of many to the executive departments. In time, as claims multiplied, that practice subjected Congress and those departments to a heavy burden. To lessen that burden Congress created the Court of Claims and delegated to it the examination and determination of all claims within stated classes.[10] Other claims have since been included in the delegation and some have been excluded. But the court is still what Congress at the outset declared it

[9] *United States* v. *Ferreira,* 13 How. 40, 47; *De Groot* v. *United States,* 5 Wall. 419, 431–433; *Ex parte Russell,* 13 Wall. 646, 668; *McElrath* v. *United States,* 102 U. S. 426, 440; *United States* v. *Louisiana,* 123 U. S. 32, 36-37; *Schillinger* v. *United States,* 155 U. S. 163, 166; *Luckenbach S. S. Co.* v. *United States,* 272 U. S. 533, 536.

[10] Act Feb. 24, 1855, c. 122, 10 Stat. 612.

should be—"a court for the investigation of claims against the United States." The matters made cognizable therein include nothing which inherently or necessarily requires judicial determination. On the contrary, all are matters which are susceptible of legislative or executive determination and can have no other save under and in conformity with permissive legislation by Congress.

The nature of the proceedings in the Court of Claims and the power of Congress over them are illustrated in *McElrath* v. *United States,* 102 U. S. 426, where particular attention was given to the statutory provisions authorizing that court, when passing on claims against the government, to consider and determine any asserted set-offs or counter-claims, and directing that all issues of fact be tried by the court without a jury. The claimant in that case objected that these provisions were in conflict with the Seventh Amendment to the Constitution, which preserves the right of trial by jury in suits at common law where the value in controversy exceeds twenty dollars. This Court disposed of the objection by saying (p. 440):

"There is nothing in these provisions which violates either the letter or spirit of the Seventh Amendment. Suits against the government in the Court of Claims, whether reference be had to the claimant's demand, or to the defence, or to any set-off, or counter-claim which the government may assert, are not controlled by the Seventh Amendment. They are not suits at common law within its true meaning. The government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. Congress, by the act in question, informs the claimant that if he avails himself of the privilege of suing the

government in the special court organized for that purpose, he may be met with a set-off, counter-claim or other demand of the government, upon which judgment may go against him, without the intervention of a jury, if the court, upon the whole case, is of opinion that the government is entitled to such judgment. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the government to the exercise of the privilege."

While what has been said of the creation and special function of the court definitely reflects its status as a legislative court, there is propriety in mentioning the fact that Congress always has treated it as having that status. From the outset Congress has required it to give merely advisory decisions on many matters. Under the act creating it all of its decisions were to be of that nature.[11] Afterwards some were to have effect as binding judgments, but others were still to be merely advisory.[12] This is true at the present time.[13] A duty to give decisions which are advisory only, and so without force as judicial judgments, may be laid on a legislative court, but not on a constitutional court established under Article III.[14]

In *Gordon* v. *United States,* 117 U. S. 697, and again in *In re Sanborn,* 148 U. S. 222, this Court plainly was of opinion that the Court of Claims is a legislative court

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[11] Act Feb. 24, 1855, c. 122, §§ 7–9, 10 Stat. 612.

[12] Acts March 3, 1863, c. 92, §§ 3, 5, and 7, 12 Stat. 765; March 17, 1866, c. 19, 14 Stat. 9; March 3, 1883, c. 116, §§ 1 and 2, 22 Stat. 485; Jan. 20, 1885, c. 25, § 6, 23 Stat. 283; March 3, 1887, c. 359, §§ 12–14, 24 Stat. 505.

[13] Title 28, §§ 254, 257, U. S. C.

[14] *United States* v. *Ferreira,* 13 How. 40, 48–51; *Gordon* v. *United States,* 117 U. S. 697; *In re Sanborn,* 148 U. S. 222; *Muskrat* v. *United States,* 219 U. S. 346; *Keller* v. *Potomac Electric Co.,* 261 U. S. 428, 442–444; *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693, 698–691; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70, 74; *Fidelity National Bank* v. *Swope,* 274 U. S. 123, 134; *Willing* v. *Chicago Auditorium,* 277 U. S. 274, 289.

specially created to consider claims for money against the United States, and on that basis distinctly recognized that Congress may require it to give advisory decisions. And in *United States* v. *Klein,* 13 Wall. 128, 144–145, this Court described it as having all the functions of a court, but being, as respects its organization and existence, undoubtedly and completely under the control of Congress.

In the present case the court below regarded the recent decision in *Miles* v. *Graham,* 268 U. S. 501, as disapproving what was said in the cases just cited, and holding that the Court of Claims is a constitutional rather than a legislative court. But in this *Miles* v. *Graham* was taken too broadly. The opinion therein contains no mention of the cases supposed to have been disapproved; nor does it show that this Court's attention was drawn to the question whether that court is a statutory court or a constitutional court. In fact, as appears from the briefs, that question was not mooted. Such as were mooted were considered and determined in the opinion. Certainly the decision is not to be taken in this case as disturbing the earlier rulings or attributing to the Court of Claims a changed status. *Webster* v. *Fall,* 266 U. S. 507, 511.

That court was said to be a constitutional court in *United States* v. *Union Pacific R. R. Co.,* 98 U. S. 569, 602–603; but this statement was purely an *obiter dictum,* because the question whether the Court of Claims is a constitutional court or a legislative court was in no way involved. And any weight the dictum, as such, might have is more than overcome by what has been said on the question in other cases where there was need for considering it.

Without doubt that court is a court of the United States within the meaning of § 375 of Title 28, U. S. C.,[15] just as the superior courts of the District of Columbia are; [16] but this does not make it a constitutional court.

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[15] 21 Op. A. G. 449.

[16] *James* v. *United States,* 202 U. S. 401, 407–408.

The authority to create legislative courts finds illustration also in the late Court of Private Land Claims. It was created in virtue of the power of Congress over the fulfillment of treaty stipulations; and its special function was that of hearing and finally determining claims founded on Spanish or Mexican grants, concessions, etc., and embracing lands within the territory ceded by Mexico to the United States and subsequently included within the Territories of New Mexico, Arizona and Utah and the States of Nevada, Colorado and Wyoming.[17] By the treaties of cession the United States was obligated to inquire into private claims to lands within the ceded territory and to respect inviolably those that were valid. Congress at first entrusted the preliminary inquiry to executive officers and required that they make reports whereon it could make the ultimate determinations. This was an admissible mode of dealing with the subject and many claims were finally determined under it.[18] But later on Congress created the Court of Private Land Claims and charged it with the duty of examining and adjudicating, as between claimants and the United States, all claims not already determined. In *Coe* v. *United States,* 155 U. S. 76, that court was held to be a legislative court and the validity of the act creating it was sustained. And while that case related to lands in a Territory there can be no real doubt that the same rule would apply were the lands in a State. The obligation of the United States would be the same in either case and Congress would have the same discretion respecting the mode of fulfilling it.[19] In fact the act creating the court included within its jurisdiction all claims within three States as well as those within three Territories, and the court adjudicated

[17] Act March 3, 1891, c. 539, 26 Stat. 854.

[18] *Tameling* v. *U. S. Freehold Co.*, 93 U. S. 644, 662–663; *Astiazaran* v. *Santa Rita Land and Mining Co.,* 148 U. S. 80, 81–82.

[19] *Grisar* v. *McDowell,* 6 Wall. 363, 379.

all within these limits that were brought before it within the periods fixed by Congress.

The Choctaw and Chickasaw Citizenship Court was another legislative court. It was created to hear and determine controverted claims to membership in two Indian tribes. The tribes were under the guardianship of the United States, which in virtue of that relation was proceeding to distribute the lands and funds of the tribes among their members. How the membership should be determined rested in the discretion of Congress. It could commit the task to officers of the department in charge of Indian Affairs, to a commission or to a judicial tribunal. As the controversies were difficult of solution and large properties were to be distributed, Congress chose to create a special court and to authorize it to determine the controversies. In *Wallace* v. *Adams,* 204 U. S. 415, this was held to be a valid exertion of authority belonging to Congress by reason of its control over the Indian tribes. And it is of significance here that in so ruling this Court approvingly cited and gave effect to the opinion of Chief Justice Taney in *Gordon* v. *United States* respecting the status of the Court of Claims.

Before we turn to the status of the Court of Customs Appeals it will be helpful to refer briefly to the Customs Court. Formerly it was the Board of General Appraisers. Congress assumed to make the board a court by changing its name. There was no change in powers, duties or personnel.[20] The board was an executive agency charged with the duty of reviewing acts of appraisers and collectors in appraising and classifying imports and in liquidating and collecting customs duties.[21] But its functions,

[20] Act May 28, 1926, c. 411, 44 Stat. 669.

[21] Acts June 10, 1890, c. 407, §§ 12–18, Stat. 131, 136; August 5, 1909, c. 6, reenacted §§ 12–17, 36 Stat. 11, 98; September 21, 1922, c. 356, § 518, 42 Stat. 858, 972; Title 19, §§ 381, 383, 398–402, 404–406, U. S. C.

although mostly quasijudicial, were all susceptible of performance by executive officers and had been performed by such officers in earlier times.

The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution.[22] The full province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the Customs Court, formerly called the Board of General Appraisers.[23] The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the Treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid;[24] but this does not make the matters involved in the protests any the less susceptible of determination by executive officers.[25] In fact their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings.[26]

This summary of the court's province as a special tribunal, of the matters subjected to its revisory authority,

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[22] Constitution, Article I, § 8, cls. 1 and 18; *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 281.

[23] Act August 5, 1909, c. 6, § 29, 36 Stat. 11, 105; Title 28, §§ 301–311, U. S. C.

[24] Title 19, §§ 386, 396–399, 407, 408, U. S. C.

[25] *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 280–281; *Auffmordt* v. *Hedden*, 137 U. S. 310, 329; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 714–715.

[26] *Cary* v. *Curtis*, 3 How. 236, 242, 245–246.

and of its relation to the executive administration of the customs laws, shows very plainly that it is a legislative and not a constitutional court.

Some features of the act creating it are referred to in the opinion below as requiring a different conclusion; but when rightly understood they cannot be so regarded.

A feature much stressed is the absence of any provision respecting the tenure of the judges. From this it is argued that Congress intended the court to be a constitutional one, the judges of which would hold their offices during good behavior. And in support of the argument it is said that in creating courts Congress has made it a practice to distinguish between those intended to be constitutional and those intended to be legislative by making no provision respecting the tenure of judges of the former and expressly fixing the tenure of judges of the latter. But the argument is fallacious. It mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred. Nor has there been any settled practice on the part of Congress which gives special significance to the absence or presence of a provision respecting the tenure of judges. This may be illustrated by two citations. The same Congress that created the Court of Customs Appeals made provision for five additional circuit judges and declared that they should hold their offices during good behavior; [27] and yet the status of the judges was the same as it would have been had that declaration been omitted. In creating courts for some of the Territories Congress failed to include a provision fixing the tenure of the judges; [28] but

[27] Act June 18, 1910, c. 309, 36 Stat. 534, 540.

[28] Acts May 7, 1800, c. 41, § 3, 2 Stat. 58; January 11, 1805, c. 5, § 3, 2 Stat. 309; February 3, 1809, c. 13, § 3, 2 Stat. 514.

the courts became legislative courts just as if such a provision had been included.

Another feature much stressed is a provision purporting to authorize temporary assignments of circuit and district judges to the Court of Customs Appeals when vacancies occur in its membership or when any of its members are disqualified or otherwise unable to act. This it is said shows that Congress intended the court to be a constitutional one, for otherwise such assignments would be inadmissible under the Constitution. But if there be constitutional obstacles to assigning judges of constitutional courts to legislative courts, the provision cited is for that reason invalid and cannot be saved on the theory that Congress intended the court to be in one class when under the Constitution it belongs in another. Besides, the inference sought to be drawn from that provision is effectually refuted by two later enactments—one permitting judges of that court to be assigned from time to time to the superior courts of the District of Columbia,[29] which are legislative courts, and the other transferring to that court the advisory jurisdiction in respect of appeals from the Patent Office which formerly was vested in the Court of Appeals of the District of Columbia.[30]

Another feature to which attention was given is the denomination of the court as a United States court. That the court is a court of the United States is plain; but this is quite consistent with its being a legislative court.

As it is plain that the Court of Customs Appeals is a legislative and not a constitutional court, there is no need for now inquiring whether the proceeding under § 316 of the Tariff Act of 1922, now pending before it, is a case or controversy within the meaning of section 2 of Article

[29]Act September 14, 1922, c. 306, § 5, 42 Stat. 836, 839; Title 28, § 22, U. S. C.

[30]Act March 2, 1929.

III of the Constitution, for this section applies only to constitutional courts. Even if the proceeding is not such a case or controversy, the Court of Customs Appeals, being a legislative court, may be invested with jurisdiction of it, as is done by § 316.

Of course, a writ of prohibition does not lie to a court which is proceeding within the limits of its jurisdiction, as the Court of Customs Appeals appears to be doing in this instance. *Prohibition denied.*

ST. LOUIS & O'FALLON RAILWAY COMPANY ET AL. *v.* UNITED STATES ET AL.

UNITED STATES ET AL. *v.* ST. LOUIS & O'FALLON RAILWAY COMPANY ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Nos. 131 and 132. Argued January 3, 4, 1929.—Decided May 20, 1929.

1. Under Jud. Code § 238, as amended, this Court has jurisdiction to review directly the final decree of a District Court of three judges in a suit to annul an order of the Interstate Commerce Commission directing a railway company to place in a reserve fund one-half of its excess net income, as determined under § 15a of the Interstate Commerce Act, and to pay the other one-half to the Commission. P. 481.
2. This Court accepts the conclusion of the Interstate Commerce Commission and the District Court that the two carrier plaintiffs in this suit—one operating a switching railroad in St. Louis, Missouri, and the other a coal-carrying railroad in Illinois, the two being separated by 12 miles and communicating only over the tracks and bridge of a terminal company—were not proved to be under common control and management and operated as a single system within the meaning of par. (6), § 15a of the Interstate Commerce Act. P. 483.
3. Where a carrier resists by suit a recapture order made by the Commission under § 15a, denying, unsuccessfully but *bona fide* and

under circumstances justifying the contest, that there was any excess income, no interest should be imposed for any time prior to the final order of the District Court. P. 483.

4. Recapture of excess earnings of a carrier, under pars. (5) and (6) of § 15a of the Act, does not depend upon a prior fixing of a general level of rates intended to yield fair return upon the aggregate value of carrier property either as a whole, or in some prescribed rate or territorial group, under pars. (5) and (6). *Id.*
5. Under par. (4) of § 15a, which directs that in determining values of railway property for purposes of recapture the Commission "shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes," it is the duty of the Commission to give consideration to present or reproduction costs in estimating the value of a carrier's property. P. 484.
6. It appearing from the report of the Commission in this case, and from opinions delivered by some of its members, that reproduction costs were not considered, the order is invalid, because of failure to obey this mandate of the statute. P. 485.
7. The weight to be accorded to reproduction costs in valuing railroad property for recaption purposes is not a matter before the Court in this case. P. 487.
8. As the making of a recaption order without consideration of reproduction costs in valuing the property is beyond the power conferred on the Commission by the statute, an order so made can not be sustained upon the ground that the income it permits the railroad to retain is sufficient to negative any suggestion of confiscation. *Id.*

22 F. (2d) 980, reversed.

CROSS APPEALS from a decree of the District Court, three judges sitting, in a suit brought by the two railway companies to set aside a recaption order of the Interstate Commerce Commission. The decree annulled so much of the order as provided for payment of interest, but in other respects denied relief.

Messrs. Daniel N. Kirby and *Frederick H. Wood,* with whom *Messrs. Robert H. Kelley, Leslie Craven,* and

Charles Nagel were on the brief, for appellant railway companies.

Irrespective of any issue of confiscation, the appellants were entitled to a review of the Commission's finding of value, which was attacked for errors of law and because unsupported by and contrary to the evidence, and upon which its determination of the carrier's excess income depended.

The court erred in not holding that if the amount ordered paid to the Government exceeded that authorized by the statute, the order deprived the carrier of property without due process of law.

Section 15a, if construed according to the theory enunciated by the lower court, is an improper delegation of arbitrary power to the Commission, and both the statute and the order made thereunder are therefore void.

Whether the order deprived the carrier of its property without due process of law, depended upon a determination of the value of the carrier's property. This being so, the O'Fallon was entitled to the independent judgment of the court as to both the law and the facts. *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287; *Bluefield* v. *Public Service Comm'n,* 262 U. S. 679.

It was the duty of the Commission to find the present value of the property of the O'Fallon in accordance with the decisions of this Court. The report of the Commission, instead of following the decisions of this Court in determining value, constitutes a direct and deliberate challenge thereto.

This Court has repeatedly held that present value is not synonymous with original cost, nor is it a matter of mathematical formula, but must be determined by a consideration of all relevant facts and circumstances.

Instead of undertaking to determine the present value of the carrier's property in accordance with these deci-

sions, the Commission's findings of value are based on a mathematical formula, the primary purpose of which was to determine the amount of investment in the carrier's property.

It expressly appears on the face of the report that the Commission's primary purpose was to determine investment instead of value. The effect of the formula employed was to determine the value of the major portion of the carrier's property in each of the recapture years on the basis of obsolete pre-war prices. The only consideration given to enhanced cost of labor and materials in determining the value of the major portion of carrier's property, was to reject it as not a relevant fact entitled to any consideration whatever.

This Court first rejected the prudent investment theory because of its obvious hardship to the public, at a time when prices were substantially below those prevailing during the original construction and when the railroads insisted that their investment should be protected. *Smyth* v. *Ames,* 169 U. S. 466. It held that the value of such property should be determined as the value of property is customarily determined, viz., as a matter of judgment reflecting a proper consideration of all relevant facts and circumstances. The same question and substantially the same arguments were presented, and the same decision reached in *San Diego Land Co.* v. *Nat'l City,* 174 U. S. 757; *Cotting* v. *Goddard,* 183 U. S. 91; *San Diego Land Co.* v. *Jasper,* 189 U. S. 439; *Stanislaus Co.* v. *San Joaquin, etc. Co.,* 192 U. S. 214. These cases are significant because they show that following the decision in *Smyth* v. *Ames, supra,* the utilities vainly attempted to establish the very propositon which the Commission now seeks to establish.

In the *Minnesota Rate Cases,* 230 U. S. 252, when the level of prices had become substantially higher than those during original construction, this Court adhered to its

prior decisions and, in so dong, considered and rejected substantially every argument now advanced in support of the "dollars invested" theory.

Notwithstanding the great enhancement in prices which has taken place since the World War, this Court has adhered to its prior decisions. *S. W. Bell Telephone Co.* v. *Public Service Comm'n,* 262 U. S. 276; *McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400; *Bluefield Co.* v. *Public Service Comm'n,* 262 U. S. 679; *Pacific Gas Co.* v. *San Francisco,* 265 U. S. 403; cf. *Standard Oil Co.* v. *Southern Pacific Co.,* 268 U. S. 146.

The present value theory is supported by principle as well as by precedent. The investment theory is economically unsound and rests upon the illusion that the dollar is a fixed and unchanging standard of value. *Consolidated Gas Co.* v. *New York,* 157 Fed. 849.

Even under the Commission's theory of value, its order is void because its findings are unsupported by any evidence. The method pursued, as described by the Commission itself, is one by which it is impossible to determine the approximate investment in the property of this or any other carrier.

The order is void because the findings of value are arbitrary and artificial. In the last analysis, the order may be supported only on the theory that the Commission is at liberty to adopt any basis for the determination of value that suits its convenience or its conceptions of supposed economic expediency.

The court below erred in holding that appellants,—although found by the Commission and held by the court to be "a group of carriers under common control and management,"—were not "operated as a single system." The general purpose of the act is to grant constructive benefits to the carriers, and to smaller groups of carriers. *Dayton-Goose Creek R. Co.* v. *United States,* 263 U. S. 456. Congress clearly intended that the Commission

should look through matters of form and grant the benefit of single system treatment whenever the essential nature of the relations between the different parts of such a group was in accord with the fundamental purpose of the Act; and that, in administering the Act, the Commission should give it a liberal—not a strict, harsh, or technical—interpretation.

By requiring that the properties shall be "operated" as a single system, Congress merely intended that their mechanical operation or functioning should be substantially the same as they would have been if owned by the same corporation and operated as a single "operating" unit.

The grounds on which the District Court and the Commission held against single system operation, are erroneous, being contrary to the undisputed facts and without supporting evidence.

Both the District Court and the Commission erred in not according to the decisions of this Court in the "*Terminal*" cases their necessary effect as conclusively holding that there was no "gap" between the respective transportation services rendered by appellants. *United States* v. *Terminal R. Ass'n,* 224 U. S. 383; *United States* v. *Terminal,* 236 U. S. 194; *Terminal* v. *United States,* 266 U. S. 17.

Compliance by the Commission with the rate-making rule of § 15a is a condition precedent to the enforcement of its recapture provisions. The inter-dependence of the rate-making rule and the recapture provisions appear on the face of the Act and from the history of the times, and from the decisions of this Court. *Dayton-Goose Ck. Ry.* v. *United States,* 263 U. S. 456; *Wisconsin Comm'n* v. *C. B. & Q.,* 275 U. S. 563; *New England Divisions Case,* 261 U. S. 184.

In no event can income arising prior to August 26, 1920, be subjected to recapture, because none of the carrier's net railway operating income during this period was received under the provisions of § 15a.

The order is invalid because the provisions of the statute requiring the creation of a reserve fund usable only for restricted purposes is unreasonable and in violation of the Fifth Amendment. *Chicago, M. & St. P. R. Co.* v. *Minnesota,* 134 U. S. 18; *United States* v. *Lynah,* 184 U. S. 445.

Interest is not recoverable. *Lincoln* v. *Claflin,* 7 Wall. 132; *Redfield* v. *Iron Co.,* 110 U. S. 174; *In re Nesmith,* 148 N. Y. 609; *Southern Pacific R. Co.* v. *United States,* 228 U. S. 618; *International Paper Co.* v. *Beacon Oil Co.,* 290 Fed. 45; *Great Northern R. Co.* v. *Philadelphia Co.,* 242 Fed. 799; *Valentine* v. *Quackenbush,* 239 Fed. 832; *Security State Bank* v. *Gannon,* 40 S. D. 495. It is established that the Commission is not a court and has no judicial power. *Baer Bros. Co.* v. *D. & R. G.,* 233 U. S. 479. The order of the Commission, therefore, is not a judgment which can have the effect of liquidating a claim. Moreover, there is no analogy here to interest recoverable as damages on reparation allowances made by the Commission. In such cases the liability of the carrier for both principal and interest is fixed by established law. When, as here, the beneficiary of a trust makes a claim upon his trustee for the payment of alleged trust funds admitted to be lawfully in the trustee's custody, it is essential to the running of interest that the amount of the claim be first liquidated in a judicial proceeding.

The court erred in the exclusion of evidence of the value of the property. The law is well established that if a constitutional issue is present in the case, the appellants are entitled to a trial *de novo* before the court, with the right to introduce evidence.

Mr. George W. Wickersham, Special Assistant to the Attorney General, with whom *Attorney General Sargent* was on the brief, for the United States.

The District Court correctly affirmed the conclusion reached by the Commission that the railways of the appellant companies did not constitute "a group of carriers under common control and management and operated as a single system" within the meaning of the statute. Passing over the question whether or not two can make "a group," in our view no conclusive evidence of common control is to be found in the record.

The question whether or not there was "single system operation" is almost entirely one of fact. Insofar as it is a question of fact, we submit this Court will not review it further than to ascertain that the findings of the Commission and of the District Court were supported by the evidence.

The District Court rightly refused to enter upon a trial *de novo* of the question of valuation. Ample opportunity has been afforded the appellants to submit to the Commission all evidence which they considered pertinent and material. There is no pretense to the contrary. No case is presented, therefore, requiring the court to substitute itself for the Commission as a fact finding body. Distinguishing *Manufacturers' R. Co.* v. *Interstate Commerce Comm'n,* 246 U. S. 457. Citing *Interstate Commerce Comm'n* v. *Union Pacific R. Co.,* 222 U. S. 541; *Illinois Central* v. *Interstate Commerce Comm'n,* 206 U. S. 441; *Assigned Car Cases,* 274 U. S. 564.

The Commission, in finding the value of the property of the O'Fallon held for and used by it in the service of transportation, proceeded in precise conformity with the statute. It gave "due consideration to all the elements of value recognized by the law of the land for rate-making purposes," and gave "to the property investment account of the carriers only that consideration which under such

law it is entitled to in establishing values for rate-making purposes."

The Commission did not, as contended by appellants, base its findings of value "on a mathematical formula, the avowed purpose of which was to determine the approximate investment in the property as distinguished from its present value."

The true basis for the determination of public utility valuation was laid down in the case of *Smyth* v. *Ames,* 169 U. S. 466, which is still the law. The decision in that case sets up, not a formula, but a standard of evidence, holding that neither reproduction cost nor original cost is alone a criterion of value, or to be given dominant consideration, but that the rate-making body must take all elements and measures of value into consideration, and analyze and ascribe to each its proper weight in the light of the evidence of the case.

This doctrine has been quoted in most of the cases involving the question of valuation which have arisen since *Smyth* v. *Ames,* and has been approved in practically every one of them, including the most recent, *McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400. It is still unquestionably the law.

During the decade that followed *Smyth* v. *Ames,* however, circumstances conspired to enhance the reputation of the reproduction cost basis at the expense of all the other measures of value. This was before regulation of utilities by commissions had become common, and the care-free methods of the promoters of utilities in financing and construction had rendered estimates of original cost difficult and unreliable, and capitalizations in most cases frankly unrepresentative of any sort of value. Reproduction cost, not being subject to the effects of the business ethics of the time, profited by the suspicion and disrepute into which capitalization and original cost had fallen, and became the commonly accepted measure of value. This

was generally satisfactory to both commissioners and utilities, because the price level maintained itself fairly stable during most of the period.

That this is the real reason for the frequent use of the reproduction cost basis before the war, is very well illustrated by the case of *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, which often is cited in support of the reproduction cost rule.

An examination of any of the pre-war cases will show that the Supreme Court was doing no more than holding that a rate-making body could, in the light of all the facts of the particular case, find a value based primarily on reproduction cost, rather than on any of the other elements of *Smyth* v. *Ames.* Compare *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19; *Minnesota Rate Cases,* 230 U. S. 352; *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153; *Cedar Rapids Gas Co.* v. *Cedar Rapids,* 223 U. S. 655; *Omaha* v. *Omaha Water Co.,* 218 U. S. 180; *San Diego Land Co.* v. *Nat'l City,* 174 U. S. 739; *San Diego Land Co.* v. *Jasper,* 189 U. S. 139; *Newton* v. *Consolidated Gas Co.,* 258 U. S. 165; *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388; *Denver* v. *Denver Union Water Co.,* 246 U. S. 178.

There are other cases, but these cases include all pre-war cases relied on by appellants, and all are essentially the same. To contend that any of them holds that, as a matter of law, a valuation not based on reproduction cost new (less depreciation, of course) is confiscatory, is utterly unjustifiable.

Every one of them is based on the rule of *Smyth* v. *Ames,* and if they are authority for the proposition that rate-making bodies could and should give dominant consideration to reproduction cost at a time when other elements of value were admittedly unreliable and undesirable as bases, and when reproduction cost was not only the only reliable base, but actually did approximate the value of

the investment, they are equally good authority for the proposition that at a time when abnormal prices have swollen reproduction cost out of proportion, the rate-making bodies may, in the light of all the facts, accord it less, rather than more weight. Especially is this so, since the other elements of value are now, due to strict regulation, fairly certain and wholly reliable—in fact, infinitely more so than the now fluctuating reproduction cost.

We turn now to the cases which arose after the war, when the enormous rise in prices had transformed the reproduction cost basis as far as the utilities were concerned, from a sometimes convenient, but usually annoying, measure of value, to a veritable El Dorado,—cases in which the utilities strive to get rid of the restrictions which the broad rule of *Smyth* v. *Ames* wisely permitted commissions and courts to place on their claims, and to substitute therefor the reproduction cost theory as a minimum requirement in valuation. This O'Fallon case is one step in that drive. There have been four previous cases in which this valuation question was raised,—at least raised well enough to have merited attention from this Court. They are the *Southwestern Bell Telephone* case, the *Georgia R. & P. Co.* case, and the *Bluefields Water Co.* case, all in 262 U. S., and the *McCardle* case in 272 U. S. All these adhere to the rule of *Smyth* v. *Ames*.

We submit that the procedure of the Commission in the present case was in exact conformity with the law. Mature and deliberate consideration was given to every possible element of value, and the result was the reasoned opinion of the Commission.

The Commission had a broad discretion in weighing the various elements of value in evidence before it and in reaching a conclusion based thereon. This discretion will not be reviewed by the courts; and the order made by the Commission, in the exercise of such discretion, is not invalid as made without due process.

The action of the Commission in rejecting the spot cost of reproduction as the sole basis of valuation in the recapture years was in conformity with the intention of Congress in framing the Transportation Act of 1920. The history of the legislation is helpful in its interpretation. This Court, in a measure, reviewed it in the *Wisconsin Passenger Case,* 257 U. S. 563. And see Cong. Rec. Vol. 59, Pt. 4, p. 3269; Report of hearings before the Special Committee on Interstate Commerce in 1916; Cong. Rec., Vols. 58 and 59 (especially Vol. 59, Parts I, III, and IX); and the files of The New York Times, The New York Tribune, and the Financial Chronicle during 1919 and 1920.

Appellants in effect attack the whole 1920 scheme of legislation, first by urging a construction which would make it impracticable, and secondly by challenging its constitutionality. This Court has broadly upheld the constitutionality of the Act in all the cases which have involved its consideration. The application of the recapture clause invades no constitutional rights of appellants. *R. R. Comm'n* v. *C. B. & Q. R. Co.,* 257 U. S. 563; *New York* v. *United States,* 257 U. S. 591; *New England Divisions Case,* 261 U. S. 184; *Dayton-Goose Creek R. Co.* v. *United States,* 263 U. S. 456.

Appellants' argument, when analyzed, is in effect a contention that the Commission erred because it did not fix the value of the carrier's railway solely on the basis of cost of reproduction based on the prices prevailing at the recapture dates.

The required payments by the O'Fallon are not confiscation. They leave to the company in each of the years affected a net railway operating income in excess of six per centum of the value of the railway property held for and used in the service of transportation, even on the basis of valuation contended for by the O'Fallon.

The provisions of § 15a, par. (6), so far as the income of appellant companies is concerned, took effect from and after the passage of the Act. Appellants' contention that the recapture provision could not be applied to either of them until the results of the whole rate structure established by the Commission should realize the congressional intention, is unsupported by the statute itself or by reason.

The District Court erred in holding that the Commission exceeded its power in directing the payment of interest on the sums which it found were payable by the O'Fallon.

Mr. Walter L. Fisher, with whom *Messrs. Oliver E. Sweet* and *Roland J. Lehman* were on the brief, for the Interstate Commerce Commission.

This case is chiefly important because it presents for the consideration of the Court the validity of the administrative measures and methods which the Interstate Commerce Commission, after mature consideration, regards as necessary to the effective operation of the recapture provisions of the Transportation Act. The principal ground of attack is that the order of the Commission is invalid because the recapture base or "value for rate-making purposes" upon which the excess earnings have been computed is less than the hypothetical cost of reproducing the railroad on the basis of current commodity prices for the periods in question.

The answer of the Commission to the principal attack is that the valuations it has fixed are the results of "due consideration" by the Commission of "all the elements of value recognized by the law of the land for rate-making purposes" as provided by the Act and (quoting the language of this Court) that reproduction cost, or "the present as compared with the original cost of construction," is only one of the many elements to be given "due consideration" in determining "fair value," or "reason-

able value," or "value for rate-making purposes," or "rate base," which by the Act is made the recapture base upon which excess earnings are to be figured; that the recapture of excess earnings is an exercise of the power to regulate rates, and that its determination in the rate regulating process is a "legislative function," properly entrusted to an expert commission "appointed by law and informed by experience," whose judgment will be set aside by the courts only when it clearly results in the denial of constitutional rights; that its determination "is not controlled by artificial rules" and "is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts"; that it is "fundamental that the judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases" and that this is "true of asserted value as of other facts"; that if the alleged constitutional invalidity "rests upon disputed questions of fact, the invalidating facts must be proved"; that the "property" of a railroad is "dedicated" to the performance of a "function of government" and is to be valued in the light of the fundamental restrictions upon its use and disposition inherent in this dedication; that in determining the weight to be attached to current "reproduction cost" there is a clear and vital distinction between local public utilities and railroads, especially the railroads of the United States considered as a whole under the provisions of the Transportation Act; that this Act "introduced into the federal legislation a new railroad policy" in which the recapture of excess earnings is "the key provision of the whole plan"; that its fundamental purpose is to recognize the interstate railroads of the entire country as a national transportation system and to "foster, protect, and control" them so that they will most efficiently and economically perform the service to the public for which they were originally created as govern-

mental agencies; and that by the Act "new rights, new obligations and new machinery were created" by which this new and constructive policy is to be made effective; that it imposes an unprecedented task on the Commission; that it "puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission," that "obviously Congress intended that a method should be pursued by which the task which it imposed upon the Commission could be performed"; that the Act is to be interpreted in no narrow legalistic fashion, but with constant regard to the economic and administrative factors involved, chief of which is such treatment of the capital already invested as will encourage and promote the procurement of the new capital upon which the whole future of the railroads as a national transportation system fundamentally depends; that the Act definitely and specifically provides that the Commission "shall give due consideration among other things to the transportation needs of the country and the necessity (under honest, efficient, and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation"; that the treatment which has been given by the Commission since the passage of the Act to the existing investment has already produced unprecedented prosperity and financial stability for the railroads and is already proving attractive to new capital investment in railroad securities, stocks as well as bonds; that the continuance of these methods, as they have been continued in the *O'Fallon* case, will maintain and increase these highly desirable results, and certainly can not be regarded as "confiscatory," while the adoption of the theory of reproduction cost at current commodity prices as the controlling element in fixing "value for rate-making purposes" as the "recapture base" will have the opposite effect as well as

being contrary to "the law of the land" and destructive of the beneficent purposes of the Transportation Act; that it is impracticable in administration, inconsistent with the history and nature of railroad construction and development, grossly unfair to the public in a period of abnormally high commodity prices and disastrous to the railroads in a period of declining commodity prices.

As to the relatively minor objections made to the Commission's order, it is respectfully insisted (a) that under the Act it is only when "the Commission finds" that two or more railroads are "under common control and management and are operated as a single system" that the value and net operating income of such railroads are to be computed for the group as a whole, and that the Commission has not only not made the finding which is the essential condition of any such treatment, but that the facts of record clearly show that these roads are operated separately, that their stockholders are not the same, and that there is no "common pocketbook" out of which the excess earnings of one can be or ever have been used for the benefit of the other, and that the decision of the Commission upon this particular point is not reviewable; (b) that the establishment of rates that will actually produce the "fair return" contemplated by the Act is not a condition precedent to the operation of the recapture provisions, as the Act did not intend anything whatever in the nature of a guaranty but simply directed the Commission to fix rates from time to time that would produce the results intended "as nearly as may be"; (c) that the Transportation Act became effective on and after the date of its passage on February 28, 1920, and that recapture must be effective on excess earnings after the effective date of the Act and not on August 26, 1920, when the first rate increases became effective; (d) that the "Reserve Fund" provisions of the Act and their application

in the Commission's order do not constitute the taking of private property without just compensation or without due process of law, because the railroad is "only a trustee for the excess over a fair return received by it" and "never had such a title to the excess as to render the recapture of it by the Government a taking without due process," as expressly decided by this Court; (e) that "the steps prescribed in the Act constitute a direct and indirect legislative fixing of rates," but that the procedure is adequately prescribed, and this Court has repeatedly held that an administrative tribunal may fill in procedural details; (f) that interest on the recapturable excess is properly recoverable from the dates respectively when the several instalments of such excess became payable to the Commission under the statute, which was four months after the expiration of each period for which there was recapturable excess. By a cross appeal and the assignment of cross errors, the Commission asks this Court to reverse the decision of the trial court as to this feature of the order, and to sustain the provisions of the Commission's order with respect to the payment of interest.

The questions here involved were questions of law, as well as of fact, but they were to be correctly solved in no narrow, legalistic fashion. The law was to be interpreted in the light of the economic factors and purposes. *Dayton-Goose Creek R. Co.* v. *United States,* 263 U. S. 456; *Texas & Pacific R. Co.* v. *Interstate Commerce Comm'n,* 162 U. S. 197; *New England Divisions Case,* 261 U. S. 184.

If these recapture provisions can not be made practically effective for the accomplishment of the fundamental purpose of the Act, which is the protection and promotion of the interests of the entire public, including both users and owners of railroads, the whole plan will necessarily fail.

Mr. Donald R. Richberg participated in the oral argument and filed a brief, as *amicus curiae,* in behalf of The National Conference on Valuation of American Railroads, by special leave of Court.

Messrs. F. G. Dorety and *Fletcher Rockwood* filed a brief, as *amici curiae,* in behalf of the Great Northern Railway Company, by special leave of Court.

Mr. Justice McReynolds delivered the opinion of the Court.

These are cross appeals from the final decree of the District Court, Eastern Missouri,—three judges sitting—in a suit to annul an Interstate Commerce Commission order, dated February 15, 1927, which directed St. Louis and O'Fallon Railway Company to place in a reserve fund one-half of its determined excess income for the years 1920 (ten months), 1921, 1922 and 1923 (that is half of the sum by which the net railway operating income for each of those years exceeded six per cent of the ascertained value of property devoted to public service); and to pay to the Commission the remaining one-half with six per cent interest beginning four months after termination of the year, i. e., May 1, 1921, 1922, 1923 and 1924.

Section 15a, added to the Interstate Commerce Act by Transportation Act, 1920, contains nineteen paragraphs. Of those specially important here, 1, 2, 3, 5, 7 and 8 are copied in the margin;* 4 and 6 follow:—

" (4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined

*" Section 15a. (1) [This defines the terms employed.]

" (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management

by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the

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and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

"(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided,* That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

"(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so

land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value."

"(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described.

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in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

"(7) For the purpose of paying dividends or interest on its stocks, bonds or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose.

"(8) Such reserve fund need not be accumulated and maintained by any carrier beyond a sum equal to 5 per centum of the value of its railway property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under paragraph (6) may be used by it for any lawful purpose."

For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4)."

After an investigation instituted under § 15a, May 14, 1924, for the purpose of determining incomes received by St. Louis and O'Fallon Railway Company (The O'Fallon) and Manufacturers' Railway Company (The Manufacturers'), asserted to be parts of one system, for the years 1920–1923, the Commission found: (1) Although the stock of both corporations was mostly owned by the Adolphus Busch Estate and their principal officers were the same, they were not carriers operated under common control and management as a single system within paragraph 6. (2) The Manufacturers' had received no excess operating income. (3) The value of The O'Fallon's property devoted to public service in 1920 (ten months) was $856,065; in 1921, $875,360; in 1922, $978,874; in 1923, $997,236; and during each of those years it received net operating income exceeding six per cent upon the stated valuation.

The above-described recapture order followed.

The cause is properly here under the Judicial Code, as amended by Act of February 13, 1925, (U. S. C., Title 28, § 345)—

"Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district

court may be had where it is so provided in the following Acts or parts of Acts and not otherwise: . . .

"(4) So much of 'An Act making appropriations . . . for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money. . . ."

The Act of October 22, 1913, (38 Stat. 219, 220) transferred to District Courts the jurisdiction granted to the Commerce Court by Act of June 18, 1910, (36 Stat. 539); and provided for review by this Court of causes embraced therein. The jurisdiction of the Commerce Court included—

"First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission. . . ."

Paragraph (4), § 238, applies to all those causes formerly cognizable by the Commerce Court and reviewable here. The words "other than for the payment of money" were taken from clause First, Act of 1910, above quoted and, as there, they delimit the trial court's jurisdiction. They do not inhibit review here of any cause formerly cognizable by the Commerce Court. Moreover, the order under consideration was not merely for payment of money; and the proceeding below was to set aside, not to enforce it.

Wisconsin Railroad Commission v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, and *Dayton-Goose*

Creek Railway Co. v. *The United States*, 263 U. S. 456, point out the general purpose of the Transportation Act, 1920, and uphold the validity of § 15a.

The Manufacturers' is a switching road with thirty miles of track within St. Louis, Missouri. The O'Fallon—a coal-carrying road—has nine miles of main line, all in Illinois, and this connects with The Terminal Railroad at East St. Louis. Through the latter deliveries are made to sundry points in St. Louis, some of which are on The Manufacturers' line. "The distance between the railroad of the O'Fallon and the railroad of the Manufacturers' is about 12 miles, and all communication by rail between the two properties is effected over the tracks of the Terminal, including a bridge over the Mississippi River." Both the Commission and the District Court held that the record failed to show these two roads were under common control and management and operated as a single system within the meaning of paragraph 6. We accept their conclusion.

The Commission directed The O'Fallon to pay 6% interest on the recaptured one-half of its ascertained excess net railway operating income beginning four months from the end of the year during which the excess accrued (§ 6). The District Court rightly ruled that as the carrier made bona fide denial of any excess under circumstances sufficient to justify a contest, no interest should have been imposed for any time prior to the final order. Not until then could the carrier know what, if anything, it should pay.

Also, we think the District Court rightly rejected the claim that excess earnings were not recapturable unless and until the Commission had fixed a general level of rates intended to yield fair return upon the aggregate value of carrier property either as a whole, or in some prescribed rate or territorial group. Congress, of course,

realized that final valuations would require prodigious expenditure of time and effort; but the language concerning recapture indicates that prompt action was expected. Practical application of paragraphs 5 and 6 does not necessarily depend upon prior compliance with paragraphs 2 and 3. The Act should be construed so as to carry out the legislative purpose. The proviso of paragraph 3 prescribing action to be taken during two years beginning March 1, 1920, and the clause of paragraph 6 excepting the income of certain roads prior to September 1, 1920, are hardly compatible with this claim by the carrier.

Paragraph 4, § 15a, directs that in determining values of railway property for purposes of recapture the Commission "shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes." This is an express command; and the carrier has clear right to demand compliance therewith. *United States ex rel. Kansas City Southern Railway Co.* v. *Interstate Commerce Commission,* 252 U. S. 178.

"The elements of value recognized by the law of the land for rate-making purposes" have been pointed out many times by this Court. *Smyth* v. *Ames,* 169 U. S. 466; *Wilcox* v. *Consolidated Gas Co.,* 212 U. S. 19; *Minnesota Rate Cases,* 230 U. S. 352; *Southwestern Bell Telephone Co.* v. *Public Service Commission,* 262 U. S. 276; *Bluefield Water Works & Improvement Co.* v. *Public Service Commission,* 262 U. S. 679; *McCardle* v. *Indianapolis Water Co.,* 272 U. S. 400. Among them is the present cost of construction or reproduction.

Thirty years ago, *Smyth* v. *Ames* announced (546):

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a cor-

poration maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

In *Southwestern Bell Telephone Co.* v. *Public Service Commission, supra* (287), we said: "It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances, is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible. Estimates for tomorrow cannot ignore prices of today."

The doctrine above stated has been consistently adhered to by this Court.

The report of the Commission is long and argumentative. Much of it is devoted to general observations relative to the method and purpose of making valuations; many objections are urged to doctrine approved by us; and the superiority of another view is stoutly asserted.

It carefully refrains from stating that any consideration whatever was given to present or reproduction costs in estimating the value of the carrier's property. Four dissenting Commissioners declare that reproduction costs were not considered; and the report itself confirms their view. Two of the majority avow a like understanding of the course pursued.

The following from the dissenting opinion of Commissioner Hall, concurred in by three others, accurately describes the action of the Commission:—

"In order to determine the value of the O'Fallon property devoted to carrier service during the recapture periods, 10 months in the year 1920 and the years 1921, 1922, and 1923, we start with a valuation or inventory date of June 30, 1919. The units in existence on that date are known. Original cost of the entire property can not be ascertained. As to the man-made units we estimate the cost of reproducing them in their condition on that date and in so doing apply to the units installed prior to June 30, 1914, the unit prices of 1914, representing a fairly consistent price level for the preceding 5 or 10 years. To like units, installed after June 30, 1914, and prior to June 30, 1919, we apply the same prices, but add a sum representing price increases on those units during that period. For the third period, from June 30, 1919, down to each recapture date, we abandon estimate and turn to recorded net cost of additions less retirements. On this composite, made up of estimated value for two periods and ascertained net cost for the third period, the majority base a conclusion as to value at recapture date of the man-made items. Land goes in at its current value as measured by that of neighboring lands.

"Without summarizing the other processes, all clearly stated in the majority report, it will be observed that the rate-making value arrived at for the successive recapture periods, as for example the year 1923, rests upon 1923

market value of lands; costs of other property installed since June 30, 1919; unit prices of 1914, enhanced by allowance for increased cost of units installed during June 30, 1914–1919; and, for the units installed prior to June 30, 1914, constituting by far the major part of the property, unit prices of 1914 without any enhancement whatever. As to this major part of the carrier's property devoted to carrier purposes in 1923 no consideration is given to costs and prices then obtaining or to increase therein since 1914."

In the exercise of its proper function this Court has declared the law of the land concerning valuations for rate-making purposes. The Commission disregarded the approved rule and has thereby failed to discharge the definite duty imposed by Congress. Unfortunately, proper heed was denied the timely admonition of the minority—"The function of this commission is not to act as an arbiter in economics, but as an agency of Congress, to apply the law of the land to facts developed of record in matters committed by Congress to our jurisdiction."

The question on which the Commission divided is this: When seeking to ascertain the value of railroad property for recapture purposes, must it give consideration to current, or reproduction, costs? The weight to be accorded thereto is not the matter before us. No doubt there are some, perhaps many, railroads the ultimate value of which should be placed far below the sum necessary for reproduction. But Congress has directed that values shall be fixed upon a consideration of present costs along with all other pertinent facts; and this mandate must be obeyed.

It was deemed unnecessary by the Court below to determine whether the Commission obeyed the statutory direction touching valuations since the order permitted The O'Fallon to retain an income great enough to negative any suggestion of actual confiscation. With this we

cannot agree. Whether the Commission acted as directed by Congress was the fundamental question presented. If it did not, the action taken, being beyond the authority granted, was invalid. The only power to make any recapture order arose from the statute.

The judgment of the court below must be reversed. A decree will be entered here annulling the challenged order.

Reversed.

MR. JUSTICE BUTLER took no part in the consideration or determination of this cause.

MR. JUSTICE BRANDEIS, dissenting.

The main question for consideration is that of statutory construction. By Transportation Act, 1920, February 28, 1920, c. 91, § 15a, 41 Stat. 456, 488, Congress delegated to the Interstate Commerce Commission the duty to establish and maintain rates which will yield "a fair return upon the aggregate value of the railway property" of the United States. By paragraph 4 thereof, it directs that in ascertaining value the Commission shall "give due consideration to all the elements of value recognized by the law of the land for rate-making purposes"; and shall "give to the property investment account only that consideration which under such law it is entitled to in establishing values for rate-making purposes." The report of the Commission, which accompanies the order challenged, declares: "In the methods of valuation which we have followed in this proceeding we have endeavored to give heed to this direction [that contained in paragraph 4] . . ." *Excess Income of St. Louis and O'Fallon Ry. Co.*, 124 I. C. C. 3, 19. Speaking for the dissenting members, Mr. Commissioner Hall said: "If the law needs change, let those who made it change it. Our duty is to

apply the law as it stands." (pp. 63, 64.) And Mr. Commissioner Aitchison added: "If we anticipate grave results will follow, our responsibility will be fully met if we suggest to the Congress, under our statutory powers to recommend new legislation to that body, the enactment of a rule for rate making under the commerce clause which will have no such unfavorable effects." (p. 64.)

Section 15a makes no specific reference either to the original cost of the property, or to prudent investment, or to current reproduction cost, or to the then existing price level. Section 19 (a) (the valuation provisions of the Act of 1913), to which § 15a refers, directs the Commssion to report, among other things, "in detail as to each piece of property, . . the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation"; and also "other values, and elements of value." After the enactment of § 15a and before entry of the order challenged, it was held in *Southwestern Bell Telephone Co.* v. *Public Service Commission,* 262 U. S. 276, a case arising under a state law, that the rate-base on which a public utility is constitutionally entitled to earn a fair return is the then actual value of the property used and useful in the business, not the original cost or the amount prudently invested in the enterprise. The Government concedes that current reproduction cost is admissible as evidence to show present value under § 15a. The carrier concedes now that neither Congress, nor the common law, made current reproduction cost the measure of value. The question on which the Commission divided is this: Did Congress require the Commission when acting under § 15a to give, in all cases and in respect to all property, some, if not controlling, effect to evidence establishing the estimated current cost of reproduction? Or did Congress intend to leave to the Commission the authority to determine, as in passing upon other con-

troverted issues of fact, what weight, if any, it should give to that evidence?

The O'Fallon contends, among other things, that the order is confiscatory. The claim is that the order left to the company a return of only 4.35 per cent upon the value ascertained in accordance with the rule declared in the *Southwestern Bell case* and *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400. If this were true, it would be immaterial whether Congress purported to authorize the course pursued by the Commission. But the fact is that, in each of the recapture periods, the earnings were so large as to leave, after making the required payments to the Commission, about 8 per cent on what the carrier alleged was the fair value of the property. The O'Fallon argues that, since the statute and the order required it to hold as a reserve one-half of the excess over 6 per cent, it is deprived of that property. This is not true. The requirement that one-half of the earnings in excess of 6 per cent shall be retained by the carrier until the reserve equals 5 per cent of the value of the railroad does not deprive the carrier of any property. It merely regulates the use thereof. Compare *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423, 453. The provision is one designed to secure financial stability; and is similar to those prescribing sinking funds, depreciation, and other appropriate accounts.[1] Congress may regulate the use of railroad property so as to ensure financial as well as physical stability. Both are essential to the safety and the service of the public. In *Dayton-Goose Creek Ry. Co.* v. *United*

[1] See Report of Senate Committee reporting S. 3288, Report No. 307, p. 19, 66th Congress, 1st Session: "The Company reserve fund may be drawn upon by the carrier whenever its annual railway operating income falls below 6 per cent of the value of the property. The reserve fund is, of course, the absolute property of the carrier; and the purpose in requiring it to be established and maintained is to give stability to the credit of the carrier and enable it to render more efficiently the public service in which it is engaged."

States, 263 U. S. 456, 486, where the facts were in this respect identical with those in the case at bar, the constitutional validity of the order was sustained. If the failure to give to the evidence of current reproduction costs the effect claimed for it by the O'Fallon was error, it is not because the carrier's constitutional rights have been invaded, but because the Commission failed to observe a rule prescribed by Congress for determining the amounts to be recaptured and reserved.

The claim of the O'Fallon is in substance that, since construction costs were higher during the recapture periods than in 1914, the order should be set aside, because the Commission failed to find that the existing structural property and equipment which had been acquired before June 30, 1914 was worth more than it had been then.[2] The Commission undertook, as will be shown, to find present actual value and, in so doing, both to follow the direction of Congress and to apply the rule declared in the *Southwestern Bell* case. It is true that this Court there declared that current reconstruction cost is an element of actual value; and that Congress directed the Commission "to give due consideration to all the elements of value recognized by the law of the land for rate making purposes." But, while the Act required the Commission to consider all such evidence, neither Congress nor this Court required it to give to evidence of reconstruction cost a mechanical effect or artificial weight. They left untrammeled its duty to give to all relevant evidence such probative force as, in its judgment, the evidence inherently possesses. The Commission concluded that in respect to the evidence of reproduction costs the differences between the *Southwestern Bell* case and that at bar were

[2] The complaint concerns all the structural property and equipment acquired before June 30, 1919. But, as nearly all of this had been installed before July 1, 1914, the discussion is limited to the property acquired before that date.

such as to lead to different results in the two cases. It did so mainly because " in the administration of the valuation and recapture provisions," ascertainment of value " is affected by a vast variety of considerations that either do not enter into, or are less easily perceived in, problems incident to the regulation of local public utilities." (p. 27.) In my opinion the conclusions of the Commission are well founded. To make clear the reasons, requires consideration of the function of the Commission in applying § 15a and of the problems with which it is confronted.

First. The Commission is a fact-finding body. The question whether it must give to confessedly relevant facts evidential effect is solely one of adjective law. Statutes have sometimes limited the weight or effect of evidence. They have often created rebuttable presumptions and have shifted the burden of proof. But no instance has been found where under our law a fact-finding body has been required to give to evidence an effect which it does not inherently possess. Proof implies persuasion. To compel the human mind to infer in any respect that which observation and logic tells us is not true interferes with the process of reasoning of the fact-finding body. It would be a departure from the unbroken practice to require an artificial legal conviction where no real conviction exists.[3]

An arbitrary disregard by the Commission of the probative effect of evidence would, of course, be ground for setting aside an order, as this would be an abuse of discretion. Orders have been set aside because entered without evidence; [4] or because matters of fact had been considered

[3] Compare Best on Evidence (seventh English edition) §§ 69, 70; *Manley* v. *Georgia,* 279 U. S. 1.

[4] See *Interstate Commerce Commission* v. *Union Pacific R. R.,* 222 U. S. 541, 547; *Interstate Commerce Commission* v. *Louisville & Nashville R. R.,* 227 U. S. 88, 92; *Florida East Coast Ry.* v. *United States,* 234 U. S. 167; *New England Divisions Case,* 261 U. S. 184, 203.

which were not in the record; [5] or because the Commission excluded from consideration facts and circumstances which ought to have been considered; [6] or because it took into consideration facts which could not legally influence its judgment.[7] But no case has been found in which this Court has set aside an order on the ground that the Commission failed to give effect to evidence which seemed to the Court to be of probative force, or on the ground that the Commission had drawn from the evidence an inference or conclusion deemed by the Court to be erroneous.[8] On

[5] See *Interstate Commerce Commission* v. *Louisville & Nashville R. R.*, 227 U. S. 88, 93; *Chicago Junction Case*, 264 U. S. 258, 263.

[6] See *Texas & Pac. Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U. S. 144; *Interstate Commerce Commission* v. *Northern Pacific Ry.*, 216 U. S. 538.

[7] See *Florida East Coast Line* v. *United States*, 234 U. S. 167, 187; *Central R. R. Co.* v. *United States*, 257 U. S. 247.

[8] Alleged errors of the Interstate Commerce Commission in weighing evidence or drawing inferences therefrom have been urged as grounds for reversal in many cases. This Court has consistently held that the Commission's decisions as to such matters are not the proper subject for judicial review. See e. g., *Cincinnati, &c. Ry.* v. *Interstate Commerce Commission*, 206 U. S. 142, 154; *Illinois Central R. R.* v. *Interstate Commerce Commission*, 206 U. S. 441; *Interstate Commerce Commission* v. *Illinois Central R. R.*, 215 U. S. 452, 470; *Los Angeles Switching Case*, 234 U. S. 294; *United States* v. *New River Co.*, 265 U. S. 533; *Western Chemical Co.* v. *United States*, 271 U. S. 268; *Virginian Ry.* v. *United States*, 272 U. S. 658; *Chicago, R. I. & Pac. Ry.* v. *United States*, 274 U. S. 29; *Assigned Car Cases*, 274 U. S. 564. The following excerpts from recent opinions succinctly express the Court's position in the matter:—"The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions." *United States* v. *New River Co.*, 265 U. S. 533, 542. "To consider the weight of the evidence is beyond our province." *Western Chemical Co.* v. *United States*, 271 U. S. 268, 271. "This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsist-

the contrary, findings of the Commission involving the appreciation or effect of evidence have been treated with the deference due to those of a tribunal "informed by experience" and "appointed by law" to deal with an intricate subject. *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454. Unless, therefore, Congress required the Commission, not only to consider evidence of reconstruction cost in ascertaining values for rate making purposes under § 15a, but also to give, in all cases and in respect to all property, some weight to evidence of enhanced reconstruction cost, even if that evidence was not inherently persuasive, the Commission was clearly authorized to determine for itself to what extent, if any, weight should be given to the evidence; and its findings should not be disturbed by the Court, unless it appears that there was an abuse of discretion.

Second. While current reproduction cost may be said to be an element in the present value of property, in the sense that it is "evidence properly to be considered in the ascertainment of value," *Standard Oil Co.* v. *Southern Pacific Co.,* 268 U. S. 146, 156, it is clear that current cost of reproduction higher than the original cost does not necessarily tend to prove a present higher value. Often the fact of higher reconstruction cost is without any influence on present values. It is common knowledge that the current market values of many office buildings and residences constructed prior to the World War have failed to reflect the greatly increased building costs of recent years, although the need of new buildings of like character was being demonstrated by the large volume of con-

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ency with findings made in other proceedings before it." *Virginian Ry.* v. *United States,* 272 U. S. 658, 665–666. "But if the determination of the commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider the wisdom of the commission's action." *Chicago, R. I. & Pac. Ry.* v. *United States,* 274 U. S. 29, 33–34.

struction at the higher price level. Many railroads built before the World War have never been worth as much as their original cost, because high construction cost combined with adverse operating conditions and limited traffic have at all times prevented their earning, despite reasonable rates, a fair return on the original cost. The Puget Sound extension of the Chicago, Milwaukee and St. Paul is a notable example.[9] Many branches, and indeed whole lines of railroad, have been scrapped since 1920. Abandonment of 2,439 miles of railroad was authorized under paragraph 18 of § 1 of the Interstate Commerce Act between 1920 and 1925; and in the three fol-

[9] The Puget Sound extension of the Chicago, Milwaukee & St. Paul Railway was completed in 1909 at a cost of about $257,000,000. It earned, during fifteen years, little more than operating expenses. As late as 1925, its net operating income was "only about one-half of 1 per cent on this investment." *Investigation of Chicago, Milwaukee & St. Paul Ry. Co.*, 131 I. C. C. 615, 617, 619, 621. The upset cash price fixed by the court in the foreclosure proceeding was $42,500,000. *Guaranty Trust Co.* v. *Chicago, M. & St. P. Ry.*, 15 F. (2d) 434, 443.

Another striking example of the discrepancy often existing between market price or actual value, and reproduction cost is to be found in the case of the Detroit, Toledo & Ironton Railroad, which Mr. Ford purchased in 1920 for $6,800,000. It was said to have a physical value of between $16,000,000 and $20,000,000. Railway Age, Vol. 69.1, p. 132.

In an order granting, on March 8, 1929, the application of the Nashville, Chattanooga & St. Louis Ry. to abandon its Middle Tennessee & Alabama branch, which had been in operation more than thirty years, the Interstate Commerce Commission said: "The applicant contends that the project was poorly conceived and doomed to failure from the outset." 150 I. C. C. 539, 540.

"But cost of reproduction obviously does not measure value in the sense of what a purchaser would pay for a property. Let the owners of the old Wabash Pittsburgh Terminal put their road upon the market to prove the truth of this assertion." Homer D. Vanderblue in Railway Age, 1920—Vol. 68.2, p. 1105.

lowing years 2,010 miles more.[10] These properties had, in the main, become valueless for transportation, either because traffic ceased to be available or because competitive means of transportation precluded the establishment of remunerative rail rates.[11] Obviously, no one would contend that their actual value just before abandonment was what it originally cost to construct them or what it would then have cost to reconstruct them.

Third. The terms of § 15a and its legislative history preclude the assumption that Congress intended by paragraph 4 to deny to the Commission in respect to evidence of reconstruction cost the discretion commonly exercised in determining what weight, if any, shall be given to an evidential fact. In 1920, no fact was more prominent in the mind of the public and of Congress than that the cost of living was far greater than that prevailing when the existing railroads were built.[12] But, neither in Transportation Act, 1920, nor in any Committee report, is there even a suggestion that the Commission would be required

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[10] *Motor Bus and Motor Truck Operation,* 140 I. C. C. 685, 727. See Annual Reports of the Commission, 1921, p. 19; 1922, p. 219; 1923, p. 237; 1924, p. 253; 1925, p. 263; 1926, p. 286; 1927, p. 294; 1928, p. 298.

[11] Motor competition has to some extent been a factor in such abandonments. For instances arising since October 31, 1927, see *Abandonment of Potato Creek R. R. Co.,* 131 I. C. C. 481, 482; *Pennsylvania R. R. Co.,* 131 I. C. C. 547, 548; *Grand Rapids and Indiana Ry. Co.,* 138 I. C. C. 345; *Spokane, Coeur d'Alene & Palouse Ry. Co.,* 138 I. C. C. 722, 723; *Illinois Traction, Inc.,* 145 I. C. C. 20; *Western Maryland Ry. Co.,* 145 I. C. C. 232; *Southern Ry. Co.,* 145 I. C. C. 355; *St. Louis-San Francisco Ry. Co.,* 145 I. C. C. 379, 383; *Pere Marquette Ry. Co.,* 145 I. C. C. 560, 561; *Chicago, Rock Island & Pacific Ry Co.,* 145 I. C. C. 698, 699; *Southern Pacific Co.,* 145 I. C. C. 705, 707. Compare *Hill City Ry. Co.,* 150 I. C. C. 159.

[12] Senator Cummins stated that the cost of living was then from 80 to 100 per cent above prewar prices. 59 Cong. Rec., Part I, p. 129. See, also, Senate Committee Hearings, Vol. 148, Part II, p. 277; House Committee Hearings, Vol. 232, Part I, pp. 376–377.

to give to that fact any effect in ascertaining values for rate making purposes under § 15a. If it had been the intention of Congress to compel the Commission to increase values for rate making purposes because the price level had risen, it would naturally have incorporated such a direction in the paragraph. On the other hand, the Committee reports and the debates show that the opinion was quite commonly held that the actual values were less than the property investment account appearing on the books of the carriers; [13] and the proposal made by the railroads that the investment account be accepted as the measure of value was resisted as being excessive.[14] The property

[13] Senator Cummins said "I think there are a great many instances in which the investment accounts are larger than any possible value that could be attributed to the property." 59 Cong. Rec., Part 1, p. 126. "My own judgment is, however, that the value of the properties is less than the aggregate investment accounts . . ." pp. 135-136. For other expressions of opinion to the same effect see pp. 224, 228, 905. Senator Cummins stated that the aggregate of the investment accounts was about $19,000,000,000. (p. 127.) See also p. 130. Compare Mr. Esch, 59 Cong. Rec., Part 4, p. 3269.

[14] The Commission says (124 I. C. C. 39): "In this connection it is significant that when the legislation of 1920, of which § 15a is a part, was under congressional consideration there was offered in behalf of the carriers a proposed bill in which their recorded investment in road and equipment was made the sole element in the determination of the rate base. It is also worthy of note that when the legislation of 1920 was under such consideration a representative of this commission on September 26, 1919, in response to a question, publicly informed the congressional committee that he knew of no warrant for an assumption 'that the commission will base the value of the property wholly or in part on present prices.'"

The investment in road and equipment as stated on the books of the Kansas City, Mexico and Orient R. R. Co. (of Kansas) as of June 30, 1919, was $22,190,935. The final valuation by the Commission as of that date was $6,453,528. After that date $1,064,782 was expended for additions and betterments, making a total value of $7,518,310. The Kansas City, Mexico & Orient of Texas (with expenditures for additions) was valued at $6,854,522. *Kansas City,*

investment account in 1920 was about 19 billions of dollars.[15] The then reproduction cost of the railroads, applying index figures to estimated actual cost, was over 40 billions.[16] It is inconceivable that Congress, after rejecting property investment account as excessive, intended by § 15a to make mandatory on the Commission the consideration of elements which would give a valuation double that which had been rejected. The insertion in § 15a of the provision that the Commission "shall give to the property investment account of the carriers only that consideration which under the law it is entitled to in establishing values for rate making purposes" and the rejection of other proposed measures of value show that Congress intended not to impose restrictions upon the discretion of the Commission.[17]

Congress did intend to provide a return on the existing railroad property which should be only slightly more than that which had been enjoyed during the six preceding years. To have required that the then price level be reflected in the values to be fixed under § 15a would have resulted in a rate-base of double the property investment account of the carriers. For the cost of living was then about double prewar prices. The prescribed fair return

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Mexico & Orient R. R. Co., 135 I. C. C. 217; *Kansas City, Mexico & Orient Reorganization*, 145 I. C. C. 339, 344. These properties, with an aggregate book value of $29,045,457 were valued by the Commission at $14,372,832 and, with 320 miles of road in Mexico added, were purchased by the Atchison, Topeka and Santa Fe R. R. for $14,507,500. See *Control of Kansas City, Mexico & Orient Ry. Co.*, 145 I. C. C. 350.

[15] See note 13.

[16] *Excess Income of St. Louis and O'Fallon Ry. Co.*, 124 I. C. C. 3, 32.

[17] Contemporary opinion of the railroads to this effect was expressed in their behalf in the hearings held before the Interstate Commerce Commission on March 22–24, 1920 (Hearings, In re: § 422 of the Transportation Act, Ex parte 71, p. 134).

applied to such a rate base would have produced more than double the average net earnings from operation of the several properties during the three years preceding federal control; more than double the amount which the carriers agreed to accept under the Federal Control Act, March 21, 1918, c. 25, § 1, 40 Stat. 451, as fair compensation for the use of their property; more than double the guarantee provided by Transportation Act, 1920, § 209, for the six months' period after the surrender of control. The sum which the railroads had thus earned net in those six years equalled 5.2 per cent on the property investment account, as carried on their books.

In making provision for a fair return, the main purpose was not to increase the earnings of capital already invested in railroads, but to attract the new capital needed for improvement or extension of facilities.[18] This was to be accomplished by raising the rate of return from 5.2 per cent to 5.5 per cent (Senate Reports, Vol. 1, No. 304, 66th Cong., 1st Sess.):

"The basis adopted by the Committee is three-tenths of 1 per cent higher than the basis of the test period [the three years preceding June 30, 1917]; and assuming, though not conceding that the value of the property is equal to the property investment accounts, it will yield for all the railways a net operating income of $54,000,000 in excess of the income of the test period. There were two considerations which led the majority of the committee

[18] "The writer of this report is firmly convinced that when the Government assumed the operation of the railways they were, taken as a whole, earning all that they should be permitted to earn; but, in the inevitable distribution of these earnings among the various railway companies, the railways which carried 30 per cent of the traffic were earning so little that they could not, by any economy or good management, sustain themselves." Senate Reports, No. 304, Vol. 1, 66th Cong., 1st Sess. A rate base which reflected the then increase in price levels over 1914 would have yielded about $700,000,000 more than the income of the test period.

to believe that this increase is not only warranted but necessary:

"First. The railways are being returned to their owners when everything is unsettled and abnormal; when there is suspicion and distrust everywhere. Just what rate of return will enable the carriers to finance themselves under such conditions can not, with certainty be determined. It was felt, therefore, that some increase over the prewar period was justifiable.

"Second. As compared with all kinds of commodities, money is much less valuable than it was a few years ago, and it would seem to be only fair that the returns from railway investments should be reasonably advanced."

The means by which the bill was to accomplish the desired end are thus stated in the report:

"First: By prescribing a basis of return upon the value of the railway property, to give such assurance to investors as will incline them to look with favor upon railway securities; that is to say, by making a moderate return reasonably certain to establish credit for the carriers.

"Second: In making the return fairly certain to secure for the public a lower capital charge than would otherwise be necessary.

"Third: In requiring some carriers, which under any given body of rates will earn more than a fair return, to pay the excess to the Government and in so using this excess that transportation facilities or credit can be furnished to the weaker carriers, and thus help to maintain the general system of transportation."

Either increase in the rate of return or increase of the base on which that return is measured would have served to adjust compensation to higher price levels. The adoption by Congress of the increase in the return, as the means of compensating for the decreased purchasing power of the dollar, precludes the assumption that it intended that the valuation should reflect that lessened pur-

chasing power. By explicitly choosing the former Congress implicitly rejected the latter.[19] For to have allowed an increase in both would have gone beyond adjusting earnings to increased costs and have made this increase a mere pretext for allowing unwarranted profits to the railroads. The proceedings which led to the passage of the Act make it clear that Congress intended no such result.

Fourth. The declared purpose of Congress in enacting § 15a was the maintenance of an adequate national system of railway transportation, capable of providing the best possible service to the public at the lowest cost consistent with full justice to the private owners. Following the course consistently pursued by this Court in applying other provisions of the Interstate Commerce Act, *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 211, 219; *New England Divisions Case,* 261 U. S. 184, 189–190; *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 478, the Commission construed § 15a in the light of the declared purpose of Congress and of the economic factors involved. From its wide knowledge of actual conditions and its practical experience in rate making, it concluded that to give effect to enhanced reproduction costs would defeat that purpose. (p. 27.)

It knew that the value for rate making purposes could not be more than that sum on which a fair return could be earned by legal rates; and that the earnings were

[19] Senator Kellogg in the debate on the bill justified the 5½ per cent return by the same argument as used by the Committee in reporting the bill: "Again it must be remembered that 5½ per cent today is not equal to 5½ per cent five years ago. The great inflation of currency and the general rise in all commodities have made a dollar very much less in purchasing power." 59 Cong. Rec., Part 1, p. 224. The same recognition of increased costs had been given as a justification for the liberal return authorized by the Federal Control Act. 1916 and 1917, two of the three years taken as a basis for measuring the return, were the most prosperous in the history of the railroads. See 56 Cong. Rec., Part II, p. 2021.

limited both by the commercial prohibition of rates higher than the traffic would bear and the legal prohibition of rates higher than are just and reasonable. It knew that a rate-base fluctuating with changes in the level of general prices would imperil industry and commerce. It knew that the adoption of a fluctuating rate-base would not, as is claimed, do justice to those prewar investors in railroad securities who were suffering from the lessened value of the dollar, since the great majority of the railroad securities are represented by long term bonds or the guaranteed stocks of leased lines which bear a fixed return; and that only the stockholders could gain through the greater earnings required to satisfy the higher rate base. It recognized that an adequate national system of railways, so long as it is privately owned, cannot be provided and maintained without a continuous inflow of capital; that "obviously, also, such an inflow of capital can only be assured by treatment of capital already invested which will invite and encourage further investment," (p. 30); and that as was said in *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456, 481: "By investment in a business dedicated to the public service the owner must recognize that as compared with investment in private business, he cannot expect either high or speculative dividends but that his obligation limits him to only fair or reasonable profit." [20]

[20] Mr. Esch, in submitting the conference report to the House, said: "'Investors want something definite and fixed upon which they can reckon. The provisions of section 422 give that stability, that standard which I trust, will encourage investment . . .'" 59 Cong. Rec., Part 4, p. 3269. The Commission points out (p. 32): "In other words, assuming a static property [valued at $18,000,000,000] there would have been a gain of 23.4 billions in 1920, a loss of 6.3 billions in 1921, a further loss of 6.8 billions in 1922, and a gain again of 3 billions in 1923. These huge 'profits' and 'losses' would have occurred without change in the railroad property used in the public service other than the theoretical and speculative change derived from a shifting of general price levels."

The conviction that there would in time be a fall in the price level was generally held. As a fluctuating rate-base would thus directly imperil industry and commerce and investments made at relatively high price levels during and since the World War; [21] would tend to increase the cost of new money required to supply adequate service to the public; and would discourage such investment, the Commission concluded that Congress could not have intended to require it to measure the value or rate-base by reproduction cost, since this would produce a result contrary to its declared purpose. And as confirming its construction of § 15a the Commission showed that, with the stable rate-base which it had accepted as the basis for administering the Act, the aim of Congress to establish an adequate national system had been attained. It pointed out that: "During the period 1920–1926, inclusive, the investment in railroad property increased by 4 billions of dollars. A substantial part of this money was derived from income, but much of it was obtained by the sale of new securities. The market for railroad securities since the passage of the transportation act, 1920, has steadily improved and the general trend of interest rates has been downward. The credit of the railroads in general is now excellent. . . ." (p. 33.)

Fifth. Other considerations confirm the construction given by the Commission to the phrase "value for rate making purposes," as used in § 15a. In condemnation proceedings, the owner recovers what he has lost by the

[21] "During the seven years, 1920 to 1926, inclusive, there was an approximate net investment in additions and betterments and new construction of 4 billions. These were paid for at then current prices, all above, in many cases far above, present prices. Assuming that there has since been an average decline in unit price level of 25 per cent, a valuation under the current reproduction cost doctrine would wipe out one billion of that additional investment. The effect upon any railroad entirely or largely constructed during the period 1920 to 1926 may be imagined." (p. 32.)

taking of the property, *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195; and such loss must be determined " not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted." *Boom Co.* v. *Patterson,* 98 U. S. 403, 408. Compare *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Co.,* 197 U. S. 430, 435. But the actual value of a railroad—its value for rate making purposes under § 15a—may be less than its condemnation value. As was said in *Southern Ry. Co.* v. *Kentucky,* 274 U. S. 76, 81–82, a case involving state taxation: " The value of the physical elements of a railroad—whether that value be deemed actual cost, cost of reproduction less depreciation or some other figure—is not the sole measure of or guide to its value in operation. *Smyth* v. *Ames,* 169 U. S. 466, 557. Much weight is to be given to present and prospective earning capacity at rates that are reasonable, having regard to traffic available and competitive and other conditions prevailing in the territory served."

Value has been defined as the ability to command the price.[22] Railroad property is valuable as such only if, and so far as, used. If rates are too high, the traffic will not move. Hence, the value or rate-base is necessarily dependent, in the first place, upon the commercial ability of the property to command the rates which will yield a return in excess of operating expenses and taxes; and such value cannot be higher than the sum on which, with the

[22] The value of the plant is " a result of the rates rather than a basis for rates. . . . If rates are established upon a basis of reproduction cost, value will tend to approximate such cost, but this will be through the operation of economic law and not because a certain figure has been decreed as value." F. G. Dorety, " The Function of Reproduction Cost," 37 Harvard Law Rev. 173, 189. Compare *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 328; *C. C. C. & St. L. Ry. Co.* v. *Backus,* 154 U. S. 439, 445; 1 Taussig, Principles of Economics, 115; Laughlin, Elements of Political Economy, pp. 75–77.

available traffic, the fair return fixed under § 15a can be earned. Persistent depression of rates or lessening volume of traffic, from whatever cause arising, ordinarily tends to lower actual values of railroad properties. It follows, that since the Commission is required by the rule of *Smyth* v. *Ames,* re-affirmed in the *Southwestern Bell* case, to determine the rate-base under § 15a by actual value as distinguished from prudent investment, it must in making the finding consider the effect upon value of both the commercial and the legal limitations upon rates and, among other things, the effect of competition upon the volume of traffic.

Recent experience affords striking examples of commercial limitations upon rates. In *Ex parte 74, Increased Rates, 1920,* 58 I. C. C. 220, the Commission sought to establish rates which would yield 6 per cent upon the aggregate values of the railroads in the several groups. The carriers claimed as the aggregate value $20,040,572,611—that amount being carried on their books as the cost of road and equipment. The Commission fixed the value about 5 per cent lower—at $18,900,000,000. In order to produce on that sum net earnings equal to 6 per cent, it increased freight rates, in the eastern group, 40 per cent over the then existing rates; in the southern group 25 per cent; in the western group 35 per cent; and in the mountain-Pacific group 25 per cent.[23] As a result of these increases, the average gross revenue per ton mile in 1921 was in the eastern district 96.1 per cent greater than for the fiscal year ended June 30, 1914; in the southern, 61.4; in the western, 59.3; and in the United States as a whole, 76.2. *Reduced Rates, 1922,* 68 I. C. C. 676, 702.

[23] Large increases had been made theretofore. A general rate increase of 5 per cent in 1914, *Five Per Cent Case,* 31 I. C. C. 351; 32 I. C. C. 325; 15 per cent in 1917, *Fifteen Per Cent Case,* 45 I. C. C. 303; and 25 per cent in 1918, General Order of Director General, No. 28.

Passenger rates were subjected by the order in *Ex parte 74,* to a flat increase of 20 per cent and surcharges were added. (p. 242.)[24]

On a large number of basic commodities, which were among the most important articles of commerce, the rates proved to be higher than the traffic would bear. Reductions became imperative. Within a year after the entry of that order, many applications for reductions were made to the Commission, not only by shippers but also by the carriers themselves. It was estimated that the reductions in freight rates made by the carriers prior to March 15, 1922, would aggregate for that year $186,700,000; and would lower the general rate level nearly 5 per cent. On some important articles of traffic the entire increase made by *Ex parte 74* was cancelled.[25] Further reductions were then ordered by *Reduced Rates, 1922,* 68 I. C. C. 676, the Commission saying (pp. 732–3): "High rates do not necessarily mean high revenues, for, if the public cannot or will not ship in normal volume, less revenue may result than from lower rates. Shippers almost unanimously contend, and many representatives of the carriers agree, that 'freight rates are too high and must come down.'

[24] They had been raised 40 per cent before.

[25] See Rate Reductions, House Doc. No. 115, 67th Congress, 1st Session, e. g., p. 7: "Reductions in all rates on iron ore throughout the so-called eastern territory, including generally points east of the Mississippi and north of the Potomac and Ohio Rivers, including, of course, ex-Lake ore moving from Lake Erie ports. These reductions will eliminate all increases effected under *Ex parte 74,* and it is conservatively estimated the amount will reach in round figures $5,000,000 per year." For instances of important reductions made by the carriers voluntarily, see *Smelter Products from Nevada & Utah,* 61 I. C. C. 374; *Grain from Illinois Points to New Orleans,* 69 I. C. C. 38; *Copper-Duquesne Reduction Co.* v. *Pennsylvania R. R. Co.,* 96 I. C. C. 351, 354–355.

This indicates that transportation charges have mounted to a point where they are impeding the free flow of commerce and thus tending to defeat the purpose for which they were established, that of producing revenues which would enable the carriers 'to provide the people of the United States with adequate transportation.'" Further reductions made in the year 1923 are said to have again lowered freight rates 5 per cent.[26] The effect of the several reductions made in the rates authorized by *Ex parte 74* is said to have lowered by $800,000,000 the freight charges otherwise payable on the traffic carried during the eighteen months ending December 31, 1923.[27] Each year since has witnessed a further lowering in the revenue per ton mile and per passenger mile.[28]

This constant lowering of the weighted average of rates since 1920 must have been due to causes other than desire on the part of the Commission. Its aim was to adjust rates so that they would yield the prescribed return. But for the period from 1920 to 1927 inclusive, there was only one year in which the railroads of the United States as a whole, despite general prosperity and greater efficiency, earned on the value found in *Ex parte 74* brought down to date, the full average return prescribed as fair under

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[26] Railway Age, 1924—Vol. 76.1, p. 726.

[27] Letter of Chairman Hall to Senator E. D. Smith, May 28, 1924, 68 Cong. Rec., Part 10, p. 10275.

[28]

Revenue per—	1921	1922	1923	1924	1925	1926	1927
Ton mile (cts.)	1.294	1.194	1.132	1.132	1.114	1.096	1.095
Passenger mile (cts.)	3.093	3.037	3.026	2.985	2.944	2.941	2.901

Annual Report of the Interstate Commerce Commission for 1928, p. 115. It is impossible to say to what extent this persistent shrinkage has been the result of miscellaneous rate adjustments and to what extent to fluctuations in character of traffic. Statistics of Railways in the United States, I. C. C. 1927, p. X.

§ 15a.[29] The Commission repeatedly refused to permit carriers to make reductions, because the reduction would lower the revenues sought to be provided under § 15a.[30] On the other hand, carriers, although earning less than the fair return prescribed under § 15a, have often voluntarily reduced rates.[31] The lowering of rates was probably due

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[29] The fair return for the first two years was fixed by Congress at 5½ per cent, and the Commission was authorized to add one-half of one per cent for improvements, betterments and equipment. This additional allowance was granted in *Ex parte 74*, 58 I. C. C. 220. For the rest of the period it was prescribed by the Commission at 5¾ per cent. *Reduced Rates, 1922*, 68 I. C. C. 676, 683. The rate of return calculated on *Ex parte 74* value of the railroads as a whole brought down to date, was:

	1921	1922	1923	1924	1925	1926	1927	1928
Per cent.....	3.2	4.0	5.1	4.9	5.5	5.8	5.1	5.5

The return on that basis in the Southern group has in most years exceeded that prescribed as fair. In the Eastern group the return has since 1924 exceeded that prescribed. In the Western groups the prescribed return appears never to have been reached. Compare Bonbright, "Economic Merits of Original Cost and Reproduction Cost," 41 Harvard Law Review 593, 618.

[30] *Trunk Line & Ex-Lake Iron Ore Rates*, 69 I. C. C. 589, 610–611; *Import and Domestic Rates on Vegetable Oils*, 78 I. C. C. 421; *Grain & Grain Products from Kansas and Missouri to Gulf Ports*, 115 I. C. C. 153, 164; *Grain & Grain Products to Eastern Points*, 122 I. C. C. 551, 563–4; *Lake Cargo Coal*, 139 I. C. C. 367, 392–5. See *Rates from Atlantic Seaboard*, 61 I. C. C. 740; *Salt from Louisiana Mines*, 66 I. C. C. 81; *Coal to Kansas City*, 66 I. C. C. 457; *Coal from Wyoming Mines*, 68 I. C. C. 254; *Coal from Southwest*, 73 I. C. C. 536; *Transcontinental Cases of 1922*, 74 I. C. C. 48; *Canned Goods from Pacific Coast*, 132 I. C. C. 520; *Cement in Carloads, etc.*, 140 I. C. C. 579, 582. Compare Henry Wolf Biklé, "Power of the Interstate Commerce Commission to Prescribe Minimum Rates," 36 Harvard Law Rev. 5, 30.

[31] See *Smelter Products from Nevada and Utah*, 61 I. C. C. 374; *Coal from Illinois to Arkansas, Louisiana and Texas*, 68 I. C. C. 1; *Coal from Kentucky, Tennessee and West Virginia*, 68 I. C. C. 29; *Rates from Chicago via Panama Canal*, 68 I. C. C. 74; *Grain from Illinois Points to New Orleans*, 69 I. C. C. 38; *Trunk-Line and Ex-*

in large measure to the influence of competing means of transportation.[32]

Sixth. Since 1914, the railroads have been obliged, to an ever increasing extent, to compete with water lines and with motors. This competition has been fostered by the Government[33] through the Panama Canal Act;[34] through

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Lake Iron Ore Rates, 69 I. C. C. 589; *Sugar Cases of 1922,* 81 I. C. C. 448; *Grain to Texas,* 96 I. C. C. 727; *Pig Iron from Southern Points,* 104 I. C. C. 27; *Grain and Grain Products from Western States,* 104 I. C. C. 272; *Coal to Cincinnati,* 123 I. C. C. 561. The suspension docket for the calendar year 1928 shows that of the cases in which rates proposed by the carrier were permitted to become effective without suspension, after protest, 81 were reductions of existing rates and 93 were increases.

[32] Compare F. G. Dorety, "The Function of Reproduction Cost," 37 Harvard Law Review 173, 194.

[33] Transportation Act, Feb. 28, 1920, c. 91, § 500, 41 Stat. 456, 499: "It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." *Chicago, Rock Island & Pacific Ry. Co.* v. *United States,* 274 U. S. 29, 36. Compare *Transcontinental Cases of 1922,* 74 I. C. C. 48; *United States War Department* v. *Abilene, etc. Ry. Co.,* 77 I. C. C. 317; 92 I. C. C. 528; *Houston Cotton Exchange & Board of Trade* v. *Arcade, etc. Corp.,* 87 I. C. C. 392; 93 I. C. C. 268; *Reduced Commodity Rates to Pacific Coast,* 89 I. C. C. 512; *Southern Class Rate Investigation,* 100 I. C. C. 513; *Commodity Rates to Pacific Coast Terminals,* 107 I. C. C. 421; *Consolidated Southwestern Cases,* 123 I. C. C. 203; *Canned Goods from Pacific Coast,* 132 I. C. C. 520; *Tinplate to Sacramento,* 140 I. C. C. 643; *American Hawaiian S. S. Co.* v. *Erie R. R. Co.,* 152 I. C. C. 703.

[34] The Panama Canal Act, Aug. 24, 1912, c. 390, § 11, 37 Stat. 566, now incorporated in the Interstate Commerce Act as par. 10 of § 5 (see Transportation Act, Feb. 28, 1920, c. 91, § 408, 41 Stat. 482), prohibits any railroad from having any interest "in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad . . does or may compete for traffic." Compare *Application of United States Steel Products Co.,* 57 I. C. C. 513; 77 I. C. C. 685; 151 I. C. C. 577.

the intracoastal waterways acts;[35] through the inland waterways acts;[36] through the development of coastwise

[35] The Cape Cod Canal purchased pursuant to Act of Jan. 21, 1927, c. 47, § 2, 44 Stat. 1015, resulted in the elimination of tolls and an immediate large increase in vessel traffic. "The use of the canal under present conditions will undoubtedly operate to reduce freight rates." Report of Chief Engineers to the Secretary of War, Oct. 2, 1928, p. 76. The Chesapeake and Delaware Canal was acquired and improved pursuant to Act of March 2, 1919, c. 95, § 1, 40 Stat. 1277, and Act of Jan. 21, 1927, c. 47, § 3, 44 Stat. 1016. "The opening of the canal at sea level to navigation within the limits of the dimensions authorized under the project has resulted in increasing the number and size of vessels passing through. New vessels to take advantage of the increased facilities are being constructed. Freight rates have been lowered as a result of the increased competition between carriers. Its effect on rail rates is to hold them at a minimum." Annual Report of Chief of Engineers to the Secretary of War, Oct. 2, 1928, pp. 408, 410. See Proposed Intracoastal Waterway from Boston, Massachusetts to the Rio Grande, Act of March 3, 1909, c. 214, § 13, 35 Stat. 822; Letters of Secretary of War transmitting to Congress letters from the Chief of Engineers on Surveys, House Doc. 391, January 5, 1912, 62 Cong., 2d Sess.; House Doc. 229, September 11, 1913, 63 Cong., 1st Sess.; House Doc. 233, September 11, 1913, 63 Cong., 1st Sess.; House Doc. 610, January 17, 1914, 63 Cong., 2d Sess.; House Doc. 1147, June 3, 1918, 65 Cong., 2d Sess.; House Doc. 238, April 12, 1924, 68 Cong., 1st Sess.; Senate Doc. 179, December 8, 1924, 68 Cong., 2d Sess.; House Doc. 586, December 14, 1926, 69 Cong., 2d Sess.

[36] The river improvements on the Ohio, the Mississippi and the Warrior rivers, and the creation of the government owned Inland Waterways Corporation to operate barge lines has been followed by legislation requiring the railroads to join in through routes and joint rates and providing for differentials. Act of May 29, 1928, c. 891, § 3 (e), 45 Stat. 980. Although barge lines are still limited in their sphere of operation, the through routes with differentials applied for by the Inland Waterways Corporation and ordered by the Commission pursuant to the direction of Congress cover a large part of the United States. *Ex parte 96*, 153 I. C. C. 129, 132. Compare Annual Report Inland Waterways Corporation, 1928,

shipping by means of harbor improvements,[37] and through federal aid in the construction of highways.[38] There has also been increased competition by pipe lines. Competition from other means of transportation has tended to arrest the normal increase in the volume of rail traffic; and as to some traffic it has actually produced a reduction in both the volume and the rates. It has resulted in a general shrinkage in the passenger business; [39] in some regions, in a lessening of the carload freight;[40] and in

[37] For an instance of the effect of harbor improvement in increasing coastwise shipping and thereby reducing rail rates, see Annual Report of the Chief of Engineers (1928) upon Miami, p. 722: "The completion of the 20-foot project has had a pronounced effect on railroad and water-transportation rates." The domestic water-borne commerce on the Atlantic, Gulf, and Pacific Coasts rose from 114,557,241 tons in 1920 to 231,530,937 tons in 1927. The tonnage on the rivers, canals and connecting channels rose from 125,400,000 in 1920 to 219,000,000 in 1927. Annual Report of the Chief of Engineers for 1928, Commercial Statistics, p. 3. On the New York State canals the tonnage increased steadily from 1,159,270 in 1918 to 2,581,892 in 1927. Commerce Year Book, 1928, Vol. 1, p. 617. The tonnage of the shipping occupied in the coastwise and internal trade increased from 6,852,000 tons in 1914 to 9,743,000 tons in 1928. p. 619.

[38] The competition by motor has, in large measure, been stimulated and made possible by the grants by Congress since 1914 of federal aid to highway construction. The highways completed with federal aid to June 30, 1928, aggregate 72,394 miles. The aggregate mileage comprised in what is designated as federal-aid highway systems is 187,753 miles. Report of Chief of Bureau of Public Roads, Sept. 1, 1928, pp. 3, 7.

[39] The passenger miles per mile of road dropped gradually from 199,708 in 1920 to 141,800 in 1927; the passenger revenues from $1,286,613,000 in 1920 to $974,950,000 in 1927. 42 Annual Report I. C. C., Dec. 1, 1928, pp. 115, 117. This shrinkage continued throughout 1928.

[40] For an example of reduction in carload traffic, see note 45.

many, in a reduction of the volume of the less than carload freight.[41]

The influence of water competition on rates is strikingly illustrated by the effect of the Panama Canal on transcontinental freight rates.[42] In order to meet this water competition carriers have repeatedly asked leave to make sweeping reductions.[43] Rates voluntarily established by the rail carriers are lower now, on some articles of traffic, than they were in 1914. On others they are only a little higher.[44] The influence of competition by

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[41] The less-than-carload freight on all the railroads of the United States shrank from 44,338,000 tons in 1923 to 38,440,000 tons in 1927. In the Eastern District (including the Pocahontas region) it shrank from 23,321,000 tons in 1923 to 19,363,000 tons in 1927. Statistics of Railways in the United States, 1927 [I. C. C.], p. XVII. This reduction has continued in 1928.

[42] "The volume of general cargo carried in United States vessels, particularly in United States intercoastal traffic, has been increasing from year to year." Annual Report of Governor of Panama Canal for 1928, p. 12.

"Like all other western lines we feel rather severely the effect of Panama Canal competition." J. S. Pyeatt, president, Denver & Rio Grande Western Ry., Railway Age, 1926—Vol. 80.1, p. 10.

[43] *Class and Commodity Rates for Transshipment via Panama Canal,* 68 I. C. C. 74; *Reduced Rates from New York Piers,* 81 I. C. C. 312, 315; *Reduced Commodity Rates to Pacific Coast,* 89 I. C. C. 512; *Reduced Rates to Pacific Coast Terminals,* 107 I. C. C. 421. Compare *American Hawaiian S. S. Co.* v. *Erie R. R. Co.,* 152 I. C. C. 703, 705, 707.

[44] "Shortly after the opening of the Panama Canal, a rate of $10.90 per ton was established on copper, lead and zinc smelter products from certain far west mines to the eastern refineries for movement by rail to the Pacific Coast and thence by water through the canal. This forced a reduction in all rail rates from the same points to New York, first from $22.50 per ton to $16.50 per ton, and then to $12.50 per ton which is the present rate." *Brass, Bronze and Copper Ingots,* 109 I. C. C. 351, 355. Compare Eastbound Tariffs, San Francisco and Los Angeles to Kansas City and Chicago, Agent Countiss

the inland waterways on the volume of rail traffic is illustrated in the effect which improvement of the Ohio River and its tributaries has had in the Pittsburgh district. The rail tonnage in 1927 was materially less than in 1914, while the water tonnage more than doubled.[45] The influence of barge lines in reducing or holding down rail rates is illustrated by the rail rates in competition with those of the barge lines on the Ohio, the Mississippi and

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I. C. C. 978, July 1, 1914, with Agent Toll, March 25, 1929, I. C. C. 1209; Westbound, Kansas City and Chicago to Portland and Seattle, Agent Countiss I. C. C. 984 with Agent Toll, March 25, 1929, I. C. C. 1211; Agent Toll, I. C. C. 1209 with Agent Countiss, I. C. C. 1065; Agent Toll, I. C. C. 1206 with Agent Countiss, I. C. C. 1084; Agent Toll, I. C. C. 1210 with Agent Countiss, I. C. C. 1077; Agent Toll, I. C. C. 1211 with Agent Countiss, I. C. C. 1068. See Applications of the Southern Pacific-Atlantic S. S. Lines for fourth section relief, Nos. 13638, 13639.

A striking illustration of the effect of Panama Canal competition is furnished by the reduction in proportional rates made by the Illinois Central R. R. Co. to New Orleans, May 31, 1928, on shipments via the Redwood (steamship line) to California in order to place manufacturers in the Chicago District on a parity with those in the Pittsburgh District shipping via the Atlantic seaboard. The domestic rate on iron and steel from Chicago to New Orleans was 55 cents; and the proportional rail and water rate to California had been 39½ cents. It was reduced to 31 cents, leaving the domestic rate unchanged. Tariff I. C. C. No. A–10314.

[45] In 1914, 158,327,451 tons were transported by rail and 17,601,661 by water; in 1927, 152,872,882 by rail and 39,998,562 by water. "The advantages of the utilization of the Ohio and its connecting waterways have been amply demonstrated and the rail carriers should realize that they cannot continue to handle by all rail routes much traffic which can be more economically transported by all water or rail-and-water routes. The interveners express fear that lower rates over a rail-and-water route will jeopardize the present rate structure, but assuming such fear to be well founded, that fact would not justify us in withholding approval of any plan which promises to reduce substantially the cost of necessary transportation." *Construction of Branches by P. L. & W. Co.*, 150 I. C. C. 43, 52, 55.

the Warrior rivers.[46] The widespread effect of competition by motor truck in lowering both the rates and volume of rail traffic is obvious.[47] Not obvious, but indisputable, has been the effect of the potential competition of pipe-

[46] The establishment of barge lines, especially when followed by the establishment of through rail and barge line routes, tends both to reduce rail rates and the volume of rail tonnage. See *Inland Waterways Corporation* v. *Alabama G. S. R. R.*, 151 I. C. C. 126; *Coal and Coke from Western Kentucky*, 151 I. C. C. 543, 549; *Rates on Fertilizer, etc., Within Florida*, 151 I. C. C. 602, 608. Compare Vanderblue, "The Long and Short Haul Clause Since 1910," 36 Harvard Law Review 426, 437. As to the development of the barge lines, see Annual Report of the Inland Waterways Corporation for 1928.

[47] For instances on Boston & Maine R. R., compare authority I. C. C. Nos. A–2535, 2540, 2565, 2597, 2600 with issue I. C. C. Nos. A–2556, 2657, 2600, 2654; M. D. P. U. 1706, 1717, 1719, 1728, 1729, 1730; N. H. P. S. C. 1166. Many illustrations of this are afforded by applications made under § 6 of the Interstate Commerce Act for permission, because of motor competition, to change rates on less than 30 days' notice. In the period from Nov. 23, 1928 to March 19, 1929, six such applications were made by the Boston & Maine Railroad; five by the New York, New Haven & Hartford, and two by the Boston & Albany. In one instance the rate was reduced to less than one-half; in another to just one-half; and in the others by varying percentages. The reductions related, among others, to articles as bulky as crushed stone and lumber, and as heavy as scrap iron and wire rods. Among such applications made by western lines in 1928, are those of the Southern Pacific and Atchison for carload rates on sugar (Nos. 87,723, 87,724) and on dried fruits (86,227); and that of the Southern Pacific for carload rates on iron or steel pipe (No. 90,219).

In a paper delivered before the Mid-West Transportation Conference, R. C. Morse, general superintendent, Pennsylvania R. R., said: "The truck has proved more economical than the box car for the transportation of less than carload freight for short hauls and, under special circumstances, for comparatively long hauls." Railway Review, 1925—Vol. 76, p. 1116.

In an address before the Western Railway Club, T. C. Powell, president, Chicago & Eastern Illinois Ry., said: "The great change, therefore, that has taken place since 1920 has been this growth of automobile traffic, and by this I mean not simply the ownership of

lines shown by reductions in oil rates caused by the threat of competing pipe-lines.[48]

Moreover, rates which are not so high as to prevent commercially the movement of traffic are often required to be lowered because they conflict with some statutory provision. Thus, Congress compels reduction of rates which discriminate unjustly against individuals, localities, articles of traffic or other carriers. Perhaps the most striking instance of the limitation by law of rates which the traffic would bear commercially is furnished by cases under the long and short haul clause. By that clause, a rail carrier is often obliged (unless relieved by order of the Commission) to elect between suffering practically a total loss of existing traffic between competitive points or suffering a loss in existing revenues by reducing rates at both the competitive points and intermediate noncompetitive points. The effect of this limitation upon rates, and hence upon the actual value of railroads, has become very great. Its influence has grown steadily with the growth

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automobiles, but the diversion to the passenger automobile and freight motor truck of a large number of passengers and a large tonnage of freight, respectively, of the character heretofore handled by the steam carriers, and this loss of gross-revenue producing traffic has brought about a reduction in train service on main lines as well as on branch lines, which has a very marked effect upon the number of employees engaged in train service." Railway Review, 1925—Vol. 77, p. 768.

For further comment on the motor bus and motor truck as competitive and auxiliary instruments of transportation, see Railway Age, Vol. 71.1, p. 432; Vol. 75.2, p. 995; Vol. 76.1, p. 319; Vol. 77.1, p. 275; Vol. 78.2, p. 1513; Vol. 79.2, p. 1017; Vol. 80.1, pp. 12, 547, 918; Vol. 80.2, pp. 1401, 1981; Vol. 81.1, pp. 153, 381; Vol. 81.2, p. 801; Vol. 82.2, p. 1651; Vol. 83.1, p. 601; Vol. 83.2, p. 753; Vol. 84.2, pp. 1025, 1315; Vol. 85.1, p. 399; Railway and Locomotive Engineering, Feb., 1928, p. 37; Engineering News-Record, Vol. 96.1, p. 305; Railway Review, Vol. 77, p. 604.

[48] *Petroleum and Petroleum Products from Oklahoma* (I. & S. 3144, April 6, 1929), 153 I. C. C. 483, 486.

of competition by water and motor, with the growth in the size of the individual railroad system, with the growth in the dependence of railroads for their revenues upon long-haul freight traffic and with the growing length of the average haul.[49] It has become so important for rail carriers to hold a share of the long-haul freight traffic at competitive points, that the long and short haul clause, if not relieved from, results in the carriers' giving, in large measure, to the intermediate non-competitive points which otherwise would be subject to monopoly exactions, the full benefit of that lowering of rates required to meet the competition. The many applications for reductions made in petitions for relief from the operation of the long and short haul clause illustrate the influence of rail, as well as of water and motor, competition in thus depressing rates.[50] Congress has by that clause limited values for rate making purposes under § 15a, almost as effectively as by its promotion of competitive means of transportation.

Seventh. In requiring that the value be ascertained for rate making purposes, Congress imposed upon the rate-base as defined in *Smyth* v. *Ames,* still another limitation which is far-reaching in its operation. By declaring in § 15a that the Commission shall, " in the exercise of its

[49] In the period from 1914 to 1927 the average freight haul for the individual railroad increased from 144.17 to 172.11 miles; and the average haul, treating all the railroads as a single system, increased from 255.43 to 314.75 miles. Annual Report of the Interstate Commerce Commission for 1928, p. 114.

[50] See e. g. *Trunk-Line & Ex-Lake Iron Ore Rates,* 69 I. C. C. 589; *Reduced Rates from New York Piers,* 81 I. C. C. 312, 317; *Sugar Cases of 1922,* 81 I. C. C. 448; *Vinegar Rates from Pacific Coast,* 81 I. C. C. 666; *Iron from Southern Points,* 104 I. C. C. 27; *Reduced Rates on Commodities to Pacific Coast Terminals,* 107 I. C. C. 421, 436; *Pacific Coast Fourth Section Applications,* 129 I. C. C. 3, 23. Compare Vanderblue, " The Long and Short Haul Clause Since 1910," 36 Harvard Law Rev. 426, 437.

power to prescribe just and reasonable rates" so adjust them that upon the value a fair return may be earned "under honest, efficient and economical management" Congress made efficiency of the plant an element or test of value.[51] Efficiency and economy imply employment of the right instrument and material as well as their use in the right manner. To use a machine, after a much better and more economical one has become available, is as inefficient as to use two men to operate an efficient machine, when the work could be performed equally well by one, at half the labor cost. Such an instrument of transportation, although originally well conceived and remunerative, should, like machines used in manufacturing, be scrapped when it becomes wasteful.

Independently of any statute, it is now recognized that, when in confiscation cases it is sought to prove actual value by evidence of reproduction cost, the evidence must be directed to the present cost of installing such a plant as would be required to supply the same service. For valuation of public utilities by reproduction cost implies that "the rates permitted should be high enough to allow a reasonable per cent of return on the money that would now be required to construct a plant capable of rendering the desired service"; and does not mean "that the plant should be valued at what would now be needed to

[51] In confiscation cases the term "used and useful" had been commonly employed in making the valuations. The specific provision, requiring efficiency and economy, was doubtless inserted in § 15a because the Commission had theretofore expressed a doubt as to the extent to which it could, in determining the reasonableness of rates, consider the efficiency and economy of the management. Compare *Advances in Rates—Eastern Case*, 20 I. C. C. 243, 278–280. This provision must be read in the light of paragraph (5) of § 20, also added to the Interstate Commerce Act by Transportation Act, 1920, which directed the Commission to prescribe what depreciation charges should be allowed as a part of the operating expenses.

duplicate the plant precisely." [52] Proof of value by evidence of reproduction cost presupposes that a plant like that being valued would then be constructed. To the extent that a railroad employs instruments which are inconsistent with efficiency the plant would not be constructed; and because of the inefficient part, the railroad is obviously not then worth the cost of reconstructing the identical plant. While a part often has some service value, although not efficient according to the existing standard, its use may involve such heavy, unnecessary operating expense as to render it valueless for rate making purposes under § 15a. The Commission when requested to consider evidence of reproduction cost must, therefore, examine the value of every part of the plant, and that of the whole plant, as compared with the value of a modern, efficient plant. Upon such consideration the Commission may conclude that the railroad is so largely obsolete in construction and equipment as to render evidence of the reproduction cost of the identical plant of no probative force whatsoever. The duty so to deal with the evidence seems to flow necessarily from the rejection by the Court of prudent investment as the measure of value and the adoption, instead, of the actual value of the property at the time of the rate hearing as the governing rule of substantive law.

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[52] Harry Gunnison Brown, "Present Costs," p. 6. (Reprinted from Public Utilities Fortnightly, March 7, 1929); F. G. Dorety, "The Function of Reproduction Cost," 37 Harvard Law Rev. 173, *passim;* James C. Bonbright, XL Quarterly Journal of Economics, pp. 295, 317. Compare 42 Proceedings, Am. Soc. of Civil Engineers, 1916, pp. 1719, 1772. Compare *City of Spokane* v. *Northern Pacific Ry. Co.*, 15 I. C. C. 376, 393–4; Goddard, "The Evolution of the Cost of Reproduction as the Rate Base," 41 Harvard Law Rev. 564, 572; Robinson, "Duty of a Public Utility to Serve at Reasonable Rates: The Valuation War," 6 No. Car. Law. Rev. 243, 256; "Railroad Valuation," by Leslie Craven, Railway Age, 1923—Vol. 75.2, pp. 807, 808.

The physical deterioration of a railroad plant through wear and tear may be very small as compared with a plant new, while its functional deterioration may be very large as compared with a modern efficient plant. This lessening of service value may be due to any one of several causes. It may, in the first place, be due to causes wholly external. Freight terminals, originally well conceived and wisely located in the heart of a city, may have become valueless for rate making purposes under § 15a, because through growth of the city the expense of operating therein has become so high, or the inescapable cost of eliminating grade crossings so large, that efficient management requires immediate abandonment of the terminals.[53] And, even if the cost of continuing operation there is not so high as to require abandonment, the property may have for rate-making purposes a value far below its market value.[54] Compare *Minneapolis & St. Louis*

[53] In a paper delivered before the Western Society of Engineers, F. J. Scarr, supervisor motor service, Pennsylvania R. R., said: "We are conducting inefficient terminal operations through inadequate facilities, and by means of antiquated methods. . . . Before the general acceptance of the motor vehicle as a dependable means of transportation, we had only the horse drawn vehicle available for the movement of freight over the highways. The limited effective radius of action, slow speed, and low capacity, of this instrument forced the railroads to place on track freight stations as near the centers of production and consumption as possible, almost regardless of cost or future expansion requirements. This factor, with reckless competition between carriers, influenced the railroads to engage in what approaches retail transportation, by the establishing of innumerable small stations and private sidings. It is my firm conviction that had the motor truck, with its greater radius of action, greater capacity, greater flexibility, and greater endurance, been available, the carriers would have developed terminals better adapted to take advantage of these characteristics." Railway Review, 1926—Vol. 78, p. 790.

[54] "'The time is fast approaching when railroads will stop buying expensive downtown city property for freight houses, and will, by the use of trucks, handle freight from outside and less costly freight

R. R. Co. v. *Minnesota,* 186 U. S. 257, 268; *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 52.

The lessening of the service value of a part of the railroad plant may flow from changes in the volume or character of its traffic. For economy and efficiency are obviously to be determined with reference to the business of the carrier then being done and about to be done.[55] A station warehouse for less-than-carload freight may have become valueless for rate making purposes, because, through motor competition, the railroad had lost substantially all its less-than-carload business at that point. Large reductions in the value of passenger stations and equipment may have resulted from decline in the passenger traffic. Branch lines may lose all their service value so that they should be abandoned because motor transportation has become more efficient. On the other hand, the traffic may have grown so much as to render inefficient a part of a

houses direct to consignees' door.' . . . Where is the economy in hauling freight into terminals situated on the most valuable land in Chicago, and why should this same freight be hauled through Chicago's most congested district for delivery? . . . The delays in switching, due to congestion, are so costly that their elimination, if only in part, would pay very handsome dividends on a very large capital investment." Railway Review, 1926—Vol. 78, p. 403. See, also, Railway Age, Vol. 71.1, p. 21; Vol. 81.2, p. 968; Engineering News-Record, Vol. 96.1, p. 354.

[55] See *Advance in Rates—Eastern Case,* 20 I. C. C. 243, 271: "Assume that a railroad is originally constructed over a mountain, it being more economical to haul the traffic up and down the steep grades than to incur the great outlay which would be required by constructing a tunnel. With the development of traffic the time comes when this mountain must be pierced, and a tunnel is accordingly constructed at a large expenditure. When the tunnel is put into service and the line over the mountain abandoned the cost of the tunnel is added and the cost of the abandoned railroad subtracted from construction cost, so that, as shown by the books, the cost of construction is the same as though the tunnel had been built at the outset."

line originally wisely constructed with heavy grades [56] or curves.[57] In that event economy and efficiency will demand elimination of the grades and curves and may even

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[56] C. A. Morse, chief engineer, Chicago, Rock Island & Pacific Ry., in an address before the Western Society of Engineers in 1926, said: "Comparatively little has been done in the reduction of grades and today a great majority of the trunk line railroads in this country are operating over grade lines that were considered economical 50 or 75 years ago. These railroads were built in the days before steam shovels and other mechanical grading devices had been developed, and when rock was handled with hand drills, black powder and carts. The result was that grading was very expensive and they sought to minimize it. . . . The reduction in the ruling grade and in the rate of curvature will result in both cheaper transportation and a saving in time. . . . During the last twenty-five years, it has been the practice of most railroads to reduce their grades in connection with the construction of a second track, but unfortunately additional main track has been constructed on many of the older roads before the value of the lighter ruling grade was appreciated. The reduction of grade means practically the rebuilding of such lines and the expense of this together with the interruption to traffic while it is being done has prevented much of this from being carried out, for unless the subject is thoroughly investigated, we are apt to consider it as impracticable. . . . Simply maintaining in first class condition a roadway that, as far as grades and alinement are concerned, is of a type such as was constructed a half century ago, is not maintaining a modern railroad. . . . With the great majority of the railroads operating over lines that have the grade line and curvature of a half century ago, the big job is to modernize the roadway." Railway Age, Vol. 80.1, p. 279. See also Engineering News-Record, Vol. 96.1, p. 309; Vol. 96.2, p. 803; Railway Review, Vol. 72, p. 937; Vol. 73, p. 124; Vol 78, p. 187; Railway Age, Vol. 81.1, p. 181.

[57] "Curves, it is a matter of long record, have an important relation to speed of trains and cost of transportation as well as to track maintenance, while very sharp curves have a relation to safety of traffic. It has been found that in a 10-year period, with no rail renewals on 1 deg. curves, the rails were renewed once on 2 deg. curves, once or twice on 3 deg., and twice on 4 degree curves. Furthermore, track displacement by traffic has necessitated double or triple the

require the building of tunnels or a cut-off.[58] In so far as such a condition exists, the railroad would obviously not be reconstructed with the heavy grades and curves;[59] and when considering the reconstruction cost of the whole

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amount of surfacing on the sharper curves, and there is a correspondingly greater wear on driving wheels, so that an engine working regularly over numerous sharp curves has a shorter period of service before it has to be sent to the shop for re-turning the tires. . . ." (Engineering News-Record, 1926—Vol. 96.1, p. 306.) For further comment on improvements in grades and curves, see Railway Age, Vol. 73.1, p. 94; Vol. 75.2, p. 1191; Vol. 78.1, pp. 502, 519; Vol. 79.1, p. 75; Vol. 81.1, p. 551; Vol. 85.1, p. 403; Railway Review, Vol. 77, p. 507; Enginering News-Record, Vol. 94.1, p. 392.

[58] "Tracks, though, are just as important as cars and locomotives in the railroads' program of reducing costs by moving heavier trains faster. The New York Central has just finished spending more than $20,000,000 to get freight trains around Albany and across the Hudson river without having to lower them to the river level and pull them up again. The Illinois Central is spending $16,000,000 for a straighter, flatter and more economical line through Illinois and Kentucky, crossing the Ohio river. The Southern Pacific is spending a similar sum to build its Natron cut-off in Oregon and California to get a better grade over the Siskiyous. The Central of Georgia is spending $5,000,000 to relocate and rebuild its line between Columbus, Ga. and Birmingham. The Central of New Jersey is putting a four-track steel trestle three miles across Newark Bay, a $10,000,000 job. The Louisville & Nashville is spending $5,000,000 or more to raise and move its Gulf Coast line out of the reach of storms. The Southern Ry. is spending a couple of millions to shorten the haul and cut the grades for coal trains moving out of the Appalachian fields to the South Atlantic. These projects represent the kind of improvement that will make it possible in the future to carry on the same line of development that American railroads have followed whenever and wherever they could. Each will pay for itself in reduced transportation costs, and along with hundreds of other improvements will make possible lower rates." Railway Review, 1925—Vol. 77, p. 522.

[59] "If it is reasonable to expect that large amounts of heavy freight will be offered, the question of grades to be adopted is of paramount importance and should be given most careful consideration, and the lightest grades possible should be adopted, even if some increase in

property that part of the line must be given merely scrap value. Compare *Kansas City Southern Ry. Co.* v. *United States,* 231 U. S. 423.

Perhaps the most common cause of the lessening of service value of parts of railroad plants originally well conceived and still in good physical condition is the progress in the art of rail transportation. Science and invention have wrought since June 30, 1914, such extraordinary improvements in the types of automobiles and aeroplanes that no one would contend that the present service value of such machines should be ascertained by enquiring what their original cost was or what their reproduction cost would be. The progress since June 30, 1914, in the art of transportation by railroad has been less spectacular; but the art has been far from stagnant.[60] In railroading, as in other

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distance and considerable increase in cost is caused thereby, because grade and curve resistance govern the tonnage that any locomotive will haul; and as the limit in the size of the locomotive that can be built within clearances of 10 feet wide and 15 feet high has been nearly reached, we must improve our grades to secure lower costs of handling.

"As an illustration of the importance of light grades to increase train loads and thereby reduce cost of movement, we may cite the fact that about three times as much tonnage can be hauled on a grade of two tenths, or 10.6 feet per mile, as on a grade of one per cent, or 52.8 feet per mile, with the same expenditure of energy. On a grade of four-tenth only half as much tonnage can be hauled as on a level with the same power." F. S. Stevens, engineer maintenance of way, Phila. & Reading Ry., Railway Review, 1923—Vol. 72, p. 937.

[60]Alba B. Johnson, president of the Railway Business Association, testifying before the Senate Committee on Interstate Commerce in 1924, said: "The heavier locomotives and cars and the longer trains brought about a new standard of rails, road-bed, bridges and other structures. If it were possible to show on a chart the rise in cost of replacing the railroad as a whole we would still not be telling the whole story, because the increase would represent not only a higher level of wages and prices but a change in the character of the plant. Rails and ballast are heavier, frogs and switches more powerful, bridges stronger. Capacity of track was increased by installation of signal

fields of business, the great rise in the cost of labor and of supplies, and the need of better service, have stimulated not only inventions but also their utilization. Through technological advances instruments of transportation with largely increased efficiency and economy have been developed. The price of lower operating costs is the scrapping of those parts of the plant which progress in the art renders obsolete.[61] The present greatly increased efficiency of the railroads as compared with 1920, their greatly improved credit, and their present prosperity are, in large measure, due to the advances made toward introducing the improved instruments of rail transportation which have become available.[62] Obviously much remains to be done.

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systems. Repairs have been expedited and cheapened by new shop machinery. . . . The 90 pound rail . . . replaces a 60 pound rail. . . . Instead of replacing worn out locomotives with new ones of the same design . . . the railroad orders a type which costs more in original outlay but is expected to earn the difference by the economy with which it does the work. The same principle runs through all the schedules of maintenance of road and equipment and additions and betterments." Railway Age, Vol. 76.2, p. 1039. See, also, Railway Age, Vol. 71.2, p. 1295; Railway Engineering and Maintenance, Vol. 21, p. 274; Railway Review, Vol. 78, p. 601.

[61] "A glance at the operating returns of the railways of this country will show that those roads which have added most liberally to their facilities in recent years are today making the best showings." Railway Age, 1921—Vol. 71.2, p. 1295.

[62] The investment account of the railroads of the United States increased between December 31, 1919 and December 31, 1927, $5,152,751,000—that is about 25 per cent. Nearly all of that sum was expended in improving the road, terminals and shop facilities and in replacing outworn and obsolete equipment. During that period the operating ratio improved greatly. The percentage of operating revenues consumed in the several years by operating expenses was: 1920, 94.38 per cent; 1921, 82.71 per cent; 1922, 79.41 per cent; 1923, 77.83 per cent; 1924, 76.13 per cent; 1925, 74.10 per cent; 1926, 73.15 per cent; 1927, 74.54 per cent. The improvement in the operating ratio (after the 1920 rate increase) was due in large measure to the improvement of the railroad plant. This made possible, among

The extent of this technological progress may be illustrated by the modern locomotive. The development of the superheater, the mechanical stoker, the booster, and other devices, the increase in the size of the boiler, and other radical changes in size, weight, and design have resulted in the production of engines which are recognized by railway experts as having set such an entirely new standard of efficiency in fuel consumption,[63] in tractive power,[64] and in speed [65] as to render wasteful, under many condi-

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other things, a reduction in the number of employees from 2,022,832 in 1920 to 1,735,105 in 1927. The reduction in the operating ratio and in the number of employees has continued in 1928 and 1929. See Monthly Labor Review, Vol. 28, No. 5, p. 215. The number of locomotives on December 31, 1927 was 3,629 less than on December 31, 1919; the number of freight cars 48,089 less. Annual Report of Interstate Commerce Commission for 1928, pp. 111–114.

[63] "There are numerous cases where the unit fuel consumption of locomotives that represented good practice five or six years ago has been reduced almost one-half by locomotives of thoroughly modern design. This saving alone goes far toward paying a return on the additional investment required to produce a thoroughly modern traveling power plant." Railway Age, Vol. 82.1, p. 171.

"As a result of intensive development and improvement, it is not unheard of for a modern locomotive to handle 80 per cent more ton-miles per hour on 50 per cent of the unit fuel consumption formerly considered good locomotive performance." Railway Age, Vol. 84.1, p. 659. See, also, Railway Age, Vol. 72.2, pp. 1295, 1686; Vol. 79.1, p. 256; Vol. 83.1, p. 45.

[64] Ralph Budd, president of the Great Northern Ry., in an address delivered in 1927, said: "It is just beginning to be realized that while in principle the steam locomotive is the same as it was a few years ago, the efficiency of the locomotive, as exemplified by the modern type, has been practically doubled, measured in ton-miles of transportation per unit of fuel consumed." Railway Age, Vol. 83.1, p. 250. See, also, Railway & Locomotive Engineering, Nov., 1927, p. 326; Railway Age, Vol. 78.1, p. 26.

[65] "By producing more ton miles of transportation per hour it reduces the total number of locomotives required; it postpones the time when increased investment in tracks and most other fixed properties to increase capacity will be necessary; it reduces the number of

tions, the use of older locomotives, no matter how good their condition. Statistics as to actual performances of the locomotive of today as compared with that built but a few years ago graphically illustrate this great advance in efficiency.[66]

Its economies are compelling. But important changes in roadway and equipment are conditions of its effective use. Heavier locomotives make greater demands on the road structure which carry them. To obviate large maintenance expenses attendant upon frequent repair and replacement the roadway must be made more durable.[67] To

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employees required; or that would be required in train service; it reduces the number of employees required in signaling and dispatching trains—in fact, there is hardly any form of fixed charges or transportation expenses that is not made less than it otherwise would be by locomotives that produce an increased output of ton miles per locomotive hour." Railway Age, Vol. 81.1, p. 493. See, also, Engineering News-Record, Vol. 98.1, p. 58; Railway Review, Vol. 74, p. 203; Vol. 78, p. 601; Railway Age, Vol. 83.1, p. 240.

[66] See Transactions of American Society of Mechanical Engineers (1921), Vol. 43, p. 334; Railway Age, Vol. 78.1, p. 26; Vol. 81.1, p. 487; Vol. 82.1, p. 928; Vol. 83.1, p. 322; Vol. 84.1, p. 659; Vol. 84.2, p. 1153; Railway and Locomotive Engineering, Feb., 1927, p. 42; Nov., 1927, p. 326; Feb. 1928, p. 41; Railway Mechanical Engineer, July, 1927, p. 405; Railway Review, Vol. 77, p. 521. Compare 15 The Commonwealther, No. 2 (April, 1929), pp. 14, 19.

[67] " There has been a steady development in the track structure in recent years. Rail of 75-lb. and 85-lb. sections have given way to that of 110-lb., 115-lb. and 130-lb. on many divisions; cinder ballast has been replaced by gravel and gravel by stone; stronger joints have been installed and more tie plates, rail anchors and other accessories used. At the same time and in spite of these improvements the impression remains among those most directly in touch with maintenance work that the roads can still afford to go much further in this direction with economy." Railway Engineering and Maintenance, 1926—Vol. 22, p. 174. See, also, Ibid., p. 190.

this end rails of heavier section,[68] and of increased length are adopted.[69] Anti-creepers are freely used to prevent rail movement.[70] Larger ties are selected; and they are treated to prevent deterioration.[71] Ballast is made deeper and heavier; and of gravel or stone rather than of cinders.[72] Bridges are of stronger construction.[73] And to

[68] Rail of 85 lb. section or lighter was the type most commonly used prior to 1914. Railway Age, 1921—Vol. 70.2, p. 998. 68.8 per cent of the 2,806,930 tons of rail rolled in the United States in 1927 was 100 lb. section or heavier. Railway Age, 1928—Vol. 84.2, p. 900. See, also, Railway Age, Vol. 71.1, p. 413; Vol. 78.1, p. 181; Vol. 79.1, p. 393; Railway Review, Vol. 74, p. 101.

[69] "The American Railway Association has announced that new specifications increasing the length of standard rails from 33 to 39 ft. have been approved by that organization. This change will result in a 16 per cent reduction in the number of rail joints and a saving of about one-sixth of the total of bolts, nuts, angle bars and spring washers now required." Engineering News-Record, 1925—Vol. 95.2, p. 816.

[70] "The rail anti-creepers thus saved 26,400 hours of labor on this thirty mile stretch in one year entirely aside from the saving arising from the lessening of damage to rail, fastenings, and equipment caused by wide expansion and uneven line and surface where the rail was permitted to creep. As a result of the test the entire track was securely anchored and the practice inaugurated of anchoring all double track and whatever single track showed a tendency to creep." Railway Engineering and Maintenance, 1923—Vol. 19, p. 114.

[71] See Engineering News-Record, 1925—Vol. 94.2, p. 844; Railway Engineering and Maintenance, 1926—Vol. 22, p. 15.

[72] See Engineering News-Record, 1925—Vol. 94.2, p. 674; Vol. 95.2, p. 958; Railway Age, 1928—Vol. 84.1, p. 3.

[73] In noting that the Chicago & Northwestern Railway is replacing a bridge which, "while still as good as the day it was built," is too light for the heavier loads now being carried, the Railway Age observes, "This is characteristic of many units of railway construction which, if properly maintained, show little or no evidences of wear but must give way just as truly as though they wore out." (1924—Vol. 77.2, p. 918.)

facilitate the movement of traffic, watering stations [74] and automatic signals [75] of improved design are introduced. Moreover, the effective employment of the modern locomotive involves ordinarily the use of larger cars of steel construction, displacing the wooden car of small capacity with which so many of the railroads were equipped in 1914.[76] Engine terminals and carshops built prior to 1914 are, in many cases, inadequate [77] for the efficient and

[74] "More efficient pumping equipment is rapidly replacing antiquated machinery." Railway Engineering and Maintenance, 1926—Vol. 22, p. 132. See, also, Railway Age, 1928—Vol. 84.2, p. 1329.

[75] "The improvement in equipment and in methods of locating signals to meet the requirements of modern train operation, have to a great extent rendered obsolete much of the automatic signaling placed in service 20 years or more ago." Railway Age, 1927—Vol. 83.2, p. 1144.

[76] "An investigation made by one railroad a few years ago disclosed the fact that the retirement of a large number of cars of all-wood construction, and their replacement with new cars of steel or steel underframe construction, would effect a saving in maintenance alone which in five years it was estimated would amount to about 68 per cent of the entire cost of the new equipment. . . . A thorough study of the economics of freight car maintenance and operation today would lead to equally startling conclusions with respect to the 300,000 or 400,000 weak and unsuitable freight cars which are still in service." Railway Age, 1921—Vol. 71.1, p. 52, 53. See, also, Railway Age, Vol. 70.1, p. 490; Vol. 72.2, p. 1515; Vol. 73.2, p. 645; Vol. 74.2, p. 989; Vol. 75.2, p. 1023; Vol. 78.2, p. 1443; Vol. 79.1, p. 186; Vol. 80.1, p. 462; Vol. 80.2, p. 1301; Vol. 82.2, p. 1556; Vol. 85.2, p. 916. Railway Review, Vol. 72, p. 1073; Vol. 77, p. 522; Vol. 78, p. 767.

[77] "The advent of the overhead, electric traveling crane, as well as the modern smoke exhausting devices and other such improvements, have thrown many of the older type buildings into the obsolete class. . . . It is very difficult to add modern facilities to an existing plant which is designed and constructed without the contemplation of such added facilities. . . . It is impossible to install crane runways and other labor saving devices in existing buildings, due to lack of clearance and insufficient strength in the existing structures." Railway Review, 1921—Vol. 68, pp. 449, 450.

"The enlargement of locomotive terminal facilities and the modernization of locomotive terminal equipment is admittedly the most

economical handling, housing and repairing of the modern locomotives and cars, and must be replaced to prevent curtailment of the productive capacity of the rolling-stock by needless idle hours while awaiting service or repair.[78] And the waste incident to the use of shop-tools and machinery long since rendered obsolete by progress in the art must be stopped.[79]

Thus, the efficient post-war railroad plant differs widely even from the efficient one of 1914. That during the recapture period here in question the plants of most of

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needed physical improvement in the railway structure of today . . . there are many railways on which the locomotive terminals have received practically no improvements for more than fifteen years." Railway Review, 1924—Vol. 74, p. 151.

"These are days of rapid improvement in methods, in which many facilities become obsolete long before their normal service life has been reached. This is particularly true of terminal facilities." Railway Age, 1927—Vol. 83.2, p. 966. See, also, Railway Age, Vol. 66.2, p. 994; Vol. 68.2, p. 1702; Vol. 69.2, p. 729; Vol. 71.2, p. 890; Vol. 76.1, pp. 269, 314; Vol. 76.2, p. 1494; Vol. 78.2, p. 1071; Vol. 83.1, p. 249; Railway Review, Vol. 72, pp. 112, 495; Vol. 77, p. 522.

[78] "The real terminal problem, therefore, is that of providing facilities that will enable the railways to effect some reduction in the enormous investment in idle locomotives now held at terminals." Railway Review, 1923—Vol. 72, p. 176. See, also, Railway Review, Vol. 70, p. 344; Railway Age, Vol. 68.2, p. 1745; Vol. 74.2, p. 1354; Vol. 75.2, p. 1141.

[79] "It is said that 'any machine that will run' is good enough for a railroad shop and while most railroad men realize the falsity of this statement, it is seemingly borne out by the large number of obsolete, worn-out machines now in use." Railway Age, 1921—Vol. 71.1, p. 1.

"Without doubt, railroad net earnings are appreciably reduced by the many obsolete and inefficient machines now used in railroad shops and enginehouses." Railway Age, 1923—Vol. 74.1, p. 211.

"The tools to be seen on any trip of inspection through your own shops or those of other roads, are in many cases a generation outgrown." Railway Review, 1924—Vol. 74, p. 733. To the same effect, see Railway Age, Vol. 67.2, p. 1101; Vol. 69.1, p. 90; Vol. 70.1, p. 222; Vol. 72.2, p. 1205; Vol. 74.2, pp. 1082, 1351; Vol .81.2, p. 629; Vol. 83.2, p. 706; Vol. 85.1, p. 599.

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the railroads of the United States built before the War were lacking in improved instruments of transportation made available by recent progress in the art is of common knowledge.[80] That this is true even today of many of the railroads will not be denied.[81] To the extent that there is inefficiency in plant, there was and is functional depreciation, lessening actual value. That this functional depreciation, arising through external changes, through

[80] "Little attention is ordinarily given to obsolescence or the economy of replacement with more modern equipment solely because of the reduced cost of operation with the newer units. In their failure to appreciate this principle the railways trail far behind many of the utilities with the result that they are paying the penalty in high operating costs. . . . The engineering and maintenance of way department is cluttered with equipment that it cannot afford to operate." Railway Engineering and Maintenace, 1926—Vol. 22, p. 2. To the same effect, see Railway Age, Vol. 81.2, p. 621, p. 1091; Railway Review, Vol. 68, p. 784.

"Our railroads were built for the locomotive of the past. They were and are operated in accordance with the locomotive of the past. . . . It remains to do on railroads the things manufacturers have done—to build better locomotives, improve old ones and to operate them according to the new conditions these improvements themselves have created." Railway Age, 1922—Vol. 72.1, p. 178. See, also, Transactions, American Society of Mechanical Engineers (1919), p. 999; Railway Review, Vol. 70, p. 43; Engineering News-Record, Vol. 98.1, p. 58; Railway Age, Vol. 69.2, p. 729; Vol. 76.1, p. 269; Vol. 79.1, pp 256, 505; Vol 81.1, pp. 45, 123, 492; Mechanical Engineering, Vol. 43.1, p. 311; Railway Engineering & Maintenance, Vol. 22, p. 2

[81] In 1920 there were 68,942 locomotives in use on American Railways. (41st Annual Report of the Interstate Commerce Commission, p. 107.) Of these 12,000 were reported to be obsolete by the Railway Age (Vol. 68.1, p. 33). Of the 2,648 locomotives in service on the B. & O., on December 31, 1920, 633 were more than twenty years old. On the Southern, 501 locomotives out of a total of 1,865; on the Erie, 474 out of 1,540; on the Seaboard Air Line, 142 out of 581; on the Lackawanna, 57 out of 757; and on the Pennsylvania, 624 out of a total of 7,599, exceeded that age. In 1926 it was esti-

competitive means of transportation, and through progress in the art of transportation, may, in respect to a particular railroad, have become so large as to more than counterbalance that increase in its actual value which would otherwise flow from the rise in the price level since 1914, seems clear.

It may be urged that the continued use of the inefficient plant[82] and the repairing rather than replacement of its antiquated parts,[83] has been due to lack of capital and

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mated by the editor of the Railway Age that 68 per cent of the locomotives then in use were over ten years old. (Railway Age, Vol. 81.1, p. 493. In 1928 there were about 65,000 locomotives in use. Of these, according to the Railway Age (Vol. 84.2, p. 950): "There are probably between 15,000 and 20,000 locomotives in this country, 20 years old or older, which have practically none of those features of locomotive equipment that are now regarded as the ear-marks of modern motive power."

[82] e. g. Locomotives no longer capable of pulling heavy loads, instead of being scrapped or rebuilt, have frequently been continued in use for branch-line or suburban service; or in switch-yards. It is said that their use in such passenger service has been rendered wasteful by the comparative economies of the modern motor rail-car. See Railway Age, Vol. 72.1, p. 315; Vol. 72.2, p. 1372; Vol. 76.2, p. 975; Vol. 82.1, p. 563; Vol. 83.1, p. 601; Vol. 84.1, p. 753; Railway and Locomotive Engineering, Feb., 1928, p. 37. And "just what measure of economy is effected by retaining locomotives in yard and work train service after their condition has become such that they are no longer capable of performing their assigned duties in road service, is not apparent, to say the least." Railway Review, 1924—Vol. 74, p. 771. The replacement of antiquated power with modern locomotives in its switch-yards by the Seaboard Air Line Ry. is estimated to have effected a savings in operating costs which will pay an annual return of fifty per cent on the investment in the new engines. Railway Age, 1927—Vol. 83.1, p. 45. See, also, Railway Age, Vol. 79.1, p. 209; Railway Review, Vol. 75, p. 396.

[83] "There is too much tendency to patch up and perpetuate an obsolete, inadequate and uneconomical unit of equipment rather than to retire it and purchase new equipment to derive the benefit of the advanced state of the art in building." F. H. Hardin, assistant to the

insufficient revenues.[84] Such an excuse for failing to install the improved plant might have been conclusive if prudent investment had been accepted as the measure of value. But the fact that the management may have been wholly free from blame in continuing to use the inefficient parts obviously does not add to their actual value. The actual value of an existing plant, and the difference between its value and the present cost of constructing a modern efficient plant which will render the service, is precisely the same whether the continued use of the obsolete part was due to lack of capital, or to lack of good judgment, or to somnolence on the part of the management. As was said in *Board of Commissioners* v. *New York Telephone Co.*, 271 U. S. 23, 32: "Customers pay for the service, not for the property used to render it." Only the then service value of the property is of legal significance under the rule of *Smyth* v. *Ames*.

It may also be urged that such functional depreciation of the railroad plant since 1914 is allowed for in the depreciation customarily estimated by the Commission. But this is not true. Functional depreciation prior to June 30, 1914, was included when valuing as of that date

president, New York Central Ry. (Railway Age, 1926—Vol. 81.2, p. 670, 671.) To the same effect, see Transactions, American Society of Mechanical Engineers, 1925—Vol. 47, p. 179; Railway Review, Vol. 78, pp. 195, 271.

[84] Samuel Rea, president of the Pennsylvania Railroad, in an address before the eastern division of the U. S. Chamber of Commerce delivered in 1923, said: "From an engineering viewpoint there are many improvements which could be adopted, or the present use of which could be greatly extended, and which would very materially increase the efficiency and reduce the cost of railroad operation. The initial installations, however, would require the investment of very large sums of money, and it is difficult to see how these sums can be raised. . . ." Railway Review, Vol. 74, p. 262, 263. To the same effect, see statement of R. H. Aishton, president, American Railway Association. Railway Review, 1921—Vol. 68, pp. 783, 784.

the then property of the railroads. But the instructions of the Commission provided that functional depreciation arising after that date should not be considered unless "imminent." And the Commission made clear that it did not intend by the term to include functional depreciation of the character described above arising from external causes, from the competition of new methods of transportation, from the extraordinary urban growth, from the need of new economies arising from the largely increased labor and fuel costs, and from other incidents of the war and post-war developments in industry and transportation. *Texas Midland R. R.*, 75 I. C. C. 1, 47–52, 124–130. Compare, *Depreciation Charges on Steam Railroads,* 118 I. C. C. 295.[85]

If weight is to be given to reproduction cost in making the valuation of any railroad for rate making purposes under § 19a and § 15a, there must be a determination of the functional depreciation of the individual plant as compared with a modern, efficient plant adequate to perform the same service. To make such a determination for any railroad involves a detailed enquiry into the character and condition of all those parts of the plant which may have reduced functional value because of the post-war changes affecting transportation above referred to, and also into the character and the volume of the carrier's business. For the efficient plant means that plant which is economical and efficient for the particular carrier in view of the peculiar requirements and possibilities of its own business. To make such a determination justly, the Commission must have the data on which a competent and vigilant management would insist when required to pass upon the advisability of making capital

[85] e. g. "With respect to account No. 3, 'Grading,' it appears that the retirement of grading is a contingency sufficiently remote in most cases so that it is not practicable to treat it as depreciable property." (118 I. C. C. 295, 362.)

expenditures. And the Commission would be obliged to give them the same careful consideration. The determination of the extent of functional depreciation is thus a very serious task; a task far more serious than that of determining merely physical depreciation.

To make such a determination of functional depreciation annually for each of the railroads of the United States would be a stupendous task, involving perhaps prohibitive expense. To make the necessary decisions promptly would seem impossible, among other reasons, because railroad valuation is but a small part of the many duties of the Commission. On the other hand, to adjust rates so as to render a fair return, and to provide through the recapture provision funds in aid of the weaker railroad, are tasks which Congress deemed urgent; and which must be promptly performed if its purpose is to be achieved. Obviously Congress intended that in making the necessary valuations under § 15a a method should be pursued by which the task which it imposed upon the Commission could be performed. Compare *New England Divisions Case,* 261 U. S. 184, 197. Recognizing this, the Commission construed § 15a as it had paragraph (f) of § 19a. That is, as permitting the Commission to make a basic valuation as of some general date (June 30, 1914 was selected); and, unless good reason to the contrary appeared, to find the value for any year thereafter by adding to or subtracting from the 1914 value the net increases or decreases in the investment in property devoted to transportation service as determined from the carrier's annual returns with due regard to the element of depreciation.[86]

[86] "Upon the completion of the valuation herein provided for the Commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof and shall from time to time, revise and cor-

Eighth. The significance, in connection with current reproduction costs, of the requirement in § 15a that value be ascertained "for rate making purposes" as there defined becomes apparent when the position of railroads, in this respect, is compared with that of most local utilities enjoying a monopoly of a necessary of life. The fundamental question in the *Southwestern Bell* case was one of substantive constitutional law, namely: Is the rate-base on which the Constitution guarantees to a public utility the right to earn a fair return the actual value of the property at the time of the rate hearing or is it the cost or capital prudently invested in the enterprise? The Court decided that the rate-base is the actual value at the time of the rate hearing. That proposition of substantive law the Commission undertook to apply to the facts presented in the case at bar. Recognizing that evidence of increased reconstruction costs is admissible for the purpose of showing an actual value greater than the original cost or the prudent investment, it found in respect to some of the carrier's property that the evidence of enhanced reconstruction cost was persuasive of higher present value. As to the rest of the property, it held that the evidence was neither adequate nor persuasive.

Of both railroads and the local utility it is true, under the rule of substantive law adopted in the *Southwestern Bell* case, that value is the sum on which a fair return can be earned consistently with the laws of trade and legal enactments. But the operative scope upon railroads of the limitations so imposed upon the rates, and

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rect its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Columbia which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session."

Compare Frederick K. Beutel, "Due Process in Valuation of Public Utilities," 13 Minnesota Law Review 409, 426–427.

hence upon values, is much greater than in the case of local utilities.[87] Rail rates are being constantly curbed by the competition of markets and of rival means of transportation. Rail rates are curbed also by the influence of high rates upon the desires of individuals. The public can, to a considerable extent, do without rail service. If the rates are excessive traffic falls off. Thus, when passenger rates are too high travel is either curtailed or people employ other means of transportation. But the service rendered by a local water company in a populous city is practically indispensable to every inhabitant. There can be no substitute for water and to escape taking the service is practically impossible; for an alternative means of supply is rarely available. Even the common business incentive of establishing low prices in order to induce an enlarged volume of sales is absent; since the volume of the business done by a water company will not be appreciably affected by a raising or lowering of the rates, except in so far as water in quantity is used for manufacturing purposes. In other words, the commercial limitation upon rates—what the traffic will bear—is to a large extent absent in the case of such a local monopoly. The city water user must submit to such rates as the utility chooses to impose, unless they are curbed by legislative enactment.

The legal limitations upon rates (so potent in the case of railroads) are, in the main, inoperative in the case of such a water company. Rail rates are sometimes held illegal because the exaction is greater than the value of the service to the shipper. There is in fact no corresponding limitation upon water rates. The charge is so small, as compared with the inconvenience which would be

[87] Compare "Railroad Valuation" by Leslie Craven, counsel, Western Group, [Railroad] Presidents' Conference Committee on Federal Valuation of Railroads, 9 Amer. Bar Assn. Journal, 681, 683, 684.

suffered in doing without the service, that the worth to the water taker could rarely be doubted. The prohibition of discrimination against persons, places, or articles of commerce, which so frequently interferes to prevent railroads from charging higher rates, although the traffic would easily bear them, affords no protection to city water users; and seldom causes a loss of revenue to the water company. There is in respect to the water rates no prohibition comparable to that embodied in the long and short haul clause, which has an important effect in limiting rail rates. Hence, under the rule of substantive law declared in the *Southwestern Bell* case, practically the only limitation imposed upon water rates is the denial to the utility of rates which will yield an excessive return upon the actual value of the property. In applying that rule of substantive law, the then actual cost of reproducing the plant would (assuming it to be efficient) commonly be persuasive evidence of its actual value, as the current cost of reproducing the vessel was held to be in *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S. 146, 156.

It is true that in the *Southwestern Bell* case the Court passed also upon a subsidiary question—the weight and effect of the evidence of reconstruction cost. But the question of adjective law arose upon a record very different from that in the case at bar; and the action of the Commission here is entirely consistent with that decision. In the *Southwestern Bell* case direct testimony as to the then value of the property was introduced. The efficiency of the plant was unquestioned. Witnesses had testified both to the actual cost of constructing identical property at that time; and that the specific property under consideration was worth at least 25% more than the estimate of the state commission. The Court believed those witnesses. Concluding that this direct and uncontradicted evidence had been ignored by the state commission be-

cause of error as to the governing rule of substantive law, this Court set aside the rate order as confiscatory, saying: "We think the proof shows that for the purposes of the present case the valuation should be at least $25,000,000." (262 U. S. 276, 288.)

The action of the Commission in the case at bar was consistent also with *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, and *Bluefield Water Works Co.* v. *Public Service Commission*, 262 U. S. 679. Each of these water companies enjoyed a local monopoly of an indispensable service. In order to provide a substitute, the community would have either to take the utility's property by eminent domain; or, if it was free to do so, build a competing plant. There was practically no commercial limitation upon the earning power of these water companies except the extent of the local market; and practically no legal limitation except the requirement that the rates charged should not be so high as to yield an excessive return upon the actual value of the utility's property. The current cost of constructing then a plant substantially like the utility's (assuming it to be efficient) would be persuasive evidence of its actual value. For upon that issue, concerning a local water monopoly, the enquiry would naturally be: How much would it cost the community to substitute for the private monopoly a publicly owned plant? But evidence of the cost of reconstructing a railroad built before 1914 might, for the reasons stated above, be no indication whatever of its post-war value for rate making purposes under § 15a. And where, as in the case at bar, the probative force of the evidence may be considered free from any question of confiscation, the rule declared in *Ohio Valley Water Co.* v. *Ben Avon*, 253 U. S. 287, which requires in confiscation cases a judicial determination on the weight of the evidence, does not apply.

Ninth. A further question of construction requires consideration. It is suggested that, even if the Commission

is not required to give effect to the higher price level when finding values for rate making purposes under § 15a, it must do so when fixing the amount of the excess income to be recaptured from a particular railroad under paragraphs 6 to 18. The language of the section affords a short answer to that contention. The valuation prescribed in paragraph 4 is declared to be "for the purposes of this section"—that is, for recapture purposes as well as for rate making. And paragraph 6, which provides for the recapture, declares: "The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4)."

The recapture of excess earnings and the establishment of reserves are a part of the process of establishing such rates

". . . that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management . . , earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation." (par. 2.)

The recapture and reserve are the readjustment made necessary:

"Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared

that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States." (par. 5.)

Thus, the direction in the order here challenged to pay or reserve the excess over 6 per cent of the amounts earned from 1920 to 1923 by rates established pursuant to *Ex parte 74, Increased Rates, 1920,* 58 I. C. C. 220, is merely a readjustment of those rates.

Tenth. The question remains whether the Commission, in valuing the structural property acquired before June 30, 1914, abused its discretion by declining to give effect to the evidence of enhanced reconstruction cost.[88] The O'Fallon insists that the Commission, in fact, adopted a mathematical formula; that it declined to determine the present value of the carrier's property in accordance with "the flexible and rational rule of *Smyth* v. *Ames,* under which value is a matter of judgment to be determined by a consideration of all relevant facts and circumstances"; that it erected "an arbitrary standard of its own based on no relevant facts"; that if it had given consideration to all relevant facts and circumstances, including as one its cost of reproduction at current prices, "the value found must have been substantially higher"; and that its primary purpose was to determine the amount of the investment in the carriers' property. In short, the O'Fallon asserts that the Commission refused to find actual value; and instead, found the prudent investment.

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[88] The nature of the order here challenged is described in the report which accompanied it: "At the outset it is to be borne in mind that in no sense can these proceedings properly be treated as lawsuits. No issue is raised between parties. There is no controversy between disputants, each contending for protection of its rights. They are purely administrative proceedings wherein we are following the direction of Congress to create a contingent fund to be used in furtherance of the public interest in railway transportation." *Excess Income of St. Louis and O'Fallon Ry. Co.,* 124 I. C. C. 1, 7.

In support of this assertion, the O'Fallon points to the statement in the report that " the value of the property of railroads for rate-making purposes . . . approaches more nearly the reasonable and necessary investment in the property than the cost of reproducing it at a particular time." (p. 41.) The statement just quoted does not mean that the Commission accepted prudent investment as a measure of value. It means merely that the Commission deemed the estimated original cost a better indication of actual value than the estimated reconstruction cost. While this Court declared in the *Southwestern Bell* case that prudent investment is not to be taken as the measure of value, it has never held that prudent investment may not be accepted as evidence of value, or that a finding of value is necessarily erroneous if it happens to be more nearly coincident with what may be supposed to have been the cost of the property than with its estimated reproduction cost. The single-sum values found by the Commission do not coincide either with the estimated prudent investment or with the estimated reconstruction cost. They are much nearer the estimated original cost of the property than they are to its estimated reproduction cost. But the values found do not conform to any formula.[89]

[89] The O'Fallon has calculated that the single-sum values found by the Commission for the several recapture periods exceed by $32,660.88 the sums of the following amounts: (1) the cost of reproduction less depreciation, as of June 30, 1919, of all property exclusive of lands and working capital at 1914 or pre-war prices; (2) the amount by which the actual cost of the property installed between July 1, 1914, and June 30, 1919, exceeded its cost of reproduction at 1914 prices; (3) the present value of the land; (4) the allowance for working capital; (5) the actual investment in additions and betterments, less retirements, subsequent to June 30, 1919. The calculation is correct; but the assertion that the $32,660.88 (which is about 5% of the aggregate of the other amounts) must have been allowed as overhead is without foundation in the record and is inconsistent with statements in the Commission's report.

The general method pursued by the Commission in reaching its conclusion closely resembles that approved by the Court in *Georgia Ry. & Power Co.* v. *Railroad Commission,* 262 U. S. 625, 629–630. It appeared that the O'Fallon Railroad had been constructed long prior to June 30, 1914. The Commission had before it "the cost of reproduction new of the structural portion of this property estimated on the basis of our 1914 unit prices, coupled with the knowledge that costs of reproduction so arrived at were not greatly different from the original costs." As bearing upon the value of those parts of the Railroad's property which were added or replaced later the Commission had the actual cost. As bearing on the then value of the railroad land it had current values of adjacent lands. It had evidence concerning the railroad and the character and volume of its traffic, the working capital, revenues and expenses. It had evidence of increased price levels after 1914 and estimates of current reproduction costs during the recapture periods.

The carrier insisted that physically the property had appreciated more than it had depreciated; and urged the Commission to take as the basic measure of value the "cost of reproduction new at current prices to the exclusion of everything else, or at least of everything that might tend to a lower value." (124 I. C. C. 28.) This the Commission declined to do. It gave full effect to increased current market values in determining the value of the land. It gave to the additions and betterments made after June 30, 1914, a value approximating their cost less physical depreciation.[90] But, in respect to structural

[90] "The method which we therefore find logical and proper for determining the value in the subsequent recapture periods is to add to or subtract from the 1919 value the net increases or decreases in the investment in property devoted to transportation service as determined from the carrier's returns to valuation order No. 3, with due regard to the element of depreciation." 124 I. C. C. 3, *passim,* particularly pp. 37, 42.

property and equipment acquired before June 30, 1914, it declined to give weight to the evidence introduced to show current reproduction costs greater than those of 1914. It concluded, despite the estimates of higher reconstruction costs, that, except for the additions, the actual value of this part of the O'Fallon Railroad had not increased; and it found the single sum value for rate making purposes in 1920 to be $856,065; in 1921, $875,360; in 1922, $978,874; in 1923, $978,246.

The Commission recognized, as stated in *Minnesota Rate Cases,* 230 U. S. 352, 434, that the determination of value is "not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts." *Georgia Ry. & Power Co.* v. *Railroad Commission,* 262 U. S. 625, 630. It states that "it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the carrier" as well as the evidence otherwise introduced; and that "from this accumulation of information we have formed our judgments as to the fair basic single-sum values, not by the use of any formula but after consideration of all relevant facts." The report makes clear that its finding was the result of an exercise of judgment upon all the evidence; that the Commission accorded to the evidence of reconstruction cost all the probative force to which it deemed that evidence entitled on the issue of actual value; and that it considered, as bearing upon value, not only the probable cost and the estimated reproduction cost, but also "descriptions of the carrier, of its traffic, of the territory in which it operates, its history, and summaries of the results of its operation." (p. 25.)

The difficulties by which the Commission was confronted when requested to apply the evidence of reproduction cost can hardly be exaggerated. In the first place, the evidence was of such a character that it did

not satisfactorily establish what would have been the current cost of reproduction during the recapture periods.[91] During the years here in question there was practically no construction of new lines.[92] Thus, the current cost of reproduction for those years had to be obtained by using index figures as the basis for a guess as to what it would cost to build then the identical railroad. To give

[91] As to the evidence the Commission said: "The use of cost of reproduction is by no means free from practical difficulties. For example, the record here shows that there was a dearth of reliable data from which an accurate estimate of such cost could be made for the period 1920 to 1923. In proof of this assertion reference need only be made to the sources of the data relied upon by the witnesses both for the bureau and for the carriers. Their estimates for those years were founded in large part upon manufacturers' records and price statistics appearing in various publications, and to a lesser extent upon cost of construction actually incurred by railroads in that period. There was, in fact, very little new railroad construction in those years.

"Synthetic estimates of cost of reproduction based upon statistics showing price and wage changes do not make allowance for improved methods of assembly and construction. As will hereinafter be more fully indicated, we found in *Texas Midland Railroad, supra,* [75 I. C. C. 1] at page 140, that the increase in the cost of labor and materials between 1900 and 1914 was largely offset by improvement in the art of construction. How far there may have been a similar offset, so far as costs in the period from 1920-1923 are concerned, is not disclosed of record." (p. 29.)

And later (p. 41): ". . . even if the cost of reproduction new in 1920 were to be regarded as a controlling element there is not in the present record evidence showing what it might have cost to reproduce the property of the O'Fallon at that time. The only evidence in this respect is that of the relation of general prices in 1914 and in 1920 and the other recapture years."

[92] Compare *United States* v. *Boston, Cape Cod & New York Canal Co.,* 271 Fed. 877, 889, where the Court said that the jury "should not consider the evidence of reconstruction cost upon the question of value, unless they were satisfied that a reasonably prudent man would purchase or undertake the construction of the property at such a figure."

to such figures effect as proving what it would then have cost to reproduce the O'Fallon Railroad, it must be assumed that there had not been introduced since June 30, 1914, new cost-saving methods of construction which would overcome, in whole or in part, the effect of the higher price level upon the cost of reproducing the identical property. This, in view of its experience, the Commission properly declined to do.[93] In the second place there was a lack of evidence to show to what extent, if any, higher reconstruction cost, in the several recapture periods, implied a value higher than that theretofore prevailing.[94] The Commission believed that it could act only on proof; that it was not required or permitted to base findings on conjecture; and that to assign, under the circumstances, any weight to the evidence of reconstruction cost would be mere conjecture.

Moreover, the Commission had, through its valuation department, special knowledge of the property of this carrier. It had acquired necessarily in the performance of its many duties the general knowledge, already referred to,

[93] "Costs of railroad building, owing to improvements in methods and economies thereby effected, did not vary greatly during the period of 20 years preceding 1914, although the prices of labor and material fluctuated. There is no testimony here as to how much it cost to build any railroad or any substantial part of one in any recapture periods, and for that reason it is impossible to make a comparison of costs in the two periods. It is not safe to assume, as the O'Fallon has assumed, that costs of building railroads have varied in recent years in direct ratio to the variation in costs of commodities in general use, or in the costs of materials or labor generally. The fallacy of basing reproduction cost upon price curves or ratios is clearly indicated by the tabulations introduced by the carrier." (p. 41.)

[94] The Commission says (p. 40): "Weighing the figures previously mentioned in the light of these considerations and the entire record, and viewing the carrier as a common carrier in successful operation and with an established business, we conclude that the value for rate-making purposes of the entire common carrier property of the O'Fallon on June 30, 1919, was $850,000."

concerning changes in transportation conditions and of the advances in the art; and it knew how great was their effect upon the actual values of railroad property. The value of the O'Fallon Railway not having been finally ascertained under § 19a, it was obliged by paragraph 4 to utilize "the results of its investigation under section 19a of this Act in so far as deemed by it available." The evidence introduced in the recapture proceedings showed, among other things, that of the five locomotives in the O'Fallon's service, December 31, 1920, one had been built as early as 1874, and that their average age was 20.8 years; also that the aggregate outlays for additions and betterments in the railroad, less small retirements, had in eleven years been only $98,148.25. The O'Fallon did not introduce any evidence bearing upon functional depreciation of the property. The Commission may reasonably have concluded that, even if there had been introduced persuasive evidence that the cost, during the recapture periods, of reproducing new the identical plant approximated the rise in the general price level, still the actual value of the O'Fallon Railway, as it existed June 30, 1914, had not increased, because the functional depreciation plus the physical depreciation since that date counterbalanced fully what otherwise might have been the higher value of the plant.

The O'Fallon urged that its large net earnings during the recapture periods and earlier fully established a higher value, independently of the evidence of reproduction cost. This contention ignores the peculiar character of the property. The Railroad, which is owned by the Adolphus Busch estate and family and lies wholly in Illinois, operates about 9 miles of main line from two coal mines also owned by the Busch estate and family, to the tracks of the Terminal Company in East St. Louis. There are 12 miles of yardage tracks, located largely at the Busch mines. While the Railroad is legally a common carrier, it is actually

an industrial railroad. Ninety-nine per cent of its revenues are derived directly from the carriage of coal; and of the remaining one per cent, about half appears to come from a payment of $300 a month made by the Busch coal company for carrying its miners to and from its mines. Besides the coal from the Busch mines there is a substantial, but diminishing amount carried under a long time contract, from two mines located on an electric road, the East St. Louis and Suburban Railway, which crosses the O'Fallon. This coal it carries from the junction to East St. Louis. See *St. Louis & O'Fallon Ry. Co.* v. *East St. Louis & Suburban Ry. Co.*, 81 I. C. C. 538. Obviously the value of this railroad property is wholly dependent upon the operation of the mines.

How long the four mines will continue to be operated was and still is entirely uncertain. Their product is subject to the competition of 221 other bituminous coal mines in Illinois. These, which are all located on other railroads, enjoy low rates to St. Louis. See *Perry Coal Co.* v. *Alton & Southern R. R.*, 5 Illinois Commerce Commission 461. The vicissitudes of coal mining, the diminishing use of coal since the war because of increased fuel efficiency, the competition of oil as fuel, and the growing use of hydro-electric power are matters of common knowledge; as are the diminishing operations during recent years of the Illinois coal mines as compared with the mines in non-union territory.[95] Moreover, the decline in the volume of traffic, the reduction in coal rates made by *Reduced Rates, 1922,* 68 I. C. C. 676, and the growing expenses of the carrier due to increased payroll, were put in evidence by it. In view of these facts, the Commission was clearly justified in refusing to find that the Railroad had a higher value than in 1914, although the net earning

[95] See Geological Survey: "Coal in 1923," pp. 528–535; Bureau of Mines: "Coal in 1924," p. 460; "Coal in 1925," pp. 394–398; "Coal in 1926," pp. 420–431, 443–461.

as reported showed a return for the earlier period averaging 7½ per cent upon the amount claimed as reproduction cost.

This Court has no concern with the correctness of the Commission's reasoning on the evidence in making its findings of fact, since it applied the rules of substantive law prescribed by Congress and reached its findings of actual value by the exercise of its judgment upon all the evidence, including enhanced construction costs. *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 665–666; *Assigned Car Cases,* 274 U. S. 564, 580. We must bear in mind that here we are not dealing with a question of confiscation; that we are dealing, as was pointed out in *Smyth* v. *Ames,* 169 U. S. 466, 527, with a legislative question which can "be more easily determined by a commission composed of persons whose special skill, observation and experience qualifies them to so handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people."

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 and add a word only by way of emphasis of those aspects of the case which appear to me sufficient, apart from all other considerations, to sustain the finding of the Commission.

The report of the Interstate Commerce Commission is rejected and its order set aside on the sole ground that in a recapture proceeding under § 15 (a) of the Interstate Commerce Act, it has failed to consider present reproduction cost or value of appellant's property and so to "give

due consideration to all the elements of value recognized by the law of the land for rate making purposes." No constitutional question is involved.

The Commission was called upon to value a railroad, with less than nine miles of main line track, which had been constructed prior to 1900. Much of its equipment was purchased before 1908, a considerable part being second hand. Its traffic was very largely dependent on the output of a few coal mines which it served.

In performing its task the Commission had before it the cost of reproduction new of appellant's structural property, estimated on the basis of 1914 unit prices, "with the knowledge that the costs of reproduction so arrived at were not greatly different from the original costs." It had evidence of the actual cost of later additions and replacements, of the physical condition of the railroad and equipment, of the character, volume and sources of its traffic, of its working capital and revenues and expenses. It possessed, through its valuation department, special knowledge of the property of this carrier. Through its own experience it had the benefit of an expert knowledge of all the factors affecting value of railway property growing out of changes in methods of transportation, of improvement in transportation appliances and the consequent obsolescence of existing equipment, of improvement in methods of railroad construction and consequent reductions in cost. Although it had estimates of present construction costs in the form of index figures based on the comparative general price levels of labor and materials for 1914 and each of the recapture years, which it considered and discussed in its report, there was no evidence before it of the actual present cost of construction of this or any other railroad or any affirmative showing that, if appellant's road was to be built and equipped anew, competent railroad engineers would deem the present structure and equipment suitable for or adapt-

able to the economical and efficient management contemplated by the statute.

After stating that it had before it the evidence above outlined, including that of reproduction cost, and such other matters as the carrier desired to bring to its attention, the Commission added, "From this accumulated information we have formed our judgment as to the fair basic single sum values, not by the use of any formula, but after consideration of all relevant facts." That the Commission gave consideration to present reproduction costs appears not only from its own statement, but from the fact that it gave full effect to increased current market values in determining the value of land and to additions and betterments since June 30, 1914, taken at their cost less depreciation. In the light of those considerations which affect the present value of appellant's structural property which Mr. Justice Brandeis has mentioned, I cannot say that the Commission did not have before it the requisite data for forming a trustworthy judgment of the value of appellant's road or that it failed to give to proof of reproduction cost all the weight to which it was entitled on its merits. Had the Commission not turned aside to point out in its report the economic fallacies of the use of reproduction cost as a standard of value for rate making purposes, which it nevertheless considered and to some extent applied, I suppose it would not have occurred to anyone to question the validity of its order.

I cannot avoid the conclusion that in substance the objection, now upheld, to the order of the Commission is not that it failed to consider or give appropriate weight to evidence of present reproduction cost of appellant's road, but that it attached less weight to present construction costs than to other factors before it affecting adversely the present value of the structural property. That this was the real nature of the objection voiced by the dissenting Commissioners seems to me apparent from their opin-

ion. They seem to assume that as a result of *Southwestern Tel. Co.* v. *Public Service Comm.*, 262 U. S. 276, and other cases in this Court, the Commission as a matter of law may never, under any circumstances, find that the value of the structural part of a railroad does not exceed its fair value of an earlier date, if the Commission has before it evidence of later increased construction costs. They say "under the law of the land," in valuing a railroad under § 15a "we must accord weight in the legal sense to the greatly enhanced cost of material, labor and supplies" during the recapture periods. Weight in the legal sense is evidently taken to be not that accorded by an informed judgment but imposed by some positive rule of law.

Without discussion of the evidence and other data which received the consideration of the Commission, the opinion of this Court seems to proceed on the broad assumption that the evidence relied on, mere synthetic estimates of costs of reproduction, must so certainly and necessarily outweigh all other considerations affecting values as to require the order of the Commission to be set aside. In effect the Commission is required to give to such index figures an evidential value to which it points out they are not entitled when applied to railroad properties in general or to this one in particular, and this, so far as appears, without investigation of the soundness of the reasons of the Commission for rejecting them.

This Court has said that present reproduction costs must be considered in ascertaining value for rate making purposes. But it has not said that such evidence, when fairly considered, may not be outweighed by other considerations affecting value, or that any evidence of present reproduction costs, when compared with all the other factors affecting value, must be given a weight to which it is not entitled in the judgment of the tribunal "informed by experience" and "appointed by law" to deal with the

very problem now presented. *Illinois Central, &c. R. R.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454. But if "weight in the legal sense" must be given to evidence of present construction costs, by the judgment now given we do not lay down any legal rule which will inform the Commission how much weight, short of its full effect, to the exclusion of all other considerations, is to be given to the evidence of synthetic costs of construction in valuing a railroad property. If full effect were to be given to it in all cases then, as the Commission points out in its report, the railroads of the country, valued by the Commission in 1920 at nineteen billion dollars, would have had in that year a reproduction value of forty billion dollars and we would arrive at the economic paradox that the value of the railroads may be far in excess of any amount on which they could earn a return. If less than full effect may be given, it is difficult for me to see how, without departure from established principles, the Commission could be asked to do more than it has already done—to weigh the evidence guided by all the proper considerations—or how, if there is evidence upon which its findings may rest, we can substitute our judgment for that of the Commission. Such, I believe, is the "due consideration" which the statute requires of "all the elements of value recognized by the law of the land for rate making purposes."

As I cannot say *a priori* that increased construction costs may not be more than offset by other elements affecting adversely the present value of appellant's property, and as there was evidence before the Commission to support its findings, I can only conclude that the judgment below should be affirmed. In any case, in view of the statement of the Commission that it considered all relevant facts, including the elements of value brought to its attention by the carrier, I should not have supposed that we could rightly set aside the present order without some

consideration of the probative value of the evidence of present reproduction costs which the Commission discussed at length in its report.

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

UNITED STATES *v.* CALIFORNIA COÖPERATIVE CANNERIES.

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

No. 375. Argued April 16, 1929.—Decided May 20, 1929.

1. Judicial notice is taken of proceedings in the trial court shown by the record of the case in this court at an earlier stage. P. 555.
2. Under the Expediting Act of Feb. 11, 1903, in suits in equity under the Anti-Trust Act "in which the United States is complainant," appeal must be direct to this Court from the final decree of the trial court. P. 558.
3. The Court of Appeals of the District of Columbia had no jurisdiction over an appeal by a private person from an order of the Supreme Court of the District refusing leave to intervene in a suit brought by the United States under the Anti-Trust Act. P. 559.

299 F. 908, reversed.

CERTIORARI, 278 U. S. 592, to review an order of the Court of Appeals of the District of Columbia refusing to set aside its earlier one, which reversed an order of the Supreme Court of the District denying a petition to intervene in a suit under the Anti-Trust Act. See *Swift & Co.* v. *United States,* 276 U. S. 311.

Mr. Alfred A. Wheat, with whom *Solicitor General Mitchell, Assistant to the Attorney General Donovan,* and *Mr. H. B. Teegarden,* Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. Nelson T. Hartson, with whom *Mr. Frank J. Hogan* was on the brief, for respondent.

The appeal was within the jurisdiction of the Court of Appeals. Sec. 226, Code of Law for the District of Columbia; *Gilbert* v. *Endowment Ass'n,* 10 App. D. C. 316; s. c., 15 App. D. C. 40.

The appeal was not from a final decree in a suit in which the United States was complainant, but from an order denying leave to a third party to intervene in a suit in which the United States was complainant.

For the purpose of the appeal, the order was sufficiently final as to the Canneries to sustain the appeal to the Court of Appeals under § 226 of the Code, but not to sustain a direct appeal to this Court under the Expediting Act. *Voorhees* v. *Indianapolis Car Co.,* 140 Ind. 220. Distinguishing *Stich* v. *Dickinson,* 38 Cal. 608; *People* v. *Pfeiffer,* 59 Cal. 89; *Henry* v. *Travelers Ins. Co.,* 16 Colo. 179; and *Harmon* v. *Bashydt,* 20 Neb. 625.

The respondent was not a party to the anti-trust suit wherein the United States was complainant and could not appeal therein. *Voorhees* v. *Indianapolis Car Co., supra; Bayard* v. *Lombard,* 9 How. 530; *Indiana Southern R. Co.* v. *Liverpool Ins. Co.,* 109 U. S. 168; *Ex parte Cockcroft,* 104 U. S. 578; *In re Leaf Tobacco,* 222 U. S. 578.

The final decree appealable to this Court under the Expediting Act must dispose of the merits of the case wherein the United States is complainant. *Arnold* v. *United States,* 263 U. S. 427; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comm'n,* 215 U. S. 216; *Rudolph* v. *Potomac Electric Co.,* 24 F. (2d) 882; *Keatley* v. *Furey,* 226 U. S. 399; *Continental Ins. Co.* v. *United States,* 259 U. S. 156; *In re Leaf Tobacco,* 222 U. S. 578; *Swift & Co.* v. *United States,* 276 U. S. 311.

Mr. Frank K. Nebeker, by special leave of Court, filed the brief of *Messrs. Wm. C. Breed, Sumner Ford,* and *Edward A. Craighill, Jr.,* as *amici curiae,* on behalf of the National Wholesale Grocers' Association of the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This case is a sequel to *Swift & Co.* v. *United States,* 276 U. S. 311, decided March 19, 1928. It is here by a writ of certiorari for the determination of a question which arose upon the going down of the mandate in the *Swift* case.

The suit was commenced by the Government in the Supreme Court of the District of Columbia on February 27, 1920, against the leading packers to prevent a long feared monopoly in meat and other food products. On that day a consent decree was entered. Nearly five years later, two of the defendants, Swift & Co. and Armour & Co., filed in the cause motions to vacate that decree. From the denial of those motions appeals were taken to the Court of Appeals for the District. That court certified questions to us. We ordered the entire record sent here; and then held that, because the Expediting Act of February 11, 1903, c. 544, § 2, 32 Stat. 823, provides for a direct appeal to this Court in suits in equity brought by the United States under the Anti-Trust Act, the Court of Appeals was without jurisdiction. We also held that the Supreme Court of the District had jurisdiction of the subject matter and of the parties; and that the consent decree entered by it was in all respects valid and enforceable. Its order denying the motions to vacate the consent decree was, therefore, affirmed.

An obstacle to the enforcement of the consent decree remains. An order of the Supreme Court of the District, entered May 1, 1925, suspends the operation of the consent decree as a whole "until further order of the court to be made, if at all, after a full hearing on the merits according to the usual course of chancery proceedings." That order (as we know judicially from our own records, *Aspen Mining & Smelting Co.* v. *Billings,* 150 U. S. 31, 38) was made upon motion of the California Coöperative

Canneries, which, long after the entry of the consent decree was allowed to intervene under the following circumstances.

On April 29, 1922, the Canneries made a motion for leave to file an intervening petition. The petition accompanying the motion alleged that the consent decree interferes with the performance by Armour & Co. of a contract theretofore made with it, by which Armour agreed to buy large quantities of California canned fruit. The petition charged that the decree is void because the Supreme Court of the District lacked jurisdiction; and it prayed that the decree be vacated. The Supreme Court denied leave to intervene. The Canneries appealed to the Court of Appeals. That court, so far as appears, did not consider the question whether, in view of the Expediting Act, it had jurisdiction on appeal. It did not refer to the decisions which hold that an order denying leave to intervene is not appealable, *In re Cutting,* 94 U. S. 15; *Credits Commutation Co.* v. *United States,* 177 U. S. 311; *Ex parte Leaf Tobacco Board of Trade,* 222 U. S. 578, 581; *In re Engelhard,* 231 U. S. 646; *City of New York* v. *Consolidated Gas Co.,* 253 U. S. 219; *New York* v. *New York Telephone Co.,* 261 U. S. 312, except where he who seeks to intervene has a direct and immediate interest in a *res* which is the subject of the suit, compare *French* v. *Gapen,* 105 U. S. 509, 524–526; *Smith* v. *Gale,* 144 U. S. 509; *Leary* v. *United States,* 224 U. S. 567; *Swift* v. *Black Panther Oil & Gas Co.,* 244 Fed. 20, 30. Nor did it refer to the settled rule of practice that intervention will not be allowed for the purpose of impeaching a decree already made.[1] On June 2, 1924, it reversed the order of the

[1] See *Forbes* v. *Railroad,* Fed. Cas. No. 4,926; *Coffin* v. *Chattanooga Water & Power Co.,* 44 Fed. 533; *Lombard Investment Co.* v. *Seaboard Mfg. Co.,* 74 Fed. 325, 327; *Land Title & Trust Co.* v. *Asphalt Co. of America,* 114 Fed. 484; *State Trust Co.* v. *Kansas City, etc. Co.,* 120 Fed. 398, 407–408. This rule of practice is embodied in

Supreme Court; directed that leave to intervene be granted; and ordered "that such further proceedings thereupon be had as are necessary to determine the issue raised." *California Coöperative Canneries* v. *United States,* 299 Fed. 908. No such proceedings were ever taken.

So far as appears, the Supreme Court of the District has not been requested by the Government since our decision in the *Swift* case, to rescind the order of suspension. Instead the Government, upon the coming down of our mandate, moved in the Court of Appeals that its judgment of June 2, 1924, directing that the Canneries have leave to intervene and ordering further proceedings, be vacated. That motion the Court of Appeals denied without either an opinion or a statement of any reason therefor. This writ of certiorari was then granted to review its refusal. 278 U. S. 592. In support of the refusal, the Canneries contends that the Court of Appeals had jurisdiction of the appeal from the order denying leave to intervene. It argues that the appeal was not within the purview of § 2 of the Expediting Act,[2] because it was not " an appeal from the final decree "; because the Canneries was not at the

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Equity Rule 37. See *Hutchinson* v. *Philadelphia & G. S. S. Co.,* 216 Fed. 795; *Hopkins* v. *Lancaster,* 254 Fed. 190; *Cauffiel* v. *Lawrence,* 256 Fed. 714; *King* v. *Barr,* 262 Fed. 56; *Mueller* v. *Adler,* 292 Fed. 138; *In re Veach,* 4 F. (2d) 334; *Union Trust Co.* v. *Jones,* 16 F. (2d) 236; *Board of Drainage Com'rs.* v. *Lafayette Bank,* 27 F. (2d) 286. Compare *Farmers' Loan & Trust Co.* v. *Kansas City R. R.,* 53 Fed. 182, 186; *United States* v. *Northern Securities Co.,* 128 Fed. 808; *Horn* v. *Pere Marquette R. R.,* 151 Fed. 626, 634; *United States* v. *McGee,* 171 Fed. 209; *Jennings* v. *Smith,* 242 Fed. 561, 564; *Adler* v. *Seaman,* 266 Fed. 828.

[2] Section 2. " That in every suit in equity pending or hereafter brought in any circuit [district] court of the United States under . . [the Anti-Trust Act], wherein the United States is complainant, . . an appeal from the final decree of the circuit [district] court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof. . . ."

time of its appeal a party to a suit in which the United States was the "complainant"; and because, under § 226 of the District of Columbia Code, the Court of Appeals has, in its discretion, jurisdiction of an appeal from interlocutory orders. The contention is unsound.

Congress sought by the Expediting Act to ensure speedy disposition of suits in equity brought by the United States under the Anti-Trust Act. Before the passage of the Expediting Act the opportunities for delay were many. From a final decree in the trial court under the Anti-Trust Act an appeal lay to the Circuit Court of Appeals; and six months were allowed for taking the appeal. From the judgment of the Court of Appeals an appeal lay to this Court; and one year was allowed for taking that appeal. Act of March 3, 1891, c. 517, §§ 6, 11, 26 Stat. 826, 828, 829. See *United States* v. *E. C. Knight Co.*, 60 Fed. 306; 60 Fed. 934; 156 U. S. 1; *United States* v. *Trans-Missouri Freight Association*, 53 Fed. 440; 58 Fed. 58; 166 U. S. 290. Moreover, there might be an appeal to the Circuit Court of Appeals from a decree granting or denying an interlocutory injunction, Act of June 6, 1900, c. 803, 31 Stat. 660. These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act "in which the United States is complainant," the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins* v. *Miller*, 252 U. S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree. The time for taking the appeal from the final decree was shortened to sixty days.

For the enforcement of the Anti-Trust Act within the District of Columbia, its Supreme Court has jurisdiction

corresponding to that which is exercised by the federal district courts in the several districts; and the appellate jurisdiction of the Court of Appeals of the District corresponds to that of the several Circuit Courts of Appeals. Compare *Federal Trade Commission* v. *Klesner,* 274 U. S. 145. In suits in equity brought by the United States under the Anti-Trust Act, an appeal by one who was permitted to intervene, like an appeal by one of the original parties, must be taken direct to this Court. *Continental Insurance Co.* v. *United States,* 259 U. S. 156. Compare *Buckeye Co.* v. *Hocking Valley Ry. Co.,* 269 U. S. 42, 48. The purpose of Congress to expedite such suits would obviously be defeated if in the District of Columbia an appeal lay to the Court of Appeals from a denial of a motion for leave to intervene. Compare *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 38–39. Even under the Act of 1891, c. 517, in cases where the appeal was taken direct to this Court from the final decree in the trial court, every appeal thereafter taken in the cause was necessarily also to this Court. *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.,* 249 U. S. 134, 140–142; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Hasty,* 255 U. S. 252, 254. Compare *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McKnight,* 244 U. S. 368.

The order of the Supreme Court of the District suspending the enforcement of the consent decree was made pursuant to the judgment of the Court of Appeals of June 2, 1924. When our opinion in the *Swift* case settled that by reason of the Expediting Act the Court of Appeals was without jurisdiction of an appeal in a suit in equity under the Anti-Trust Act in which the United States is the complainant and that the consent decree is valid, all obstacles to the enforcement of the consent decree should have been promptly removed. In refusing to vacate its

judgment and mandate the Court of Appeals departed from the limits of admissible discretion.

Reversed.

MR. JUSTICE SUTHERLAND and MR. JUSTICE STONE took no part in the consideration or decision of this case.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* ALABAMA PUBLIC SERVICE COMMISSION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 568. Argued April 24, 25, 1929.—Decided May 20, 1929.

Where a carrier, having discontinued some of its interstate trains without first applying to the state commission, under Ala. Code (1923) § 9713, for permission to abandon the intrastate service which they had furnished, applied to the federal court for an injunction against infliction of heavy penalties prescribed by the statute, claiming that to deny the right to discontinue without such permission would violate the commerce clause of the Constitution and that to require reinstatement of the service without prior hearing would violate due process; and where the admitted facts made it clear that no constitutional right would have been impaired or serious financial loss incurred by applying first to the commission and that there had been no emergency requiring immediate action, *Held:*

1. That the carrier should not have discontinued the intrastate service without applying to the commission for permission. P. 563.

2. That its discontinuance of the intrastate service without such application does not justify exposing it and its officers and employees to the statutory penalties. *Id.*

3. The Commission should give the carrier an opportunity to present facts and, if the application is made promptly, should determine the matter without subjecting the carrier to any prejudice because of its failure to apply earlier. *Id.*

4. To this end a decree denying a preliminary injunction should be vacated and a restraining order be kept in force, leaving the

case open for further proceedings in the District Court if the commission should insist on having the intrastate service restored. P. 563.

27 F. (2d) 893, reversed.

APPEAL from a decree of a District Court which denied an interlocutory injunction in a suit by the Railway against the above-named commission and divers Alabama officials.

Mr. Forney Johnston, with whom *Messrs. E. T. Miller, E. H. Cabaniss,* and *W. R. C. Cocke* were on the brief, for appellant.

Mr. J. Q. Smith, Special Assistant Attorney General of Alabama, with whom *Mr. Charlie C. McCall,* Attorney General, was on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Section 9713 of the Code of Alabama (1923) prohibits a railroad from abandoning "any portion of its service to the public . . . unless and until, there shall first have been obtained from the [Public Service] Commission a permit allowing such abandonment." Very severe penalties, including punishment of officers, agents and employees, are prescribed in case the abandonment is willful. §§ 9730, 9731, 5350, 5399. Without obtaining such permission or applying therefor, the St. Louis-San Francisco Railway discontinued two interstate trains by means of which it had long furnished intrastate service between several cities and towns in Alabama. Then it brought, in the federal court for the Middle District of that State, this suit against the Commission, the Attorney General and other officials, to enjoin the commencement of proceedings to enforce the penalties prescribed. An application for an interlocutory injunction, heard before three judges

under § 266, was denied, 27 Fed. (2d) 893. A restraining order, issued upon the filing of the bill, was continued in force pending the determination of this appeal.

The bill alleges that the operation of the interstate trains by which the intrastate service had long been furnished had involved the carrier in losses; that the service still furnished by other trains is adequate to supply the reasonable needs of the communities; that, upon learning of the discontinuance of the service, the Commision demanded that it be restored, without first hearing the carrier; that if § 9713 is construed as requiring the carrier to obtain the Commission's permission before discontinuing intrastate service rendered by means of an interstate train, or as prohibiting such discontinuance although an unreasonable burden is thereby imposed upon the carrier, the statute violates the commerce clause of the Federal Constitution; that if construed as requiring, without a prior hearing, reinstatement of the service so discontinued, it violates also the due process clause; and that the matter in controversy exceeds the jurisdictional amount. The prayers are for an injunction against enforcing any penalty for discontinuance of the service or for failure to reinstate the same; and for a declaration that the statute, if construed as stated, is void under the federal Constitution. The answer denies many of the allegations of the bill.

The Railway contends that it had no way of testing the constitutionality of the statute, otherwise than by this suit. It urges that if it had applied to the Commission for permission to discontinue the service, it would have thereby recognized its jurisdiction; and that since the Commission did not before directing reinstatement of the service issue any order to the carrier to appear, there was no action by the Commission which could form the basis

for a review in courts of the State. We have no occasion to consider the issues of fact or to determine whether the Alabama statute if construed as suggested is obnoxious to the Federal Constitution. Upon facts admitted it is clear that the carrier should not have discontinued the intrastate service without first applying to the Commission for permission. No constitutional right could have been prejudiced by so doing. No emergency existed requiring immediate action. And no serious financial loss would have been incurred by the slight delay involved. *Western & Atlantic R. R.* v. *Georgia Public Service Commission,* 267 U. S. 493, 496; *Lawrence* v. *St. Louis-San Francisco Ry. Co.,* 274 U. S. 588, 595.

The past failure of the Railway to apply for leave to discontinue the service does not, however, justify exposing it, and its officers and employees, to the severe penalties prescribed by the statute. It may be that, upon full presentation of the facts, the Commission would find that to continue the service would subject the carrier to an unreasonable burden; or the carrier may suggest some satisfactory substitute for the specific service now demanded of it. The Commission should give to the Railway the opportunity of presenting the facts; and if an application is made promptly, the matter should be determined by the Commission without subjecting the Railway to any prejudice because of its failure to ask leave before discontinuing the service. Compare *Lawrence* v. *St. Louis-San Francisco Ry. Co.,* 278 U. S. 228. To this end the decree will be vacated; and the restraining order will be continued. Compare *Ohio Oil Co.* v. *Conway, post,* p. 813. If after such hearing the Commission insists that the service objected to be restored, further proceedings appropriate to the situation may be had in the cause in the District Court.

Decree vacated.

W. A. MARSHALL & COMPANY, INCORPORATED, *v.* S. S. "PRESIDENT ARTHUR," ETC.

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

No. 272. Argued February 27, 1929.—Decided May 20, 1929.

1. The Ship Mortgage Act, Subsections P and S, gives a maritime lien on any vessel, whether foreign or domestic, for necessaries furnished on the order of the owner or his authorized agent, and relieves the libellant from the necessity of alleging or proving that credit was given to the vessel, but no other change in the general principles of the existing law of maritime liens was intended. Pp. 567–568.
2. The lien may be waived by agreement or otherwise, and no express renunciation of the lien is essential. P. 568.
3. Coal was sold to the owner of a vessel under contracts providing that payment should be made on delivery by trade acceptances endorsed by designated persons who, in consideration of the contracts, agreed to make such endorsements. Neither contract referred to any lien on the vessel and each recited that the entire contract was as therein stated and that there was no outside condition, warranty or understanding. Upon delivery of the coal, the libellant accepted the endorsed acceptances, (one of which was later paid,) and when it filed the libel against the vessel it still retained the unpaid acceptance, and afterwards brought suit upon it against the endorsers. *Held* that the right to a lien was waived. P. 572.

25 F. (2d) 648, affirming 22 F. (2d) 584, affirmed.

CERTIORARI to the Circuit Court of Appeals to review a decision affirming a decree of the District Court which denied petitioner's claim to a maritime lien for an unpaid balance of the purchase price of bunker coal furnished by it on the request of the owner to and for the use of the steamship.

Mr. George Wright Hinckley for petitioner.

Messrs. John M. Woolsey and *Samuel D. Stein,* with whom *Mr. Saul S. Myers* was on the brief, for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

In May, 1925, W. A. Marshall & Co., Inc., filed a libel in admiralty in the federal District Court for Southern New York against the Steamship "President Arthur," asserting a maritime lien thereon for an unpaid balance of the purchase price of bunker coal furnished by it on the request of the owner to and for the use of the steamship. The owner, the American Palestine Line, Inc., answered as claimant, denying that the Company had a lien on the steamship and alleging that the entire purchase price had been paid in accordance with the contract of sale.

At the hearing the District Court held, on the evidence, that the Company had no lien on the vessel, and dismissed the libel. 22 F. (2d) 584. This decree was affirmed by the Circuit Court of Appeals. 25 F. (2d) 648.

The evidence—which is undisputed—shows that when the negotiations were entered into for the coal the Line wished to pay for it on longer terms than were usually granted, and that the Company, after investigating the standing of the Line, not believing that it was financially responsible, and wanting additional security, required the Line to give trade acceptances endorsed by responsible and acceptable persons; with the purpose that, if needed at any time, the money could be obtained by discounting the acceptances, thus endorsed, prior to their maturity.

Thereupon, in February and March, 1925, the parties entered into two written contracts for the coal. Each of these provided that the Company should sell and the Line, as owner of the steamship, should buy, at a specified price, a designated amount of coal "to be used as bunker coal for" the steamship, and to be delivered on specified dates. Each provided that the Line should "pay for the said coal as follows: By delivering" to the Company two trade acceptances, dated the date of the delivery of

the coal, due March 10 and May 8, respectively, and "endorsed by Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb." Neither contract referred to any lien on the vessel; and each recited that "The entire contract between the parties is stated above and there is no outside condition, warranty, agreement, or understanding." At the foot of each contract the persons named as endorsers also signed an agreement reciting that "In consideration of the execution of the foregoing contract" and the delivery of the coal to the Line and of one dollar, they jointly and severally agreed to endorse the trade acceptances described in the contract.

Without the consideration of such endorsements, it was shown, the Company would not have sold the Line the coal.

The coal called for by the contracts was delivered to the steamship. The purchase price amounted to $21,736.16. For this the Line gave the Company its two trade acceptances endorsed by the three designated persons; these being consolidations of the four acceptances required by the two contracts. The acceptance for $11,794.54, first maturing, was duly paid. The acceptance for $9,382.62, maturing later, was not paid and was protested. This was the amount of the balance for which the Company claimed a lien.

After filing the libel, the Company also brought a civil action upon the unpaid acceptance in a state court, against the endorsers only. This is still pending and undetermined.

The questions presented here are: Whether under the contracts the Company waived the maritime lien which it would otherwise have had on the steamship to secure the payment of the purchase price; and, if not, whether the delivery of the endorsed acceptances constituted under the contracts payments of the purchase price which extinguished the lien.

1. As to the first of these questions it is necessary to consider the provisions of the Maritime Lien Act of 1910,[1] relating to liens for necessaries, which were reenacted in the Ship Mortgage Act of 1920.[2] Subsec. P of the latter Act provides that: "Any person furnishing repairs, supplies . . or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel." Subsec. S provides that: "Nothing in this section shall be construed to prevent the furnisher of repairs, supplies . . or other necessaries . . from waiving his right to a lien . . at any time, by agreement or otherwise. . ." [3]

Prior to the Act of 1910 it had been settled that by the maritime law as administered in this country a lien was given for necessaries furnished a vessel in a port of a foreign country or state upon the credit of such vessel; but that no such lien was given for necessaries furnished in the home port or state. *The Roanoke,* 189 U. S. 185, 193.

The purpose of the Act of 1910, as shown by the Reports of the Committees of Congress, was to do away with this "artificial distinction" and "the doctrine that, when the owner of a vessel contracts in person for necessaries or is present in the port when they are ordered, it is presumed that the materialman did not intend to rely upon the credit of the vessel, and that hence, no lien arises"; and "to substitute a single federal statute for the state statutes in so far as they confer liens for repairs, supplies and necessaries." *Piedmont Coal Co.* v. *Seaboard Fisheries Co.,* 254 U. S. 1, 11.

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[1] 36 Stat. 604, c. 373.

[2] This is the separate designation of § 30 of the Merchant Marine Act of 1920, 41 Stat. 988, 1005, c. 250.

[3] U. S. C., Tit. 46, §§ 971, 974.

To this end the Act gave a maritime lien on any vessel, whether foreign or domestic, for necessaries furnished on the order of the owner or his authorized agent, and relieved the libellant from the necessity of alleging or proving that credit was given to the vessel. The Committee reports show, however, that it was not intended to make any other change in the general principles of the existing law of maritime liens, *Piedmont Coal Co.* v. *Seaboard Fisheries Co., supra,* p. 11; and the specific provision that the Act should not be construed as preventing the furnisher of the necessaries from waiving his right to a lien, "by agreement or otherwise," indicates clearly, we think, that it was not intended to change the principles of the maritime law in respect thereto. That an express renunciation of the lien is not essential, is plain.

We need not enter here into the general field of the waiver of maritime liens. Such liens differ in their character and are not equally favored—the lien for necessaries, which is a secret one, being *stricti juris, Piedmont Coal Co.* v. *Seaboard Fisheries Co., supra,* 12. It suffices to say that we think the principles applicable to the question whether the lien was waived by the contracts entered into here, are aptly indicated in the following cases, which, in the main, were analogous in their facts to the present case, and were decided by members of this Court, sitting at circuit.

In *Murray* v. *Lazarus,* 1 Paine 572, 17 Fed. Cas. 1049, 1051 (1826), the libellants made a special agreement with the master for the payment of their advances for repairs and supplies furnished the vessel in a foreign port, and took from him a bill of exchange drawn upon the agents of the owner. Thompson, Circuit Justice, in holding that the libellants had no lien for these advances on the freight monies received by the owners, said: "When an express contract has been entered into for the payment of such

expenses, that must be resorted to, and will be considered a waiver of such implied lien if any existed. And a party who has waived his right in this respect cannot be permitted, at a subsequent time, and under a change of circumstances to reinstate himself in his former condition to the injury of others . . . If this is to be considered a regular and ordinary bill of exchange, it was a substitution for any lien that might have existed, and must be considered a relinquishment thereof."

In *Phelps* v. *The Camilla,* Taney, 400, 19 Fed. Cas. 441, 445 (1838), the libellants furnished the agents of the vessel in a foreign port copper which was used in repairing the vessel. The sale was made on a written order of the agents that made no mention of the vessel or her owners. The copper was charged to the agents, and they gave the libellants their negotiable note, which was not paid. The libellants claimed that the charge to the agents had been made by mistake, and some months later changed the account on their books and charged the copper to the ship and her owners. Taney, Circuit Justice, finding upon the evidence that the copper was sold to the agents upon their personal credit and was not furnished upon the credit of the brig and her owners, held that the libellants had no lien, but added: "It must not, however, be understood, that the decision would be different, if the copper had been originally charged to The Camilla and her owners. It is true, that upon such a sale, the libellants would, in the first instance, have acquired a lien upon the brig; but that lien, in my opinion, would have been waived by taking afterwards the note of [the agents]. . . If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special

agreement, the law presumes that he relied; and if he takes a note or bill of exchange, or any other personal engagement, for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall still continue."

In *Leland* v. *Medora,* 2 Woodb. & M. 92, 15 Fed. Cas. 298, 299 (1846), Woodbury, Circuit Justice, speaking of the lien for repairs on a vessel, said that "if the evidence . . shows, that the ship was not relied on originally, though foreign, but the master or owners or other security were, the lien does not attach any where, or under any form. *The Maitland,* 2 Hagg. Adm. 253; *The Nestor* [1 Sumner (U. S. C. C.) 73]."

In *The Ann C. Pratt,* 1 Curt. 340, 1 Fed. Cas. 947, 950 (1853), Curtis, Circuit Justice, in holding that there was no maritime lien for advances to the master of the vessel in a foreign port to make necessary repairs that had been secured by a void bottomry bond, said, citing *The Nestor* and other cases, "that the lien created by the maritime law may be, and is, waived by the creditor, by any act or contract which is inconsistent with an intention to receive or retain that lien." The decree in this case was affirmed in *Carrington* v. *Pratt,* 18 How. 63, 68, in which this Court said that "it is well settled that the lien implied by the general admiralty law, may be waived by the express contract of the parties, or by necessary implication; and the implication arises in all cases where the express contract is inconsistent with an intention to rely upon the lien. A familiar instance is where the money is advanced or repairs made, looking solely to the personal responsibility of the owner or master."

In *Taylor* v. *The Commonwealth,* 23 Fed. Cas. 756, 757 (1875), the libellant, before making repairs on the vessel

at her home port, had entered into a written contract specifying that they were to be paid for partly in cash and partly in endorsed notes, that is, negotiable notes, with personal security. Miller, Circuit Justice, in holding that under these circumstances there was no lien on the vessel for the repairs, said: "I have no doubt of the fact that a man doing that kind of work may rely on the owner of the vessel, and that if he makes no specific contract on the subject, he will have a right against the owner and the vessel . . ; but that is a lien which the law implies from the circumstances, and if a specific contract is made which shows that the party relied upon other security and other modes of payment, then he cannot enforce the admiralty lien. It is very clear to me, here, that [the libellant] in making this contract, never intended to rely on the security of the vessel itself, because he made this contract for the very best kind of other payment. . . I think, having made an express contract for an express security, he cannot say, 'I did this work on the credit of the vessel.' In other words, I think if there is any question of admiralty lien, that it must have been the intention in the mind of the party who furnishes the supplies and repairs whether in a home or foreign port, to rely on the credit of the vessel. . . If it can be shown that he did not rely on that alone, and that he intended to rely on other security, which he supposed sufficient, or which was supposed to be better, then he had no lien, because the lien arises from implication, from the fact expressed or implied that the man in furnishing the supplies or contracting a debt, relied on the vessel as security, and if he relied on anything else it is another security sufficient, or supposed to be, which, in case that turned out to be insufficient, does not restore his lien."

In the present case the libellant, being unwilling to sell the coal to the owner for the use of the vessel without per-

sonal security for the payment of the purchase price, before furnishing the coal made contracts which specifically provided that the owner should "pay for" the coal at the time of its delivery by trade acceptances endorsed by three designated persons, who in consideration for the contracts agreed to endorse the acceptances. Neither of the contracts provided for any lien upon the vessel; and each, on the contrary, specifically recited that it stated the entire contract between the parties and that there was no outside agreement or understanding. Furthermore, upon the delivery of the coal, the libellant accepted the trade acceptances endorsed by the designated persons, and when it filed the libel against the vessel still retained the unpaid acceptance, on which later it brought suit against the endorsers.

Applying the principles stated in the foregoing cases, we think that the libellant, having made specific contracts for an express security, instead of resting on the lien which the law would otherwise give, must rely on the contracts it made for itself, and cannot now, in a change of circumstances, resort to the lien it would have had in the absence of the special agreements; and that by taking other and different security, upon which it relied, and which it still retains, without stipulating for the retention of the lien, it has waived the lien which it otherwise would have had.

2. Holding that the lien was waived, it becomes unnecessary to determine whether the deliveries of the endorsed acceptances constituted under the contracts payments of the purchase price which would have extinguished the lien.

The decree is

Affirmed.

Syllabus.

LUCAS, COLLECTOR OF INTERNAL REVENUE, *v.* ALEXANDER ET AL.

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

No. 481. Argued April 12, 1929.—Decided May 20, 1929.

1. A respondent in certiorari who did not seek review for himself is not entitled to question the correctness of the decree of the court below. P. 576.
2. *Semble* that the amount realized by an insured, over and above premiums paid, when, by exercising an option in his policy, he receives in his lifetime the amount of the policy plus accumulated dividends, is within the provisions of § 213 of the Revenue Act of 1918 taxing "gains or profits and income derived from any source whatever," and not exempted as such by any other provision of the Act. *Id.*
3. That part of the gain so received which is attributable to and accrued during the period before the effective date of the Sixteenth Amendment (February 25, 1913), and of the first law taxing the income of indivduals (March 1, 1913), must be deemed an accretion to capital not taxable by the income tax acts enacted after the Amendment. P. 577.
4. In determining what part of such total gain accrued to the taxpayer after March 1, 1913, provisions of the taxing statute enacted as aids in arriving at the answer must be so construed as to avoid doubts as to its constitutionality. *Id.*
5. The purpose of ascertaining the value of a taxpayer's property on March 1, 1913, (Revenue Act of 1918, § 202 (A)(1),) is to measure that part of his total gain which had arisen or accrued after the enactment of any of the statutes taxing income, and thus to arrive at his gain taxed as income. Value as of that date may be disregarded unless it serves that purpose. P. 578.
6. In applying § 202(A)(1) to an insurance policy having no market value, which was liquidated by the insured, its value on March 1, 1913, need not be determined by making a prediction as of that time based upon an estimate of future possibilities; the 1913 value is at most but a method of allocating a known income to the periods in which it actually accrued. P. 579.

7. The taxpayer insured his life in 1899 under deferred dividend policies which he fully paid up by 1908. Dividends were payable only if he were living and the policies in force twenty years from date of issue. At the end of that period (1919), exercising an option, he discontinued the insurance and received the face value of the policies and the accumulated dividends. *Held,* construing and applying § 202(A)(1) of the Revenue Act of 1918,

(1) That the value of the policies as of March 1, 1913, was not their cash-surrender or loan value on that date, nor was the taxable gain the amount by which the proceeds of the policies exceeded the total premiums paid. P. 578.

(2) That, (upon the evidence presented and for the purposes of this case) the value which had accrued on March 1, 1913, could be taken as the total of the insurance reserve liability and dividend accumulations provisionally apportioned to the policies on the company's books at that date. P. 580.

27 F. (2d) 237, affirmed.

Certiorari, 278 U. S. 594, to review a judgment of the Circuit Court of Appeals which affirmed a judgment recovered by A. J. A. Alexander in the District Court, 21 F. (2d) 68, in an action for money illegally collected as income taxes. The present respondents were substituted in this Court, as executors, after the plaintiff's death.

Assistant Attorney General Willebrandt, with whom *Attorney General Mitchell,* and *Messrs. J. Louis Monarch* and *Edwin G. Davis* were on the brief, for petitioner.

Mr. Elwood Hamilton, with whom *Mr. George V. Triplett* was on the brief, for respondents.

Mr. Justice Stone delivered the opinion of the Court.

This case is here on certiorari, granted November 19, 1928, 278 U. S. 594, to review a judgment of the Court of Appeals for the Sixth Circuit, 27 F. (2d) 237, affirming a judgment of the District Court for Western Kentucky, 21 F. (2d) 68, allowing recovery from the Collector of Inter-

nal Revenue of federal income taxes alleged to have been illegally exacted.

On May 19, 1899, respondents' testator procured two life insurance policies for $50,000 each upon his own life and payable to his estate. On May 19, 1908, they became fully paid up policies, upon the payment of the last of ten annual premiums aggregating, for both policies, $78,100. Each policy stipulated that in the event of death within ten years the amount payable should be $50,000 and, from the eleventh to the twentieth year inclusive, an annually increasing amount ranging from $50,700 in the eleventh year to $72,150 in the twentieth year. The death benefit on each policy during the year ending May 19, 1913, was $59,300. The policies participated in the surplus of the company and "dividends" properly allocable to each were set aside or ascertainable on its books each year, but were payable only at the end of the tontine period of twenty years and only to holders of policies still in force at that time.

The insured was given an option at the end of the period of receiving on each policy the sum of $50,000 "and in addition the cash dividend then apportioned by the company." The insured elected to exercise this option May 19, 1919, receiving as proceeds of the two policies $120,797, representing $100,000 face value plus $20,797 dividends. The gain to him over his total premium expenditure was thus $42,697. The Commissioner assessed this amount as taxable income under the Revenue Act of 1918, c. 18, 40 Stat. 1057.

Both the district court and the court of appeals thought that, under § 202a(1) of the Act, only so much of the proceeds of the policies as exceeded their value on March 1, 1913, was subject to tax. They found that the amount provisionally set aside by the company as surplus accum-

ulations applicable to the two policies on that date was $13,600, and that it was then evident that the rate of accumulation, although not certain, would probably be greater during the later years of the tontine period than before March 1, 1913. Even at the same rate, the accumulation at the end of the period would amount to $19,428.57. Both courts, therefore, concluded that the insured might reasonably have anticipated that the policies would have been worth on their maturity date, if then in force, their face value plus the anticipated accumulations, or a total for both policies of $119,428.57. Since, under the sliding scale, the death benefits would have been even proportionately larger had the insured died before the end of the period, they decided that the combined value of the policies on March 1, 1913, was the smaller amount discounted at the rate of 4% compounded annually to that date, or $93,587.81. The taxable gain on the policies, accordingly, was taken to be the difference between this amount and the actual proceeds of the policies, or $27,209.19. A recovery was allowed of the difference between the tax as assessed and that as computed on the gain after March 1, 1913, so ascertained.

As respondents did not ask certiorari, we may disregard their argument that the judgment below was erroneous in that the proceeds of an insurance policy paid to the insured are not taxable income except as the determination of that question may be involved in passing upon the assignments of error of petitioner. See *Federal Trade Commission* v. *Pacific Paper Ass'n.*, 273 U. S. 52, 66.

By the expenditure of $78,100 in premiums, the insured secured a return of $120,797, resulting in an economic and realized money gain to him of $42,697. The question of liability for the tax on this gain is different from that mooted by counsel, but not decided, in *United States* v. *Supplee-Biddle Hardware Co.*, 265 U. S. 189, 194, which

was whether insurance upon the life of a corporate officer, paid at his death to the corporation, could be constitutionally subjected to a tax on income. Here the amount paid was not a death benefit or in the nature of a gift to a beneficiary and was in no sense an indemnity for, or repayment of, an economic loss suffered by the insured, but was a profit or gain upon his premium investment, and would seem to be plainly embraced within the provisions of § 213 taxing "gains or profits and income derived from any source whatever" and not exempted as such from tax by any other provision of the Act. See *Penn. Mutual Co.* v. *Lederer,* 252 U. S. 523, 532, 534; *Eisner* v. *Macomber,* 252 U. S. 189, 207; *Merchants' Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509, 518.

But of this total gain received by the insured, a part is attributable to and accrued during the period before the effective date of the Sixteenth Amendment (February 25, 1913), and of the first law taxing the income of individuals (March 1, 1913), and hence, for income tax purposes, must be deemed an accretion to capital not taxable by the income tax acts enacted under the Sixteenth Amendment. See *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330, 334; cf. *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179; *Lynch* v. *Turrish,* 247 U. S. 221. Whether or not such accretions may be constitutionally subjected to tax, we have no occasion to decide. The present Act, at least, does not attempt it. But the question presented necessarily involves a determination of what part of the total gain received by the taxpayer accrued to him after March 1, 1913. In answering it, provisions of the taxing statute enacted as aids in arriving at the answer must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity. *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 407, 408; *United States* v. *Standard Brewery,* 251 U. S. 210, 220; *Texas* v. *Eastern Texas R. R.*

Co., 258 U. S. 204, 217; *Bratton* v. *Chandler,* 260 U. S. 110, 114; *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, 390.

Section 202 of the Revenue Act of 1918 provides:

"(A) That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be:

"(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date."

The Government insists that the policies, being non-assignable except to persons having an insurable interest in the life of the insured, had no market price and their combined value as of March 1, 1913 did not exceed their loan or cash surrender value on that date, which alone could be realized on them, of $74,600, Regulations 45 (1920) Art. 87, and that any greater value assigned to them as of that date must be rejected as contingent and speculative. But in view of the provisions of § 213b(2) of the Act, see Regulations 45 (1920) Art. 72(b), exempting from taxation the return of premiums on the maturity of the policy, it concedes that the taxable gain of the insured may be taken at the amount, fixed by the commissioner, by which the proceeds of the policies exceeded $78,100, the total premiums paid.

Plainly, in the present case, the $42,697 gained over premium cost of the two policies, which accrued to the taxpayer through a period of twenty years, did not all accrue in the six years following March 1, 1913. If the value on that date, for the purpose of ascertaining taxable gain, was greater than the total premium expenditure which had been completed more than four years before, there is no reasonable basis for determining the taxable gain which accrued after March 1, 1913, by deducting from the total amount received the total premium payments.

Nor can we accept the contention of the Government that the value of the policies on March 1, 1913, did not

exceed their loan value as of that date. The purpose of ascertaining the value of the taxpayer's property on March 1, 1913 is, as § 202 states, to measure that part of his total gain which has arisen or accrued after the enactment of any of the statutes taxing income and thus to arrive at his gain which may be taxed as income. *Lynch* v. *Turrish, supra.* Value as of that date may be disregarded unless it serves that purpose. *United States* v. *Flannery,* 268 U. S. 98; *Goodrich* v. *Edwards,* 255 U. S. 527; *Walsh* v. *Brewster,* 255 U. S. 536.

Under the statute, market price of the taxpayer's property on that date, where ascertainable, may be resorted to as generally a sufficiently definite and trustworthy gauge of the gain which has later accrued. But where the property has no market value, the statute must be interpreted in the light of its purpose to ascertain taxable gains accruing since March 1, 1913. Hence, in such a case, its fair value on the critical date is not necessarily what might have been realized upon it by a forced liquidation by accepting the unfavorable loan or cash surrender value. Having in mind the purpose of the statute, we think it must be taken rather to be that part of the amount actually realized by the taxpayer which, by the use of appropriate accounting methods, can fairly be said to have accrued before March 1, 1913—its value then as compared with the value in fact later realized by the taxpayer taken as a standard.

In applying § 202a(1) to an insurance policy having no market value, we are not required either by circumstances or any positive provision of statute to determine its value on March 1, 1913, by making a prediction as of that time based upon an estimate of future possibilities, as is the case in valuing for purposes of inheritance tax an interest of uncertain duration passing at the death of the testator. See *Ithaca Trust Co.* v. *United States, ante,* p. 151.

There the value as of the date of death is the very thing taxed and can usually be determined only by speculation as to future events. Here, 1913 value is at most merely a method of allocating a known income to the periods in which it actually accrued. It is never necessary to speculate, as did the court below, as to what might later be realized from his property by the taxpayer, nor as to what might have been realized if, on March 1, 1913, he had made some forced disposition of the property which would have precluded any taxable gain. For the necessity of ascertaining value as of March 1, 1913, can never arise until some later date when income has been produced by converting the property into money or money's worth and the amount actually realized is known, and then, as we have said, only for the purpose of apportioning the total gain which has accrued between the periods before and after March 1, 1913.

It is familiar knowledge that the source of dividend accumulations upon insurance policies is interest upon investments of the company and savings effected from estimated future expenses and from death payments covered by premiums, with appropriate " loadings " to give a margin of safety, which the policy holders have paid. In accordance with the usual practice of life insurance companies, under the system of accounting employed by the insurer in the present case, the amount of reserve set aside by the company to meet its policy liability and dividend accumulations provisionally apportioned to each policy was ascertained or ascertainable on the books of the company at the end of each year. During the policy year which included March 1, 1913, the insurance reserve liability thus ascertained on each of the present policies was $40,600 and the dividend accumulation on each, which both courts below found had accrued on March 1, 1913, was $6,800, making a total of reserve and accumulations applicable to each policy of $47,400. These items with subsequent annual additions totaled at the maturity of

each policy, for the former $50,000 and for the latter $10,398.50 which, taken together, made up the total payment received by the taxpayer on each policy. They constitute a complete record and determination of the actual economic gain annually accruing upon the policies which was ultimately realized by the taxpayer and they provide an adequate basis for ascertaining the proportion of the total value realized which had accrued on March 1, 1913. The sum of the insurance reserve liability and the dividend accumulations provisionally apportioned to the two policies on March 1, 1913, their accrued value on that date, was $94,800. As that valuation is larger than that found by either of the lower courts and is supported by reliable data, we may, in the absence of other evidence, accept it as sufficiently establishing that the value found below was not more than that required to be ascertained by the statute and so did not prejudice the rights of petitioner. It is unnecessary to consider the question mooted whether upon other evidence, not here presented, a larger value as of March 1, 1913, might have been found.

The court below, by discounting the total estimated value of the policies at their maturity at 4%, arrived at a rough approximation of their accrued value on that date. This method, however, did not ascertain that value or the taxable gain with accuracy, since it was based on an assumed instead of the actual value of the policies at maturity. It discounted the assumed value at a flat rate of interest instead of at that actually earned, and it left out of account savings from estimated expenses and death losses which, as well as actual interest earned, were taken into account in determining dividend accumulations annually ascertained and credited to the policies on the books of the company. But, as the accuracy of the computation is not questioned here, and as it gave a result of which petitioner cannot complain, the judgment will be

Affirmed.

STANDARD OIL COMPANY ET AL. *v.* CITY OF MARYSVILLE ET AL.

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

No. 545. Argued April 19, 1929.—Decided May 20, 1929.

1. Where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rest the duty and responsibility of decision. P. 584.
2. The court takes judicial notice that gasoline and kerosene stored in large quantities are dangerously inflammable. *Id.*
3. A city ordinance requiring that all tanks with a capacity of more than ten gallons, used within the city limits for the storage of gasoline and kerosene, be buried at least three feet under ground, *held* a legitimate exercise of the police power in the interest of public safety, and not violative of the Fourteenth Amendment. P. 585.
4. Legislation may not be held invalid merely because compliance with it is burdensome. P. 586.

27 F. (2d) 478, affirmed.

CERTIORARI, 278 U. S. 596, to review a decree of the Circuit Court of Appeals, which reversed a decree of the District Court, entered in two consolidated cases, enjoining the City of Marysville, and city officials, from enforcing by prosecution of the plaintiff companies, an ordinance requiring that tanks for storage of petroleum products be buried underground.

Messrs. Earle W. Evans and *Thomas F. Doran,* with whom *Messrs. L. L. Stephens, R. R. Vermilion, Joseph G. Carey, W. F. Lilleston, Henry V. Gott, Roy T. Osborn, Clayton E. Kline,* and *M. F. Cosgrove* were on the brief, for petitioners.

Messrs. Edgar C. Bennett and *Harry W. Colmery* for respondents.

Messrs. James M. Beck, Ira Jewell Williams, and *Francis Shunk Brown,* filed a brief on behalf of American Petroleum Institute and The Atlantic Refining Company, as *amici curiae,* by special leave of Court.

Mr. Justice Stone delivered the opinion of the Court.

This case is here on certiorari, 278 U. S. 596, to review a judgment of the Court of Appeals for the Eighth Circuit, reversing a decree of the District Court for Kansas which enjoined the enforcement of an ordinance of respondent, the City of Marysville, as in violation of the Fourteenth Amendment of the Federal Constitution. 27 F. (2d) 478.

The ordinance, No. 350, of October 8, 1923, requires that all tanks within the city limits used for the storage of petroleum products or other inflammable liquids shall be buried at least three feet underground. Tanks of a capacity of 500 gallons or less, if used for the storage of crude oil, distillate or fuel oil, and of less than ten gallons, if used for the storage of gasoline, kerosene or naphtha, are exempted from this requirement. Violation of the ordinance is punishable by a fine of $25.00 for each day of its continuance. Petitioners, who are dealers in petroleum products licensed under a former ordinance, have each for many years maintained within the city limits two tanks for the storage of gasoline and kerosene of approximately 12,000 gallons capacity each. They assert that compliance with the ordinance will impose upon them a large and unnecessary expense and that the ordinance is so arbitrary and capricious as applied to them as to deprive them of their property without due process of law.

At the trial before a master voluminous evidence was taken, much of it conflicting, speculative and theoretical in character, concerning the relative safety of the storage

of petroleum products above and beneath the surface of the earth and their relative likelihood of ignition, and danger to life and property in the vicinity if ignited, when so stored. The master made elaborate findings of fact from which he inferred generally that it is more dangerous, from the standpoint of public safety, to store underground than above, gasoline or kerosene in quantities of ten gallons or more. From this he drew the legal conclusion, adopted by the district court, that the ordinance was so arbitrary and capricious as not to be a permissible exercise of the police power.

We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision. *Zahn* v. *Board of Public Works,* 274 U. S. 325, 328; *Hadacheck* v. *Los Angeles,* 239 U. S. 394, 408–412, 413–414; *Euclid* v. *Ambler Realty Co.,* 274 U. S. 365, 388; *Jacobsen* v. *Massachusetts,* 197 U. S. 11, 30; *Laurel Hill Cemetery* v. *San Francisco,* 216 U. S. 358, 365; *Cusack Co.* v. *City of Chicago,* 242 U. S. 526, 530; *Price* v. *Illinois,* 238 U. S. 446, 451. To determine that the present ordinance was a permissible exercise of legislative discretion, as thus defined, we need not go beyond those findings of the master to which petitioners offer no serious challenge.

The master found that gasoline and kerosene stored in large quantities are dangerously inflammable substances, as we judicially know, *Pierce Oil Corporation* v. *City of Hope,* 248 U. S. 498, 500, which, when ignited, are a menace to life and property in the vicinity; that even with the use of the most modern safety devices, fires or explosions of such storage tanks occur and that within the four years preceding the trial five disastrous fires of gasoline

storage stations had occurred in Kansas, in two of which gasoline tanks had exploded, in one case striking and burning a building 475 feet away, killing nine people, wounding twenty-six more and burning several other houses. His findings show that within an even smaller radius from petitioners' tanks, or within the same or adjacent blocks, there are many buildings, including residences, a hotel, warehouses and garages, some of wooden structure, and gasoline and kerosene storage tanks of 75,000 gallons capacity, and that the principal business street of the town is within two blocks of the Standard tanks. From local conditions and recent public improvements the master found it reasonable to conclude that there would be increased residential building in the vicinity.

The objection which petitioners make to the storage of gasoline and kerosene in tanks buried under ground is that through the effect of electrolysis and corrosion caused by acid in the soil, and the possible "floating out" of the tanks, leaks are likely to occur, difficult to discover, by which the gasoline might penetrate through the earth into sewers, wells and basements, contaminating the water and causing explosions. But the master found that conditions which produce electrolysis are not present in the City of Marysville; that only a slight percentage of acid was found in the soil there, and although there was more chance of corrosion of metal under ground at the Standard Oil property than at the Sinclair tanks, it might take a term of years for it to take place. The findings also show that tanks already placed underground in the vicinity in compliance with the ordinance and which it appeared had been in successful operation for more than two years, had not "floated out" during periods of heavy rainfall and the danger of floating could be overcome by proper drainage and by anchoring down the tanks; that the tanks buried

in compliance with the ordinance would rest on a level below the sewers; that there were no wells in the vicinity and that the soil there had been shown by experiment to be impervious to gasoline. It was also found that the danger from fire or explosion due to lightning, which causes many fires in gasoline storage, and from static electricity, is less with under ground than above ground tanks and that the base rate of insurance on storage tanks of gasoline and kerosene under ground is 50% of that for tanks above.

The facts that the tanks of petitioners within the city limits have been operated successfully above ground; that appliances used by them are of the best type; that fires in connection with their many tanks located elsewhere have been relatively infrequent, and numerous others found by the master, were properly for the consideration of the city council in determining whether the ordinance should be enacted, but they fall far short of withdrawing the subject from legislative determination or establishing that the decision made was arbitrary or unreasonable. The passage of the ordinance was within the delegated powers of the city council, *City Service Oil Co.* v. *Marysville,* 117 Kan. 514, and it acted within its constitutional province in dealing with the matter as one affecting public safety. *Pierce Oil Corporation* v. *City of Hope, supra.* From the facts as found it might, in the exercise of a reasonable judgment, have at least concluded that the danger of ignition to the tanks placed under ground, under the conditions prevailing at Marysville, was no greater than when placed above ground and that in the event of ignition the danger to life and property was very much less.

We may not test in the balances of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body, nor may we set aside the ordinance because compliance with it is burdensome. *Chicago & Alton R. R.* v. *Tranbarger,* 238 U. S. 67, 77; *Hadacheck* v. *Los Angeles, supra; Rast* v. *Demen & Lewis,* 240 U. S.

342. It does not preclude petitioners from locating their storage tanks without the city limits. Hence, the burden imposed upon them cannot be greater or otherwise more objectionable than that imposed by the enforced removal from cities by legislative action of dangerous or offensive trades or businesses. See *Pierce Oil Corporation* v. *City of Hope, supra; Hadacheck* v. *Los Angeles, supra; Reinman* v. *Little Rock,* 237 U. S. 171; *Euclid* v. *Ambler Realty Co., supra; Fischer* v. *St. Louis,* 194 U. S. 361; *Laurel Hill Cemetery* v. *San Francisco, supra.*

We have considered but do not discuss other objections to the ordinance which are without merit.

Affirmed.

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* STAPLETON.

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

No. 133. Submitted January 2, 1929. Restored to docket and argued April 9, 1929.—Decided May 27, 1929.

1. A right of action cannot arise under the Federal Employers' Liability Act upon any other basis than negligence. P. 589.
2. The carrier cannot be held for negligence under this Act upon the ground that the employee was under sixteen years of age, employed in violation of a statute of the State where the accident occurred forbidding and penalizing the employment of infants of his years for work upon any railroad. P. 593.
3. The question whether the carrier is so liable is a federal question and is not determined by rulings of the state court holding violations of the state statute to be negligence *per se.* P. 593.

233 Ky. 154, reversed.

CERTIORARI, 278 U. S. 585, to review a judgment of the Court of Appeals of Kentucky affirming a recovery of damages in an action under the Federal Employers' Liability Act.

Mr. Le Wright Browning for petitioner.

Mr. George B. Martin for respondent.

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

Plaintiff is a citizen of Kentucky, and at the time of the suit was between 15 and 16 years of age. Marion Stapleton was his father and guardian. The Chesapeake and Ohio Railway Company is a railway corporation of Virginia, doing an interstate commerce business in Kentucky. The plaintiff and his father were employed by the defendant as section hands and were engaged in maintaining the railroad and the roadbed for interstate commerce. The plaintiff was directed by his father, who was his foreman, to get water for his companions. In returning with the water he passed between or under the cars of a train standing on a switch track. The train moved unexpectedly while he was under the cars, he was run over and sustained permanent injury. The evidence showed that the boy was large and well developed and had been working as a section hand and water carrier for nine months previously.

The law of Kentucky in force at the time of the accident was §331a–9 Carroll's Kentucky Statutes, 1922, as follows:

"Children under sixteen; where not to work.

"No child under the age of sixteen years shall be employed, permitted or suffered (1) to sew or assist in sewing belts in any capacity whatever; (2) nor to adjust any belt to machinery; . . . (6) nor to work upon any railroad whether steam, electric or hydraulic; (7) nor to operate or to assist in operating any passenger or freight elevator. . . ."

Section 331a–16 of the same statute provided:

"Whoever employs or suffers or permits a child under sixteen years of age to work, and any parent, guardian or any adult person under whose care or control a child under such age is, who suffers or permits such child to work, in violation of any of the provisions of this act, shall be

punished for the first offense by a fine of not less than fifteen dollars nor more than fifty dollars; for second offense by a fine of not less than fifteen dollars and nor [not] more than one hundred dollars, or by imprisonment for not more than thirty days, or by both such fine and imprisonment; for a third or any subsequent offense by a fine of not less than two hundred dollars, or by imprisonment for not less than thirty days, or by both such fine and imprisonment. . . ."

Suit was brought under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65. The case was tried to a jury and resulted in a verdict of $17,500. The Kentucky Court of Appeals affirmed the judgment. 233 Ky. 154. The case comes here on certiorari, and the error chiefly pressed is the giving of charge No. 3, as follows:

"The court instructs the jury that if they believe and find from the evidence that the defendant Chesapeake and Ohio Railway Company employed the plaintiff to work for it as a section hand at a time when he was under sixteen years of age, and if they further believe and find from the evidence that the plaintiff while working for it as a section hand in the course of said employment, was injured at a time when he was under the age of sixteen years, then the law is for the plaintiff, and the jury will so find. Unless they so believe they will find for the defendant."

The language of the Federal Employers' Liability Act shows unmistakably that the basis of recovery is negligence and that without such negligence no right of action is given under this Act. *New York Central R. R.* v. *Winfield,* 244 U. S. 147, 150; *Erie R. R.* v. *Winfield,* 244 U. S. 170, 172. The question squarely presented here is whether the employment by an interstate carrier in Kentucky in the business of interstate commerce of a worker under the age of sixteen years is by reason of the state statute

negligence justifying a recovery under the federal Act for injuries received during such employment. Instruction No. 3 as given above dispenses with any burden on the part of the plaintiff to show that his injury was due to his age.

This Court, in the case of *Chicago, M. & St. P. Ry.* v. *Coogan,* 271 U. S. 472, 474, said:

"By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail; and all state laws upon that subject were superseded. *Second Employers' Liability Cases,* 223 U. S. 1, 55; *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 501. The rights and obligations of the petitioner depend upon that Act and applicable principles of common law as interpreted by the federal courts. The employer is liable for injury or death resulting in whole or in part from the negligence specified in the Act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several States. This court will examine the record, and if it is found that as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed."

In *St. Louis, Iron Mountain & Southern Ry.* v. *Hesterly,* 228 U. S. 702, it was held that the federal Act saves a right of action to relatives for pecuniary loss sustained by the death of the one wrongfully injured, but does not permit a recovery for pain and suffering of the decedent, although in suits under the state law such a recovery may be had. See also *Michigan Central R. R.* v. *Vreeland,* 227 U. S. 59.

In *Seaboard Air Line* v. *Horton,* 233 U. S. 492, this Court held that a state statute as to assumption of risk does not apply to a suit for an injury under the Federal

Employers' Liability Act, but only the common law on that subject as interpreted by the Federal courts.

In *New York Central R. R.* v. *Winfield,* 244 U. S. 147, Winfield was a section laborer in interstate commerce. He was tamping a cross tie and a pebble rebounded and hit his eye. He applied for compensation under a workmen's compensation act of the State. It was held that as his injury was not due to negligence on part of the railroad, and did occur in interstate commerce, the Federal Employers' Liability Act excluded recovery for it.

In *North Carolina R. R.* v. *Zachary,* 232 U. S. 248, the action was brought in a state court of North Carolina to recover damages for the negligent killing of a locomotive fireman of the Southern Railway Company, lessee of the defendant. Under the law of the State, the North Carolina Railroad as lessor of the Southern Railway Company was held responsible for all acts of negligence occurring in the conduct of business upon the lessor's road and its liability was extended to employees of the lessee, injured through the negligence of the latter. The State Supreme Court held that the Federal Employers' Liability Act did not apply. This Court reversing that court held that the Federal Employers' Liability Act did apply to the case and that the case should be submitted to the jury on the issue whether the fireman was engaged in interstate commerce at the time of death.

New Orleans & Northeastern R. R. v. *Harris,* 247 U. S. 367, was a suit for damages under the Federal Employers' Liability Act. It was there sought to apply a Mississippi statute making it *prima facie* proof of negligence that an injury was done by a locomotive engine. It was held that the state statute was inapplicable. See also *New Orleans & N. E. R. R.* v. *Scarlet,* 249 U. S. 528; *Yazoo & Mississippi Valley R. R.* v. *Mullins,* 249 U. S. 531; *Central Vermont Ry.* v. *White,* 238 U. S. 507; *Toledo, St. Louis &*

Western R. R. v. *Slavin,* 236 U. S. 454; *Chicago, R. I. & P. Ry.* v. *Wright,* 239 U. S. 548; *Wabash R. R.* v. *Hayes,* 234 U. S. 86.

The exclusive operation of the Federal Employers' Liability Act within the field of rights and duties as between an interstate commerce common carrier and its employees has been illustrated in opinions of this Court applying that Act by quotation of the words of Mr. Justice Story in *Prigg* v. *Pennsylvania,* 16 Pet. 539, 617, used in another association:

"If this be so, then it would seem, upon just principles of construction, that the legislation of Congress, if constitutional, must supersede all state legislation upon the same subject; and by necessary implication prohibit it. For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it can not be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates, that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it. This doctrine was fully recognized by this Court, in the case of *Houston* v. *Moore,* 5 Wheat. 1, 21, 22, where it was expressly held that where Congress have exercised a power over a particular subject given them by the Constitution, it is not competent for state legislation to add to the provisions of Congress upon that subject; for that the will of Congress upon the whole subject is as clearly established by what it has not declared, as by what it has expressed."

We come then to the specific question whether the violation of a statute of a State prohibiting the employment of workmen under a certain age and providing for punishment of such employment should be held to be negligence in a suit brought under the Federal Employers' Liability Act. That the State has power to forbid such employment and to punish the forbidden employment when occurring in intrastate commerce, and also has like power in respect of interstate commerce so long as Congress does not legislate on the subject, goes without saying. But it is a different question whether such a state Act can be made to bear the construction that a violation of it constitutes negligence *per se* or negligence at all under the Federal Employers' Liability Act. The Kentucky Act, as we have set it out above, is a criminal act and imposes a graduated system of penalties. There is nothing to indicate that it was intended to apply to the subject of negligence as between common carriers and their employees. It is true that in Kentucky and in a number of other States it is held that a violation of this or a similar state act is negligence *per se,* and such a construction of the Act by a state court is binding and is to be respected in every case in which the state law is to be enforced. *Louisville H. & St. L. Ry.* v. *Lyons,* 155 Ky. 396; *Terry Dairy Co.* v. *Nalley,* 146 Ark. 448; *Grand Rapids Trust Co.* v. *Petersen Beverage Co.,* 219 Mich. 208; *Elk Cotton Mills* v. *Grant,* 140 Ga. 727. But when the field of the relations between an interstate carrier and its interstate employees is the subject of consideration, it becomes a federal question and is to be decided exclusively as such.

We have not found any case in which this question has been presented to the federal courts, but there are three or four well-reasoned cases in state courts, wherein this exact point is considered and decided.

In the case of *Smithson* v. *Atchison, T. & S. F. Ry.*, 174 Cal. 148, an action was brought under the Federal Employers' Liability Act by an employee against an interstate carrier. The California law provided that no minor under the age of 18 years should be employed between 10 o'clock in the evening and 5 o'clock in the morning, and the trial court charged that if the jury believed from the evidence that the employment or permission to work at night hours contributed to his injuries, the plaintiff was not guilty of contributory negligence. This was held to be error because of the exclusive provisions of the Federal Employers' Liability Act.

In *Petranek* v. *Minneapolis, St. Paul & S. S. M. Ry.*, 240 Mich. 655, where an accident causing an injury to a 16 year old boy working for a railroad as a section hand occurred while the boy and railroad were engaged in interstate commerce, it was held that the plaintiff could not rely on the violation of a state statute forbidding the hiring of boys under 18 in a hazardous employment as evidence of negligence, but that in its exercise of its right to control means by which interstate commerce should be carried on, Congress dealt exclusively with the matter of employers' liability to employees for injuries occurring in that commerce.

In *St. Louis-San Francisco Ry.* v. *Conly*, 154 Ark. 29, plaintiff was a minor 15 years of age working for defendant railroad in interstate commerce and was injured therein. It was held that a state law prohibiting such employment could not supplement or change the rule as to negligence under the Federal Employers' Liability Act. The court said:

"It is therefore wholly beyond the power of the State legislature to make carriers engaged in interstate commerce civilly liable in damages for injuries to their employees while engaged in such commerce for the violation of some police regulation of the State. This power

of Congress under the commerce clause of the Constitution does not in any manner trench upon or dislodge the police power of the states from their own local and internal affairs which are reserved to them under the 10th Amendment to the Constitution."

See also *St. Louis, Iron Mountain & Southern R. R.* v. *Steel,* 129 Ark. 520.

A similar case was *McLain* v. *Chicago Great Western R. R.,* 140 Minn. 35. In that case an action was brought by the plaintiff under the Federal Employers' Liability Act, and it was held that a city ordinance and police regulation limiting the speed of trains, having all the effect of a statute, could not be admitted as evidence of contributory negligence. The Supreme Court of Minnesota said:

"The Act covers the entire field under which the employer in interstate commerce shall be liable for injury to its employees likewise engaged. It pertains solely to the relation of master and servant. It does not supersede state legislation outside of this field, nor does it deal with the duties and obligations of either to the public; but it does supersede all state and municipal legislation governing the circumstances under which the master while within the provisions of the Act, shall be liable for injury to the servant. It follows that the ordinance in question was superseded by the Act of Congress and was not admissible in evidence."

The citations from these state cases, four of them, seem to show that their effect is confined to the government of the relation between the employer and the employee, between the common carrier and the interstate commerce agent. A different rule might well apply where the issue and the litigation is with reference to the duties of the common carrier in dealing with the public, with passengers or with strangers. The cases cited were decided only after a full examination of the cases on the subject of the Federal Employers' Liability Act in this Court.

The cases chiefly relied on by respondent are cases which were decided before the Federal Employers' Liability Act was passed. A palpable instance of this is the case of *Narramore* v. *Cleveland, C. C. & St. L. Ry.*, 96 Fed. 298. It was a suit of which the federal court took jurisdiction because of diverse citizenship of the parties, but it involved the application of an Ohio statute requiring railroads to block the frogs, switches, and guard rails on their tracks, on penalty of a fine. State statutes relating to duties of the railroad company as a common carrier and enacted to secure the safety of the public are obligations on the company in many ways; but they cannot encroach on the field occupied by admissible federal statutes. Therefore the *Narramore* and other cases cited have no application to the present case because they did not involve the construction or effect of the Federal Employers' Liability Act. *Hover & Co.* v. *Denver & Rio Grande Western R. R.*, 17 F. (2d) 881; *Star Clay Co.* v. *Budno*, 269 Fed. 508; *Klicke* v. *Allegheny Steel Co.*, 200 Fed. 933; *Steel Car Forge Co.* v. *Chec*, 184 Fed. 868.

Frese v. *Chicago, B. & Q. Ry.*, 263 U. S. 1, is relied on by the plaintiff. In that case a state statute made it the duty of a locomotive engineer to stop his train within a certain distance of a crossing of another railroad and positively to ascertain that the way was clear and that the train could safely resume its course before proceeding to pass the crossing. The duty was a personal one which could not be devolved by custom upon the fireman and it was held that the failure of the engineer to comply with the duty was a defense to an action for his resulting death brought by his administratrix under the Federal Employers' Liability Act. This was a crossing of two railroads, a crossing where appropriate precautions must be taken to avoid collision between railroad trains whether state or interstate. It was a situation dependent

for public safety on the enforcement of the state law as against the employees of all railroads, state or interstate. The application of the state statute was not by way of enlargement or contraction of the Federal Employers' Liability Act. See *Salabrin* v. *Ann Arbor R. R.,* 194 Mich. 458; *Pennsylvania R. R.* v. *Stalker,* 67 Ind. App. 329.

We think that the statute of Kentucky limiting the age of employees and punishing its violation has no bearing on the civil liability of a railway to its employees injured in interstate commerce and that application of it in this case was error.

Reversed.

BARRY, SERGEANT-AT-ARMS OF THE UNITED STATES SENATE, ET AL. *v.* UNITED STATES EX REL. CUNNINGHAM.

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

No. 647. Argued April 23, 1929.—Decided May 27, 1929.

1. A resolution of the Senate which recites the refusal of a witness to answer questions asked of him by a committee pursuing an investigation under authority from the Senate, and which directs that he be attached and brought before the bar of the Senate "to answer such questions pertinent to the matter under inquiry as the Senate through its said committee or the President of the Senate may propound," expresses the purpose of the Senate to elicit testimony in response to questions to be propounded at its bar; and in deciding whether the witness must attend, it is not material to consider whether the information sought to be elicited from him by the committee was pertinent to the inquiry which it had been directed to make. P. 612.
2. Exercise by the Senate of its judicial power to judge of the elections, returns and qualifications of its members, Const., Art. I, § 5, cl. 1, necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel answers to pertinent questions, to determine

the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review. P. 613.

3. In the exercise of this power, the Senate may dispense with the services of a committee and itself take the testimony, or, after conferring authority on its committee, it may at any stage resume charge of the inquiry, and deal with the subject without regard to the limitations that were put upon the committee and subject only to the restraints of the Constitution. P. 613.
4. It is not to be assumed, in advance of a witness' interrogation at the bar of the Senate, that constitutional restraints will not be faithfully observed. P. 614.
5. When one who, upon the face of the returns, has been elected to the Senate and who has a certificate from the Governor of his State to that effect, presents himself to the Senate claiming the right of membership, the jurisdiction of the Senate to determine the rightfulness of the claim is invoked and its power to adjudicate such right immediately attaches by virtue of § 5 of Article I of the Constitution, empowering it to judge of the elections, returns and qualifications of its "members." P. 614.
6. Whether, pending this adjudication, the credentials should be accepted, the oath administered, and the full right accorded to participate in the business of the Senate, is a matter within the discretion of the Senate. P. 614.
7. Refusal by the Senate to seat the claimant pending the investigation does not deprive the State of its "equal suffrage in the Senate" within the meaning of Article V of the Constitution. P. 615.
8. The power of the Senate to require the attendance of witnesses, when judging of the elections, returns and qualifications of its members, is a necessary incident of the power to adjudicate in nowise inferior under like circumstances to that exercised by a court of justice, and includes in some cases the power to issue a warrant of arrest to compel such attendance. P. 616.
9. The warrant may issue without previous subpoena, where there is good reason to believe that otherwise the witness will not be forthcoming. P. 616.
10. The Senate, having sole authority under the Constitution to judge of the elections, returns and qualifications of its members, may exercise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute. P. 618.
11. The act of the Senate in issuing its warrant for the arrest of a witness is attended by the presumption of regularity which applies to the proceedings of courts. P. 619.

12. It is to be assumed that the Senate will deal with the witness in accordance with well-settled rules and discharge him from custody upon proper assurance, by recognizance or otherwise, that he will appear for interrogation when required. P. 619.
13. If judicial interference can be successfully invoked by the person so arrested, it can only be upon a clear showing of arbitrary and improvident use of the power constituting a denial of due process of law. P. 620.

29 F. (2d) 817, reversed.

CERTIORARI, *post,* p. 827, to review a judgment of the Circuit Court of Appeals reversing a decision of the District Court, 25 F. (2d) 733, which discharged a writ of *habeas corpus* sued out by Cunningham and remanded him to the custody of the Sergeant-at-Arms of the Senate, who had arrested him under a warrant issued pursuant to a resolution of the Senate.

Mr. George W. Wickersham, Special Assistant to the Attorney General, with whom *Attorney General Mitchell* was on the brief, for petitioners.

The Circuit Court of Appeals erred in holding the warrant under authority of which respondent was arrested to be a process in a proceeding to punish for contempt, and in not holding it to be a warrant of attachment to compel respondent's presence and testimony. The purpose of the Senate is obvious from the face of the warrant and resolution.

It is well settled that the Senate has the power to punish for contempt a witness in an inquiry which the Senate had the power to make, who refuses to answer questions pertinent to the inquiry. *Anderson* v. *Dunn,* 6 Wheat. 204; *In re Chapman,* 166 U. S. 661; *Marshall* v. *Gordon,* 243 U. S. 521; *McGrain* v. *Daugherty,* 273 U. S. 135.

It is also now equally well settled that the Senate has the power to compel the presence and testimony of a recalcitrant witness by a body attachment in the form of an arrest, in a proper case. *McGrain* v. *Daugherty,* 273

U. S. 135; *Matter of Stewart,* Sup. Ct., Dist. of Columbia, Feb. 25, 1928.

The compelling of the presence and testimony of respondent before the bar of the Senate after a refusal to answer questions put to him by a member of a committee, is in full accord with congressional precedent. *Woolley's Case,* Hinds' Pre., Vol. 3, §§ 1685 *et seq.; Stewart's Case, Id.,* § 1689; *Irwin's Case, Id.,* § 1690; *Barnes' Case, Id.,* § 1695; Jefferson's Manual, § 13.

The inquiry was within the constitutional powers of the Senate, to judge of the elections, returns and qualifications of its members, and to make or alter regulations as to the times and manner of holding elections for Senators. Art. I, § 3; *McGrain* v. *Daugherty,* 273 U. S. 135.

The respondent's second examination before the committee was preceded by Resolution 324, expressly reciting the election contest, and the subsequent resolutions adopted December 9, 1927, December 12, 1927, December 17, 1927, referring the claims to the committee, emphasize this as the primary purpose of the inquiry. The same resolution under which the proceedings against respondent were initiated, was before this Court in *Reed* v. *County Comm'rs,* 277 U. S. 376.

The Senate, in judging of the elections, returns and qualifications of its members, is not limited to the enforcement of prohibitions contained in Article I, § 3, cl. 3. Sen. Doc. No. 4, 70th Cong., 1st Sess.

The provisions of Article I, § 5, do not require that one must be seated and sworn as a member before an investigation is possible. The practical construction placed upon the word "member" by legislation is entirely at variance with respondent's contention. For example, see R. S. § 105.

The language in Article V of the Constitution "that no State without its consent, shall be deprived of its

equal Suffrage in the Senate," has no reference to such a condition as we are considering. Story, 1 Const., § 627.

Provision is made in the Seventeenth Amendment for temporarily filling any vacancy which may occur in the representation of a State in the Senate.

The Senate had power and jurisdiction to order the arrest of respondent to bring him to its bar to testify, under its judicial power as the sole constitutional judge of the elections, returns and qualifications of its members. *Kilbourn* v. *Thompson,* 103 U. S. 168; *McGrain* v. *Daugherty,* 273 U. S. 135.

The Circuit Court of Appeals erred in holding that a subpoena served on a witness followed by his neglect to appear constituted necessary preliminaries to the issue of the attachment. It is conceded that the Senate has the powers of a court in a proceeding such as this. It is of course admitted that a court (at least in a civil case) will not ordinarily order the arrest of a witness without a previous disobedience of a subpoena, or a showing that the witness is about to leave the jurisdiction, or something of the sort. But it must be borne in mind that this general practice is the result of the usual way of exercising discretion, and has nothing to do with the power or the jurisdiction of the courts to issue such process. Chamberlayne's Modern Law of Evidence, Vol. 5, § 3612.

The power to issue such summary warrants of attachment is amply demonstrated by the common practice, well known to this Court, of issuing bench warrants for material witnesses in criminal cases. See U. S. Code, Tit. 28, § 659; *Blair* v. *United States,* 250 U. S. 273; *In re Aliens,* 231 Fed. 335; G. L. Mass., 1921, c. 277, § 70; § 618–b, N. Y. Code Crim. Pro.; *People* v. *Sharp,* 78 Misc. 528; *People ex rel. Maloney* v. *Sheriff,* 117 Misc. 421; *People ex rel. Farina* v. *Wallis,* 208 App. Div. 720; *People ex rel. Bruno* v. *Maudlin,* 206 N. Y. Supp. 523.

These cases and statutes also show to be unfounded the contention that the warrant was violative of the Fourth Amendment because issued without probable cause. It is clear that the fact that the person arrested is a material witness in a case involving the interests of the people or of the Government, is sufficient cause. But even were more needed, the contumacy of the witness at his hearings before the committee, and the difficulty found in serving a subpoena on him for the first examination should be more than sufficient cause.

In exercising its separate power to "judge of the elections, returns and qualifications of its members," the Senate cannot be made to depend upon the concurrence of the House of Representatives or upon any statute. *Reed* v. *County Comm'rs,* 277 U. S. 376.

Since the Senate has jurisdiction to bring the respondent before it by process of attachment, no inquiry should be made by this Court on *habeas corpus* into the reasons which induced it to do so, and he should be remanded to custody.

The recitals in Resolution 179 of the previous double recusance of respondent may strengthen the position of the Senate, as was held in the *Stewart* case, *supra,* regarding a legislative inquiry; but it is wholly unnecessary where, as in the case at bar, the Senate acts in its judicial capacity. If the Senate's questions to respondent are to be inquired into at all by a court, it can be only after they have been formulated and put to him at its bar, and he has refused to answer and has been committed to close custody until he shall answer.

Unless this Court were able to say that no question pertinent to the elections, returns or qualifications of members of the Senate elected in November, 1926, could or would be asked of respondent by the Senate on his production at its bar, there can be no basis on which to order his discharge upon *habeas corpus.*

The propriety of an inquiry into the method and amount of moneys expended to secure the nomination of a candidate, is demonstrated by the provisions of the Pennsylvania Corrupt Practices Act. If it should appear as the result of the investigation that the conduct of either the primary or the general election for Senator was such that a candidate would have been disqualified for the office had he been seeking a state office, can it be contended that the Senate under its powers to judge the qualifications of its own members, might not refuse to seat that candidate?

Newberry v. *United States,* 256 U. S. 232, is not decisive on the power of Congress to regulate primary elections within the States, since the adoption of the Seventeenth Amendment, especially as this Court has more recently recognized the direct relation between the primary and the general election in the case of *Nixon* v. *Herndon,* 273 U. S. 536. But even if it were decisive, it has no bearing on this case, which is concerned not with Congressional regulation of primaries, but with violations of state primary laws; which is concerned, not with a criminal prosecution, but with an inquiry to judge of the elections, returns and qualifications of a member-elect of the Senate.

If the warrant was an attachment to compel respondent to testify, the propriety or pertinency of the questions he refused to answer is immaterial.

Even if this were a contempt process, so that pertinency of the questions respondent refused to answer was involved, the questions were clearly pertinent and proper.

The arrest was not violative of the Fourth Amendment, because unsupported by oath or affirmation. *McGrain* v. *Daugherty,* 273 U. S. at p. 158.

The fact that a new Congress has convened since respondent's examinations, is wholly immaterial to this case, whether considered from the viewpoint of the Senate's legislative power or its judicial power in regard to its own members. *McGrain* v. *Daugherty, supra.*

Mr. Ruby R. Vale, with whom *Messrs. Otto Kraus, Jr.,* and *Benjamin M. Golder* were on the brief, for respondent.

Respondent has always admitted the Senate's power to compel his attendance as a witness by subpœna or other legal process. The broad inquiry as to the existence of that power, will not then be discussed, because not raised.

Respondent has always assumed, and the Circuit Court of Appeals has concluded, in effect, that the special committee recommended that he be adjudged in contempt because of contumacy committed by him on two occasions in the 69th Congress; that the Senate acted on this recommendation when, on the same day that the report was filed, it passed Resolution 179 of the 70th Congress, the recital of which charged him with this specific offense; that because of such contumacy, Resolution 179 was the first step taken by the Senate in the contempt proceedings to have him legally punished therefor, if finally so adjudged, when he appeared before the Senate "to answer such questions . . . as the Senate . . . may propound."

Uniformly it has been urged that the inclusion in Senate Resolution 179 of the order to appear before the bar of the Senate and there to answer "questions pertinent to the matter under inquiry," was to give the accused an opportunity to purge himself of the contempt charged.

Since a contumacious witness should not be punished without proper proceedings being instituted against him after the commission of the offense, Resolution 179 was in effect, and in analogy to the practice which obtains in the courts, a rule to show cause why he should not be adjudged in contempt for the past offense charged in the recital of the resolution. The final adjudication of the fact of contempt with the imposition of punishment then

depends upon the answer and attitude of the accused witness when he appears at the bar of the Senate.

Courts have jurisdiction in habeas corpus proceedings to pass on the power of the Senate to institute proceedings in contempt against an alleged contumacious witness, or to imprison a witness not contumacious for future examination. *Anderson* v. *Dunn,* 6 Wheat. 204; *Marshall* v. *Gordon,* 243 U. S. 521; *McGrain* v. *Daugherty,* 273 U. S. 135; *Matter of Stewart,* Supreme Court, District of Columbia, Feb. 25, 1928; *Kilbourn* v. *Thompson,* 103 U. S. 168; *In re Chapman,* 166 U. S. 135.

The American cases, federal and state, are uniform in holding that a legislative body is not the final judge of its power and privileges in cases involving the rights and liberties of individuals; but the courts may discharge on habeas corpus a relator arrested and detained in excess of legislative authority. *Anderson* v. *Dunn, supra; McGrain* v. *Daugherty,* 273 U. S. 135; *Sinclair* v. *United States,* 279 U. S. 263; *Kilbourn* v. *Thompson,* 103 U. S. 168; *Kielley* v. *Carson,* 4 Moo. P. C. 63; *Burnham* v. *Morrissey,* 14 Gray 226; *Marshall* v. *Gordon,* 243 U. S. 521; *In re Chapman,* 166 U. S. 661; *McDonald v. Keeler,* 99 N. Y. 463; *Interstate Commerce Comm'n* v. *Brinson,* 154 U. S. 478.

The transforming of the warrant of arrest into a process to appear, is without precedent. Distinguishing *McGrain* v. *Daugherty,* 273 U. S. 135; *Matter of Stewart,* Supreme Court, District of Columbia.

The treating of the warrant as a process to compel attendance of a witness and to take and hold his body without outstanding process or "without probable cause," violates the Fourth and Fifth Amendments. *Ex parte Field,* 5 Blatch. C. C. Rep. 63.

Text-book writers and the courts generally regard the power to compel the attendance of a witness by attachment as analogous to a proceeding for contempt; and

they all emphasize the necessity of showing the service of a subpœna as a condition precedent. *Commonwealth* v. *Shecter,* 250 Pa. 282; *Douglass Co.* v. *Simpson,* 233 Pa. 517; *Respublica* v. *Duane,* 4 Yeates 347; *Commonwealth* v. *Carter,* 11 Pick. 277; *Andrews* v. *Andrews,* 2 Johns. 109; *Sanderson* v. *The State,* 168 Ala. 109; *Brand* v. *The State,* 13 Ala. App. 390; *Ex parte Humphrey,* 2 Blatchf. 228; *Ex parte Beebees,* 2 Wall. Jr., 127; *Burnham* v. *Morrissey,* 14 Gray 226; Jones, Evidence, (Civil Cases) § 799; Wigmore, Evidence, 2d ed., Vol. 4; § 2199, p. 663.

In § 881, Rev. Stats., Congress was careful to safeguard the rights of individuals against an arbitrary use of this extraordinary remedy by permitting its issuance only after formal application in open court had been made by the District Attorney; and when the court was "satisfied by proof that the testimony of any person is competent and will be necessary on the trial." This Act and also that of March 3, 1887, c. 397, § 2, 24 Stat. 635, and § 660, U. S. C., emphasize and make clear, not only that an attachment will not issue without a previous subpœna or to prevent the absconding of a material witness, but also that statutory authority has been deemed necessary, even in such instances.

Neither the Senate nor the House of Representatives has ever assumed the power here asserted by the Senate to arrest and bring to its bar a witness without first summoning him by subpœna. Hinds Preced., Vol. 3, pp. 1–67. In every other case where warrant of arrest issued, the witness refused to answer certain specific questions after he had disobeyed the subpœna.

The warrant is issued without probable cause because the record does not disclose respondent to be guilty of defiant and contumacious conduct as a witness before the special committee: (a) since he answered truthfully all

relevant questions, and (b) refused to answer only improper inquiries concerning his personal affairs.

The Senate can not commit for a contempt by an individual in an investigation involving either the election or qualifications of an individual certified as elected, but who in fact, by its own resolution, is not a member of the Senate.

The Senate can perform its judicial function only if and when the election of a *member* is in question; or the age, residence, or citizenship of a *member,* or his conduct, or character, raise the issue of his qualification. Membership in the Senate is essential to its passing on the fact of "either his election or qualification." The nomination of a Senator at a primary or convention is distinct from his final election. The formality of the oath is necessary to membership in the Senate.

Legislative bodies, on many occasions, have refused to administer the oath of office to a member-elect, pending an examination into the legality of his credentials, but the Senate will search in vain for a precedent where a Senator-elect has presented credentials in legal form, evidencing his election, and possesses the constitutional qualifications, who has been denied membership.

When the Senate declared that Vare was not a member of that body, it, by that formal act, deprived itself of power to pass on his constitutional qualifications, or to investigate either his election or inquire into his nomination; and when it forfeited its power so to function in a judicial capacity, it was without authority or jurisdiction to commit respondent for contempt.

The qualifications as to age, citizenship, residence and inhabitancy, as set forth in § 3 of Article I of the Constitution, are the only qualifications which can determine his right to be qualified as a Senator under the legal certificate of the Governor of the State whose accredited repre-

sentative he is; and this because the words of the Constitution confer power to judge of the qualifications of members only.

If the Senate has power to pass upon the non- or extra-constitutional qualifications of a Senator-elect, and before he becomes a member, then any qualification pleasing to the Senate, as then constituted, is added to the qualifications named in the Constitution; and the latter, by arbitrary act of the Senate, is in fact amended.

If the Senate has the power to ignore the legal certificate of election of the Governor of a State and deny membership to one who possesses the qualifications as defined in the Constitution, the safeguards for continuous and perpetual representation in the Senate will have been stricken down; the Senate by its act will have written into the Constitution qualifications not defined therein; and the State thereby will have been deprived of its equal suffrage in the Senate for the length of time, at least, intervening between the vote denying him membership and the determination of the issue of the election or his qualifications.

The scope of the special committee functioning under Resolution 195 embraces a subject-matter as to which there can be no valid legislation, because it relates to nominations of Senators at primaries. *Newberry* v. *United States,* 256 U. S. 232.

The Senate having taken no action in the 69th Congress upon the recommendation of the committee, is without power in the 70th Congress to punish for a contempt committed in the preceding Congress.

The revival of the special committee by Resolution 10 of the 70th Congress, confers no authority to commit for a contempt committed in the 69th Congress, because there can be no imprisonment for a contempt beyond the Congress in which it was committed.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The questions here presented for determination grow out of an inquiry instituted by the United States Senate in respect of the validity of the election of a United States Senator from Pennsylvania in November, 1926. The inquiry began before the election, immediately after the conclusion of the primaries, by the adoption of a resolution appointing a special committee to investigate expenditures, promises, etc., made to influence the nomination of any person as a candidate or promote the election of any person as a member of the Senate at the general election to be held in November, 1926.

After the Pennsylvania primaries, Cunningham was subpoenaed and appeared before this committee. Among other things, he testified that he was a member of an organization which supported William S. Vare for Senator at the primary election; that he had given to the chairman of the organization $50,000 in two instalments of $25,000 each prior to the holding of the primaries. He had been clerk of a court for 21 years and was then receiving a salary of $8,000 a year. He paid the money to the chairman in cash, but refused to say where he obtained it except that he had not drawn it from a bank. He would not say how long the money had been in his possession; said he had never inherited any, but declined to answer whether he had made money in speculation. In short, he declined to give any information in respect of the sources of the money, insisting that it was his own and the question where he had obtained it was a personal matter. He further said that he had learned the trick from a former senator of " saving money and putting it away and keeping it under cover "; that this senator " was a past master in not letting his right hand know what his left hand done,

and he dealt absolutely in cash. The 'long green' was the issue."

Mr. Vare was nominated and elected at the succeeding November election. The special committee thereafter submitted a partial report in respect of Cunningham's refusal to testify. In January, 1927, Vare's election having been contested by William B. Wilson upon the ground of fraud and unlawful practices in connection with the nomination and election, the Senate adopted a resolution further authorizing the special committee to take possession of ballot boxes, tally sheets, etc., and to preserve evidence in respect of the charges made by Wilson. In February, 1927, Cunningham was recalled and, questions previously put to him having been repeated, he again refused to give the information called for, as he had done at the first hearing.

At the opening of Congress in December, 1927, the Senate adopted an additional resolution, reciting, among other things, that there were numerous instances of fraud and corruption in behalf of Vare's candidacy and that there had been expended in his behalf at the primary election a sum exceeding $785,000. Expenditure of such a large sum of money was declared to be contrary to sound public policy; and the special committee was directed to inquire into the claim of Vare to a seat in the Senate, to take evidence in respect thereto, and report to the Senate—in the meantime, it was resolved, Vare should be denied a seat in the Senate. By a subsequent resolution, the Committee on Privileges and Elections was directed to hear and determine the contest between Vare and Wilson.

The special committee, in March, 1928, reported its proceedings, including testimony given by Cunningham, recited his refusal to give information in response to questions, as hereinbefore set forth, and recommended that he be adjudged in contempt of the committee and of the Senate. The Senate, however, did not adopt the recom-

mendation of the committee, but, instead, passed a resolution reciting Cunningham's contumacy and instructing the President to issue his warrant commanding the Sergeant-at-Arms or his deputy to take the body of Cunningham into custody, and to bring him before the bar of the Senate, "then and there or elsewhere as it may direct, to answer such questions pertinent to the matter under inquiry as the Senate, through its said committee, or the President of the Senate, may propound, and to keep the said Thomas W. Cunningham in custody to await further order of the Senate." The warrant was issued and executed; and thereupon Cunningham brought a habeas corpus proceeding in the federal district court for the eastern district of Pennsylvania.

In his petition for the writ of habeas corpus, Cunningham averred that he was arrested under the warrant by reason of an alleged contempt; and that, by reason of his refusal to disclose his private and individual affairs to the special committee, the Senate had illegally and without authority adjudged him to be in contempt and had issued its warrant accordingly. A return was made to the writ, denying that the Senate had adjudged Cunningham in contempt and, in substance, averring that the warrant by which he was held simply required that he be brought to the bar of the Senate to answer questions pertaining to the matter under inquiry, etc.

The district court, to which the return was made, after a hearing and consideration of written briefs and oral arguments, entered an order discharging the writ and remanding Cunningham to the custody of the Sergeant-at-Arms. A written opinion was handed down by Judge Dickinson, sustaining the power of the Senate to compel the attendance of witnesses under the circumstances above set forth, and holding that the Senate had not proceeded against Cunningham for a contempt; but by its resolution had required his arrest and production at the bar of the

Senate, simply to answer questions pertinent to the matter under inquiry. 25 F. (2d) 733.

Upon appeal, the court of appeals reversed the district court, holding that the arrest was in reality one for contempt, but, if it should be regarded as an arrest to procure Cunningham's attendance as a witness, it was void because a subpoena to attend at the bar of the Senate had not previously been served upon him, and that this was a necessary prerequisite to the issue of an attachment. Treating the proceeding as one for contempt, that court held that the information sought to be elicited and which Cunningham refused to give was not pertinent to the inquiry authorized to be made by the committee, and that Cunningham was justified in declining to answer the questions in respect thereof. Circuit Judge Woolley dissented, substantially adopting the view of the district court. 29 F. (2d) 817.

The correct interpretation of the Senate's action is that given by the district judge and by Judge Woolley. It is true the special committee in its report to the Senate recited Cunningham's contumacy and recommended that he be adjudged in contempt, but the resolution passed by the Senate makes it entirely plain that this recommendation of the committee was not followed. The Senate resolution, after a recital of Cunningham's refusal to answer certain questions, directs that he be attached and brought before the bar of the Senate, not to show cause why he should not be punished for contempt, but "to answer such questions pertinent to the matter under inquiry as the Senate through its said committee or the President of the Senate may propound . . ." We must accept this unequivocal language as expressing the purpose of the Senate to elicit testimony in response to questions to be propounded at the bar of the Senate, and the question whether the information sought to be elicited

from Cunningham by the committee was pertinent to the inquiry which the committee had been directed to make may be put aside as immaterial.

It results that the following are the sole questions here for determination: (1) whether the Senate was engaged in an inquiry which it had constitutional power to make; (2) if so, whether that body had power to bring Cunningham to its bar as a witness by means of a warrant of arrest; and (3) whether as a necessary prerequisite to the issue of such warrant of arrest a subpoena should first have been served and disobeyed.

First. Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers which are not legislative but judicial in character. Among these is the power to judge of the elections, returns and qualifications of its own members. Art. I, § 5, cl. 1. "That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections." *Reed* v. *County Commissioners,* 277 U. S. 376, 388. Exercise of the power necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review. In exercising this power, the Senate may, of course, devolve upon a committee of its members the authority to investigate and report; and this is the general, if not the uniform, practice. When evidence is taken by a committee, the pertinency of questions propounded must be determined by reference to the scope of the authority vested in the committee by the Senate. But undoubtedly, the Senate, if it so de-

termine, may in whole or in part dispense with the services of a committee and itself take testimony; and, after conferring authority upon its committee, the Senate, for any reason satisfactory to it and at any stage of the proceeding, may resume charge of the inquiry and conduct it to a conclusion or to such extent as it may see fit. In that event, the limitations put upon the committee obviously do not control the Senate; but that body may deal with the matter, without regard to these limitations, subject only to the restraints imposed by or found in the implications of the Constitution. We cannot assume, in advance of Cunningham's interrogation at the bar of the Senate, that these restraints will not faithfully be observed. It sufficiently appears from the foregoing that the inquiry in which the Senate was engaged, and in respect of which it required the arrest and production of Cunningham, was within its constitutional authority.

It is said, however, that the power conferred upon the Senate is to judge of the elections, returns and qualifications of its "members," and, since the Senate had refused to admit Vare to a seat in the Senate or permit him to take the oath of office, that he was not a member. It is enough to say of this, that upon the face of the returns he had been elected and had received a certificate from the Governor of the state to that effect. Upon these returns and with this certificate, he presented himself to the Senate, claiming all the rights of membership. Thereby the jurisdiction of the Senate to determine the rightfulness of the claim was invoked and its power to adjudicate such right immediately attached by virtue of § 5 of Article I of the Constitution. Whether, pending this adjudication, the credentials should be accepted, the oath administered, and the full right accorded to participate in the business of the Senate, was a matter within the discretion of the Senate. This has been the practical construction of the

power by both Houses of Congress;* and we perceive no reason why we should reach a different conclusion. When a candidate is elected to either House, he of course is elected a member of the body; and when that body determines, upon presentation of his credentials, without first giving him his seat, that the election is void, there would seem to be no real substance in a claim that the election of a "member" has not been adjudged. To hold otherwise would be to interpret the word "member" with a strictness in no way required by the obvious purpose of the constitutional provision, or necessary to its effective enforcement in accordance with such purpose, which, so far as the present case is concerned, was to vest the Senate with authority to exclude persons asserting membership, who either had not been elected or, what amounts to the same thing, had been elected by resort to fraud, bribery, corruption, or other sinister methods having the effect of vitiating the election.

Nor is there merit in the suggestion that the effect of the refusal of the Senate to seat Vare pending investigation was to deprive the state of its equal representation in the Senate. The equal representation clause is found in Article V, which authorizes and regulates amendments to the Constitution, "provided, . . . that no state, without its consent, shall be deprived of its equal suffrage in the Senate." This constitutes a limitation upon the power

* Among the typical cases in the House, where that body refused to seat members in advance of investigation although presenting credentials unimpeachable in form, was that of Roberts, in the 56th Congress, where it was so decided after full debate by a vote of 268 to 50. Cong. Record, Vol. 33, pt. 2, p. 1217.

It was stated at the bar in this case that the Senate in 29 cases had, in advance of investigation, seated persons exhibiting *prima facie* credentials, and in 16 cases had taken the opposite course of refusing to seat such persons, before investigation and determination of charges challenging the right to the seat.

of amendment and has nothing to do with a situation such as the one here presented. The temporary deprivation of equal representation which results from the refusal of the Senate to seat a member pending inquiry as to his election or qualifications is the necessary consequence of the exercise of a constitutional power, and no more deprives the state of its "equal suffrage" in the constitutional sense than would a vote of the Senate vacating the seat of a sitting member or a vote of expulsion.

Second. In exercising the power to judge of the elections, returns and qualifications of its members, the Senate acts as a judicial tribunal, and the authority to require the attendance of witnesses is a necessary incident of the power to adjudge, in no wise inferior under like circumstances to that exercised by a court of justice. That this includes the power in some cases to issue a warrant of arrest to compel such attendance, as was done here, does not admit of doubt. *McGrain* v. *Daugherty,* 273 U. S. 135, 160, 180. That case dealt with the power of the Senate thus to compel a witness to appear, to give testimony necessary to enable that body efficiently to exercise a legislative function; but the principle is equally, if not *a fortiori,* applicable where the Senate is exercising a judicial function.

Third. The real question is not whether the Senate had power to issue the warrant of arrest, but whether it could do so under the circumstances disclosed by the record. The decision of the court of appeals is that, as a necessary prerequisite to the issue of a warrant of arrest, a subpoena first should have been issued, served, and disobeyed. And undoubtedly the courts recognize this as the practice generally to be followed. But undoubtedly also, a court has power in the exercise of a sound discretion to issue a warrant of arrest without a previous subpoena when there is good reason to believe that otherwise the witness will not be forthcoming. A statute of the United

States (U. S. Code, Title 28, § 659) provides that any federal judge, on application of the district attorney, and being satisfied by proof that any person is a competent and necessary witness in a criminal proceeding in which the United States is a party or interested, may have such person brought before him by a warrant of arrest, to give recognizance, and that such person may be confined until removed for the purpose of giving his testimony, or until he gives the recognizance required by said judge. The constitutionality of this statute apparently has never been doubted. Similar statutes exist in many of the states and have been enforced without question.

United States v. *Lloyd,* 4 Blatchf. 427, was a case arising under the federal statute. The validity of the statute was not doubted, although the witness was held under peculiar conditions of severity, because of which the court allowed him to be discharged upon his own recognizance in the sum of $1,000.

In *State of Minnesota ex rel.* v. *Grace,* 18 Minn. 398, a similar statute was upheld and applied in the case of a material witness where it was claimed that there was good reason to believe that he would leave the state before the trial and not return to be present at the time of such trial. The court, using the words of Lord Ellenborough in *Bennett* v. *Watson,* 3 Maule & Selwyn 1, said (p. 402): "The law intends that the witness shall be forthcoming at all events, and it is a lenient mode which it provides to permit him to go at large upon his own recognizance. However this is only one mode of accomplishing the end, which is his due appearance." The witness, however, was discharged because of an entire absence of proof of any intention on his part not to appear and testify.

The comment of the court in *Crosby* v. *Potts,* 8 Ga. App. 463, 468, is peculiarly apposite:

"It is a hardship upon one whose only connection with a case is that he happens to know some material fact in

relation thereto that he should be taken into control by the court and held in the custody of the jailer unless he gives bond (which, from poverty, he may be unable to give), conditioned that he will appear and testify; but the exigencies of particular instances do often require just such stringent methods in order to compel the performance of the duty of the witness's appearing and testifying. There are many cases in which an ordinary subpoena would prove inadequate to secure the presence of the witness at the trial. The danger of punishment for contempt on account of a refusal to appear is sometimes too slight to deter the witness from absenting himself; especially is this true where there are but few ties to hold the witness in the jurisdiction where the trial is to be held, and there are reasons why he desires not to testify; for when once he has crossed the state line, he is beyond the grasp of any of the court's processes to bring him to the trial or to punish him for his refusal to answer to a subpoena. We conclude, therefore, that since the law manifestly intends that the courts shall have adequate power to compel the performance of the respective duties falling on those connected in any wise with the case, it may, where the exigencies so require, cause a witness to be held in custody, and in jail if need be, unless he gives reasonable bail for his appearance at the trial."

See also *Ex parte Sheppard,* 43 Tex. Cr. Rep. 372; Chamberlayne, Modern Law of Evidence, § 3622.

The rule is stated by Wharton, 1 Law of Evidence, § 385, that where suspicions exist that a witness may disappear, or be spirited away, before trial, in criminal cases, and when allowed by statute in civil cases, he may be held to bail to appear at the trial and may be committed on failure to furnish it, and that such imprisonment does not violate the sanctions of the federal or state constitutions.

The validity of acts of Congress authorizing courts to exercise the power in question thus seems to be established.

The Senate, having sole authority under the Constitution to judge of the elections, returns and qualifications of its members, may exercise in its own right the incidental power of compelling the attendance of witnesses without the aid of a statute. Compare *Reed* v. *County Commissioners, supra,* p. 388. The following appears from the report of the committee to the Senate upon which the action here complained of was taken. "A subpoena was issued for his appearance early in June. A diligent search failed to locate him. Finally Representative Golder of the Fourth District of Pennsylvania communicated with the committee, stating that Cunningham would accept service. His whereabouts was disclosed and he was served." Upon examination by the committee, he repeatedly refused to answer questions which the committee deemed relevant and of great importance, not upon the ground that the answers would tend to incriminate him, but that they involved personal matters. These questions have already been recited, and it is impossible for us to say that the information sought and refused would not reflect light upon the validity of Vare's election.

It is not necessary to determine whether the information sought was pertinent to the inquiry before the Committee, the scope of which was fixed by the provisions of the Senate resolution. But it might well have been pertinent in an inquiry conducted by the Senate itself, exercising the full, original and unqualified power conferred by the Constitution. If the Senate thought so, and, from the facts before it reasonably believing that this or other important evidence otherwise might be lost, issued its warrant of arrest, it is not for the court to say that in doing so the Senate abused its discretion. The presumption in favor of regularity, which applies to the proceedings of courts, cannot be denied to the proceedings of the Houses of Congress, when acting upon matters within their constitutional authority. It fairly may be assumed that the Senate will deal with the witness in accordance

with well-settled rules and discharge him from custody upon proper assurance, by recognizance or otherwise, that he will appear for interrogation when required. This is all he could properly demand of a court under similar circumstances.

Here the question under consideration concerns the exercise by the Senate of an indubitable power; and if judicial interference can be successfully invoked it can only be upon a clear showing of such arbitrary and improvident use of the power as will constitute a denial of due process of law. That condition we are unable to find in the present case. *Judgment reversed.*

THE MACALLEN COMPANY *v.* MASSACHUSETTS.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 578. Argued April 25, 1929.—Decided May 27, 1929.

1. A state tax on federal securities, or on the interest therefrom, is invalid, regardless of the amount of the tax. P. 624.
2. In determining whether a tax is an excise on the privilege of doing business as a corporation, or is in reality a tax on income from tax-exempt securities, this Court must inquire independently and is not bound by the designation of the tax in the taxing act or the opinion of the state court as to its nature. P. 625.
3. In the decisions of this Court holding that a tax lawfully imposed on the exercise of corporate privileges within the taxing power may be measured by income from the property of the corporation although a part of such income is derived from non-taxable property, it is implicit that the thing taxed in form was in fact and reality the subject aimed at, and that any burden put upon the non-taxable subject by its use as a measure of value was fortuitous and incidental. P. 627.
4. The fact that a tax ostensibly laid upon a taxable subject is to be measured by the value of a non-taxable subject at once suggests the probability that it was the latter rather than the former that the law-maker sought to reach. If inquiry discloses persuasive grounds for the conclusion that such is the real purpose and effect of the legislation, the tax cannot be upheld. P. 628.

5. A State can not tax the bonds of the United States, or the income therefrom, directly or indirectly, in any form. Words, which, literally considered, import a tax on something else—e. g., a tax upon the privilege of doing corporate business measured in part upon the amount of non-taxable interest received,—may nevertheless be adjudged to lay a tax upon the interest, if that purpose be fairly inferable from a consideration of the history, the surrounding circumstances, or the statute itself considered in all its parts. P. 629.
6. A liberal application of the foregoing principles is essential to the preservation of the constitutional limitations imposed upon the taxing power of the States. P. 631.
7. The Massachusetts legislature, having provided for a tax on corporations measured in part by net income, but exempting from consideration as part of the measure all interest upon non-taxable securities, passed an amendment, presumably based on a report of a special committee, which had the effect of repealing this exemption and of thereby imposing a burden on the securities from which, by express language, they had theretofore been free. *Held,* upon a consideration of the legislation and the contents of the report, that the purpose of the change was to tax the income of the securities. P. 631.
8. Assuming that the States are authorized by Act of Congress to tax income of national banks derived from United States bonds, this would not justify imposition of like taxes in the case of an ordinary corporation. P. 633.
9. A state tax on the income of United States bonds held by an ordinary corporation cannot be upheld upon the ground that it was necessary in order to avoid discriminating against national banks contrary to Acts of Congress. P. 634.
10. State taxation of the income of county and municipal bonds which were exempt by statutory contract of the State, *held* invalid under the contract clause of the Federal Constitution. P. 634.

264 Mass. 396, reversed.

APPEAL from a judgment of the Supreme Judicial Court dismissing a petition for abatement of a tax.

Mr. Thomas Allen for appellant.

Mr. R. Ammi Cutter, Assistant Attorney General of Massachusetts, with whom *Mr. Joseph E. Warner,* Attorney General, was on the brief, for appellee.

Messrs. Seth T. Cole and *Stuart G. Knight* filed a brief as *amici curiae* on behalf of the Tax Commission of New York, by special leave of Court.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

A statute of Massachusetts, G. L. c. 63, § 32, as amended by Stat. 1923, c. 424, § 1, provides:

"Except as otherwise provided in sections thirty-four and thirty-four A, every domestic business corporation shall pay annually, with respect to the carrying on or doing of business by it, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one twentieth of one per cent of the fair cash value of all the shares constituting its capital stock on the first day of April when the return called for by section thirty-five is due:

"(1) An amount equal to five dollars per thousand upon the value of its corporate excess.

"(2) An amount equal to two and one half per cent of that part of its net income, as defined in this chapter, which is derived from business carried on within the commonwealth."

By G. L. c. 63, § 30, par. 5, as amended by Stat. 1925, c. 343, § 1A, "net income" is defined—

"'Net Income,' except as otherwise provided in sections thirty-four and thirty-nine, the net income for the taxable year as required to be returned by the corporation to the federal government under the federal revenue act applicable for the period, adding thereto any net losses as defined in said federal revenue act that have been deducted, and all interest and dividends not so required to be returned as net income except dividends on shares of stock of corporations organized under the laws of the commonwealth and dividends in liquidation paid from capital."

Before this amendment, the definition embodied in G. L. c. 63, § 30, par. 5, as amended, shortly before the passage of the last quoted amendment, by Stat. 1925, c. 265, § 1, provided:

"'Net income,' except as otherwise provided in sections thirty-four and thirty-nine, the net income for the taxable year as required to be returned by the corporation to the federal government under the federal revenue act applicable to the period, adding thereto any net losses as defined by said federal revenue act that have been deducted, and, in the case of a domestic business corporation, such interest and dividends, not so required to be returned as net income, as would be taxable if received by an inhabitant of this commonwealth; less, both in the case of a domestic business corporation and of a foreign corporation, interest, so required to be returned, which is received upon bonds, notes and certificates of indebtedness of the United States."

Thus, under the original definition of net income, there was expressly excluded from the net income taxable at two and one-half per cent all interest received upon bonds, notes and certificates of indebtedness of the United States. And the definition had the effect of excluding, in the same respect, interest on state, county and municipal bonds.

Appellant, a business corporation organized under the laws of Massachusetts, owned a large number of United States Liberty bonds and Federal Farm Loan Bonds. The Liberty bonds by statute of the United States are expressly made exempt from all taxation imposed by any state, except estate or inheritance taxes. C. 56, 40 Stat. 288, 291, § 7. Federal Farm Loan bonds are issued under authority of c. 245, 39 Stat. 360, and, by § 26, p. 380, declared to be instrumentalities of the United States and both as to principal and income exempt from all state taxa-

tion. The corporation also owned a large number of bonds of Massachusetts counties and municipalities which, when issued and acquired by the corporation, were exempt from taxation by the terms of a state statute. G. L. c. 59, § 5, par. 25. Of course, in respect of United States securities, the statutory exemption is superfluous. A state tax, however small, upon such securities or interest derived therefrom, interferes or tends to interfere with the constitutional power of the general government to borrow money on the credit of the United States, and constitutes a burden upon the operations of government, and carried far enough would prove destructive. The principle set forth a century ago in *Weston* v. *Charleston,* 2 Pet. 449, 468, has never since been departed from by this Court:

"The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government; to any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely."

Home Savings Bank v. *Des Moines,* 205 U. S. 503, 513.

The taxing authorities of the state assessed against appellant, for the year 1926, a tax under the provisions of the then-existing statute as first above quoted, adding, for the purpose of computing the assessment, to the amount of the net income of appellant as determined by the federal income tax returns of appellant, all sums of interest received by appellant from the foregoing United States, Farm Loan, and county and municipal bonds. Without this addition, and under the original definition of net income, the amount of the tax assessed would have been materially less.

Appellant paid the amount assessed under protest and brought a petition for abatement of the tax under the provisions of the state law, setting forth the foregoing facts

and alleging the unconstitutionality, under the federal Constitution, of the statute insofar as it was held to include interest derived from the tax-exempt securities: (1) as impairing the obligation of contracts; (2) as an attempt to impose a tax upon income derived from securities and instrumentalities of the United States; (3) as depriving petitioner of its property without due process of law and denying it the equal protection of the law in violation of the Fourteenth Amendment; (4) as an impairment and in derogation of the power of Congress to borrow money on the credit of the United States; and for other reasons not necessary for present purposes to be set forth.

A Justice of the Supreme Judicial Court sustained a demurrer to the petition. On appeal, this was affirmed by the full court, and the petition dismissed. That court, through its Chief Justice, delivered a carefully drawn opinion, reviewing numerous decisions of this Court bearing upon the question involved. The tax was held to be not a tax on income, but an excise "with respect to the carrying on or doing of business," as the statute itself in form declares. While it was plain that the tax was larger than it would have been if the income from the tax-exempt securities had not been added to the other items in making up the factor of "net income," the court held that the income was not taxed, but simply employed together with the other items in ascertaining the measure for computing the excise.

The words of the act and the opinion of the state court as to the nature of the tax are to be given consideration and weight; but they are not conclusive. As it many times has been decided, neither state courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect. *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292, 298; *Galveston, Harrisburg, &c. Ry. Co.* v.

Texas, 210 U. S. 217, 227. And this Court must determine for itself by independent inquiry whether the tax here is what, in form and by the decision of the state court, it is declared to be, namely, an excise tax on the privilege of doing business, or, under the guise of that designation, is in substance and reality a tax on the income derived from tax-exempt securities. If, by varying the form,—that is to say, if, by using one name for a tax instead of another, or imposing a tax in terms upon one subject when another is in reality aimed at,—the substance and effect of the imposition may be changed, constitutional limitations upon powers of taxation would come to naught. The rule is otherwise. To this effect, the following cases may be cited as illustrative.

A tax laid in terms on the occupation of an importer is in effect a tax on imports. *Brown* v. *Maryland,* 12 Wheat. 419, 444. Answering the contention that a state may tax an occupation, and that this tax was nothing more, Chief Justice Marshall said:

"It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. . . . So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the constitution."

A tax on the income of an office is a tax on the office itself, and cannot be laid in that form if the office be exempt. *Dobbins* v. *The Commissioners of Erie County,* 16 Pet. 435.

A tax on sales made by an auctioneer is a tax on the goods sold, and, where such goods are imported and sold for the importer, the law authorizing the tax is void as imposing a duty on imports. *Cook* v. *Pennsylvania,* 97 U. S. 566.

A stamp tax upon a bill of lading is in substance and effect a tax upon the thing transported, because of its necessary association with the shipment. *Almy* v. *California,* 24 How. 169, 174. And see *Woodruff* v. *Parham,* 8 Wall. 123, 138.

In *Indian Oil Co.* v. *Oklahoma,* 240 U. S. 522, 530, a tax upon oil leases of lands of Indians under the protection of the federal government, made by authority of such government, was held void as being in fact a tax upon the power to make the leases and capable of being used to destroy such power. It was said that since the lessees were federal instrumentalities the state could not tax their interest in the leases either directly or as they were represented by the capital stock of the corporations owning them. "A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them. If they cannot be taxed as entities they cannot be taxed vicariously by taxing the stock, whose only value is their value, or by taking the stock as an evidence or measure of their value, rather than by directly estimating them as the Board of Equalization and the referee did."

In *Federal Land Bank* v. *Crosland,* 261 U. S. 374, this Court condemned, as beyond the constitutional power of the state, a statute subjecting mortgages executed to a Federal Land Bank to the payment of a recording tax, as being in effect a tax upon the mortgages.

It is not necessary to extend the list of cases of like effect.

The court below predicates its decision upon a series of decisions of which *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 163–165, is the extreme example, holding that a tax lawfully imposed upon the exercise of corporate privileges within the taxing power may be measured by income from the property of the corporation although a part of such income is derived from non-taxable property. See also *Home Ins. Co.* v. *New York,* 134 U. S. 594; *Society for Savings* v. *Coite,* 6 Wall. 594; *Provident Institution* v. *Massachusetts,* 6 Wall. 611. The distinction pointed out in these cases is between an attempt to tax the property or income as such and to measure a legitimate tax upon the privileges involved in the use thereof. It is implicit in all that the thing taxed in form was in fact and reality the subject aimed at, and that any burden put upon the non-taxable subject by its use as a measure of value was fortuitous and incidental.

The aphorism of Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 431, that "the power to tax involves the power to destroy," has frequently been reiterated by this Court. The principle, of course, is important only where the tax is sought to be imposed upon a non-taxable subject, or, as said in *Knowlton* v. *Moore,* 178 U. S. 41, 60, " . . . the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope." Not only may the power to tax be exercised oppressively, but for one government—state or national—to lay a tax upon the instrumentalities or securities of the other is derogatory to the latter's dignity, subversive of its powers, and repugnant to its paramount authority. See *California* v. *Pacific Railroad Co.,* 127

U. S. 1, 41. These constitute special and compelling reasons why courts, in scrutinizing taxing acts like that here involved, should be acute to distinguish between an exaction which in substance and reality is what it pretends to be, and a scheme to lay a tax upon a non-taxable subject by a deceptive use of words. The fact that a tax ostensibly laid upon a taxable subject is to be measured by the value of a non-taxable subject at once suggests the probability that it was the latter rather than the former that the law-maker sought to reach. If inquiry discloses persuasive grounds for the conclusion that such is the real purpose and effect of the legislation, the tax cannot be upheld without subverting the well-established rule that ". . . what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. . . . constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation." *Fairbank* v. *United States,* 181 U. S. 283, 294, 300.

In the consideration of such legislation, the controlling principle, constantly to be borne in mind, is that the state cannot tax the instrumentalities or bonds of the United States, or, what is the same thing, the income derived therefrom, directly or indirectly—that is to say, it cannot tax *them* in any form. Words which, literally considered, import a tax upon something else,—a tax, for example, as here, upon the privilege of doing business measured in part by the amount of non-taxable interest received—may, nevertheless, be adjudged to lay a tax upon the interest, if that purpose be fairly inferable from a consideration of the history, the surrounding circumstances, or the statute itself considered in all its parts. See *Home Savings Bank* v. *Des Moines,* 205 U. S. 503, 510, 521.

On the one hand, the state is at liberty to tax a corporation with respect to the doing of its business. On the other hand, the state cannot tax the income of the corporation derived from non-taxable securities. It necessarily follows that the legislature may not, by an artful use of words, deprive this Court of its authority to look beyond the words to the real legislative purpose. And the power and the duty of the Court to do so is of great practical importance. For when the aim of the legislature is simply to tax the former, it is less likely to impose an injurious burden upon the latter than when the aim is directed primarily against the latter. See *Galveston, Harrisburg &c. Ry. Co.* v. *Texas, supra,* p. 227.

In *Miller* v. *Milwaukee,* 272 U. S. 713, this Court had occasion to consider a question quite analogous to that here involved. In that case the state statute exempted the income from bonds of the United States held by corporations, but provided for taxing so much of the stockholders' dividends as corresponded to the income of the corporation not assessed. This Court, holding the tax invalid, said (p. 715):

"It is a familiar principle that conduct which in usual situations the law protects may become unlawful when part of a scheme to reach a prohibited result. If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good. Under the laws of Wisconsin the income from the United States bonds may not be the only item exempted from the income tax on corporations, but it certainly is the most conspicuous instance of exemption at the present time. A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act. On that

assumption the immunity of the national bonds is too important to allow any narrowing beyond what the Acts of Congress permit. We think it would be going too far to say that they allow an intentional interference that is only prevented from being direct by the artificial distinction between a corporation and its members. A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them, but it becomes a more serious attack upon their immunity when they are its obvious aim. In such a case the Court must consider the public welfare rather than the artifices contrived for private convenience and must look at the facts."

See also *Northwestern Ins. Co.* v. *Wisconsin,* 275 U. S. 136; *Alpha Cement Co.* v. *Massachusetts,* 268 U. S. 203, 218; *Frick* v. *Pennsylvania,* 268 U. S. 473, 494–495; *Nat'l Life Ins. Co.* v. *United States,* 277 U. S. 508, 519.

A liberal application of the foregoing principles, which find confirmation especially in the later decisions of this Court, is essential to the preservation of the constitutional limitations imposed upon the taxing power of the states. Let it once be conceded that such limitations may be evaded by the adoption of a delusive name to characterize the tax or form of words to describe it, and the destruction of the vitality of these necessary safeguards will soon follow.

In the present case, it appears that the original statute exempted from consideration as a part of the measure of the tax all interest upon the non-taxable securities. The amended act now in force has the effect of repealing this original provision and imposing a burden upon the securities from which, by express language, they had theretofore been free. This was a distinct change of policy on the part of the Commonwealth, adopted, as though it had been so declared in precise words, for the very purpose of subjecting these securities *pro tanto* to the burden of

the tax. This conclusion is confirmed, if that be necessary, by the report of the special commission appointed by the legislature to investigate the subject of taxation of banking institutions, Mass. 1925 House Documents, No. 233, from which we quote:

"Further, the Commission addressed itself to the question of what might properly be considered as 'net income' for the purposes of this proposed tax. The national banks and trust companies in their returns to the federal government and to the State under the 12½% income tax law are allowed certain deductions of income from specified types of securities in addition to the expense of conducting their business, bad debts, losses, etc. The business corporations, also, are allowed the same deductions. In the opinion of the Commission there is no valid reason why, for purposes of this tax, such income exemption should be allowed. Corporations differ from the individual. Business corporations hold tax exempt securities generally, not because they fit into the purpose of their organization, but for the bearing they may have upon tax payments.

"The Commission believes that the income upon which this tax should be laid, so far as national banks are concerned, should be the total net income from whatever source, after the proper deductions have been made for the cost of doing business and losses. So far as relates to the business corporations, the same should be the case in respect to the 2½% part of the excise measure based on net income.

"It is true that this extension of 'net income' for the purpose of this tax would increase the tax which business corporations now pay, but the Commission after investigation believes that such increased tax would be relatively small. Many corporations invested in Liberty Bonds and other government securities during the war for patriotic reasons, which practice, so far as business corporations are

concerned, is not generally prevalent at present, and the Commission believes will not exist in the future to any appreciable extent. So that it is its opinion that such, if any, increased burden upon business corporations will not be appreciable.

"In respect to national banks and trust companies the situation is somewhat different. Considerable in amount of the assets or surplus funds of financial institutions are invested from time to time in securities now exempt from taxation either under federal or state law. The income of banking institutions from these sources is relatively much greater than that of other corporations. In endeavoring to reach a basis for a fair and equitable tax on national banks the Commission, as previously stated in this report was limited to the methods permitted under Section 5219 of the United States Revised Statutes. A tax in the nature of an excise tax upon the income of the bank is an equitable and proper tax, . . ."

This report received the consideration of the legislature and, it is fair to suppose, constituted the basis for adopting the amendment here assailed. The effect of the report is that non-taxable bonds nevertheless should be subjected to the burden of the tax; and, since that could not be imposed directly, the clear intimation is that it be imposed indirectly through the medium of the so-called "excise."

It has been suggested that the object of the change was to conform the taxation of business corporations to that authorized by Congress for the taxation of national banks. Whether under recent federal statutes, states are authorized to impose a tax upon the income from United States bonds held by national banks, we need not stop to inquire. Certainly there is no statute of the United States which undertakes to authorize a state to impose a tax upon such bonds held by other kinds of corporations. And what power Congress has under the Constitution in respect of such authorization we need not now determine.

It is clear that authority, even if given, to impose a tax on federal bonds in the case of national banks does not include, by implication or otherwise, the authority to impose a tax upon such bonds held by ordinary corporations.

It is also suggested in that connection that the amendment in question is necessary, and that its real object was, to avoid discrimination forbidden by federal statutes against national banks. But it is enough to say that if such discrimination would otherwise result it must be avoided by some method which does not involve the imposition of a tax which uniformly for a century has been condemned by this Court as unconstitutional. The state may not save itself from infringing an Act of Congress by violating the Constitution.

We conclude that the amended act in substance and effect imposes a tax upon federal bonds and securities; and it necessarily follows that the act in substance and effect also imposes a tax upon the county and municipal bonds. In both respects, the act is void. As to the former, the act is in derogation of the constitutional power of Congress to borrow money on the credit of the United States, as well as in violation of the Acts of Congress declaring such bonds and securities to be non-taxable; and as to the latter, the act impairs the obligation of the statutory contract of the state by which such bonds were made exempt from state taxation.

Judgment reversed

Dissenting opinion of MR. JUSTICE STONE.

Petitioner is a corporation of the State of Massachusetts. Its very existence and the conduct of its business in corporate form are privileges conferred by the state, which, under the Constitution, it may tax. Under the constitution of Massachusetts the present tax can be up-

held only if an excise and it and its predecessors have been consistently sustained as excises. *S. S. White Dental Mfg. Co.* v. *Commonwealth,* 212 Mass. 35, 37; *Portland Bank* v. *Apthorp,* 12 Mass. 252; *Commonwealth* v. *Provident Institution,* 94 Mass. 312; *Commonwealth* v. *Hamilton Mfg. Co.,* 94 Mass. 298, 306; *Eaton Crane & Pike Co.* v. *Commonwealth,* 237 Mass. 523, 527; *Alpha Portland Cement Co.* v. *Commonwealth,* 244 Mass. 547. This interpretation of the nature of the exaction has been repeatedly approved by this Court. *Provident Institution* v. *Massachusetts,* 6 Wall. 611; *Hamilton Co.* v. *Massachusetts,* 6 Wall. 632; cf. *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 84; *National Leather Co.* v. *Massachusetts,* 277 U. S. 413; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, 216. It is imposed "with respect to the carrying on or doing business," and is collectible only when the corporation has in fact been so engaged during the taxable year, see *Fore River Shipbuilding Corp.* v. *Commonwealth,* 248 Mass. 137, 140; *Attorney General* v. *Boston & Albany R. R. Co.,* 233 Mass. 460. It is measured by the value of the corporate assets (with appropriate deductions for machinery and real estate otherwise taxed) and by net income earned within the state, which this Court has often said are fair measures of the exercise of the corporate franchise. The tax is not measured by gross income as in *Northwestern Mutual Life Insurance Co.* v. *Wisconsin,* 275 U. S. 136, where the validity of an excise measured by net income including that from tax exempt securities of the United States was recognized. The distinction between net income and gross as the measure of a tax is well established. *Peck & Co.* v. *Lowe,* 247 U. S. 165; compare *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, 328. Being on net income, the tax does not vary in exact proportion to the gross income from the tax exempt securities included in the aggregate.

There is no constitutional principle and no decision of this Court, of which I am aware, which would deny to the state the power so to tax the privileges which it has conferred upon petitioner, even though all its property were tax exempt securities of the United States and income derived from them. For seventy years this Court has consistently adhered to the principle that either the federal or state governments may constitutionally impose an excise tax on corporations for the privilege of doing business in corporate form, and measure the tax by the property or net income of the corporation, including the tax exempt securities of the other or income derived from them. *Provident Institution* v. *Massachusetts, supra; Society for Savings* v. *Coite,* 6 Wall. 594; *Hamilton Co.* v. *Massachusetts, supra; Home Insurance Co.* v. *New York,* 134 U. S. 594; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 162–5. In *Flint* v. *Stone Tracy Co.,* a Federal tax on corporations "with respect to carrying on or doing business" measured by net income, was held to be an excise, not a direct tax on property or income, and so was valid, although not apportioned under Art. I, § 2, cl. 3, § 9, cl. 4 of the Constitution and notwithstanding the fact that net income from tax exempt municipal bonds was included in the measure of the tax. In no technical sense does this tax seem open to objection. Being an excise the tax is not one on property or income and may include either in its measurement although not directly taxable.

Upon like principle a state inheritance tax may be measured by including the value of United States bonds of the decedent. *Plummer* v. *Coler,* 178 U. S. 115; *Blodgett* v. *Silberman,* 277 U. S. 1, 12; compare *Greiner* v. *Lewellyn,* 258 U. S. 384. Similarly an excise on a corporation may be measured by its outstanding capital stock, *International Shoe Co.* v. *Shartel, ante,* p. 429; *Hump Hair-*

pin Co. v. *Emmerson,* 258 U. S. 290; or by its net income, *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 120; *United States Glue Co.* v. *Oak Creek, supra,* even though a part of its capital is used in or some of its income is derived from interstate commerce.

It would seem that only considerations of public policy of weight, which appear to be here wholly wanting, would justify overturning a principle so long established. It has survived a great war, financed by the sale of government obligations; and it has never even been suggested that in any practical way it has impaired either the dignity or credit of the national government.

I suppose a certain advantage would be enjoyed by a corporation if the exercise of its corporate franchise in the purchase and use of securities of one government could not be taxed by the other. Theoretically the advantage would inure to each government in the marketing of its securities, just as would be the case if such securities of the taxpayer could not be seized and sold for the payment of any taxes lawfully levied by the state or national government. But the advantage of the one would be gained only at the expense of the other, and it would seem that neither immunity could be claimed under any reasonably practical application of the rule that government instrumentalities may not be taxed. In a broad sense, the taxing power of neither state nor national government can be exercised without having some effect on the other and there are many points at which the exercise of the undoubted power of one affects the other, but " the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with a minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the gov-

ernment imposing the tax . . . or the appropriate exercise of the functions of the government affected by it." See *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523.

Granted that a statute otherwise valid may be deemed improper when intended as a covert means of directly burdening ownership of securities of the other sovereignty, see *Miller* v. *Milwaukee,* 272 U. S. 713, I can discern no such sinster purpose in the present legislation. It was, of course, the intention of the Massachusetts Legislature in the amendment of § 30, to deal specifically not alone with federal bonds but with the tax exempt securities of the Commonwealth and its municipalities by including them in the measure of the excise tax. The amendment did not aim at securities of the national government or discriminate against them. It was obviously designed to impose on corporations generally, a tax similar to the excise on national banks, measured by net income, recommended by the legislative committee as a means of avoiding a then existing discrimination. The inclusion in the measure of the tax of income from all tax exempt securities tended only to effect this purpose, a similar computation of net income being contemplated for national banks. But in neither case is there anything to suggest that the legislature intended to impose a direct tax on income or do more than to impose an excise tax, measured by income, including that upon federal bonds, which this Court has declared it may do. Its purpose was to prevent the evasion by corporations of payment of the tax which the Commonwealth had fixed as the price of the privilege of doing business within it in corporate form, by any course of investment of their funds in tax exempt securities, state or national. As this seems to me to be a permissible purpose both on principle and by authority, I think the judgment below should be affirmed.

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

WESTERN & ATLANTIC RAILROAD *v.* HENDERSON ET AL.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 519. Argued April 17, 1929.—Decided May 27, 1929.

A state statute which, upon the mere fact of a collision between a railway train and a vehicle at a highway grade crossing and resulting death, raises a presumption that the railway company and its employees were negligent in the particulars alleged in the complaint (even where the allegations are conflicting), and that every act or omission so alleged was the proximate cause of the death; which makes the company liable unless it shows due care in respect of every matter alleged against it, and permits the jury to consider and weigh the presumption as evidence against the testimony of the company's witnesses tending affirmatively to prove due care, is unreasonable and arbitrary and violates the due process clause of the Fourteenth Amendment. *Mobile, etc. R. Co.* v. *Turnipseed,* 219 U. S. 35, distinguished.

167 Ga. 22, reversed.

APPEAL from a judgment of the Supreme Court of Georgia sustaining a recovery in an action for wrongful death. The case was twice before the Court of Appeals of Georgia, 35 Ga. App. 353; 36 *id.* 679. The appeal here was at first dismissed for want of a federal question, but a rehearing was granted, 278 U. S. 577.

Mr. Fitzgerald Hall, with whom *Messrs. Frank Slemons* and *Walton Whitwell* were on the brief, for appellant.

Mr. Reuben R. Arnold, with whom *Messrs. W. E. Mann, W. G. Mann,* and *J. A. McFarland* were on the brief, for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellee, Mary E. Henderson, sued to recover damages for the death of her husband. He was killed near Tunnel

Hill, Georgia, at a grade crossing of a public highway and appellant's railroad, in a collision between a motor truck that he was driving and one of appellant's railway trains. The jury returned a verdict for her and the judgment entered thereon was affirmed in the court of appeals and in the supreme court of the State.

The question presented is whether the due process clause of the Fourteenth Amendment is violated by § 2780 of the Georgia Civil Code. It follows: "A railroad company shall be liable for any damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

Plaintiff's declaration charges that the collision and death were caused by negligence of defendant and its employees: in leaving the crossing in a dangerous condition; in failing to sound the whistle to give warning or to keep a lookout ahead as the train approached the crossing; in that defendant's employees, after they saw the truck upon the crossing, failed to stop the train but accelerated its speed; in running at a dangerous speed; in not having the train under control when approaching the crossing; in operating the train by a "practically blind engineer." The answer denied that defendant or any of its employees was guilty of negligence and alleged that deceased came to his death as a result of his own fault.

Plaintiff proved that her husband was killed in the collision. She also offered some evidence of negligent maintenance and a dangerous condition of the crossing. And it necessarily appeared that the train failed to stop in time to avoid the collision. Plaintiff offered no evidence, and there was none in the case, to support her other alle-

gations of negligence. Defendant offered much evidence tending to show that it and its employees exercised due care for the proper maintenance of the track and crossing and in the operation of the train and that neither it nor any employee was guilty of any negligence charged.

The court's charge included the following: "When it has been made to appear that injury or damage has occurred by reason of the operation of the locomotive and train of cars of a railroad company, the presumption arises that the railroad company and its employees were negligent in each of the particulars specified in the plaintiff's petition, and the burden thereupon shifts to the railroad company to show that its employees exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent, and, unless it does so, the fact of the injury or damage having been made to appear, the plaintiff, suing for recovery of damages by reason of such injury, would be entitled to recover. . . . The burden is upon the plaintiff in this case to establish her contentions by a preponderance of the evidence. That is subject to the qualification already given you, that, when the fact of the killing has been made to appear, the presumption arises that the defendant company was negligent in each of the particulars specified in the petition, and the burden thereupon shifts to the defendant company to show that its employees exercised ordinary care and diligence in such particulars."

Upon the mere fact of collision and resulting death, the statute is held to raise a presumption that defendant and its employees were negligent in each of the particulars alleged, and that every act or omission in plaintiff's specifications of negligence was the proximate cause of the death; and it makes defendant liable unless it showed due care in respect of every matter alleged against it. And, by authorizing the jury, in the absence of evidence, to find negligence in the operation of the engine and train, the

court necessarily permitted the presumption to be considered and weighed as evidence against the testimony of defendant's witnesses tending affirmatively to prove such operation was not negligent in any respect.*

Appellee insists that § 2780 is valid, and argues that the presumption, being one established by statute, has the effect of evidence and that it is for the jury to decide whether the company's evidence is sufficient to overcome the presumption; that "it should not as a matter of law be dissipated the instant any testimony is taken against it," and that the issue is to be determined on a consideration of all the evidence including the presumption.

Legislation declaring that proof of one fact or group of facts shall constitute *prima facie* evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property. *Manley* v. *Georgia, ante,* p. 1, and cases cited.

The mere fact of collision between a railway train and a vehicle at a highway grade crossing furnishes no basis

* The construction of § 2780 by the trial court is in harmony with that given it in the higher courts of the state. *Western & Atlantic R. R.* v. *Thompson,* 38 Ga. App. 599. *Western & Atlantic R. R.* v. *Dobbs,* 36 Ga. App. 516. *Central of Georgia Ry. Co.* v. *Barnett,* 35 Ga. App. 528. *Payne, Agent* v. *Wells,* 28 Ga. App. 29. *Central of Georgia Ry. Co.* v. *Hartley,* 25 Ga. App. 110. *Georgia Ry. & Electric Co.* v. *Bailey,* 9 Ga. App. 106. *Ellenberg* v. *Southern Ry.,* 5 Ga. App. 389. And see *Georgia Southern & Florida Ry.* v. *Thornton,* 144 Ga. 481.

for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or of both or without fault of anyone. Reasoning does not lead from the occurrence back to its cause. And the presumption was used to support conflicting allegations of negligence. Plaintiff claimed that the engineer failed to keep a lookout ahead, that he did not stop the train after he saw the truck on the crossing, and that his eyesight was so bad that he could not see the truck in time to stop the train.

Appellee relies principally upon *Mobile, J. & K. C. R. R.* v. *Turnipseed,* 219 U. S. 35. That was an action in a court of Mississippi to recover damages for the death of a section foreman accidentally killed in that State. While engaged about his work he stood by the track to let a train pass; a derailment occurred and a car fell upon him. A statute of the State provided: ". . . Proof of injury inflicted by the running of the locomotives or cars of such [railroad] company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury." That provision was assailed as arbitrary and in violation of the due process clause of the Fourteenth Amendment. This court held it valid and said (p. 43) " The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done, the inference is at an end, and the question of negligence is one for the jury upon all of the evidence. . . . The statute does not . . . fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference." That case is essentially different from this one. Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute cre-

ated merely a temporary inference of fact that vanished upon the introduction of opposing evidence. *Gulf, M. & N. R. Co.* v. *Brown,* 138 Miss. 39, 66, *et seq. Columbus & G. Ry. Co.* v. *Fondren,* 145 Miss. 679. That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate.

The presumption raised by § 2780 is unreasonable and arbitrary and violates the due process clause of the Fourteenth Amendment. *Manley* v. *Georgia, supra. McFarland* v. *American Sugar Co.,* 241 U. S. 79. *Bailey* v. *Alabama,* 219 U. S. 219.

Judgment reversed.

UNITED STATES *v.* SCHWIMMER.

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

No. 484. Argued April 12, 1929.—Decided May 27, 1929.

1. Because of the great value of the privileges conferred by naturalization, the statutes prescribing qualifications and governing procedure for admission are to be construed with definite purpose to favor and support the Government. P. 649.
2. In order to safeguard against admission of those who are unworthy or who for any reason fail to measure up to required standards, the law puts the burden upon every applicant to show by satisfactory evidence that he has the specified qualifications. P. 649.
3. On applications for naturalization, the court's function is to receive the testimony, to compare it with the law, and to judge on both law and fact. P. 649.
4. When, upon a fair consideration of the evidence adduced upon an application for citizenship, doubt remains in the mind of the court as to any essential matter of fact, the United States is entitled to the benefit of such doubt and the application should be denied. P. 650.

5. That it is the duty of citizens by force of arms to defend our Government against all enemies whenever necessity arises, is a fundamental principle of the Constitution. P. 650.
6. Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government. And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization, and are of vital importance. P. 650.
7. The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms. The fact that, by reason of sex, age or other cause, they may be unfit to serve does not lessen their purpose or power to influence others. P. 651.
8. The applicant was a woman 49 years of age, a linguist, lecturer and writer, well educated and accustomed to discuss governments and civic affairs. She testified that she would not take up arms in defense of the country; that she was willing to be treated as the Government dealt with conscientious objectors who refused to take up arms in the recent war; and that she was an uncompromising pacifist with no sense of nationalism but only a "cosmic" sense of belonging to the human family. Taken as a whole, her testimony showed that her objection to military service rested upon reasons other than mere inability because of her age and sex personally to bear arms; it was vague and uncertain in its description of her attitude towards the principles of the Constitution, and failed to sustain the burden resting upon her to show what she meant and that her pacifism and lack of nationalistic sense did not oppose the principle making it a duty of citizenship by force of arms, when necessary, to defend the country against its enemies, and that her opinions and beliefs would not impair the true faith and allegiance required by the Naturalization Act. *Held*, that the District Court was bound by the law to deny her application. P. 651.

27 F. (2d) 742, reversed; District Court affirmed.

CERTIORARI, 278 U. S. 595, to review a decree of the Circuit Court of Appeals which reversed a decree of the District Court denying the present respondent's application for naturalization.

Mr. Alfred A. Wheat, with whom *Attorney General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* were on the brief, for the United States.

Mrs. Olive H. Rabe for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondent filed a petition for naturalization in the District Court for the Northern District of Illinois. The court found her unable, without mental reservation, to take the prescribed oath of allegiance and not attached to the principles of the Constitution of the United States and not well disposed to the good order and happiness of the same; and it denied her application. The Circuit Court of Appeals reversed the decree and directed the District Court to grant respondent's petition. 27 F. (2d) 742.

The Naturalization Act of June 29, 1906 requires:

"He [the applicant for naturalization] shall, before he is admitted to citizenship, declare on oath in open court . . . that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." U. S. C., Tit. 8, § 381.

"It shall be made to appear to the satisfaction of the court . . . that during that time [at least 5 years preceding the application] he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. . . ." § 382.

Respondent was born in Hungary in 1877 and is a citizen of that country. She came to the United States in August, 1921, to visit and lecture, has resided in Illinois since the latter part of that month, declared her intention to become a citizen the following November, and filed petition for naturalization in September, 1926. On a preliminary form, she stated that she understood the prin-

ciples of and fully believed in our form of government and that she had read, and in becoming a citizen was willing to take, the oath of allegiance. Question 22 was this: "If necessary, are you willing to take up arms in defense of this country?" She answered: "I would not take up arms personally."

She testified that she did not want to remain subject to Hungary, found the United States nearest her ideals of a democratic republic, and that she could whole-heartedly take the oath of allegiance. She said: "I cannot see that a woman's refusal to take up arms is a contradiction to the oath of allegiance." For the fulfillment of the duty to support and defend the Constitution and laws, she had in mind other ways and means. She referred to her interest in civic life, to her wide reading and attendance at lectures and meetings, mentioned her knowledge of foreign languages and that she occasionally glanced through Hungarian, French, German, Dutch, Scandinavian, and Italian publications and said that she could imagine finding in meetings and publications attacks on the American form of government and she would conceive it her duty to uphold it against such attacks. She expressed steadfast opposition to any undemocratic form of government like proletariat, fascist, white terror, or military dictatorships. "All my past work proves that I have always served democratic ideals and fought—though not with arms—against undemocratic institutions." She stated that before coming to this country she had defended American ideals and had defended America in 1924 during an international pacifist congress in Washington.

She also testified: "If . . . the United States can compel its women citizens to take up arms in the defense of the country—something that no other civilized government has ever attempted—I would not be able to comply with this requirement of American citizenship. In this

case I would recognize the right of the Government to deal with me as it is dealing with its male citizens who for conscientious reasons refuse to take up arms."

The district director of naturalization by letter called her attention to a statement made by her in private correspondence: "I am an uncompromising pacifist. . . . I have no sense of nationalism, only a cosmic consciousness of belonging to the human family." She answered that the statement in her petition demonstrated that she was an uncompromising pacifist. "Highly as I prize the privilege of American citizenship I could not compromise my way into it by giving an untrue answer to question 22, though for all practical purposes I might have done so, as even men of my age—I was 49 years old last September—are not called to take up arms. . . . That 'I have no nationalistic feeling' is evident from the fact that I wish to give up the nationality of my birth and to adopt a country which is based on principles and institutions more in harmony with my ideals. My 'cosmic consciousness of belonging to the human family' is shared by all those who believe that all human beings are the children of God."

And at the hearing she reiterated her ability and willingness to take the oath of allegiance without reservation and added: "I am willing to do everything that an American citizen has to do except fighting. If American women would be compelled to do that, I would not do that. I am an uncompromising pacifist. . . . I do not care how many other women fight, because I consider it a question of conscience. I am not willing to bear arms. In every other single way I am ready to follow the law and do everything that the law compels American citizens to do. That is why I can take the oath of allegiance, because, as far as I can find out, there is nothing that I could be compelled to do that I can not do. . . . With reference to spreading propaganda among women throughout

the country about my being an uncompromising pacifist and not willing to fight, I am always ready to tell anyone who wants to hear it that I am an uncompromising pacifist and will not fight. In my writings and in my lectures I take up the question of war and pacifism if I am asked for that."

Except for eligibility to the Presidency, naturalized citizens stand on the same footing as do native born citizens. All alike owe allegiance to the Government, and the Government owes to them the duty of protection. These are reciprocal obligations and each is a consideration for the other. *Luria* v. *United States,* 231 U. S. 9, 22. But aliens can acquire such equality only by naturalization according to the uniform rules prescribed by the Congress. They have no natural right to become citizens, but only that which is by statute conferred upon them. Because of the great value of the privileges conferred by naturalization, the statutes prescribing qualifications and governing procedure for admission are to be construed with definite purpose to favor and support the Government. And, in order to safeguard against admission of those who are unworthy or who for any reason fail to measure up to required standards, the law puts the burden upon every applicant to show by satisfactory evidence that he has the specified qualifications. *Tutun* v. *United States,* 270 U. S. 568, 578. And see *United States* v. *Ginsberg,* 243 U. S. 472, 475.

Every alien claiming citizenship is given the right to submit his petition and evidence in support of it. And, if the requisite facts are established, he is entitled as of right to admission. On applications for naturalization, the court's function is " to receive the testimony, to compare it with the law, and to judge on both law and fact." *Spratt* v. *Spratt,* 4 Pet. 393, 408. We quite recently declared that: "Citizenship is a high privilege and when doubts exist concerning a grant of it, generally at least,

they should be resolved in favor of the United States and against the claimant." *United States* v. *Manzi,* 276 U. S. 463, 467. And when, upon a fair consideration of the evidence adduced upon an application for citizenship, doubt remains in the mind of the court as to any essential matter of fact, the United States is entitled to the benefit of such doubt and the application should be denied.

That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.

The common defense was one of the purposes for which the people ordained and established the Constitution. It empowers Congress to provide for such defense, to declare war, to raise and support armies, to maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for organizing, arming and disciplining the militia, and for calling it forth to execute the laws of the Union, suppress insurrections and repel invasions; it makes the President commander in chief of the army and navy and of the militia of the several States when called into the service of the United States; it declares that a well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed. We need not refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws by armed citizens. This Court, in the *Selective Draft Law Cases,* 245 U. S. 366, speaking through Chief Justice White, said (p. 378) that "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need. . . ."

Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government.

And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance, for if all or a large number of citizens oppose such defense the "good order and happiness" of the United States can not long endure. And it is evident that the views of applicants for naturalization in respect of such matters may not be disregarded. The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms. The fact that, by reason of sex, age or other cause, they may be unfit to serve does not lessen their purpose or power to influence others. It is clear from her own statements that the declared opinions of respondent as to armed defense by citizens against enemies of the country were directly pertinent to the investigation of her application.

The record shows that respondent strongly desires to become a citizen. She is a linguist, lecturer and writer; she is well educated and accustomed to discuss governments and civic affairs. Her testimony should be considered having regard to her interest and disclosed ability correctly to express herself. Her claim at the hearing that she possessed the required qualifications and was willing to take the oath was much impaired by other parts of her testimony. Taken as a whole it shows that her objection to military service rests on reasons other than mere inability because of her sex and age personally to bear arms. Her expressed willingness to be treated as the Government dealt with conscientious objectors who refused to take up arms in the recent war indicates that she deemed herself to belong to that class. The fact that she is an uncompromising pacifist with no sense of nation-

alism but only a cosmic sense of belonging to the human family justifies belief that she may be opposed to the use of military force as contemplated by our Constitution and laws. And her testimony clearly suggests that she is disposed to exert her power to influence others to such opposition.

A pacifist in the general sense of the word is one who seeks to maintain peace and to abolish war. Such purposes are in harmony with the Constitution and policy of our Government. But the word is also used and understood to mean one who refuses or is unwilling for any purpose to bear arms because of conscientious considerations and who is disposed to encourage others in such refusal. And one who is without any sense of nationalism is not well bound or held by the ties of affection to any nation or government. Such persons are liable to be incapable of the attachment for and devotion to the principles of our Constitution that is required of aliens seeking naturalization.

It is shown by official records and everywhere well known that during the recent war there were found among those who described themselves as pacifists and conscientious objectors many citizens—though happily a minute part of all—who were unwilling to bear arms in that crisis and who refused to obey the laws of the United States and the lawful commands of its officers and encouraged such disobedience in others. Local boards found it necessary to issue a great number of noncombatant certificates, and several thousand who were called to camp made claim because of conscience for exemption from any form of military service. Several hundred were convicted and sentenced to imprisonment for offenses involving disobedience, desertion, propaganda and sedition. It is obvious that the acts of such offenders evidence a want of that attachment to the principles of the Constitution of which

the applicant is required to give affirmative evidence by the Naturalization Act.

The language used by respondent to describe her attitude in respect of the principles of the Constitution was vague and ambiguous; the burden was upon her to show what she meant and that her pacifism and lack of nationalistic sense did not oppose the principle that it is a duty of citizenship by force of arms when necessary to defend the country against all enemies, and that her opinions and beliefs would not prevent or impair the true faith and allegiance required by the Act. She failed to do so. The District Court was bound by the law to deny her application.

The decree of the Circuit Court of Appeals is reversed.

The decree of the District Court is affirmed.

MR. JUSTICE HOLMES, dissenting.

The applicant seems to be a woman of superior character and intelligence, obviously more than ordinarily desirable as a citizen of the United States. It is agreed that she is qualified for citizenship except so far as the views set forth in a statement of facts "may show that the applicant is not attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same, and except in so far as the same may show tnat she cannot take the oath of allegiance without a mental reservation." The views referred to are an extreme opinion in favor of pacifism and a statement that she would not bear arms to defend the Constitution. So far as the adequacy of her oath is concerned I hardly can see how that is affected by the statement, inasmuch as she is a woman over fifty years of age, and would not be allowed to bear arms if she wanted

to. And as to the opinion, the whole examination of the applicant shows that she holds none of the now-dreaded creeds but thoroughly believes in organized government and prefers that of the United States to any other in the world. Surely it cannot show lack of attachment to the principles of the Constitution that she thinks that it can be improved. I suppose that most intelligent people think that it might be. Her particular improvement looking to the abolition of war seems to me not materially different in its bearing on this case from a wish to establish cabinet government as in England, or a single house, or one term of seven years for the President. To touch a more burning question, only a judge mad with partisanship would exclude because the applicant thought that the Eighteenth Amendment should be repealed.

Of course the fear is that if a war came the applicant would exert activities such as were dealt with in *Schenck* v. *United States,* 249 U. S. 47. But that seems to me unfounded. Her position and motives are wholly different from those of Schenck. She is an optimist and states in strong and, I do not doubt, sincere words her belief that war will disappear and that the impending destiny of mankind is to unite in peaceful leagues. I do not share that optimism nor do I think that a philosophic view of the world would regard war as absurd. But most people who have known it regard it with horror, as a last resort, and even if not yet ready for cosmopolitan efforts, would welcome any practicable combinations that would increase the power on the side of peace. The notion that the applicant's optimistic anticipations would make her a worse citizen is sufficiently answered by her examination, which seems to me a better argument for her admission than any that I can offer. Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free

thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country. And recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount.

MR. JUSTICE BRANDEIS concurs in this opinion.

MR. JUSTICE SANFORD, dissenting.

I agree, in substance, with the views expressed by the Circuit Court of Appeals, and think its decree should be affirmed.

THE POCKET VETO CASE.*

CERTIORARI TO THE COURT OF CLAIMS.

No. 565. Argued March 11, 1929.—Decided May 27, 1929.

1. Under the second clause in § 7 of Article I of the Constitution, a bill which is passed by both Houses of Congress during the first regular session of a particular Congress and presented to the President less than ten days (Sundays excepted) before the adjournment of that session, but is neither signed by the President nor returned by him to the House in which it originated, does not become a law. P. 672.
2. The Constitution in giving the President a qualified negative over legislation—commonly called a veto—entrusts him with an authority and imposes upon him an obligation that are of the highest

* The docket title of this case is *The Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville, and Lake Indian Tribes or Bands of the State of Washington* v. *United States.*

importance, in the execution of which it is made his duty not only to sign bills that he approves in order that they may become law, but to return bills that he disapproves, with his objections, in order that they may be reconsidered by Congress. P. 677.

3. The faithful and effective exercise of this duty necessarily requires time in which the President may carefully examine and consider a bill and determine, after due deliberation, whether he should approve or disapprove it, and if he disapproves it, formulate his objections for the consideration of Congress. To that end a specified time is given, after the bill has been presented to him, in which he may examine its provisions and either approve it or return it, not approved, for reconsideration. P. 677.
4. The power thus conferred upon the President cannot be narrowed or cut down by Congress, nor the time within which it is to be exercised lessened, directly or indirectly. P. 677.
5. It is just as essential a part of the constitutional provisions, guarding against ill-considered and unwise legislation, that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress, as it is that Congress, on its part, should have an opportunity to re-pass the bill over his objections. P. 678.
6. When the adjournment of Congress prevents the return of a bill within the allotted time, the failure of the bill to become a law cannot properly be ascribed to the disapproval of the President—who presumably would have returned it before the adjournment if there had been sufficient time in which to complete his consideration and take such action—but is attributable solely to the action of Congress in adjourning before the time allowed the President for returning the bill had expired. P. 678.
7. The phrase "within ten days (Sundays excepted)" in the clause of the Constitution here in question, refers not to legislative days, but to calendar days. P. 679.
8. The term "adjournment," as used in this constitutional provision, is not limited to the final adjournment of the Congress. P. 680.
9. The determinative question in reference to an "adjournment" is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that "prevents" the President from returning the bill to the House in which it originated within the time allowed. P. 680.

10. An interim adjournment of Congress at the end of the first session, as the result of which, although the legislative existence of the House in which the bill originated has not been terminated, it is not in session on the last day of the period allowed the President for returning the bill, prevents him from returning it to such House. P. 681.
11. The "House" to which the bill is to be returned is a House in session—sitting in an organized capacity for the transaction of business, and having authority to receive the return, enter the President's objections on its journal, and proceed to reconsider the bill; and no return can be made to the House when it is not in session as a collective body and its members are dispersed. P. 682.
12. This accords with the long established practice of both Houses of Congress to receive messages from the President while they are in session. P. 683.
13. There is no substantial basis for the suggestion that, although the House in which the bill originated be not in session, the bill may nevertheless be returned, consistently with the constitutional mandate, by delivering it, with the President's objections, to an officer or agent of the House, for subsequent delivery to the House when it resumes its sittings at the next session, with the same force and effect as if the bill had been returned to the House on the day when it was delivered to such officer or agent. P. 683.
14. The above construction is confirmed by the practical construction given to this provision of the Constitution by the Presidents through a long course of years, and in which Congress has acquiesced. P. 688.

66 Ct. Cls. 26, affirmed.

CERTIORARI, 278 U. S. 597, to review a judgment of the Court of Claims dismissing a petition upon the ground that a bill passed by Congress, upon which the jurisdiction was dependent, had not become a law.

Mr. William S. Lewis, with whom *Messrs. A. R. Serven* and *John G. Carter* were on the brief, for petitioners.

Each Congress is a single entity and its sessions have practical unity.

The ten days for the consideration and return of the bill may be construed as ten "legislative" days, and under

such construction return may be made when the Congress resumes active legislative sittings after adjournment. *Opinion of the Justices,* 3 Mass. 567; *State* v. *Joseph,* 175 Ala. 579; *State* v. *Norwalk,* 77 Conn. 258.

The distinction between all adjournments of Congress (other than final adjournment) is one of duration and nomenclature only.

The only adjournment that will prevent the return of the bill with the President's objections, is such adjournment as wholly defeats the revisionary intent and purpose of the veto clause.

The language of the New York constitution (1777), which was the model for the exception clause, reads: "Unless the legislature shall, by their adjournment, render a return of the bill within ten days impracticable," and the idea of those who framed and adopted the Federal Constitution was clearly such an adjournment as made any return of the bill for revision impracticable and wholly futile. And see *Opinion of the Justices,* 3 Mass. 567.

While return is to be made to a particular House; the adjournment referred to is not the adjournment of a particular House; it is an adjournment of "the Congress"—the whole law-making and legislative power of the country. A separate recess of but one House alone, taken by that House in which the bill originated, is not within the plain meaning or strict construction of the language.

The Executive must return the bill during the tenth day, although "that House" is not sitting, the Congress being yet in session. If he cannot, it is equivalent to saying that he is bound to return the bill in a lesser period, and if he fail, the bill becomes a law within ten days despite his objections.

An adjournment by "that House" for the remainder of the tenth day, not coming within the language of the

exception clause and "the Congress" being still in existence, then the bill must be constructively returned to that House, during its temporary recess, by delivery to the presiding or recording officers thereof during the remainder of the tenth day, else the bill becomes a law. All that is required of such officers is that they receive and care for the same in like manner as the other records of "that House," to be taken up with its other unfinished business when that House again resumes its active legislative sittings.

The legislative power is solely in Congress. The Executive, under the veto provisions, is simply made an instrumentality for the revision of hasty or ill-considered enactments. It was never the intention that the President's inaction should defeat legislation. It was to guard against that very abuse that the ten day clause was inserted, and the single exception is limited to an act of the Congress itself defeating the revisionary purpose of the whole veto clause and any return of the bill and objections by a final adjournment of the Congress within the allotted ten days. The effect is to leave the bill not a law, but as unfinished business which dies with the final adjournment of the Congress.

If return may be made to "that House" during its temporary recess, then the same return may be made and the whole object and purpose of "the return" may still be accomplished, though "the Congress" be in adjournment for a day, or over a holiday, or over the Christmas holidays, or for the summer recess. Within the spirit and intent of the instrument, inability to make return, on account of adjournment of the Congress, should be co-existent with inability of the Congress thereafter to consider the objections.

The presentation of bills to the President, and his return of the same for revision, are simply a process in legislative procedure like the handling of bills in committee, or in

conference, or by the separate Houses. It is not necessary that each House be actually sitting in active legislative session during every hour or day that the other House sits, or while its committees function, or while the Executive considers its legislation.

A concession that the exception clause does not apply to adjournment of "that House" alone, the Congress being yet in session, and that, in such case, return must yet be made to "that House" in its temporary recess for the remainder of the day, or for several days, as the case may be, is a concession that a like return may be made to "that House" wherein the bill originated, during the concurrent adjournment of the other House or of the Congress; and is a concession that the only adjournment which can prevent the President's return of the bill is the final adjournment of the Congress.

That a return to and receipt by a journal clerk of the House is a sufficient return, see *United States* v. *Allen,* 36 Fed. 174–6. In actual practice bills are often presented to the President by delivery to his secretary or executive clerk, who receipts for the same on behalf of the President.

The courts of last resort of several States, where the same question of construction has been raised as to similar or identical language in state constitutions, have been unanimous in holding that the adjournment contemplated in the quoted clause of the constitution is a final adjournment. Citing *Wolfe* v. *McCaull,* 76 Va. 876, and other cases which appear in the argument of Mr. Sumners, *infra.*

Absolute veto power, based upon the return of a bill, is wholly unknown under any constitution, state or federal, and cannot be upheld without doing violence to the Constitution. The Federalist, No. 73; Madison Papers, *passim.*

Executive precedents involving exercise of and asserted right of pocket-veto power contrary to the policy and

language of the Constitution and in direct derogation of other rights and powers conferred thereby, are not authority for the construction of the language here under consideration. *Union Pacific R. Co.* v. *United States,* 10 Ct. Cls. 548; s. c. 91 U. S. 72; Story, The Constitution, § 407; Cooley, Constitutional Law, pp. 85, 86; *Pingree* v. *Auditor,* 120 Mich. 95; *State* v. *Weightson,* 56 N. J. L. 128; *State* v. *Veacon,* 66 Ohio St. 491; *Harrison* v. *Willis,* 7 Heisch. (Penna.) 35; *McPherson* v. *Secretary,* 92 Mich. 377; *Henry* v. *Cherry,* 30 R. I. 13; *Waite* v. *Macey,* 246 U. S. 606; *United States* v. *United Verde Copper Co.,* 196 U. S. 207; *Morrill* v. *Jones,* 106 U. S. 466; *United States* v. *Merriam,* 263 U. S. 187.

Executive precedents of asserted inability to exercise revisionary power over or to return legislation presented within ten days of the temporary recess of a Congress, arose from a misconception of the nature of a Congress, and of the character of its sittings, and of the effect of its temporary adjournments.

The executive precedents are not unanimous.

Attorney General Mitchell, with whom *Mr. Robert P. Reeder,* Attorney in the Department of Justice, was on the brief, for the United States.

The only exception is of Sundays, and there is no basis for inserting the word " legislative " after the word " ten." Besides, an adjournment of Congress would not prevent return within the specified time if the ten days mean ten days in which Congress is in session. No President has ever acted on the assumption that he had ten legislative days to consider a bill.

It is clear that the clause " unless the Congress by their Adjournment prevent its Return " means a return within ten days, Sundays excepted. It follows that the return by the President must be made within ten calendar days, Sundays excepted, after the bill is presented to him. A

bill returned without his approval to a subsequent session commencing more than ten days after presentation of the bill to the President, is not a return within ten days. The President has ten days, Sundays excepted, after the bill shall have been presented to him in which to consider it, and if on the tenth day he is ready to return it without his approval, and is unable to return it because of an adjournment, it does not become a law. If Congress has adjourned, how is a bill to be returned?

Returning it to an officer of either House after adjournment of Congress is not returning the bill to Congress. There has never been any statute authorizing any officer of either House to receive bills returned by the President during adjournments, and there is no rule to that effect in either House. It has been the universal practice of the Houses of Congress to receive messages from the President, or messages from one House to the other, only while in session. Hinds' Precedents, Vol. 5, c. CXXXVIII. The rules of each House contemplate that messages from the President or from one House to the other shall be received while the House to which the message is directed is in session; but a quorum need not be present. See Rule XL, House of Representatives; Rule XXVIII, Standing Rules of the Senate; Jefferson's Manual, XLVII; Curtis, Const. Hist., Vol. I, p. 486, footnote.

In 1868 the Judiciary Committee of the Senate reported a bill to authorize the President to return bills to the Secretary of the Senate or the Clerk of the House, as the case might be, and to authorize the Secretary or the Clerk to endorse on a bill the date of its receipt and hold it until the House reassembled. That bill was not passed. We can not improve on the argument then made against it. Cong. Globe, 40th Cong., 2d Sess., Pt. 2, pp. 1372, 1373, 1405; *id.*, p. 1941.

There is no basis in the Constitution for the contention that the word "adjournment" relates only to an adjournment of a final session. That the word "adjournment" has no such narrow meaning is shown by the fourth clause in § 5 of Article I.

In the 69th Congress, 2d Session, the Judiciary Committee of the House made a report (House Rep. No. 2054, 2d Session) in which it expressed the conclusion that a bill became a law, although there was a final adjournment on July 3, 1926, of the first session of the 69th Congress, and the President did not approve the bill nor did he disapprove it and return it to the House in which it originated, or make any return to either House. On the strength of that report, and adopting it as the law, the Chairman of the Committee of the Whole, considering the statute to have become law, overruled a point of order made against the inclusion in an appropriation bill of an appropriation to provide funds to carry the statute into effect. Cong. Rec., Vol. 68, Part 5, pp. 4932, 4937.

We feel confident that if there had been presented to the Committee the constitutional difficulties in the way of returning a bill to a House not in session, and the overwhelming practical construction of the Constitution afterwards disclosed, in House Doc. 493, the Committee's conclusion would have been the other way. The House of Representatives has itself always used the word "adjournment" as describing the adjournment taken at the end of a session as well as the final adjournment of a Congress. Rule XXVI.

The only decision of this Court having any bearing on this subject is *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423.

It is probable that the logic of our position leads to the conclusion that there is no distinction between an adjournment and a "recess."

The practical construction is controlling, and it completely sustains the respondent's position. See House Doc. No. 493, 70th Cong., 2d Session, showing the results of an exhaustive research of governmental archives for the purpose of disclosing the practical construction placed upon the constitutional provisions here involved.

With the exception of the action of the House to which we have referred, occurring in the 69th Congress, we have been unable to find any case where either House of Congress has ever proceeded on the theory that a bill so pocketed had become a law.

No such bill has ever been spread on the statute books, or afterwards recognized as law. In some cases new legislation has been enacted on the subject. In a case like this, practical construction is controlling. *Myers* v. *United States,* 272 U. S. 52.

To hold with petitioners in this case would be to resurrect 120 bills, pocketed, as was this one, at various dates since the adoption of the Constitution and place them on the statute books.

Decisions of state courts furnish little aid in the decision of this case. See Massachusetts constitution, 1780, c. 1, § 1; Art. II; *Opinion of the Justices,* 3 Mass. 567; *The Soldiers' Voting Bill,* 45 N. H. 607; *Hequembourg* v. *Dunkirk,* 49 Hun. (N. Y.) 550; *Corwin* v. *Comptroller General,* 6 S. C. 390; *Miller* v. *Hurford,* 11 Neb. 377; *People* v. *Hatch,* 33 Ill. 9; *State* v. *South Norwalk,* 77 Conn. 257; *State* v. *Joseph,* 175 Ala. 579; *Johnson City* v. *Eastern Electric Co.,* 133 Tenn. 632.

Some of the state courts have held that when a legislature is not in session, a bill may be returned to officers of the legislature. *The Soldiers' Voting Bill, supra; Corwin* v. *Comptroller General, supra; Johnson City* v. *Eastern Electric Co., supra.* See also *Harpending* v. *Haight,* 39 Cal. 189; *Hequembourg* v. *Dunkirk, supra.*

Other courts have held that a bill may be returned only when the legislature is in session. *People* v. *Hatch, supra; State* v. *South Norwalk, supra; State* v. *Joseph, supra; People* v. *Bowen,* 21 N. Y. 517; 30 Barbour 24. *Cf. United States* v. *Allen,* 36 Fed. 174; *Tuttle* v. *Boston,* 215 Mass. 57.

In the state decisions there is no preponderance of opinion in favor of the position that a bill may be returned to officers of the legislature when the legislature itself is not in session.

Mr. Hatton W. Sumners, as *amicus curiæ,* on behalf of the Committee on the Judiciary of the House of Representatives, by special leave of Court.

To have the President examine bills and indicate his opinion was deemed important, but not so important as delay beyond the ten days specified in the Constitution.

The construction insisted upon by the Government, in effect, would eliminate the word " prevent." " Prevent " is the heart and substance of the provision. Construed as not limiting delivery of a bill with the President's objections to the House of its origin when in actual session, the provision under consideration harmonizes with and safeguards, and makes workable in every situation, the general plan of the Constitution, leaving to both the President and to the legislative bodies an opportunity to utilize appropriate and necessary agencies in the discharge of their respective duties with regard to bills, and to proceed without friction or uncertainty, and with the minimum of interference with the discharge of their general duties.

If the words " unless the Congress by their adjournment prevent its return " had not been incorporated, the ordinary rules of construction would probably have excused the President from returning a bill to the House of its origin within the time fixed if prevented from so doing, not only by this act specified, but by any act of

the Congress or of that House. These words become, therefore, under the ordinary rules of construction, not words of addition, but words of limitation, and of exclusion.

If delivery of the bill with the President's objections can only be made to the House of its origin in actual session, when Congress is in session, the President is limited where he ought not to be limited, and the Congress is limited where it ought not to be limited, in each instance interfering with the discharge of their constitutional duties under the general plan. To say that Congress by any act other than final adjournment of the Congress may prevent the delivery of a bill, and thereby without a reconsideration make law an act to which the President objects, would be utterly unreasonable. But under the construction invoked to support the pocket veto, if the President's messenger should arrive after the adjournment of the House in which the bill had originated, upon the last of the ten days, the other House being still in session, the bill could not be returned, and yet, the Congress not being adjourned, the bill would become a law contrary to the general plan. A situation would develop under which the bill would become a law despite the President's objections and without the reconsideration of the Houses of Congress, notwithstanding the fact that the President had formulated his objections and within the limit of time fixed by the Constitution. had attempted to return the bill to the House of its origin.

There is no language in this provision, nor any recognized rule of construction which,—while permitting the Congress in the first instance to send bills to the President by a messenger, as is done without question, and the President to receive such bills through an appropriate agent,— even though he himself be absent from his office, and even though the Constitution declares "he," the President, shall return it,— which would prevent the House of origin

from receiving these same bills through a proper agent if that House were engaged in other business or temporarily absent from their chambers. It is against all reason and every recognized rule of construction, when the avoidance of unnecessary delay is so clearly manifest in the provision sought to be construed, that a construction should be superimposed which would make for delay regardless of every desire and of every effort of the President and of the Congress in the situation indicated.

Why, after the States by a unanimous vote had refused to vest the President with an absolute veto, adopt a construction of this provision contrary to its language which would give to the President, under certain circumstances, an absolute veto in effect, when there is a rule of construction, recognized alike by the courts and common sense, which would avoid these consequences?

In view of the provision directing the writing and recording of the President's objections to a bill, a construction can not be maintained which would permit the President during the life of a Congress to kill a bill by his silence and thus keep his reasons and his motives for so doing from the Congress and from the country.

The sole exception in the provision which prevents a bill from becoming law when the President refuses to take any action on it for ten days, is where the Congress prevents, that is to say renders impossible, its return by their adjournment. There is but one adjournment, the final adjournment, which marks the death and dissolution of a Congress, that can have that effect.

Where choice may be had between two constructions, that is to be adopted which is most in harmony with the whole instrument. And it is the substantive and not the adjective provisions which control. It was the act of preventing delivery, of making delivery impossible, and its consequence, to which the Convention gave consideration, and not the act of adjournment *per se*. The Con-

vention was not engaged in fixing forms of procedure, or in placing upon future generations details of procedure, which might be suited to the present, but not to future conditions.

The construction sustaining the pocket veto, introduces another anomaly. It unnecessarily gives to the President a greater power over bills presented to him near the end of a session of Congress, or near temporary adjournment during a session, than at other times.

Unnecessary retention of bills by the President is not in harmony with the intent of the Constitution. If unnecessary detention be deliberate, for the purpose of denying to Congress an opportunity to pass the bill notwithstanding the President's objections, it is an abuse of discretion amounting to usurpation.

It is not in keeping with the public interest that any individual, however high his station, should have the sole power by action or inaction to kill important legislation and hide his reasons under a blanket of secrecy. Every reasonable construction should be invoked to minimize such a possibility. Nothing is more calculated to prevent unwarranted suspicion, and to promote efficiency and integrity in official conduct, than publicity given to the reasons for official action.

The President is commanded to put his reasons in writing, and the House to which the return is made is commanded to record those reasons, in their entirety, upon their permanent record books.

There is no inherent necessity for bills to die short of final adjournment.

The tendency of the practice under the claim of pocket veto power is to give the President an absolute veto. When the Constitution was framed, in all the world where enlightened judgment had impressed itself, this sort of power had been excluded. Today such a power is not to be found in exercise in the constitution of any of the

nations whose culture and governmental institutions are akin to ours. Actual tests have convinced statesmen everywhere that it has no place in the structure of democratic government.

The Houses of Congress have officers and agents of great power and responsibility who act in their stead, and who are constantly in their places when the Houses are in session, and when they are not in session. From the organization of a Congress until the end of its existence this is true. There is nothing in the Constitution which denies the right to the use of these agents in effecting the return of objected-to bills. Such a right is acknowledged, and is practiced everywhere in governments, in business, and in all human relationships. A rule of construction or of official action which would require in every instance the persons who constitute the Houses of Congress to be in formal session in order to receive bills from the President, would also require the person who is President personally to return such bills. And the Congress would be required to go in a body to the President (because the command is clearly to the Congress) to present each bill, not to some appropriate agent of the President, but to the President in person. And it would become the duty of the President, under such construction, regardless of the press of important duties, to receive the bill in person.

The delivery of the message to the Speaker by a messenger is all the President does as compliance with the provision of the Constitution that he (the President) shall return the bill to that House in which the same shall have originated. The receipt by the Speaker is correctly regarded as receipt by the House, but only upon the theory that he is an appropriate agent of the House to receive it. It is in a sealed envelope addressed to the Speaker and delivered to the Speaker. That ends the President's contact with the matter. He has no control over what the Speaker may do with the bill and message.

The President's messenger goes back to the White House, leaving the message with the Speaker. If delivery to the Speaker when Congress is in session is delivery to the House, delivery to the Speaker when the House is in adjournment would be delivery to the House.

Upon an adjournment of Congress, committees, under a rule of the House, deliver all unfinished bills and other documents to the Clerk to be preserved by him for the House until its reconvening. He is the keeper of all its archives. He is entrusted with the enrolling of all bills and other legislative action. He certifies the bills. Upon his selection by the House his name is sent to the President so that the President may recognize him as their agent, and give due weight to acts certified by him. The Clerk is the disbursing officer of the contingent fund, salaries of the House employees, and of the Members' secretaries. He makes up the roll of the incoming House, passing in the first instance upon the regularity of credentials, and presides over the meeting of the Members of the incoming House before and during the election of a Speaker. Can it be questioned that this high officer of the House, from whose office the identical bill was enrolled and certified on behalf of the House, is an appropriate agency for the receipt of such returned bill and objections?

The right of constructive delivery is necessary not only to facilitate legislative procedure, prevent delay, and to hold the President's powers within the limits imposed by the Constitution, but it is also necessary in order to hold the Congress within proper bounds by preventing bills to which the President may object from becoming law without reconsideration by the Congress. The adjournment of a House for not more than three days, without the consent of the other House, is not an adjournment of Congress. If the Senate should be in executive session,

on a matter of the highest public importance, refusing to be interrupted, on the last day of the period in which return may be made, that would not even be an adjournment of one House of the Congress; and yet return could not be made if constructive delivery is not permitted.

The pocket veto is of gradual development and unknown in the early history of the Government. To permit practices, especially practices originating out of a misconception, to fasten erroneous interpretations upon our written Constitution, would be a fatal policy. It would seem a sound doctrine that no generation, or number of generations, by a disregard of the plan of the Constitution, or confusion as to it, can deprive those who come after them of the full benefit of its provisions. The practical difficulty of inaugurating a reverse practice once it is recognized that an earlier practice has crystallized itself into a controlling constitutional construction, warns with compelling persuasion against such a recognition. It would seem a sound proposition that in the construction of a written Constitution it should never be held that practice can effect that which practice cannot change. These considerations bear with determinative force against any suggestion on the part of the Government that the length of time during which the pocket veto has been practiced has a bearing upon the constitutionality of the pocket veto.

Mr. Sumners cited the following cases in support of his position: *Opinion of the Justices,* 3 Mass. 567; *Soldiers' Voting Bill,* 45 N. H. 607; *Harpending* v. *Height,* 39 Cal. 189; *Corwin* v. *Comptroller,* 6 S. C. 390; *Miller* v. *Murford,* 11 Neb. 377; *Wolf* v. *McCaull,* 76 Va. 876; *Hequembourg* v. *Dunkirk,* 49 Hun. (N. Y.) 550; *Crawford* v. *Summerset,* 73 Md. 105; *State* v. *Joseph,* 175 Ala. 579; *Tuttle* v. *Boston,* 215 Mass. 57; *Johnson City* v. *Electric Co.,* 133 Tenn. 637.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case presents the question whether, under the second clause in Section 7 of Article I of the Constitution of the United States, a bill which is passed by both Houses of Congress during the first regular session of a particular Congress and presented to the President less than ten days (Sundays excepted) before the adjournment of that session, but is neither signed by the President nor returned by him to the House in which it originated, becomes a law in like manner as if he had signed it.

At the first session of the 69th Congress Senate Bill No. 3185, entitled "An Act authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims," having been passed by both Houses of Congress and duly authenticated, was presented to the President on June 24, 1926. On July 3 the first session of the 69th Congress was adjourned, under a house concurrent resolution.[1] The Congress was not again in session until the commencement of the second session on the first Monday in December.[2] And neither House of Congress was in session on July 6—the tenth day after the bill had been presented to the President (Sundays excepted).

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[1] 67 Cong. Rec., pt. 11, pp. 12770, 12885, 13009, 13018, 13100. By the terms of this resolution the House of Representatives adjourned *sine die;* and the Senate adjourned to November 10—this being the date to which, sitting as a court of impeachment, it had previously adjourned for the trial of certain articles of impeachment. 67 Cong. Rec., pt. 8, pp. 8725, 8733. And on that date the Senate, sitting as a court of impeachment, met and adjourned *sine die.* 68 Cong. Rec., pt. 1, pp. 3, 4.

That the adjournment on July 3 was in effect an adjournment of the first session of the Congress is not questioned.

[2] 68 Cong. Rec., pt. 1, p. 7; Constitution, Art. 1, Sec. 4, Cl. 2.

The President neither signed the bill nor returned it to the Senate. And it was not published as a law.

Taking the position that the bill had become a law without the signature of the President, the Okanogan and other Indian tribes residing in the State of Washington in March, 1927, filed a petition in the Court of Claims setting up certain claims in accordance with the terms of the bill. The United States demurred to the petition. The court sustained the demurrer and dismissed the petition, on the ground that under the provisions of the Constitution the bill had not become a law. 66 C. Cls. 26.

In view of the public importance of the question presented we granted the petitioners a writ of certiorari. 278 U. S. 597. And for like reason, at the request of the Committee on the Judiciary of the House of Representatives, we granted Mr. Sumners, a member of that Committee, leave to appear as *amicus curiae*. He has aided us by a comprehensive and forcible presentation of arguments against the conclusion of the court below.

The clause of the Constitution here in question reads as follows: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered; and if approved by two thirds of that House, it shall become a Law. . . . *If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it,*

unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." [3]

The specific question here presented is whether, within the meaning of the last sentence—which we have italicized—Congress by the adjournment on July 3 prevented the President from returning the bill within ten days, Sundays excepted, after it had been presented to him. If the adjournment did not prevent him from returning the bill within the prescribed time, it became a law without his signature; but, if the adjournment prevented him from so doing, it did not become a law. This is unquestioned.

In support of the position that the adjournment did not prevent the President from returning the bill within the prescribed time, counsel for the petitioners and the *amicus curiae* urge that the only "adjournment" which prevents the President from returning a bill within the prescribed time is the final adjournment of the Congress, terminating its legislative existence and making it impossible for the President to return the bill for its reconsideration; and that an adjournment of the first session of the Congress does not prevent the President from returning the bill within the prescribed time since the legislative existence of the Congress is not terminated, and he may within that time return the bill to the House in which it originated, although not then in session, by delivering it, with his objections, to the Secretary, Clerk, or other appropriate agent of that House, to be held by such agent

[3] The third clause reads as follows: "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."

and presented to the House when the Congress resumes its sitting at the next session—thereby enabling the Congress to proceed with the reconsideration of the bill as a part of the unfinished legislative business carried over from the first session. And it is also said, by counsel for the petitioners, that the "ten days" allowed for the return of the bill, may be construed as meaning "legislative days," that is, days on which the Congress is in legislative session, and not calendar days, thereby enabling the President to return the bill within ten days, Sundays excepted, exclusive of all days on which the Congress was not in legislative session, even although, by reason of an adjournment, this period does not expire until after the Congress has resumed its legislative sittings at the second session.

In support of the position that Congress by the adjournment on July 3 prevented the President from returning the bill within the prescribed time, the Attorney General maintains that the word "adjournment" includes an interim adjournment as well as the final adjournment at the end of a Congress; that the words "ten days" mean calendar days, and not legislative days; that the President cannot return a bill with his objections to the House in which it originated except by returning it to the House while in session; that if, by reason of an adjournment taken by Congress within the prescribed time, the House in which the bill originated be not in session on the last of such days and the bill cannot be thus returned, the President is thereby prevented from returning the bill within the prescribed time; and that this view is supported by the practical construction given to the constitutional provision by the President through a long course of years, in which Congress has acquiesced.

No light is thrown on the meaning of the constitutional provision in the proceedings and debates of the Constitutional Convention; and there has been no decision of

this Court dealing directly with its meaning and effect in respect to the precise question here involved. And while we have been cited to various decisions of state courts construing similar provisions in state constitutions, an examination of them discloses such a conflict of opinion—due in some part to differences in phraseology or their application to the procedure of the state legislatures—that, viewed as a whole, they furnish no substantial aid in the determination of the question here presented and a detailed consideration of them here would not be helpful. For that reason we shall cite in this opinion only some that seem most apposite and persuasive in their reasoning.

1. It is earnestly insisted by counsel for the petitioners and by the *amicus curiae,* as the underlying basis of their contentions, that since clause 2 gives the President merely a qualified negative over legislation and requires him, if he disapproves a bill, to return it with his objections to the House in which it originated so that Congress may have an opportunity to reconsider it in the light of such objections and pass it by a two-thirds vote of each House, the provision as to the return of a bill within a specified time is to be construed in a manner that will give effect to the reciprocal rights and duties of the President and of Congress and not enable him to defeat a bill of which he disapproves by a silent and "absolute veto," that is, a so-called "pocket veto," which neither discloses his objections nor gives Congress an opportunity to pass the bill over them. This argument involves a misconception of the reciprocal rights and duties of the President and of Congress and of the situation resulting from an adjournment of Congress which prevents the President from returning a bill with his objections within the specified time. This is illustrated in the use of the term "pocket veto," which does not acurately describe the situation, and is misleading in its implications in that it suggests that the

failure of the bill in such case is necessarily due to the disapproval of the President and the intentional withholding of the bill from reconsideration. The Constitution in giving the President a qualified negative over legislation—commonly called a veto—entrusts him with an authority and imposes upon him an obligation that are of the highest importance, in the execution of which it is made his duty not only to sign bills that he approves in order that they may become law, but to return bills that he disapproves, with his objections, in order that they may be reconsidered by Congress. The faithful and effective exercise of this momentous duty necessarily requires time in which the President may carefully examine and consider a bill and determine, after due deliberation, whether he should approve or disapprove it, and if he disapproves it, formulate his objections for the consideration of Congress. To that end a specified time is given, after the bill has been presented to him, in which he may examine its provisions and either approve it or return it, not approved, for reconsideration. See *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, 455.[4] The power thus con-

[4] Compare *The People* v. *Bowen,* 30 Barb. (N. Y.) 24, 32, 34; *Lankford* v. *County Commrs. of Somerset County,* 73 Md. 105, 110, 111; *Tuttle* v. *Boston,* 215 Mass. 57, 58, 60; and *The People* v. *Hatch,* 33 Ill. 9, 129, 135, 136, in which it was aptly said, in a concurring opinion: "The convention which framed our Constitution designed to provide for the enactment and enforcement of salutary laws in the mode best calculated to promote the general welfare. They supposed, as one of the means of best attaining this end, that the executive of the State should not only be intrusted with the enforcement of all laws, but should also be vested with a voice in their adoption. In distributing the powers of government, they could, if they had chosen to do so, have authorized the general assembly to adopt laws independent of all executive action. But to prevent the evils of hasty, ill considered legislation, they conferred upon the governor the power to arrest the passage of a bill until his objections could be heard, and the bill be again considered and adopted. As the best means of accomplishing this, and of preventing the adoption

ferred upon the President cannot be narrowed or cut down by Congress, nor the time within which it is to be exercised lessened, directly or indirectly.[5] And it is just as essential a part of the constitutional provisions, guarding against ill-considered and unwise legislation, that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress, as it is that Congress, on its part, should have an opportunity to re-pass the bill over his objections.

It will frequently happen—especially when many bills are presented to the President near the close of a session, some of which are complicated or deal with questions of great moment—that when Congress adjourns before the time allowed for his consideration and action has expired, he will not have been able to determine whether some of them should be approved or disapproved, or, if disapproved, to formulate adequately the objections which should receive the consideration of Congress. And it is plain that when the adjournment of Congress prevents the return of a bill within the allotted time, the failure of the bill to become a law cannot properly be ascribed to the disapproval of the President—who presumably would have returned it before the adjournment if there had been sufficient time in which to complete his consideration and

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of injurious measures, they gave to the governor ten days, exclusive of Sundays, in which to bestow that careful examination and consideration, so essentially necessary to determine the effects and consequences likely to flow from the adoption of a new measure. This is the duty imposed, and it is one that must be performed. And the time allowed for the purpose cannot be abridged, or the provision thwarted, by either accident or design. The use of the whole time given to the governor must be allowed. The Constitution has spoken and it must be obeyed."

[5] Compare *Tuttle* v. *Boston, supra,* 60; *The People* v. *Hatch, supra,* 136.

take such action—but is attributable solely to the action of Congress in adjourning before the time allowed the President for returning the bill had expired. Thus, in *La Abra Silver Mining Co.* v. *United States, supra,* 454, this Court said that "if by its action, after the presentation of a bill to the President during the time given him by the Constitution for an examination of its provisions and for approving it by his signature, Congress puts it out of his power to return it, not approved, within that time to the House in which it originated, then the bill falls, and does not become a law."[6]

2. There is plainly no warrant for adopting the suggestion of counsel for the petitioners—which is not urged by the *amicus curiae*—that the phrase "within ten Days (Sundays excepted)," may be construed as meaning, not calendar days, but "legislative days," that is, days during which Congress is in legislative session—thereby excluding all calendar days which are not also legislative days from the computation of the period allowed the President for returning a bill. The words used in the Constitution are to be taken in their natural and obvious sense, *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 326, and are to be given the meaning they have in common use unless there are very strong reasons to the contrary. *Tennessee* v. *Whitworth,* 117 U. S. 139, 147. The word "days," when not qualified, means in ordinary and common usage calendar days. This is obviously the meaning in which it is used in the constitutional provision, and is emphasized by the fact that "Sundays" are excepted. There is nothing whatever to justify changing this meaning by inserting the word "legislative" as a qualifying adjective. And no President or Congress has ever suggested that the Pres-

[6]And if Congress so desires the same bill may be re-introduced and passed when Congress resumes its session, and after receiving the due consideration of the President, if returned with his objections, may be then passed by the requisite vote in both Houses.

ident has ten "legislative days" in which to consider and return a bill, or proceeded upon that theory.

3. Nor can we agree with the argument that the word "adjournment" as used in the constitutional provision refers only to the final adjournment of the Congress. The word "adjournment" is not qualified by the word "final;" and there is nothing in the context which warrants the insertion of such a limitation. On the contrary, the fact that the word "adjournment" as used in the Constitution is not limited to a final adjournment, is shown by the first clause in section 5 of Article I, which provides that a smaller number than a majority of each House may "adjourn" from day to day, and by the fourth clause of the same Article, which provides that neither House, during the session of Congress, shall, without the consent of the other, "adjourn" for more than three days. And the Standing Rules of the Senate refer specifically to motions to "adjourn to a day certain" (No. XXII); and the Rules of the House of Representatives, to an "adjournment" at the end of one session (No. XXVI).[7]

4. We think that under the constitutional provision the determinative question in reference to an "adjournment" is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that "prevents" the President from returning the bill to the House in which it originated within the time allowed. It is clear, and, as

[7] The view that the "adjournment" contemplated in the constitutional provision is the final adjournment of Congress, and not an interim adjournment, appears to have been expressed in behalf of Congress, for the first and only time, in a report made by the Judiciary Committee of the House of Representatives in 1927 (H. Rep't. No. 2054, 69th Cong., 2d sess.). This was followed by the Chairman of the Committee of the Whole in overruling a point of order made against a provision in an appropriation bill that presented this question; and no appeal was taken from this ruling. 68 Cong. Rec., pt. 5, pp. 4932–4937.

we understand, is not questioned, that since the President may return a bill at any time within the allotted period, he is prevented from returning it, within the meaning of the constitutional provision, if by reason of the adjournment it is impossible for him to return it to the House in which it originated on the last day of that period. It is also conceded, as we understand, that the President is necessarily prevented from returning a bill by a final adjournment of the Congress, since such adjournment terminates the legislative existence of the Congress and makes it impossible to return the bill to either House. And the crucial question here presented is whether an interim adjournment of Congress at the end of the first session, as the result of which, although the legislative existence of the House in which the bill originated has not been terminated, it is not in session on the last day of the period allowed the President for returning the bill, likewise prevents him from returning it to such House. This brings us to the specific question whether, in order to return the bill to the House in which it originated, within the meaning of the constitutional provision, it is necessary, as the Attorney General insists, that it be returned to the House itself while it is in session, or whether, as urged by counsel for the petitioners and by the *amicus curiae,* it may be returned to the House, although not in session, by delivering it to an officer or agent of the House, to be held by him and delivered to the House when it resumes its sittings at the next session.

Clause 2 specifically provides that if the President does not approve a bill " he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." That is, it provides in the same phrase and with no change in definition, that the " House " to which the bill is to be returned is that which

is to enter the objections on its journal and proceed to reconsider the bill.

From a consideration of the entire clause we think that the "House" to which the bill is to be returned, is the House in session. In *Missouri Pac. Ry. Co.* v. *Kansas,* 248 U. S. 276, 280, 281, 283, this Court, in holding that the provision in this clause requiring a vote of two-thirds of each House to pass a bill over the President's objections, means two-thirds of a quorum of each House and not two-thirds of all its members, said *arguendo,* that "the context leaves no doubt that the provision was dealing with the two houses as organized and entitled to exert legislative power," that is, the legislative bodies "organized conformably to law for the purpose of enacting legislation"; and, after stating that the identity between this provision and that in Article V of the Constitution, giving "two-thirds of both Houses" the power to submit amendments, makes the practice as to one applicable to the other, quoted with approval the "settled rule . . . clearly and aptly stated" by the Speaker, Mr. Reed, in the House, on the passage of the amendment to the Constitution providing for the election of Senators by the vote of the people, as follows: "What constitutes a House? A quorum of the membership, a majority, one-half and one more. That is all that is necessary to constitute a House to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the House is present the House is constituted and two-thirds of those voting are sufficient in order to accomplish the object. . . ."

Since the bill is to be returned to the same "House," and none other, that is to enter the President's objections

on its journal [8] and proceeded to reconsider the bill—there being only one and the same reference to such House—it follows, in our opinion, that under the constitutional mandate it is to be returned to the "House" when sitting in an organized capacity for the transaction of business, and having authority to receive the return, enter the President's objections on its journal, and proceed to reconsider the bill; and that no return can be made to the House when it is not in session as a collective body and its members are dispersed. This is the view expressed in 1 Curtis' Constitutional History of the United States, 486, n. 1, in which it is said: "This expression, a 'house,' or 'each house,' is several times employed in the Constitution with reference to the faculties and powers of the two chambers respectively, and it always means, when so used, the constitutional quorum, assembled for the transaction of business, and capable of transacting business. This same expression was employed by the committee when they provided for the mode in which a bill, once rejected by the president, should be again brought before the legislative bodies. They directed it to be returned '*to that House in which it shall have originated*'—that is to say, to a constitutional quorum, a majority of which passed it in the first instance. . . ."

This accords with the long established practice of both Houses of Congress to receive messages from the President while they are in session. See Senate Standing Rule XXVIII, cl. 1; House Rule XL; 5 Hind's Precedents of the House of Representatives, ch. CXXXVIII, especially sec. 6591, p. 812.

We find no substantial basis for the suggestion that although the House in which the bill originated is not in session the bill may nevertheless be returned, con-

[8] The journal is the record that each House is required to keep of its own proceedings. Const., Art. I, sec. 5, cl. 3.

sistently with the constitutional mandate, by delivering it, with the President's objections, to an officer or agent of the House, for subsequent delivery to the House when it resumes its sittings at the next session, with the same force and effect as if the bill had been returned to the House on the day when it was delivered to such officer or agent. Aside from the fact that Congress has never enacted any statute authorizing any officer or agent of either House to receive for it bills returned by the President during its adjournment, and that there is no rule to that effect in either House, the delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate. The House, not having been in session when the bill was delivered to the officer or agent, could neither have received the bill and objections at that time, nor have entered the objections upon its journal, nor have proceeded to reconsider the bill, as the Constitution requires; and there is nothing in the Constitution which authorizes either House to make a *nunc pro tunc* record of the return of a bill as of a date on which it had not, in fact, been returned. Manifestly it was not intended that, instead of returning the bill to the House itself, as required by the constitutional provision, the President should be authorized to deliver it, during an adjournment of the House, to some individual officer or agent not authorized to make any legislative record of its delivery, who should hold it in his own hands for days, weeks or perhaps months,—not only leaving open possible questions as to the date on which it had been delivered to him, or whether it had in fact been delivered to him at all, but keeping the bill in the meantime in a state of suspended animation until the House resumes its sittings, with no certain knowledge on the part of the public as to whether it had or had not been seasonably delivered, and necessarily causing delay in its reconsideration which the Constitution evidently intended to avoid. In short, it was plainly the object

of the constitutional provision that there should be a timely return of the bill, which should not only be a matter of official record definitely shown by the journal of the House itself, giving public, certain and prompt knowledge as to the status of the bill, but should enable Congress to proceed immediately with its reconsideration; and that the return of the bill should be an actual and public return to the House itself, and not a fictitious return by a delivery of the bill to some individual which could be given a retroactive effect at a later date when the time for the return of the bill to the House had expired.

Thus Attorney General Devens, in a memorandum to President Hayes, said: "All these provisions indicate that in order to enable the President to return a bill the Houses should be in session; and if by their own act they see fit to adjourn and deprive him of the opportunity to return the bill, with his objection, and are not present themselves to receive and record these objections and to act thereon, the bill can not become a law unless ten days shall have expired during which the President will have had the opportunity thus to return it. There is no suggestion that he may return it to the Speaker, or Clerk, or any officer of the House; but the return must be made to the House as an organized body." [9]

It is significant that only one attempt has ever been made in Congress to authorize the President to return a bill when the House in which it originated was not in session; and that this failed. In 1868 a bill was reported by the Senate Judiciary Committee for regulating the return of bills by the President.[10] While this specifically declared that the constitutional provision allowed the President ten calendar days (Sundays excepted) in which to return a bill not approved by him, and that the return

[9] Quoted in an opinion of Attorney General Miller, 20 Op. Att. Gen. 503, 506.

[10] S. 366, 40th Cong., 2d sess.

of a bill would be prevented by "the final adjournment of a session" of Congress, although not by an adjournment to a particular day, it provided that if at any time within such ten days the President desired to return the bill to the house in which it originated when such house was not sitting, he might return it to the office of the Secretary of the Senate or Clerk of the House of Representatives, as the case might be, who should endorse thereon the day on which such return was made, and make an entry of the fact of such return in his journal of the proceedings, and that such return should be deemed a return of the bill to all intents and purposes. In the debate in the Senate strong opposition was expressed to this feature of the bill on constitutional grounds; [11] and

[11] In the debate in the Senate the constitutional objections to the provision authorizing the President to return a bill to an officer of the Senate or the House of Representatives when they were not sitting, were clearly and, as we think, convincingly expressed.

Thus Senator Davis said: "(The) Constitution requires that if the President does not approve a bill he shall return it with his objections to the House in which it originated; this bill provides a different mode of disposing of that bill in case Congress has temporarily taken a recess or an adjournment. It dispenses with the requisition of the Constitution that the bill shall be returned to the House, and directs that it be returned to the officer of the House, if the body is not in session. I do not believe it is competent for Congress to make any such change as that. . . . Of course, if (the President) is to return the bill to the House, the House must be in session, because it is not a House unless in session in the sense in which the Constitution requires the bill to be returned to the House by the President with his objections. . . . I think it is the duty of the President, in the plain language of the Constitution, to return the bill, not to the Secretary or Clerk of either House, but to the House itself. That is the unambiguous and plain language of the Constitution. . . . It is returning it to the Senate or the House of Representatives in session, because when it is returned it is to be at once considered again. The Constitution contemplates that simultaneously with the return of the bill to the House in which it originated the House may take up the matter for consideration. . . . I take the

although it passed the Senate by a majority vote, it was never reported from the Judiciary Committee of the House of Representatives, to which it was referred, and thus failed to pass the Congress. It does not appear that this suggestion has ever been renewed in Congress.

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position that to return the bill to the Clerk of the House of Representatives, if it originated there, or to the Secretary of the Senate, if it originated in the Senate, when those bodies are not in session, is not a return of the bill to the House in which it originated. It is the duty and the right of the President to communicate to the House and not to a ministerial officer of the House. To enable him to communicate to the House it must necessarily be in session, because he can not communicate with either House when it is in any other situation than in actual session. It must be assembled and in actual session. . . . I think, sir, that the Executive may not only claim it as a right, but the House in which a bill originates may claim it as the performance of a duty by him to that House, and the people of the country may claim it as the performance of a duty by him, that he shall return the bill with his objections, not, in vacation, to the Clerk or to the Secretary of the Senate or House of Representatives, but to the body itself, and to enable him to perform that duty that body must necessarily be in session." Cong. Globe, 40th Cong., 2d. Sess., Pt. 2, pp. 1372, 1374, 1405.

Senator Bayard said: "But, Mr. President, there is an additional objection which to my mind is all powerful. The committee propose . . . that if Congress is not in session during the ten days or at the end of the ten days the President may send the bill to the office of the Secretary of the Senate or the Clerk of the House of Representatives, according to the House in which the bill may have originated. There is no such provision in the Constitution; and the settled usage of this Government, without a single exception from its foundation, is that no communication is made by the Executive to either House except to the House in session, and that usage ought to have a controlling influence to exclude the idea which is contained in the provision of the bill that I am now referring to. . . . But further, the very object of the clause looks to the fact that the bill should be returned during the session of the House in which it originated. It looks, if I may so speak, to immediate action on the part of Congress—at all events it looks to giving to Congress the right of immediate action as soon as the objections of the President are received. The Houses are to proceed to consider the objections; they

5. The views which we have expressed as to the construction and effect of the constitutional provision here in question are confirmed by the practical construction that has been given to it by the Presidents through a long

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are to spread them at large on the Journal; there is to be a reconsideration of the measure formerly under debate. The whole clause looks to speedy action, at all events, upon objections made by the President, and the language employed providing for a return to the House does not imply filing a document with the Clerk or the Secretary when the House is not in session, whether it be the Senate or the House of Representatives. . . . Here the usage of the Government of the United States, from its origin to the present day, is, that in no single case has a President of the United States, on the return of a bill to the Senate or House of Representatives, ever undertaken to file his message with the Clerk of the one or the Secretary of the other; but the action of the Executive has uniformly been by message sent to the House when in session. That is the settled usage; and when you look to the language of the Constitution, that the bill is to be returned to the House, it is certainly forcing language to say that a return to the House means filing a paper with the Secretary or Clerk when the House is not in session." Cong. Globe, 40th Cong., 2d Sess., Pt. 2, pp. 1941, 1942.

Senator Buckalew said: "I should like to know how the Secretary can make entries and make up a Journal when the Senate is not in session. I can understand that when the Senate reconvenes the Clerk may hand to the President of the Senate, just as any member might or any outsider might, the particular paper, and it may then be presented to the Senate, and it may be entered in the Journal. But this bill contemplates that our Secretary shall make and keep a Journal when the Senate is not here at all, when there can be no Journal of its proceedings. . . . (The) Constitution provides that the Senate shall keep a Journal of its proceedings, of what it does itself. In another clause it is provided that when the President returns a bill with his objections that message thus containing his objections shall be entered upon the Journal of the Senate. The fact of receiving such a message and the entry of that message upon the Journal must, in the very nature of the case, be when the Senate itself is in session . . . The Journal is to be kept by the Senate, and it is to be a Journal of what it does, a Journal of its proceedings. . . . The reception of a message from the President of the United States is a proceeding by the Senate; it is an act by the Senate

course of years, in which Congress has acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character. Compare *Missouri Pac. Ry. Co.* v.

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itself. . . . I think, therefore, it is manifest that under the Constitution of the United States this Journal and the entries upon the Journal are matters which relate to a session of the Senate, an actual session, the personal presence of the body, and that it is not competent for the Senate to commit to one of its own officers, or to any officer of the Government, or to any citizen, the performance of a duty which is by the Constitution charged upon itself and to be performed by itself. . . . Now, one objection which applies to the bill . . . is that it is against the practice of the Government. From the time that Congress first convened together in 1789 down to this time it has been held, and held uniformly, that if the two Houses of Congress adjourned by a concurrent resolution before the expiration of ten days from the presentation of a bill to the President a bill which should then be left in his hands would fail. . . . They have failed upon repeated occasions, not only during recent years, but far back in former times. . . . This bill proposes, in the absence of both Houses of Congress to provide a substitute for the House to which the bill is to be returned. Instead of being returned to the House in which it originated, as the Constitution says, this bill proposes to enact that it shall be returned to the Secretary here alone . . . and that upon the paper . . . being given to that particular person it shall be considered that it has been returned to the House in which it originated. . . . Can anything more flatly contradict common sense, deny the plain fact? Can we constitute our Secretary into the Senate, and can we make the Clerk of the House of Representatives the House for the purpose of doing any official act whatever? You propose that he shall receive the communication from the President as if he were the Senate or the House; that he, sitting anywhere, responsible to nobody, with no check upon him, shall make up a Journal as if he were the Senate or the House for the occasion." Cong. Globe, 40th Cong., 2d. Sess., Pt. 3, pp. 2076, 2077.

And Senator Morton said: "The Constitution . . . contemplates that the bill shall pass from the custody of the President to the custody of the House in which it shall have originated; and we have no power, in my judgment, to say that it shall be sufficient to return

Kansas, supra, 284; *Myers* v. *United States,* 272 U. S. 52, 119, 136; and *State* v. *South Norwalk,* 77 Conn. 257, 264, in which the court said that a practice of at least twenty years duration "on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning."

A memorandum prepared in the office of the Attorney General showing the results of an exhaustive research of governmental archives for the purpose of disclosing the practical construction placed upon the constitutional provision here involved in reference to so-called "pocket vetoes," was transmitted by the President to Congress in December 1928.[12] This memorandum—the accuracy of which is not questioned—cites more than 400 bills and resolutions which were passed by Congress and submitted to the President less than ten days before a final or interim adjournment of Congress, which were not signed by the President nor returned with his disapproval. Of these, 119 were instances in which the adjournment was that at the end of a session of Congress, as distinguished from the final adjournment of the Congress. None of these bills or resolutions was placed upon the statute books or treated as having become a law; nor does it appear that there was any attempt to enforce them in the courts until the present suit was brought. Of these instances 11 oc-

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it to the President of the Senate or the Speaker of the House or to the Secretary or Clerk. . . . What has become of the bill? The Constitution does not contemplate such a condition of things. . . . It would be just as good for the private Secretary of the President to retain a bill as for the Secretary of the Senate; just as much a compliance with the provision of the Constitution; and it would be just as satisfactory to my mind for the President to retain it during the odd days as for the Secretary of the Senate to do so." Cong. Globe, 40th Cong., 2d Sess., Pt. 3, pp. 2077, 2078.

[12] Ho. Doc. No. 493, 70 Cong., 2d sess.

curred before the end of President Lincoln's administration, and the remainder from the end of that administration to the present time. They arose under the administration of all the Presidents except ten. These 119 bills and resolutions are thus classified in the brief of the *amicus curiae:* Private relief bills, 36; pension bills, 19; obsolete purposes, 10; relating to District of Columbia, 9; relating to personal status, 8; right of way over Indian and government land, 8; river and harbor bills, 7; disposition of war stores and government property, 5; reduction of national debts, 3; and general legislation, 14. It does not appear that in any of these instances either House of Congress in any official manner questioned the validity and effect of the President's action in not returning the bill after the adjournment of the session, or proceeded on the theory that it had become a law, although neither signed nor returned, until the action was taken in the House Committee of the Whole in 1927 to which we have referred.[13] And in some instances new bills were introduced in place of those that had not been returned. Without analyzing these 119 instances in detail, we think they show that for a long series of years, commencing with President Madison's administration and continuing until the action of the House Committee of the Whole in 1927, all the Presidents who have had occasion to deal with this question have adopted and carried into effect the construction of the constitutional provision that they were prevented from returning the bill to the House in which it originated by the adjournment of the session of Congress; and that this construction has been acquiesced in by both Houses of Congress until 1927.

6. For these reasons we conclude that the adjournment of the first session of the 69th Congress on July 3, 1926, prevented the President, within the meaning of the con-

[13] Note 7, *supra.*

stitutional provision, from returning Senate Bill No. 3185 within ten days, Sundays excepted, after it had been presented to him, and that it did not become a law.

The judgment of the Court of Claims is

Affirmed.

WHITE RIVER LUMBER COMPANY *v.* ARKANSAS EX REL. APPLEGATE, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF ARKANSAS.

No. 101. Argued January 7, 8, 1929.—Decided May 27, 1929.

1. A state statute authorizing the collection of back taxes on lands which, through inadequate assessment, have escaped their just burden of taxation, is not invalid under the equal protection clause of the Fourteenth Amendment because it is limited to the recovery of such additional taxes on lands of corporations and does not extend to the recovery of such additional taxes on lands of natural persons, which may likewise have been assessed at an inadequate valuation. P. 695.
2. A constitutional question which does not appear by the record to have been presented to, or passed upon by, a state supreme court, but which is raised for the first time by the assignment of errors in this Court, can not be considered here. P. 699.

175 Ark. 956, affirmed.

ERROR to review a judgment of the Supreme Court of Arkansas which affirmed with modifications a judgment of the state chancery court assessing back taxes and declaring them a lien on the land taxed.

Mr. Thomas S. Buzbee, with whom *Messrs. George B. Pugh, H. T. Harrison,* and *A. S. Buzbee* were on the brief, for plaintiff in error.

Messrs. John M. Rose and *George Vaughan,* with whom *Messrs. R. E. L. Johnson* and *H. W. Applegate,* Attorney General of Arkansas, were on the brief, for defendant in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This case involves a question as to the constitutional validity of the back tax law of Arkansas. Section 1 of Act No. 169 of the Arkansas Acts of 1913—which is set forth in the margin [1]—provides that where, because of any inadequate or insufficient valuation or assessment, or undervaluation, of any property which belonged to any corporation at the time taxes thereon should have been properly assessed and paid, there are overdue and unpaid taxes thereon owing to the State or a political subdivision thereof by any corporation, the Attorney General shall institute a suit in chancery in the name of the State for the collection thereof.

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[1] This section amended § 1 of Act No. 354 of the Acts of 1911, so as to read: "Where the Attorney General is satisfied from his own investigations or it is made to appear to him by the statement in writing of any reputable taxpayer of the State, that in consequence of the failure from any cause to assess and levy taxes, or because of any pretended assessment and levy of taxes upon any basis of valuation other than the true value in money of any property hereinafter mentioned or because of any inadequate or insufficient valuation or assessment of such property, or undervaluation thereof, or from any other cause, that there are overdue and unpaid taxes owing to the State, or any county or municipal corporation, or road district, or school district, by any corporation upon any property now in this State which belonged to any corporation at the time such taxes should have been properly assessed and paid; that it shall become his duty to at once institute a suit or suits in chancery in the name of the State of Arkansas, for the collection of the same, in any county in which the corporation owing such taxes may be found, or in any county in which any part of such property as may be found, or in any county in which any part of such property as may have escaped the payment in whole or in part of the taxes as aforesaid may be situated . . ." C. & M. Digest, § 10204. It was also provided by an earlier act that the State and its political subdivisions should have a lien on the property for the payment of such overdue taxes, to be enforced by this suit. C. & M. Digest, § 10207.

In July, 1925, the State of Arkansas, proceeding under this section, brought suit in a chancery court, on the relation of the Attorney General, against the White River Lumber Company, a foreign corporation doing business in the State, for the recovery of back taxes. The complaint, as amended, alleged that the Company owned large tracts of valuable timber lands in four counties of the State,[2] which were worth from $30 to $50 an acre but had been undervalued and underassessed for taxation for the years 1915 to 1926, inclusive, at a valuation of about $4 per acre; and prayed judgment for overdue and unpaid taxes for those years at 50 per cent of their true value—the basis of valuation that had been fixed by an order of the State Tax Commission—less the assessments actually made. The Company, answering, denied that there had been any undervaluation; claimed that the lands had been valued on the same basis as like timber lands owned by other individuals and corporations; and alleged that section 1 of the law as attempted to be enforced against it, was repugnant to the due process and equal protection clauses of the Fourteenth Amendment.

The chancery court—finding that for the years in question the value of the lands constituting the "Big Island group,"[3] was $50 an acre, and that of the remaining lands $33.33 an acre, and that the average assessments of other lands in these counties had been at approximately 30 per cent of their value—back assessed the Big Island group at $15 per acre, and the other lands at $10 per acre, less credits for timber stolen and sold and the valuations at which they had been originally assessed; and, declared a lien on the several tracts for the amount of the back taxes due on them, respectively, as thus reassessed.

Upon cross appeals the Supreme Court held that the fact that the statute authorizing suits for back taxes

[2] These contained 41,500 acres.

[3] These contained 7,964 acres.

applied only to corporations, did not render it repugnant to the Fourteenth Amendment; that under it the State might maintain suit to recover additional taxes on the ground that there had been an inadequate or insufficient valuation or assessment of the corporate property; that in such case the reassessment should be on the same basis as that upon which the original and inadequate assessment should have been made; and that as it appeared that all other property was assessed at an average of 30 per cent of its value, the Company's lands, under the uniformity clause of the State Constitution, should be assessed at that per cent, despite the fact that the State Commission had fixed a higher basis. Applying these rules of law the court found from the testimony that it was not shown that there had been any inadequate or insufficient valuation of any of the lands except the Big Island group, but that this group was a body of lands that were unusually well timbered, had a value not possessed by the other timbered lands which were assessed at from $4 to $5 per acre, and "were of an average value, during the entire time covered by the assessments in question, of $40 per acre, taking into account the timber stolen and the timber sold." And holding that they should be assessed at a valuation of 30 per cent of that amount, that is, $12 per acre, less the valuation on which the taxes had been paid, the decree of the chancery court was modified so as to permit a recovery of back taxes on the Big Island group only, and on those lands only to the extent indicated. 175 Ark. 956.

1. It is urged here that the back tax act of Arkansas, in providing for the reassessment of property of corporations by judicial proceedings and the imposition of additional taxes thereon after the payment of the taxes assessed by the duly constituted assessing authorities, and in not providing for such reassessment of property belonging to natural persons, denies to the Company and other

corporations the equal protection of the laws in violation of the Fourteenth Amendment.

We cannot sustain this contention. It is unquestioned that the Arkansas statutes providing for the original assessment of property for taxation make no distinction between the lands of corporations and those of natural persons and that it is the duty of the assessing officers to assess them in like manner, according to their value. And the question now presented is merely whether a statute authorizing the collection of back taxes on lands which have escaped their just burden of taxation, is invalid because it is limited to the recovery of additional taxes on the lands of corporations which have been assessed at an inadequate or insufficient valuation, and does not extend to the recovery of such additional taxes on the lands of natural persons, which may likewise have been assessed at an inadequate or insufficient valuation. The decision in *Quaker City Cab Co.* v. *Penna.*, 277 U. S. 389, on which the Company chiefly relies, involved merely a question as to the invalidity of the discrimination made by a statute levying an original tax on the gross receipts derived by corporations from their operation of taxicabs. As there was no question whatever as to back taxes and no back tax act was involved, the decision is not controlling in the present case.

In *Whitney* v. *California*, 274 U. S. 357, 370, we said—citing various cases—that: "A statute does not violate the equal protection clause merely because it is not all-embracing . . . A State may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses . . . The statute must be presumed to be aimed at an evil where experience shows it to be most felt, and to be deemed by the legislature coextensive with the practical need; and is not to be overthrown merely because other instances may be suggested to which also it might have been applied; that being a

matter for the legislature to determine unless the case is very clear . . . And it is not open to objection unless the classification is so lacking in any adequate or reasonable basis as to preclude the assumption that it was made in the exercise of the legislative judgment and discretion." These and like principles have been applied by this Court in four cases dealing directly with classifications made in back tax statutes and similar legislation.

In *Winona & St. Peter Land Co.* v. *Minnesota,* 159 U. S. 526, 539, in which it was held that a state statute providing for the collection of back taxes on real property without including a like provision for collecting back taxes on personal property, should be sustained, the Court said: " The case is different from that of an ordinary tax law in which there may be some foundation for the claim that the legislature is expected to make no discrimination . . . For this statute rests on the assumption that, generally speaking, all property subject to taxation has been reached and aims only to provide for those accidents which may happen under any system of taxation, in consequence of which here and there some item of property has escaped its proper burden; and it may well be that the legislature in view of the probabilities of changes in the title or situs of personal property might deem it unwise to attempt to charge it with back taxes, while at the same time, by reason of the stationary character of real estate, it might elect to proceed against that. At any rate, if it did so it would violate no provision of the Federal Constitution. . . ."

In *New York State* v. *Barker,* 179 U. S. 279, 285, a general state statute imposed a tax on the real estate of individuals and corporations upon its full and true value as found by the assessors. In the case of individuals no resort was permitted to any other proceeding by which the tax could be increased by any subsequent assessment on the difference between the assessed and the actual value.

But in the case of corporations, if real estate should be mistakenly assessed at an undervaluation another statute afforded an opportunity to reach the difference between the assessed and actual value by making an assessment upon the actual value of the corporate capital, including the real estate. The only claim was that "in this opportunity to correct a mistaken assessment upon its real estate in the case of a corporation when assessed upon its capital, which does not exist in the case of an individual, the corporation is denied the equal protection of the laws." In overruling this contention the court said: "The mere fact that the law gives the assessors in the case of corporations two chances to arrive at a correct valuation of their real estate, when they have but one in the case of individuals, cannot be held to be a denial to the corporations of the equal protection of the laws, so long as the real estate of the individual is, in fact, generally assessed at its full value."

In *Florida Central, &c. R. Co.* v. *Reynolds*, 183 U. S. 471, 480, in which it was held that in so far as the Federal Constitution was concerned the legislature had the power to compel the collection of delinquent taxes from railroad companies for certain years, even though it made no provision for the collection of delinquent taxes for those years on other property, the Court, quoting with approval from the *Winona Land Co.* case, said: "If the State, as has been seen, has the power, in the first instance, to classify property for taxation, it has the same right of classification as to property which in the past years has escaped taxation. We must assume that the legislature acts according to its judgment for the best interests of the State. A wrong intent cannot be imputed to it. It may have found that the railroad delinquent tax was large, and the delinquent tax on other property was small and not worth the trouble of special provision therefor. If

taxes are to be regarded as mere debts, then the effort of the State to collect from one debtor is not prejudiced by its failure to make like effort to collect from another. And if regarded in the truer light as a contribution to the support of government, then it does not lie in the mouth of one called upon to make his contribution to complain that some other person has not been coerced into a like contribution."

In *Ft. Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532, 534, the State, proceeding under the statute here involved, had brought suit against a corporation to recover back taxes alleged to be due upon a proper valuation of its capital stock by reason of the fact that in assessing its value there had been omitted the value of stock owned by the corporation in two other corporations, each of which had paid full taxes. The corporation defended " on the ground that individuals are not taxed for such stock or subject to suit for back taxes, and that the taxation is double, setting up the Fourteenth Amendment." This Court, in overruling the defense " with regard to confining the recovery of back taxes to those due from corporations," said: " It is to be presumed, until the contrary appears, that there were reasons for more strenuous efforts to collect admitted dues from corporations than in other cases, and we cannot pronounce it an unlawful policy on the part of the State. See *New York* v. *Barker,* 179 U. S. 279, 283."

We see no ground for distinguishing the *Ft. Smith Lumber Co.* case from that now under consideration, and on that authority and for the reasons stated therein and in the earlier cases which we have cited, hold that the back tax statute of Arkansas, although confined to the property of corporations, does not deny to them the equal protection of the laws in violation of the Fourteenth Amendment.

2. It is also urged in behalf of the Company, that even if the back tax statute be valid on its face, it was so

applied by the Supreme Court of the State in the present case, by selecting thirty-four tracts of land, constituting the Big Island group, and reassessing the same on the basis of their average value for twelve years on an average basis of assessment instead of assessing them in accordance with the Arkansas statutes according to the actual value of each separate tract for each separate year on the actual basis of assessment for that year, as to constitute a denial of the equal protection of the laws. It does not appear, however, from the record that this constitutional question was presented in or passed upon by the Supreme Court of the State; and as it was sought to raise this question for the first time by assignments of error in this Court, it is necessarily excluded from our consideration. *Whitney* v. *California, supra,* 316; and cases therein cited.

3. No other federal question is presented by the record for our consideration. The decree is

Affirmed.

Mr. Justice BUTLER, dissenting.

Plaintiff in error attacks a provision of an Arkansas statute,* on the ground that it is repugnant to the equal protection clause of the Fourteenth Amendment.

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* The original Act was passed in 1887. Laws 1887, p. 33. There was an amendment in 1911, which is not material here. Laws 1911, p. 324. It was again amended in 1913. Laws 1913, p. 724. (The words added by the last amendment are italicized, and those omitted by it are included in brackets.)

"Where the Attorney General is satisfied from his own investigation or it is made to appear to him by the statement in writing of any reputable taxpayer of the State, that in consequence of the failure from any cause to assess and levy taxes, or because of any pretended assessment and levy of taxes upon any basis of valuation other than the true value in money of any property hereinafter mentioned *or because of any inadequate or insufficient valuation or assessment of such property, or undervaluation thereof,* or from any other cause, that there are overdue and unpaid taxes owing to the State,

It directs that, where because of undervaluation there are overdue and unpaid taxes upon any property which belonged to a corporation at the time such taxes should have been assessed and paid, the Attorney General shall bring a suit to collect them unless the title passes to an individual before suit. No law of the State creates or permits the enforcement of any like or similar liability against the property of individuals. The fact that the property is owned by a corporation is the sole basis of the classification. The claim here is for additional taxes upon land, and the land alone is liable. The owner cannot be held for either the original or back taxes. See decision below, 175 Ark. 956, 973. Like lands of individuals are shown to have been grossly underassessed. And if such lands were owned by corporations, they would be liable for back taxes.

The discrimination is deliberate. The statute, passed in 1887, is entitled "An Act to provide for the collection of overdue taxes from corporations doing business in this State." It was amended in 1913. In *State ex rel. Attorney General* v. *K. C. & M. Ry. and Bridge Co.,* 117 Ark. 606, the court said (p. 613): "The object of the amendatory act of 1913 was to give a complete remedy for the

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or any county or municipal corporation, or road district, or school district, by any corporation, [or] upon any property now in this State which belonged to any corporation at the time such taxes should have been properly assessed and paid, it shall become his duty to at once institute a suit or suits in chancery in the name of the State of Arkansas, for the collection of the same, in any county in which the corporation owing such taxes may be found, or in any county in which any part of such property as may have escaped the payment in whole or in part of the taxes as aforesaid may be situated, in which suit or suits the corporation owing such taxes, or any corporation [or person] claiming an interest in any such property as may have escaped taxation as aforesaid, shall be made a party defendant."

§ 10204 Crawford & Moses' Digest.

recovery of back taxes due by a corporation upon any property then in the State, which belonged to any corporation at the time such taxes should have been properly assessed and paid. It takes away the right conferred by the original act to proceed against property where the title had passed to an individual, although it had been owned by a corporation when the assessment was made and the taxes were payable . . ." And see concurring opinion, *State ex rel. Attorney General* v. *Bodcaw Lumber Co.*, 128 Ark. 505, 523.

This suit was brought in 1925; its original purpose was to recover from plaintiff in error additional taxes, for each of the 10 years ending with 1924, on the value of the company's "capital stock or intangible property." The complaint stated that plaintiff in error had paid taxes upon its real and personal property. It alleged that the assessed value of its tangible property "upon which defendant had actually paid taxes as provided by statute" was much less than the market value of its capital stock, and judgment was demanded against plaintiff in error for back taxes on such intangibles.

But it was found that the company had no property in Arkansas other than real estate, and about the same time the state supreme court, in *State* v. *Lyon Oil and Refining Co.*, [1926] 171 Ark. 209, held that the capital stock of a foreign corporation which is neither located nor used within the State cannot be taxed therein.

Then the complaint was amended to allege that the company owned timber lands in Arkansas which had been underassessed in each of the 12 years ending with 1926. The chancery court charged the lands with back taxes. The supreme court held that there had been undervaluation of only a part of the company's lands and that the amount of back taxes imposed by the decree should be reduced accordingly.

Such taxes are imposed upon the sole ground that through mistake the original assessments were too low. The procedure for the enforcement of taxes on lands is not affected by the character of the owner; the State looks only to the land. Lands of individuals are as likely to be erroneously undervalued as are those belonging to corporations. But the law directs the Attorney General to collect back taxes not in all cases where the taxes originally levied and paid were based on undervaluation, but only where property belongs to corporations at the time of the assessment and also at time of suit. He is not permitted to bring suit to make such collections against lands owned by individuals even if they were owned by corporations when undertaxed. As here applied, the Act singles out the lands of a corporation, leaving those of natural persons free from such claims. Transfer to an individual, whenever made, prevents the operation of the Act.

This case cannot be distinguished from *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389. There the tax in controversy was imposed upon the corporation's gross receipts derived from the operation of taxicabs. But the gross receipts of individuals in the same line of business were not taxed. And for that reason the law was held repugnant to the equal protection clause. The Court said (p. 402): "Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations as are taxes on their capital stock or franchises. . . . The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference . . . in the situation or character of the property employed." It is not pretended that such back taxes on lands of individuals may not be imposed as con-

veniently as upon those of corporations. The Arkansas law imposes a tax liability on lands of a corporation to which lands of an individual are not subjected. That case rules this one.

But there are cited in support of the decision below *Winona & St. Peter Land Co.* v. *Minnesota,* 159 U. S. 526; *New York State* v. *Barker,* 179 U. S. 279, 285; *Florida Central, &c. R. R. Co.* v. *Reynolds,* 183 U. S. 471, 480; and *Fort Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532, 534.

Winona & St. Peter Land Co. v. *Minnesota, supra,* did not present any question under the equal protection clause. A state law provided generally for the assessment and taxation of both real and personal property which had been omitted from the tax roll. Lands of the company were assessed under the Act. It insisted (p. 528) that the Act violated the contract clause and the due process clause.

In support of the latter contention, the company argued that, as to back taxes on personal property, the Act was invalid because it failed to provide for notice to owners before the charges were fixed against them; that it could not be assumed that the legislature would attempt to enforce back taxes against lands alone, and that therefore the whole Act fell. But the state court declined to pass upon that contention, 40 Minn. 512, 521, and held that in any event back taxes on personal property might be enforced by an ordinary personal action. This court said (p. 539): "It seems to us . . that the assumption that it cannot be believed that the legislature would never seek to provide for the collection of back taxes on real property without at the same time including therein a like provision for collecting back taxes on personal property, cannot be sustained. The case is different from that of an ordinary tax law in which there may be some foundation for the claim that the legislature is expected

to make no discrimination, and would not attempt to provide for the collection of taxes on one kind of property without also making provision for collection of taxes on all other property equally subject to taxation . . . and it may well be that the legislature in view of the probabilities of changes in the title or situs of personal property might deem it unwise to attempt to charge it with back taxes, while at the same time, by reason of the stationary character of real estate, it might elect to proceed against that." The court concluded that in any event it was for the state court to determine whether the Act was severable.

Both in Minnesota and Arkansas, taxes and back taxes on personal property are enforceable against the owner; taxes and back taxes on land are enforced only against the land. The Minnesota Act did not attempt to make any classification. Moreover, a discrimination between personal property and land is essentially different from that attempted by the Arkansas statute. The equal protection clause does not require that, for purposes of taxation, land must be put in the class with merchandise, moneys, credits, livestock and other personal property. The differences in kind are sufficient to warrant classification.

In *New York State* v. *Barker, supra,* the controversy concerned an assessment of a corporation's capital stock. It was a proceeding against the corporation itself. There was no question in the case of increasing, reassessing or collecting taxes on land. The real estate of corporations and individuals was directly assessed, and the law required this assessment to be at actual value. In addition, there was imposed on corporations a capital stock tax, to be determined by deducting from total value of all its property, tangible and intangible, its debts and the assessed value of real estate, the remainder to be taxed as capital stock.

The taxing officers found the "actual value" of real estate to be $965,000 and added other property, making total gross assets, $1,095,049; they deducted debts, $329,050, and "assessed value" of real estate, $600,000, leaving $165,999, to be taxed as capital stock. The corporation insisted that in determining total gross assets the assessed value of the real estate should be substituted for its actual value; that would leave nothing to be taxed as capital stock.

Its contention was that the taking of its real estate at actual value instead of assessed value denied to it equal protection of the laws. This court pointed out (p. 284) that the failure to assess the company's real estate at its actual value for separate taxation and the use of actual value to ascertain the capital stock tax could work no denial of equal protection if the real estate of individuals was in fact assessed at its full and true value as required by law. And it said: "There is no allegation . . that there has been any undervaluation of real estate, either with regard to individuals or corporations. . . . (p. 285). But we are . . asked . . in the absence of allegations or proof of habitual, or indeed of any undervaluation, to assume or take judicial notice of its existence, notwithstanding such undervaluation would constitute a clear violation of the law of the State. . . (p. 286). Whether, if the case were proved, as assumed by counsel, it would in fact amount to any such discrimination against corporations as to work a denial to the plaintiff of the equal protection of the laws, is a question not raised by this record, and, therefore, not necessary to be decided." It requires no discussion to show that this case is not in point.

Florida Central, &c. Railroad Co. v. *Reynolds, supra,* considered a Florida statute providing for collection of back taxes on railroad properties. The single question was (p. 474) whether to reach backward and collect taxes

from certain kinds of property without also making provision for collecting taxes on other kinds of property transgressed the equal protection clause. It was held, as is well understood, that railroads so differ from other kinds of property that they may be separately classified. The case has no bearing here.

In *Fort Smith Lumber Co.* v. *Arkansas, supra,* the suit was to enforce an obligation of the corporation itself and not merely a claim for taxes against its land. The company in that case owned stock in two other Arkansas corporations and claimed it was entitled to omit such shares from the taxable value of its own stock. It defended on the ground that individuals are not taxed on such stock or subject to suits for back taxes. The Court said: "If the State of Arkansas wished to discourage but not to forbid the holding of stock in one corporation by another and sought to attain the result by this tax or if it simply saw fit to make corporations pay for the privilege, there would be nothing in the Constitution to hinder. . . . The same is true with regard to confining the recovery of back taxes to those due from corporations. It is to be presumed, until the contrary appears, that there were reasons for more strenuous efforts to collect admitted dues from corporations than in other cases, and we cannot pronounce it an unlawful policy on the part of the State."

This court assumed that the special burden was imposed in pursuit of a definite purpose on the part of the State in respect of incorporated owners of stock in Arkansas corporations. That decision rests upon the ground that the tax was peculiarly applicable to corporations. But a tax on land is not.

As the back taxes claimed are enforceable only against the land, there is no basis for the suggestion that there exists here any reason for more strenuous efforts to collect from corporations than from natural persons.

And there is no basis for an assumption like that made in the *Fort Smith Lumber Co.* case. The classification, at least when applied to land, is fanciful and capricious. *Liggett Co.* v. *Baldridge,* 278 U. S. 105, 114.

The decree should be reversed.

The CHIEF JUSTICE and MR. JUSTICE VAN DEVANTER concur in this opinion.

GULF REFINING COMPANY *v.* ATLANTIC MUTUAL INSURANCE COMPANY.

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

No. 506. Argued April 17, 1929.—Decided May 27, 1929.

1. In adjusting a general average loss upon cargo insurance under a valued policy, the insured is co-insurer to the extent that the sound value of the cargo at the time of contribution exceeds the agreed value in the policy, and recovers that proportion of his loss which the agreed value bears to such sound value. P. 709.
2. The co-insurance principle long and consistently applied in the case of particular average losses under both open and valued policies, gives a reasonable and equitable effect to the stipulation fixing value, consonant with principles generally applicable to marine insurance. It may be applied to general average contributions with like effect and with added consistency and harmony in the law. P. 712.
3. The application of the agreed value to the adjustment of the insurance loss does not depend on estoppel. P. 712.

27 F. (2d) 678, affirmed.

CERTIORARI, 278 U. S. 595, to a decree of the Circuit Court of Appeals (see 1927 Am. Mar. Cas. 1669), which reversed a decree of the District Court for the present petitioner in a suit in admiralty on a policy of insurance.

Mr. Ira A. Campbell for petitioner.

Mr. J. M. Richardson Lyeth for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent issued a war risk insurance policy for $27,690 upon a cargo of gasoline, owned by petitioner's predecessor in interest and valued in the policy at $212,000, on board the tanker "Gulflight," bound from Port Arthur, Texas, to Rouen. On the voyage the "Gulflight" was torpedoed and put into a port of refuge where, in consequence of the injury to the ship, damages and expenses of a general average nature were incurred. A general average contribution of $49,088.04, the correctness of which is not questioned, was assessed against the cargo on the basis of the actual value of the cargo at destination, which was taken to be $417,178. Petitioner made claim on the policy for indemnity of $6,411.54, the proportion of the general average contribution which the amount of the policy bore to the agreed policy value of the cargo. Respondent paid only $3,258.25, that portion of the indemnity claimed which the agreed policy value bore to sound value at the time of the contribution, or that portion of the general average contribution which the amount of insurance bore to sound value.

In a suit in admiralty in the District Court for Southern New York to recover the balance claimed, that court confirmed the report of its Commissioner, 1927 Am. Mar. Cas. 1669, and gave judgment for petitioner, which was reversed by the Court of Appeals for the Second Circuit. 27 F. [2d] 678. This Court granted certiorari, 278 U. S. 595, because of a conflict of opinion between that and the Court of Appeals for the Ninth Circuit. *British & Foreign Marine Insurance Co.* v. *Maldonado & Co.*, 182 Fed. 744, certiorari denied, 220 U. S. 622.

The sole question presented here is whether, in adjusting a general average loss upon cargo insurance under a valued policy, the insured is co-insurer to the extent that the sound value of the cargo at the time of contribution exceeds its agreed value or, stated in somewhat different

form, whether the effect of a valued policy on cargo, in limiting the liability of the insurer, is the same in the case of a general average as of a particular average loss.

It has long been the accepted rule that in the case of a partial loss of cargo insured under a valued policy, with the valuation honestly made, the insured, in case of increase or decrease in its value, recovers that proportion of his loss which the agreed value, or so much of it as was assumed by the particular insurer, bears to the sound value. In case of an increase in value his recovery is thus limited as though he were a co-insurer. *Lewis* v. *Rucker,* 3 Burr. 1167; *Johnson* v. *Sheddon,* 2 East 581; see *Tunno* v. *Edwards,* 12 East 488; *Lawrence* v. *New York Insurance Co.,* 3 Johns. Cas. (N. Y.) 217, 218; *Forbes* v. *Manufacturers' Ins. Co.,* 67 Mass. 371; *London Assurance* v. *Companhia de Moagens,* 167 U. S. 149, 171; *British & Foreign Ins. Co.* v. *Maldonado, supra; International Navigation Co.* v. *Atlantic Mutual Insurance Co.,* 100 Fed. 304, 317, 318, affirmed 108 Fed. 987, certiorari denied 181 U. S. 623.

So applied the rule permits the adjustment of the premium to an assumed certain and unchanging value of the subject of the insurance and protects the underwriter against increases in liability because of increase in value of the cargo, as it protects the insured against diminution of his right to recover which might otherwise result from a decrease in value. It recognizes that the purpose of valuing the cargo is not to fix the maximum amount of recovery, which is accomplished by limiting the amount of the policy, but to eliminate from the risk which the insurer assumes so much of it as is consequent upon fluctuations of the market value of the cargo, whether the loss be total or partial. For under it the insurer's liability for the loss suffered can never be greater or less than if the actual value were the agreed value.

Agreed value thus stands in the place of prime value under an open marine policy where the insured recovers such part of his loss as prime value bears to sound value. See *Lewis* v. *Rucker, supra,* at p. 1171; *Usher* v. *Noble,* 12 East 639, 646; *Clark* v. *United M. & F. Insurance Co.,* 7 Mass. 365.

Petitioner does not question the soundness of the rule when applied to partial loss of cargo, but argues that it should not be applied to general average contributions. It is said that petitioner need not refer to sound value to compute its loss, which is already fixed by the general average adjustment, and the valuation clause estops the insurer from showing that the sound value of the cargo was greater than the agreed value and so reducing the amount of its indemnity; also that the rule to be applied to the present case should be the same as that applied to insurance on hulls, where the insured is allowed to recover in full for a partial loss up to the amount of the insurance. Finally, it is insisted that this clause of the policy should be construed as having been adopted by the parties in contemplation of the rule contended for as one established by the decisions in New York, where the policy was effected, and as settled in *British & Foreign Marine Insurance Co.* v. *Maldonado & Co., supra.*

Liability for general average contributions is a risk insured against by the marine policy as is loss by particular average. Its amount, as in the case of a particular average loss, is dependent upon and varies with the sound value of the goods. There is nothing in the policy to suggest that the liability of the insurer is to be computed on a basis different in the one case from the other, and a clause whose general use and effect is to limit risk from fluctuation of value of the cargo insured is equally applicable in both classes of risks. Such a limitation is justified in both cases by the fact that the only assign-

able purpose of the agreed value is to substitute a definite for an uncertain prime value and to eliminate from the contract, in the interest of both the insured and the insurer, the fluctuation of liability which would otherwise result from a change in sound value. To allow petitioner to recover for the loss suffered in double the amount which concededly would have been its recovery had the same loss resulted from fire, jettison or other partial loss of cargo, would be an anomalous result for which petitioner offers no justification in reason or in generally established principles of marine insurance law. The co-insurance principle long and consistently applied in the case of particular average losses under both open and valued policies, gives a reasonable and equitable effect to the stipulation fixing value, consonant with principles generally applicable to marine insurance. It may be applied to general average contributions with like effect and with added consistency and harmony in the law.

The application of the agreed value to the adjustment of the insurance loss does not depend on estoppel as was suggested in *British & Foreign Marine Insurance Co.* v. *Maldonado & Co., supra.* The policy agreement valuing the cargo at a specified amount is not a representation, or so regarded. It is no more than a stipulation, in effect, that for purposes of computation of the insurance liability the cargo shall be taken at an agreed value. Within this limitation the policy is still a policy of indemnity and the insured must prove the sound value of the cargo in order to ascertain his actual loss, by deducting from it the amount of the proceeds of the damaged cargo. In every particular average adjustment the insurer may rely on the sound value of the cargo in order to establish the extent to which the insured is a co-insurer. It is true that a general average contribution is always determined and stated in terms of money and so the insured may

establish his loss merely by proof of its amount, but his contribution is itself based upon sound value which entered into its computation, and its amount for all practical purposes, as in the case of particular average, is increased in proportion to the excess of sound value over agreed value, see *S. S. "Balmoral" Company* v. *Marten,* [1902] App. Cas. 511, 514, 515. We perceive no reason why his recovery may not likewise be reduced accordingly.

The rule that the insured may recover in full for partial losses under hull insurance, *International Navigation Co.* v. *Atlantic Mutual Insurance Co., supra; International Navigation Co.* v. *Sea Insurance Co.,* 129 Fed. 13; *Providence & S. S. S. Co.* v. *Phoenix Insurance Co.,* 89 N. Y. 559; *contra Clark* v. *United M. & F. Insurance Co., supra*; cf. *Brewer* v. *American Ins. Co.,* 123 Mass. 78, does not, we think, militate against the co-insurance rule as applied to cargo insurance, or afford support for that for which petitioner contends. We need not determine whether the rule as to hull insurance may be regarded as that of this Court or of others, or pass upon its merits. The distinction between insurance on cargo and that on hulls is an old one and a different result in the case of the latter may for that reason be accepted without affecting the rule as to the former. Where the distinction has been regarded as established, the departure from the rule applied in case of particular average losses of cargo has been justified on the ground that damage to a hull is not customarily ascertained by its sale, as is the case with cargo. The usual practice in cases of partial loss is for the insured to make repairs. His repair bill represents a sum of money which is the amount of his damage, ascertained without regard to the ship's value, and so the rule has been adopted as more convenient in practice than one requiring determination of the sound value of the ship. See *Lohre* v. *Aitchison,* L. R. 2 Q. B. D. 501, 507. Some

point is given to this explanation by the ruling in *Pitman* v. *Universal Marine Insurance Co.*, L. R. 9 Q. B. D. 192, that the same rule should be applied as in particular average loss of cargoes, where the repairs were not in fact made and the loss was established by a sale of the ship. And in a case of general average contribution by the hull, the House of Lords, in *S. S. "Balmoral" Company* v. *Marten, supra,* held the insured to be a co-insurer, thus applying the rule accepted in the case of partial cargo losses, and implicitly supporting the co-insurance rule applied below to general average contribution by cargo.

It is said that this rule would result in a recovery by the insured of more than the amount of his contribution, in event of a decrease in the value of the cargo below the agreed value. The court below seems to have thought that this might be so. But no court has so held. The insured in the case of partial loss of cargo whose sound value is less than the agreed, may recover more than his actual loss, since in computing the indemnity the cargo must be taken at the agreed value. But where there is in fact no loss of the cargo, it is not entirely clear upon what theory the insured could increase his recovery beyond his contribution in general average by any recourse to the agreed value. Having the cargo intact, no matter what its value, it may well be that the insured must needs be content with the discharge of the general average lien upon it.

While an appellate court may hesitate to set aside a rule of commercial law long and generally accepted and applied, such is not the case with the suggestion that general average contributions must stand on a different footing from particular average losses under a valued policy on cargo. That has been thought to be the effect of an early New York case, *Strong* v. *New York Firemen Insurance Co.*, 11 Johns. (N. Y.) 323, in which counsel for the in-

surer argued against any such distinction. But the court seems to have considered that the only question before it was whether a general average adjustment made in a foreign port was enforceable against the insurer even though made under rules different from those in force in the home port. Diligent efforts at the trial of the present case to prove a custom failed. The commissioner's finding that no settled custom or usage was proved is not challenged here. He found that underwriters, the *Strong* case notwithstanding, did not usually pay general average contributions in full when sound value exceeded agreed value; that after the decision in the *Maldonado* case, refusals to pay on the basis of full contribution were less frequent, but some underwriters, including respondent, continued to settle on that basis and the failure to bring the issue before a court for adjudication was due to the fact that the amounts involved were too small to justify litigation.

The Massachusetts courts have followed the rule applied below. *Clark* v. *Universal F. & M. Insurance Co., supra,* cf. *Brewer* v. *American Ins. Co., supra.* The other American cases have dealt with insurance on hulls and so are not decisive. The fact that the co-insurance rule has been applied to general average contributions in England, both by judicial decision, see *S. S. "Balmoral" Company* v. *Marten, supra,* and by statute, Marine Insurance Act, 1906, § 73, and that such is conceded to be the rule by law or custom in France, Germany, Holland and Japan, is of weight in making a choice of two conflicting rules applicable to sea-borne commerce. We conclude that the rule applied below is the more consonant with principle and the more consistent with other accepted doctrines of marine insurance, and that the judgment below should accordingly be

Affirmed.

OLD COLONY TRUST COMPANY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 130. Argued January 10, 11, 1929. Reargued April 15, 1929.—Decided June 3, 1929.

1. A proceeding before the Circuit Court of Appeals, under Revenue Act of 1926, §§ 283 (b), 1001 *et seq.*, in which a taxpayer sought review of a decision of the Board of Tax Appeals finding a deficiency in his income tax return, *held* to present a "case or controversy" cognizable by that court under the judicial article of the Constitution. Pp. 722, *et seq.*
2. A proceeding begun by an administrative or executive determination may be a "case or controversy" when it comes on review before a court, if it call for the exercise of judicial power only; nor is it essential that there should be power to award execution, where the final judgment establishes a duty of an executive department and is enforceable through action of the department. P. 722.
3. Under §§ 1001–1005 of the Revenue Act of 1926, the courts authorized to review decisions of the Board of Tax Appeals have power to award execution of their final judgments. P. 726.
4. Assuming that, under § 283 (b) of the Revenue Act of 1926, a taxpayer, whose appeal to the Board of Tax Appeals was taken before the date of that Act and decided adversely to him after it, may resort both to the Circuit Court of Appeals, by way of review, and to the District Court by way of an action to recover the tax (having first paid it), this does not prevent the Circuit Court of Appeals, being a constitutional court, from having jurisdiction under the Act, since, on the principle of *res judicata,* if both remedies were pursued, the judgment first in time would be a final adjudication conclusive on both courts. P. 727.
5. A certificate by the Circuit Court of Appeals of a question of law involved in a review of a decision of the Board of Tax Appeals, *held* within the appellate jurisdiction of this Court under the Constitution. P. 728.
6. Payment by an employer of the income taxes assessable against the compensation of an employee, made in consideration of his services, constitutes additional taxable income of the employee under the Revenue Act of 1918. P. 729.

7. The objection that this construction would lead to an absurdity not contemplated by Congress, if the employer were called upon to pay the tax on the additional income, and a further tax on that payment, and so on, will not be considered, no attempt having been made by the Treasury to collect further taxes upon the theory that payment of additional taxes creates further income. P. 730.

RESPONSE to a question of law certified by the Circuit Court of Appeals, arising upon review of a decision of the Board of Tax Appeals approving a finding by the Commissioner of Internal Revenue of deficiencies in income tax returns. See 7 B. T. A. 648. This case was reargued and decided with the one next following.*

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* After the first argument, the Court, on February 18, 1929, made the following order:

"It is ordered that the above cause be restored to the docket for reargument. The Court especially desires assistance of counsel in respect of the following matters:

1. Was there power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals?

2. Does the Circuit Court of Appeals act as a tribunal of original jurisdiction when considering appeals from the Board of Tax Appeals? If so, may it under Title 28, United States Code, sec. 346, certify to this Court questions deemed necessary for the proper decision of a pending cause?

3. What has been the practice of taxing officers relative to assessments where, by agreement between the parties, the tax laid upon the income actually received by one of them has been paid by another?

4. Do applicable statutes authorize the taxing officers to estimate total income by adding to the amount actually received by the taxpayer any tax which another has paid thereon under agreement between the parties?

It is suggested that counsel apply to the court below for an amendment so that the certificate will show distinctly when the original assessments were made, and under what acts. Also when the appeals were taken to the Board of Tax Appeals; when they were there decided; and when the appeals to the Circuit Court of Appeals were perfected."

Mr. Arthur A. Ballantine, with whom *Mr. George E. Cleary* was on the brief, for Old Colony Trust Company.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Morton P. Fisher,* Special Assistants to the Attorney General, and *Mr. William E. Davis,* Special Attorney, Bureau of Internal Revenue, were on the briefs, for the Commissioner of Internal Revenue.

Mr. Warren E. Miller filed the brief of Mr. James Walton, as *amicus curiæ,* by special leave of Court.

Messrs. George M. Morris, Hugh Satterlee, Albert L. Hopkins, Louis A. Lecher, Robert N. Miller, Murray M. Shoemaker, Harry C. Weeks, Frederic P. Lee, and *Ellsworth C. Alvord,* filed a brief as *amici curiæ,* on behalf of the Committee on Federal Taxation of the American Bar Association, by special leave of Court.

Messrs. W. A. Sutherland and *Joseph B. Brennan* filed a brief, as *amici curiæ,* by special leave of Court.

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

We have before us for consideration two questions certified from the same Circuit Court of Appeals, No. 130 and No. 129. They are presented upon different statements of facts and the cases reach the certifying court in different ways, but the questions are so nearly alike that the certifying judges deemed it convenient to present them in consolidated form. We prefer to separate the questions, discuss and decide No. 130 first, and then consider No. 129.

No. 130 comes here by certificate from the Circuit Court of Appeals for the First Circuit. The action in that court was begun by a petition to review a decision of the United

States Board of Tax Appeals. The petitioners are the executors of the will of William M. Wood, deceased. On June 27, 1925, before Mr. Wood's death, the Commissioner of Internal Revenue notified him by registered mail of the determination of a deficiency in income tax against him for the years 1919 and 1920, under the Revenue Act of 1918. The deficiency was revised by the Commissioner August 18, 1925. An appeal was taken to the Board of Tax Appeals, which was filed October 27, 1925. A hearing before the Board, April 11, 1927, resulted in a decision November 12, 1927. The Board approved the action of the Commissioner and found a deficiency in the federal income tax return of Mr. Wood for the year 1919 of $708,781.93, and for the year 1920 of $350,837.14. The petition for review was perfected December 23, 1927, pursuant to the Revenue Act of 1926, § 283(b), and §§ 1001 to 1005, c. 27, 44 Stat., Part 2, 9, 65, 109, and Rule 38 of the First Circuit Court of Appeals.

The facts certified to us are substantially as follows:

William M. Wood was president of the American Woolen Company during the years 1918, 1919 and 1920. In 1918 he received as salary and commissions from the company $978,725, which he included in his federal income tax return for 1918. In 1919 he received as salary and commissions from the company $548,132.27, which he included in his return for 1919.

August 3, 1916, the American Woolen Company had adopted the following resolution, which was in effect in 1919 and 1920:

"Voted: That this company pay any and all income taxes, State and Federal, that may hereafter become due and payable upon the salaries of all the officers of the company, including the president, William M. Wood; the comptroller, Parry C. Wiggin; the auditor, George R. Lawton; and the following members of the staff, to wit: Frank H. Carpenter, Edwin L. Heath, Samuel R. Haines,

and William M. Lasbury, to the end that said persons and officers shall receive their salaries or other compensation in full without deduction on account of income taxes, State or Federal, which taxes are to be paid out of the treasury of this corporation."

This resolution was amended on March 25, 1918, as follows:

"Voted: That, in referring to the vote passed by this board on August 3, 1916, in reference to income taxes, State and Federal, payable upon the salaries or compensation of the officers and certain employees of this company, the method of computing said taxes shall be as follows, viz:

"'The difference between what the total amount of his tax would be, including his income from all sources, and the amount of his tax when computed upon his income excluding such compensation or salaries paid by this company.'"

Pursuant to these resolutions, the American Woolen Company paid to the collector of internal revenue Mr. Wood's federal income and surtaxes due to salary and commissions paid him by the company, as follows:

Taxes for 1918 paid in 1919.....	$681,169.88
Taxes for 1919 paid in 1920.....	351,179.27

The decision of the Board of Tax Appeals here sought to be reviewed was that the income taxes of $681,169.88 and $351,179.27 paid by the American Woolen Company for Mr. Wood were additional income to him for the years 1919 and 1920.

The question certified by the Circuit Court of Appeals for answer by this Court is:

"Did the payment by the employer of the income taxes assessable against the employee constitute additional taxable income to such employee?"

The first point presented to us is that of the jurisdiction of this Court to answer the question of law certified. It

requires us to examine the original statute providing for the Board of Tax Appeals under the Revenue Act of 1924, and the amending Act of 1926.

The Board of Tax Appeals, established by § 900 of the Revenue Act of 1924, Tit. IX, c. 234, 43 Stat. 253, 336, was created by Congress to provide taxpayers an opportunity to secure an independent review of the Commissioner of Internal Revenue's determination of additional income and estate taxes by the Board in advance of their paying the tax found by the Commissioner to be due. Before the Act of 1924 the taxpayer could only contest the Commissioner's determination of the amount of the tax after its payment. The Board's duty under the Act of 1924 was to hear, consider and decide whether deficiencies reported by the Commissioner were right.

Section 273 of that Act defined a " deficiency " to be the amount by which the tax imposed exceeded the amount shown by the return of the taxpayer after the return was increased by the amounts previously assessed or disallowed. There was under the Act of 1924 no direct judicial review of the proceedings before the Board of Tax Appeals. But each party had the unhindered right to seek separate action by a court of competent jurisdiction to test the correctness of the Board's action. Such court proceedings were to be begun within one year after the final decision of the Board.

Section 274 (b) provided that if the Board determined there was a deficiency, the amount so determined should be assessed and paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as a deficiency by the Board, could be assessed, but the Commissioner was at liberty, notwithstanding the decision of the Board against him, to bring a suit in a proper court against the taxpayer to collect the alleged deficiency.

On the other hand, by § 900 (g) it was provided that in any suit brought by the Commissioner, or by the taxpayer

to recover any amounts paid in pursuance of a decision of the Board, the findings of the Board were *prima facie* evidence of the facts.

By the Revenue Act of 1926, this procedure was changed and a direct judicial review of the Board's decision was substituted.

The Act of 1926 also enlarged the original jurisdiction of the Board of Tax Appeals to consider deficiencies beyond those shown in the Commissioner's notice, if the Commissioner made such a claim at or before the hearing, § 274(e), and also to determine that the taxpayer not only did not owe the tax but had over paid. Section 284 (e).

The chief change made by the Act of 1926 was the provision for direct judicial review of the Board's decisions by the filing by the Commissioner or the taxpayer of a petition for review in a Circuit Court of Appeals or the Court of Appeals of the District of Columbia under rules adopted by such courts.

It is suggested that the proceedings before the Circuit Courts of Appeals or the District Court of Appeals on a petition to review are not and can not be judicial, for they involve "no case or controversy," and without this a Circuit Court of Appeals, which is a constitutional court (*Ex parte Bakelite Corporation, ante,* p. 438) is incapable of exercising its judicial function. This view of the nature of the proceedings we can not sustain.

The case is analogous to the suits which are lodged in the Circuit Courts of Appeals upon petition or finding of an executive or administrative tribunal. It is not important whether such a proceeding was originally begun by an administrative or executive determination, if when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law.

The jurisdiction in this cause is quite like that of Circuit Courts of Appeals in review of orders of the Federal Trade Commission. *Federal Trade Commission* v. *Eastman,* 274 U. S. 623; *Silver Co.* v. *Federal Trade Commission,* 292 Fed. 752. There are other instances of a like kind which can be cited. *United States* v. *Ritchie,* 17 How. 525, 534; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 469; *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 447. See also *Fong Yue Ting* v. *United States,* 149 U. S. 698, 714.

It is not necessary that the proceeding to be judicial should be one entirely *de novo;* it is enough that, before the judgment which must be final has been invoked as an exercise of judicial power, it shall have certain necessary features. What these are has been often declared by this Court. Perhaps the most comprehensive definitions of them are set forth in *Muskrat* v. *United States,* 219 U. S. 346, 356, where this Court entered into the inquiry what was the exercise of judicial power as conferred by the Constitution. There was cited there a definition by Mr. Justice Field, in *Re Pacific Railway Commission,* 32 Fed. 241, 255, which has been generally accepted as accurate. He said:

"The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter; and includes only suits of a civil nature. *Chisholm* v. *Georgia,* 2 Dall. 431, 432; 1 Tuch. Bl. Comm. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws or treaties of the United

States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

In *Osborn* v. *United States Bank,* 9 Wheat. 738, Chief Justice Marshall construed Article III of the Constitution as follows (p. 819):

"This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it, by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States."

The Circuit Court of Appeals is a constitutional court under the definition of such courts as given in the *Bakelite* case, *supra,* and a case or controversy may come before it, provided it involves neither advisory nor executive action by it.

In the case we have here, there are adverse parties. The United States or its authorized official asserts its right to the payment by a taxpayer of a tax due from him to the Government, and the taxpayer is resisting that payment or is seeking to recover what he has already paid as taxes when by law they were not properly due. That makes a case or controversy, and the proper disposition of it is the exercise of judicial power. The courts are either the Circuit Court of Appeals or the District of Columbia Court of Appeals. The subject matter of the controversy is the amount of the tax claimed to be due or

refundable and its validity, and the judgment to be rendered is a judicial judgment.

The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided.

It is next suggested that there is no adequate finality provided in respect to the action of these courts. In the first place, it is not necessary, in order to constitute a judicial judgment that there should be both a determination of the rights of the litigants and also power to issue formal execution to carry the judgment into effect, in the way that judgments for money or for the possession of land usually are enforced. A judgment is sometimes regarded as properly enforceable through the executive departments instead of through an award of execution by this Court, where the effect of the judgment is to establish the duty of the department to enforce it. *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, 457, 461. The case of *Fidelity National Bank & Trust Co.* v. *Swope*, 274 U. S. 123, 132, shows clearly that there are instances where the award of execution is not an indispensable element of a constitutional case or controversy. In that decision there are collected familiar examples of judicial proceedings resulting in a final adjudication of the rights of litigants without it.

But even if a formal execution be required, we think power to resort to it is clearly shown with respect to the enforcement of the action of the courts here involved by §§ 1001 to 1005.

By the first, the decision of the Board of Tax Appeals rendered after the passage of the Act of 1926 may be reviewed by the Circuit Court of Appeals or the District Court of Appeals if a petition for such review is filed

either by the Commissioner or the taxpayer within six months after the decision is rendered. The courts are to adopt rules for the filing of the petition, the preparation of the record, and the conduct of the proceedings upon such review. The review is not to operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board, unless a petition for review is filed by the taxpayer, and unless the taxpayer has filed a bond which when enforced will operate finally to settle the rights of the parties as found by the courts.

By §1002, it is provided in what venue the decision may be reviewed. In § 1003, the Circuit Courts of Appeals and the Court of Appeals of the District are given exclusive jurisdiction to review the decisions of the Board and it is declared that their judgments shall be final except that they shall be subject to review by the Supreme Court of the United States, on certificate or by certiorari in the manner provided in § 240 of the Judicial Code as amended, and in such review the courts shall have the power to affirm, or if the decision of the Board is not in accordance with law, to modify or reverse the decision of the Board, with or without remanding the case for a rehearing as justice may require.

By § 1004, the same courts are given power to impose damages in any case where the decision of the Board is affirmed, and it appears that the petition was filed merely for delay.

By § 1005, the decision of the Board is to become final in respect to all the numerous instances which in the course of the review may naturally end further litigation. In the provisions of these sections, the legislation prescribes minute details for the enforcement of the judgments that are the result of these petitions for review in the several courts vested with jurisdiction over them.

The complete purpose of Congress to provide a final adjudication in such proceedings, binding all the parties, is manifest and demonstrates the unsoundness of the objection.

We have before us, however, for actual inquiry a case different from one just considered in the regular course of a petition for review of a decision of the Board, begun and decided all after the enactment of the Act of 1926. It is one in which the appeal to the Board of Tax Appeals had been taken, but the appeal had not been decided by the Board before the passage of the Act of 1926. That presents what involves a troublesome exception or duplication in the procedure. This occurs because of the last excepting clause of § 283 (b) of the amending Act of 1926, which is as follows:

"If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of Section 274 of the Revenue Act of 1924 . . . and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of Section 284."

The provisions of § 284 (d) are those which deny to the taxpayer the power to bring any suit for the recovery of the tax after he has adopted the procedure of appealing to the Board of Tax Appeals or to the Circuit Court of Appeals.

By this last exception in § 283 (b), there seems still open to the taxpayers who have filed a petition under the

law of 1924 and have not had a decision by the Board before the enactment of the law of 1926, the right to pay the tax and sue for a refund in the proper District Court (Par. 20 of § 24 of the Judicial Code, as amended by § 1310 (c), c. 136, 42 Stat. 311, U. S. Code, Title 28, § 41). *Emery* v. *United States,* 27 F. (2d) 992, and *Old Colony R. R.* v. *United States,* 27 F. (2d) 994, hold that the petitioner still retains this earlier remedy.

The truth seems to be that in making provision to render conclusive judgments on petitions for review in the Circuit Courts of Appeals, Congress was not willing in cases where the Board of Tax Appeals had not decided the issue before the passage of the Act of 1926, to cut off the taxpayer from paying the tax and suing for a refund in the proper District Court. But the apparent conflict in such cases can be easily resolved by the use of the principles of *res judicata.* If both remedies are pursued, the one in a District Court for refund, and the other on a petition for review in the Circuit Court of Appeals, the judgment which is first rendered will then put an end to the questions involved and in effect make all proceedings in the other court of no avail. Whichever judgment is first in time is necessarily final to the extent to which it becomes a judgment. There is no reason, therefore, in the case before us to decline to take jurisdiction. See *Bryar* v. *Campbell,* 177 U. S. 649; *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 230; *Stanton* v. *Embrey,* 93 U. S. 548, 554.

Second. The jurisdiction here is based upon the certificate of a question of law. That is whether the payment by the employer of the income taxes assessed against the employee constitutes additional returnable taxable income to such employee. The certification of such a question by the Circuit Court of Appeals is an invocation

of the appellate jurisdiction of this Court and therefore within the Constitution.

Third. Coming now to the merits of this case, we think the question presented is whether a taxpayer, having induced a third person to pay his income tax or having acquiesced in such payment as made in discharge of an obligation to him, may avoid the making of a return thereof and the payment of a corresponding tax. We think he may not do so. The payment of the tax by the employers was in consideration of the services rendered by the employee and was a gain derived by the employee from his labor. The form of the payment is expressly declared to make no difference. Section 213, Revenue Act of 1918, c. 18, 40 Stat. 1065. It is therefore immaterial that the taxes were directly paid over to the Government. The discharge by a third person of an obligation to him is equivalent to receipt by the person taxed. The certificate shows that the taxes were imposed upon the employee, that the taxes were actually paid by the employer and that the employee entered upon his duties in the years in question under the express agreement that his income taxes would be paid by his employer. This is evidenced by the terms of the resolution passed August 3, 1916, more than one year prior to the year in which the taxes were imposed. The taxes were paid upon a valuable consideration, namely, the services rendered by the employee and as part of the compensation therefor. We think therefore that the payment constituted income to the employee.

This result is sustained by many decisions. *Providence & Worcester R. R. Co.,* 5 B. T. A. 1186; *Houston Belt & Terminal Ry. Co.* v. *Commissioner,* 6 B. T. A. 1364; *West End Street Railway Co.* v. *Malley,* 246 Fed. 625; *Rennselaer & S. R. Co.* v. *Irwin,* 249 Fed. 726; *Northern R.*

Co. of New Jersey v. *Lowe,* 250 Fed. 856; *Houston Belt & Terminal Ry. Co.* v. *United States,* 250 Fed. 1; *Blalock* v. *Georgia Ry. & Electric Co.,* 246 Fed. 387; *Hamilton* v. *Kentucky & Indiana Terminal R. R.* 289 Fed. 20; *American Telegraph & Cable Co.* v. *United States,* 61 Ct. Cl. 326; *United States* v. *Western Union Telegraph Co.,* 19 Fed. (2d) 157; *Estate of Levalley,* 191 Wis. 356; *Estate of Irwin,* 196 Cal. 366.

Nor can it be argued that the payment of the tax in No. 130 was a gift. The payment for services, even though entirely voluntary, was nevertheless compensation within the statute. This is shown by the case of *Noel* v. *Parrott,* 15 F. (2d) 669. There it was resolved that a gratuitous appropriation equal in amount to $3 per share on the outstanding stock of the company be set aside out of the assets for distribution to certain officers and employees of the company and that the executive committee be authorized to make such distribution as they deemed wise and proper. The executive committee gave $35,000 to be paid to the plaintiff taxpayer. The court said, p. 672:

"In no view of the evidence, therefore, can the $35,000 be regarded as a gift. It was either compensation for services rendered, or a gain or profit derived from the sale of the stock of the corporation, or both; and, in any view, it was taxable as income."

It is next argued against the payment of this tax that if these payments by the employer constitute income to the employee, the employer will be called upon to pay the tax imposed upon this additional income, and that the payment of the additional tax will create further income which will in turn be subject to tax, with the result that there would be a tax upon a tax. This it is urged is the result of the Government's theory, when carried to its

logical conclusion, and results in an absurdity which Congress could not have contemplated.

In the first place, no attempt has been made by the Treasury to collect further taxes, upon the theory that the payment of the additional taxes creates further income, and the question of a tax upon a tax was not before the Circuit Court of Appeals and has not been certified to this Court. We can settle questions of that sort when an attempt to impose a tax upon a tax is undertaken, but not now. *United States* v. *Sullivan,* 274 U. S. 259, 264; *Yazoo & Mississippi Valley R. R.* v. *Jackson Vinegar Co.,* 226 U. S. 217, 219. It is not, therefore, necessary to answer the argument based upon an algebraic formula to reach the amount of taxes due. The question in this case is, " Did the payment by the employer of the income taxes assessable against the employee constitute additional taxable income to such employee? " The answer must be " Yes."

Separate opinion of MR. JUSTICE McREYNOLDS.

The Board of Tax Appeals belongs to the executive department of the Government and performs administrative functions—the assessment of taxes. The statute attempts to grant a broad appeal to the courts and directs them to reconsider the Board's action—to do or to say what it should have done. This enjoins the use of executive power, not judicial. The duty thus imposed upon the courts is wholly different from that which arises upon the filing of a petition to annul or enforce the action of the Interstate Commerce Commission or the Federal Trade Commission.

I think the Circuit Court of Appeals was without jurisdiction.

UNITED STATES *v.* BOSTON & MAINE RAILROAD.

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

No. 129. Argued January 10, 11, 1929. Reargued April 15, 1929.—Decided June 3, 1929.

Payment of the income taxes of a lessor pursuant to a provision of the lease obliging the lessee to pay all taxes upon the lessor's property or income, constitutes additional taxable income of the lessor. P. 734.

RESPONSE to a question of law certified by the Circuit Court of Appeals arising upon review of a judgment of the District Court recovered by the Railroad Company in an action for money collected as income taxes. See also the case preceding this, and 7 B. T. A. 648.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Sewall Key, J. Louis Monarch,* and *Morton P. Fisher,* Special Assistants to the Attorney General, and *Mr. William E. Davis,* Special Attorney, Bureau of Internal Revenue, were on the briefs, for the United States.

Mr. James S. Y. Ivins, with whom *Messrs. Thornton Alexander, Kingman Brewster, E. S. Kochersperger, O. R. Folsom-Jones,* and *Joseph D. Brady* were on the brief, for Boston & Maine Railroad.

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

As indicated in *Old Colony Trust Co.* v. *Commissioner of Internal Revenue,* just decided, *ante,* p. 716, this case

comes here by certificate from the Circuit Court of Appeals for the First Circuit and on the following statement:

"This action is brought by the Boston & Maine Railroad to recover income taxes for the year 1917, claimed to have been erroneously collected. In the District Court [for the District of Massachusetts] the plaintiff recovered a judgment for the full amount of its demand—$3,920.55 and interest.

"June 30, 1900, the Fitchburg Railroad Company leased all its railroad and property of every description to the Boston & Maine Railroad for the term of ninety-nine years. In the lease the lessee covenanted to pay specified rentals, to maintain and replace the leased properties in manner indicated, to pay all operating expenses, and to pay 'all taxes of every description, Federal, State, and municipal, upon the lessor's property, business, indebtedness, income, franchises, or capital stock, or said rental,' and to pay divers other charges. In 1918 an income-tax return, under the provisions of the revenue acts of 1916 and 1917, was filed on behalf of the Fitchburg Railroad Company for the calendar year 1917, upon which taxes amounting to $61,422.06 were assessed. These taxes were paid to the Commissioner of Internal Revenue by the Boston & Maine Railroad pursuant to the term of the lease. The Fitchburg Railroad Company was consolidated with the Boston & Maine Railroad in 1919.

"In 1921 the Commissioner of Internal Revenue assessed an additional income tax against the Fitchburg Railroad Company of $3,920.55. In doing this he treated the payment of $61,422.06 made by the Boston & Maine Railroad to the collector of internal revenue as additional taxable income to the Fitchburg Railroad Company to the extent of $65,342.61. This additional tax of $3,920.55 was paid to the collector of internal revenue by the Boston & Maine Railroad in July, 1921.

"The claim for refund of this additional tax was duly filed with the Commissioner of Internal Revenue, but was never formally acted upon, and more than six months having elapsed after it was filed, this action was brought for the recovery of the tax so paid [under par. 20, § 24 of the Judicial Code, as amended by § 1310(c), c. 136, 42 Stat. 310]."

The judgment of the District Court was appealed to the Circuit Court of Appeals for the First Circuit, and upon the facts recited, and under § 239 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, the Court of Appeals has asked the instruction of the Supreme Court upon the following question:

"Did the payment by the lessee of the net income taxes assessable against the lessor constitute additional taxable income to such lessor?"

The merits of this case must be disposed of in accord with the rule already laid down in the *Old Colony* case, just decided, *ante,* p. 716. Like that, it is one in which the lessee has paid to the Government the taxes due under the law from the lessor. The payment is made in accord with the contract of lease, and is merely a short cut whereby that which the lessee specifically agreed to pay as part of the rental effects that payment by discharging the obligation of the lessor to pay the tax to the Government.

Our conclusion is in accordance with the practice of the Department. Treasury Decision 2620 (19 Treas. Dec. 411). In answer to a question suggested by this Court, the Commissioner states in the appendix to the Government's brief on reargument in No. 130, that it has been the uniform practice to treat taxes paid, where by agreement between the parties the tax laid upon the income actually received by one of them has been paid by the other, as income of the taxpayer whose liability has thus been discharged. He refers to the decision of the Circuit Court

of Appeals for the First Circuit in the case of *West End Railway Co.* v. *Malley,* 246 Fed. 625, where the dividends paid by a lessee corporation directly to the stockholders of the lessor corporation were held to be income to the lessor under the Revenue Act of October 3, 1913. It was carried into Regulation 33, promulgated January 2, 1918, as Article 102, reading as follows:

"ART. 102. Leased properties.—When a corporation shall have leased its property in consideration that the lessee shall pay in lieu of rental an amount equivalent to a certain rate of dividends on its capital stock or the interest on its outstanding indebtedness, together with taxes, insurance, or other fixed charges, such payments shall be considered rental payments and shall be returned by the lessor corporation as income, notwithstanding the fact that the dividends and interest are paid by the lessee direct to the stockholders and bondholders of the lessor. The lessee, in making these payments direct to the bondholders and the stockholders, does so as the agent of the lessor, and the latter is none the less liable to return the amounts thus paid as income and to pay any tax that may be due thereon."

Article 102 of Regulations 33 has been substantially embodied in all subsequent regulations as Article 546, of Regulations 45, Article 547 of Regulations 62, 65 and 69, and Article 70 of Regulations 74, promulgated under the Revenue Acts of 1918, 1921, 1924, 1926 and 1928, respectively.

Article 109 of Regulations 45, promulgated January 28, 1921, reads as follows:

" Taxes paid by a tenant to or for a landlord for business property are additional rent and constitute a deductible item to the tenant and taxable income to the landlord, the amount of the tax being deductible by the latter."

This provision is also found in Article 109 of Regulations 62, Article 110 of Regulations 65 and 69, and Article 130 of Regulations 74.

In addition to the foregoing general provisions, a specific ruling on this question was published in May, 1920, as A. R. M., 16, C. B. 2, page 62. The facts in that case are stated by the Commissioner as follows:

"A contract was entered into in July, 1917, between the P Company and the M Company, whereby the latter agreed to sell certain goods on a cost-plus basis. It was provided that the P Company should pay Federal taxes assessed on the profits accrued from this contract to the M Company. Performance under the contract was made by the M Company during 1918. In October, 1918, the P Company closed its books upon an accrual basis and made no provision for any taxes arising out of the contract. It was there held that the amount of taxes of the M Company paid by the P Company was income to the M Company for the year for which such payment was made. This ruling was followed not only in the case in which rendered, but also as a precedent in all other similar cases."

The Commissioner says that no single instance has been found where the Bureau has departed from this general practice of construing taxes paid under the present circumstances to be income to the taxpayer whose tax liability has been discharged in such a manner.

The Commissioner says that it was the purpose of the instructions to establish a consistent policy, and that if they have not been followed in individual cases, it is due to an unauthorized departure from the Bureau's instructions. More than this, it should be added that neither before nor since 1923 has any algebraic formula been used by the Bureau in computing taxes.

Not only, therefore, is the conclusion that the question must be answered "Yes" sustained by the practice of the Department under all of the Revenue Acts, but the cases cited in the *Old Colony* case require the same view.

ANCIENT EGYPTIAN ARABIC ORDER OF NOBLES OF THE MYSTIC SHRINE ET AL. *v.* MICHAUX ET AL.

CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 7. Argued January 12, 13, 1928.—Decided June 3, 1929.

In a suit in a state court, in which a fraternal order, of white members only, sought an injunction against a similar order, of negro members only, to restrain the latter from further use of a name, constitution, designations, letters, emblems and regalia like those earlier adopted and in use by the former, the defendant challenged the plaintiff's claim of an exclusive and superior right; set up its own claim of right to do the things complained of, both on general principles and particularly in virtue of its incorporation, in the District of Columbia, under an Act of Congress; and further defended on the ground that the plaintiff by reason of laches and acquiescence was without right to an injunction or other equitable relief. The state court, while not wholly refusing to recognize the federal right, sustained the position of the plaintiff, putting its decision on principles of general law, and granted the injunction, overruling the claim of laches upon the ground that the defendants had been proceeding with a fraudulent purpose of appropriating the benefits of the plaintiff order to themselves. *Held:*

1. Whether the federal right set up in the state court was denied, or not given due recognition, is a question on which the claimants are entitled to invoke the jurisdiction of this Court on certiorari. P. 744.

2. It is the province of this Court to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support. P. 745.

3. Assuming (without deciding) that the state court was right in holding the rules relating to the use of trade-marks and trade names applicable to such controversies between fraternal orders, the white order in this case, if there was either laches or acquiescence on its part, was without right to object to the use which it was seeking to restrain, and the negro order was entitled to continue that use in virtue of its incorporation under the Act of Congress. P. 746.

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4. The record discloses not only that the finding on the question of laches is without fair support in the evidence, but that the evidence conclusively refutes it. P. 746.

5. The circumstances were such that this laches bars the white order from asserting an exclusive right, or seeking equitable relief, against the negro order. P. 748.

6. As it is apparent that had this view of the question of laches prevailed in the state court the federal right set up by the negro order must have been sustained, the decree must be reversed and the cause remanded for further proceedings. P. 749.

286 S. W. 176, reversed.

CERTIORARI, 273 U. S. 690, to review a decree of the Supreme Court of Texas sustaining a decree of injunction in a suit between two fraternal orders. See also 273 S. W. 874.

Mr. Harold S. Davis, with whom *Mr. Moorfield Storey* was on the brief, for petitioners.

Mr. Claude Pollard, with whom *Messrs. D. A. Simmons* and *John H. Crooker* were on the brief, for respondents.

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

This case presents a controversy between two fraternal orders called Nobles of the Mystic Shrine, one having white and the other negro members. A short reference to the origin and history of these orders will conduce to an accurate appreciation of the controversy.

From early times there have been two distinct masonic fraternities in the United States, one confined to white men and the other to negroes. Each has had its local lodges, grand lodges and supreme lodge, and also several component bodies, including Knights Templar and Scottish Rite consistories. Both have existed in the same territory and have had similar names, rituals and emblems, and yet have been independent and without any inter-

relation. The white fraternity's existence in this country reaches back to early colonial times. The negro fraternity was organized in Boston in 1784 and afterwards was extended to other sections.

The orders called Nobles of the Mystic Shrine are relatively modern, originated in the United States and are outgrowths of the masonic fraternities just described. They were founded by masons and their membership is restricted to masons—white in one case and negro in the other—who have become Knights Templar or have received the 32d degree in a Scottish Rite consistory. The white masons were the first to establish an order of Nobles of the Mystic Shrine. They organized one in New York in 1872 for fraternal and charitable purposes. The order grew rapidly and soon came to have local lodges, called temples, in most of the States, and also to have a national governing body called its Imperial Council. The negro masons imitatively organized a like order for like purposes in Chicago in 1893. It also grew, although not so rapidly as the white order, and came to have many local temples in other sections of the country and to have a national governing body called its Imperial Council. The constitution, emblems and regalia of the negro order, as also the titles given to the officers of its temples and council, were all adopted in imitation of those of the white order. Another feature imitatively copied was a purely fanciful claim, once put forth by the white order and afterwards discredited, to the effect that that order was an authorized extension of an ancient and illustrious order established centuries ago in Mohammedan countries.

Each of the orders, after becoming well organized, made it a practice to hold periodic national meetings attended with public parades and other features tending to bring attention to the order and to advance its extension. And, aside from such activities, each publicly engaged in commendable charitable work. The white order, by reason

of its greater membership and the larger resources of its members, was able to carry that work further than the negro order could, but the contributions and efforts of the latter in that field were both helpful and substantial.

The white order always has been a voluntary unincorporated association. In 1895 the New York legislature passed a special act purporting to incorporate it, but the proffered incorporation was rejected. In 1893 the negro order was incorporated under the laws of Illinois, but that incorporation was abandoned; and in 1901 the order was incorporated as a fraternal and charitable association under the Act of Congress of May 5, 1870, providing for the creation of corporations in the District of Columbia, c. 80, § 3, 16 Stat. 98, 101.

The name adopted by the white order is "Ancient Arabic Order of the Nobles of the Mystic Shrine for North America" and that adopted by the negro order, and under which it was incorporated, is "Ancient Egyptian Arabic Order of the Nobles of the Mystic Shrine of North and South America and its Jurisdictions."

Prior to 1918 both orders established local temples in the State of Texas—in some instances in the same cities. Among the temples of the white order were one in Dallas established in 1887, one in El Paso established in 1907 and one in Houston established in 1915. Among those of the negro order were one in Dallas established in 1894, one in El Paso established in 1902 and one in Houston established in 1917.

The present suit was begun in 1918 in a state court of Texas. Originally it was brought by members of the local temple of the white order in Houston against members of the local temple of the negro order in that city to enjoin the latter from using any imitation of the name, constitution, titles, emblems and regalia of the former. But through the voluntary intervention of other parties and a voluntary enlargement of the original pleadings—all

with the court's leave—the suit was broadened into one between the two national orders wherein the white order sought an injunction against the negro order restraining and preventing the latter, its lodges, officers and members, "throughout the State of Texas and the entire United States," from further using the name under which it was acting, from designating its local lodges as "temples," from designating its members as "Nobles" or "Shriners," from giving the officers of its lodges and council the titles of like officers in the white order, from using a constitution, emblems and regalia like those of the white order and from organizing or instituting lodges in imitation of those of that order.

The answer of the negro order may be summarized as denying that the white order had acquired any exclusive or superior right to use the name, constitution, designations, titles, emblems and regalia before mentioned or any of them; denying that the negro order's use of such name, constitution, designations, titles, emblems and regalia was with any wrongful or fraudulent purpose, or was other than the exercise of a right belonging to that order as a lawfully constituted fraternal and charitable association; setting up the negro order's incorporation in 1901 under the Act of Congress of May 5, 1870, and asserting that in virtue of that act and such incorporation the order became entitled, if not theretofore entitled, to use the name which it had been and was still using, to adopt and have a constitution, to establish and have local lodges, to select and use appropriate emblems and regalia, and to do other things properly incident to the maintenance of a fraternal and charitable order; alleging that its acts and practices were all within its rights under that incorporation; asserting that there had been and was no competition between the two orders and that the white order drew its members wholly from the white masonic fraternity while the negro order drew its members wholly from the

negro masonic fraternity; and setting up that the white order by reason of its laches and its acquiescence in the acts and practices of the negro order was without right to an injunction or other equitable relief.

On a trial of the issues the court made special findings of fact, stated its conclusions of law and entered a decree awarding to the white order all of the relief sought. The findings of fact included one to the effect that the imitative acts and practices of the negro order constituted "a fraudulent deception" injurious to the white order; and another to the effect that the white order had not acquiesced in those acts and practices and was not chargeable with laches in not taking earlier steps to stop them. The conclusions of law and the decree are copied in the margin.[1] The decree was affirmed by the Court of Civil Ap-

[1] CONCLUSIONS OF LAW.

I.

The plaintiffs, and the plaintiff-intervenor, and the other plaintiff-intervenors herein being first in time to use and adopt the constitution and laws, the regalia, paraphernalia, jewels, badges, head covering, titles of officers, names of subordinate organizations, and names of members in North America or elsewhere, and having used same continuously for more than fifty (50) years are entitled to an injunction restraining the use thereof by the defendants, and the defendant-intervenor, and this regardless of whether plaintiff intervenor is incorporated or exists, and has existed, as a voluntary unincorporated, fraternal, benevolent or social organization.

II.

The plaintiff, plaintiff-intervenor, and the other plaintiff-intervenors herein having established their legal right to the injunction, and the injury which will accrue to them if an injunction is denied being a continuous injury and wrong, the injunction may issue notwithstanding the facts may disclose delays in seeking relief.

III.

The intentional use by the defendants and defendant-intervenor of the constitution and laws, titles of officers, regalia, paraphernalia, jewels, emblems, badges, pins, head covering, names of subordinate

peals, 273 S. W. 874, and by the Supreme Court of the State, 286 S. W. 176. The negro order then petitioned this Court for a review upon writ of certiorari and the petition was granted.

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organizations, and names of plaintiff, plaintiff-intervenor, and the other plaintiff-intervenors herein by a literal appropriation thereof is a fraud, being used as a fraud as against plaintiffs, plaintiff-intervenor, and the other plaintiff-intervenors herein, and constitutes a continuing wrong, demanding a judicial interposition by the issuance of an injunction and mere delay or even acquiescence cannot defeat the remedy, unless such delay has been continued so long and under such circumstances as to defeat the right itself, and the facts in this case do not show such delay, or laches, as would constitute a defense to the issuance of the injunction herein.

IV.

The plaintiff, the plaintiff-intervenor, and the other plaintiff-intervenors herein have not been guilty of such laches or delay, or acquiescence as to defeat their right to the issuance of the injunction.

DECREE.

Wherefore it is ordered, adjudged and decreed by the Court that the individual defendants and each of them, and the defendant, "Doric Temple [Houston] of the Ancient Egyptian Arabic Order of the Nobles of the Mystic Shrine of North and South America and its Jurisdictions" and the officers and membership thereof; and the defendant intervenor, "Ancient Egyptian Arabic Order Nobles of the Mystic Shrine of North and South America and its Jurisdictions" and each and all of its officers and members and their associates, confederates and successors in office; and each and all of the "Temples" thereof, and their officers and membership throughout North America be perpetually restrained and enjoined from:

I.

Using the name "Ancient Egyptian Arabic Order Nobles of the Mystic Shrine of North and South America and its Jurisdictions" or any other name, the distinctive words of which are a colorable imitation of the name "Ancient Arabic Order of the Nobles of the Mystic Shrine for North America" and from using any of the distinctive words in said name and particularly the distinctive words "Ancient Arabic" and the distinctive word "Nobles" and the distinctive words "Mystic Shrine" or any colorable imitation of

In the state appellate courts the negro order relied on the Act of Congress of May 5, 1870, and its incorporation thereunder, just as it had done in the trial court, and also insisted that the decree against it was not in accord with the decision of this Court in *Creswill* v. *Knights of Pythias,* 225 U. S. 246, where like privileges asserted under that act of Congress by a fraternal and benevolent association incorporated thereunder were involved.

The right thus specially set up in the state court is a federal right. Whether it was denied or not given due recognition by the challenged decree, as affirmed, is a question on which the defeated claimants are entitled to

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either of them, as the name or part of the name of any society or organization, corporate or otherwise.

II.

From using the name " Temple " or any colorable imitation thereof as the designation of any organization either governing or subordinate, of any society or organization, corporate or otherwise.

III.

From organizing, undertaking to organize or maintaining directly or indirectly, or in any manner encouraging the organization or maintenance any where throughout the North America, or [of] any governing body under the name of " Imperial Council " or any colorable imitation thereof; or any subordinate body under the name of " Temple " or any colorable imitation thereof; or under the name of " Shrine " or any colorable imitation thereof as the name of, or for, any society or organization, corporate or otherwise.

IV.

From using, wearing or displaying as insignia or emblems of membership of any society or organization, corporate or otherwise, any of the emblems, insignia, paraphernalia, badges, jewels or head-covering, etc., or any colorable imitation thereof, of the plaintiffs or plaintiff intervenor or plaintiffs intervenors or any of its Temples or subordinate organizations.

V.

From using as a part of any organization, corporate or otherwise, or in connection therewith the Constitution and By-laws of the plain-

invoke the judgment of this Court, as is done in their petition for certiorari. And it is our province to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support. *Creswill* v. *Knights of Pythias,* 225 U. S. 246, 258, 261; *Ward* v. *Love County,* 253 U. S. 17, 22; *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Railroad Commission* v. *Eastern Texas R. R. Co.,* 264 U. S. 79, 86; *New York Central R. R. Co.* v. *New York & Pennsylvania Company,* 271 U. S. 124, 126.

The record and the opinions set forth therein make it apparent that the existence within the State of Texas of local lodges of each of the two orders was not contrary to any statute of the State. The state court put its decision upon principles of general law which it deemed appli-

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tiffs and the plaintiff intervenor and plaintiffs intervenors, and their Temples and subordinate organizations or any colorable imitation of the same or of any part thereof.

VI.

From using, wearing or displaying any of the emblems, insignia, paraphernalia, jewels, badges, head-coverings, constitution and laws, titles of officers or colorable imitation thereof of the plaintiffs or plaintiff intervenor or the other plaintiffs intervenors herein, as the emblems, insignia, paraphernalia, jewels, badges, head-covering, constitution and laws and titles of officers of any fraternal or secret order, or other organization or society by whatever name it may be called, and whether corporate or otherwise.

VII.

From using the name "Shrine" as the name of any fraternal or secret order or other organization or society by whatever name it may be called or otherwise known and whether corporate or otherwise.

VIII.

From using the name "Shriner" and the name "Nobles" as a designation of the membership of any fraternal or secret order or other organization or society, by whatsoever name it may be called or known and whether corporate or otherwise.

cable, and not upon any local regulations. It did not wholly refuse to recognize the right set up by the negro order in virtue of the incorporation under the act of Congress, but did hold that the white order had acquired a superior and exclusive right to use the name, constitution, emblems and regalia in question by prior adoption and use; that the subsequent adoption and use by the negro order was in derogation of that right; that the white order, in the absence of acquiescence or laches on its part, was entitled to an injunction preventing further use by the negro order; and that there had been no such acquiescence or laches as would constitute a bar to that relief, inasmuch as the negro order had been proceeding with "a fraudulent purpose of appropriating the benefits of the [white] order to themselves."

Whether the rules relating to the use of trade-marks and trade-names are applicable to controversies like this between fraternal orders has been the subject of varying decisions in other courts. Without now indicating any opinion on that question, we shall indulge the assumption that the state court was right in holding those rules applicable and shall pass to another matter turning on the facts of this case, and which as resolved by the state court resulted in the denial of the federal right set up by the negro order. That matter is whether there was acquiescence or laches on the part of the white order. The state court held there was neither. If there was either, the white order was without any right to object to the use which it was seeking to restrain and the negro order was entitled to continue that use in virtue of its incorporation under the Act of Congress.

An attentive examination of the record discloses not only that the finding on the question of laches is without fair support in the evidence, but that the evidence conclusively refutes it.

There is no evidence of a fraudulent intent on the part of the negro order, or of a purpose on its part to induce any one, whether mason or non-mason, to believe that it was the white order or that they were parts of the same fraternity. On the contrary, it is shown that the negro order always held itself out as entirely distinct from the white order and as open only to members of the negro masonic fraternity. True, there was much imitation, but this is shown to have been in the nature of emulation rather than false pretense.

The evidence discloses that the negro order promptly entered its constitution in the Congressional Library under an act of Congress providing for copyrights; that its members openly wore its insignia as indicative of its existence and their membership; and that at its yearly national meetings the members in large numbers marched in public parades wearing its regalia.

It is further shown that the Imperial Potentate of the white order in his address at their national meeting in 1894 called attention to the existence of the negro order and to its use of names, titles, etc., like those of the white order. He also named Texas as one of the States in which the negro order had established lodges. The address was published and distributed among the lodges and members of the white order. At several subsequent meetings there was a similar mention of the negro order and its activities.

Thus it is established that from the beginning the white order had knowledge of the existence and imitative acts and practices of the negro order. In addition, the evidence indubitably shows that with such knowledge the white order silently stood by for many years while the negro order was continuing its imitative acts and practices and was establishing new lodges, enlarging its membership, acquiring real property in its corporate name, and investing substantial sums in the copied paraphernalia, regalia

and emblems. It also is shown by the uncontradicted testimony of several witnesses—one a life member of the white order—that a large proportion of the copied paraphernalia, regalia, emblems and insignia used by the negro order, its lodges and members was purchased from or through members of the white order, and that in one instance a lodge of that order, preparatory to moving to new quarters, sold the paraphernalia and regalia used in the old quarters to a lodge of the negro order in the same city.

The effect on the negro order of the silence and apparent acquiescence of the white order is reflected in the fact that when this suit was brought the former had 76 local lodges, approximately 9,000 members and real and personal property valued at approximately $600,000 which was held and used for fraternal and charitable purposes.

The only evidence making against that already outlined consists of a showing that a suit was instituted in Georgia in 1914 by a local lodge of the white order against a local lodge of the negro order to restrain the latter from imitating the name, emblems and regalia of the former and that a similar suit was begun in Arkansas a few years later—one resulting in a decree for the plaintiffs and the other in a decree for the defendants. In instituting these suits the plaintiff lodges undoubtedly manifested strong objections to the imitative acts of the defendant lodges. But the objections came too late to overcome or weaken the force of the conduct of the white order during the 30 years preceding the earlier of the two suits. After that period of inaction and seeming acquiescence it was too late to resuscitate the original exclusive right for which the white order is now contending. *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 5, 19, 37.

What we have said of the evidence demonstrates, as we think, not only that there was obvious and long continued

laches on the part of the white order, but also that the circumstances were such that its laches barred it from asserting an exclusive right, or seeking equitable relief, as against the negro order. *Creswill* v. *Knights of Pythias,* 225 U. S. 246, 261–263; *Saxlehner* v. *Eisner & Mendelson Co.,* 179 U. S. 19, 35–37; *Piatt* v. *Vattier,* 9 Pet. 405, 416; *Hayward* v. *National Bank,* 96 U. S. 611, 617; *French Republic* v. *Saratoga Vichy Co.,* 191 U. S. 427, 436–437; *Benedict* v. *City of New York,* 250 U. S. 321, 328; *Du Boulay* v. *Du Boulay,* L. R. 2 P. C. 430, 446.

As it is apparent that had this view of the question of laches prevailed in the state court, the federal right set up by the negro order must have been sustained, the decree must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

SINCLAIR ET AL. v. UNITED STATES.

CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 748. Argued April 22, 23, 1929.—Decided June 3, 1929.

1. By the procurement of the defendant in a criminal case and of others acting by his direction, the jurors, throughout the progress of the trial, were systematically shadowed by a corps of private detectives, each of whom, having at first identified his subject within the court room, would follow him closely while away from it. Jurors were thus kept under strict surveillance from early morning until late at night, whenever not actually within the court house. Investigations were also made by the operatives concerning encumbrances on the home of one juror and to determine whether another had indicated his views during the trial. Daily reports were made by the operatives to one of their employers. *Held:*

(1) That such surveillance of jurors was a criminal contempt, under Jud. Code § 268, on the part of its instigators, although it did not appear that any operative actually approached or com-

municated with a juror, or attempted to do so, or that any juror was conscious of observation. P. 762.

(2) To establish misbehavior within the statute, it was not essential to show some act both known to a juror and probably sufficient to influence his mind. The reasonable tendency of the acts done was to obstruct the honest and fair administration of justice; and this is the proper criterion. P. 764.

(3) The acts in question were sufficiently near the court to obstruct the administration of justice, most of them having been within the court room, near the door of the court house, or within the city where the trial was held. P. 765.

2. A defendant in a criminal trial and others acting for him, when accused of contempt in causing the jurors to be shadowed, can not exculpate themselves by proving like wrongful conduct, amounting to a practice, by the Department of Justice, in other cases. P. 765.
3. A refusal to call and hear very numerous witnesses offered by persons who had been convicted of contempt in the shadowing of jurors and who sought by such witnesses to prove like conduct of the Department of Justice in other cases in mitigation of their punishment, *held* within the proper discretion of the trial court, the defendants having been allowed full opportunity to advise the court of their knowledge, beliefs and state of mind by answer and affidavits and by the verbal statements of themselves and their counsel. *Cooke* v. *United States,* 267 U. S. 517, distinguished. P. 766.
4. The language used in an opinion must be read in the light of the issues presented. P. 767.
5. Where the court decides the fact and the law without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment. P. 767.

Sup. Ct. D. C., affirmed in part; reversed in part.

Review of a judgment of the Supreme Court of the District of Columbia sentencing appellants for contempt. Appeal was taken to the Court of Appeals of the District. Several questions of law were certified by that court, and thereafter this Court ordered up the entire record. The conviction is here reversed as to one of the appellants, William J. Burns, for want of sufficient evidence, but affirmed as to the others.

Messrs. Martin W. Littleton and *George P. Hoover* for Sinclair.

Messrs. Daniel Thew Wright and *Philip Ershler* for Day.

Mr. Charles A. Douglas, with whom *Messrs. Jo V. Morgan* and *Frederick C. Bryan* were on the brief, for William J. Burns and W. Sherman Burns.

Mr. Owen J. Roberts for the United States.

Mr. Justice McReynolds delivered the opinion of the Court.

November 22, 1927, the United States, by their attorney, presented to the Supreme Court, District of Columbia, a written petition for an order requiring appellants Harry F. Sinclair, William J. Burns, W. Sherman Burns, and Henry Mason Day to show cause why they should not be punished for contempt of that court.

This petition alleged:—

That on October 17th, 1927, *United States* v. *Harry F. Sinclair and Albert B. Fall,* wherein the defendants were charged with conspiracy to defraud, came on for trial. Twelve persons selected as jurors were sworn at 12:20 P. M., October 18th, and thereafter the United States proceeded to present evidence. The jury was respited from day to day, until November 2nd when it was discharged and a mistrial entered because of charges of improper conduct by a juror, and proof showing that "there were a large number of operatives of the William J. Burns International Detective Agency of New York, then engaged in the District of Columbia, since October 18th, 1927, in a close, intimate, objectionable, and improper surveillance and investigation of the jurors aforesaid and the relatives, neighbors, and friends of said jurors."

That immediately after the jury was sworn Sinclair directed Day to engage the William J. Burns International Detective Agency, to receive reports therefrom and supervise the activities of its operatives for the following objects: "To spy upon said jurors and each of them, to bribe, intimidate and influence said jurors and each of them, and to do anything calculated to interfere with and impede said jurors and each of them in the unbiased discharge of their duties in the trial of said cause, and to influence pervert, impede, and prevent said jurors in the discharge of their duties as jurors, and to impede, pervert, and prevent the due administration of justice in said court in the trial of said criminal prosecution, either by corruptly influencing said jurors to decide the issues of said prosecution in favor of the defendants therein, or to disagree as to said issues, by unlawfully spying upon the said jurors and each of them for the purpose of concocting false charges against one or more of the said jurors, in case such a course should seem advantageous to said defendants in said cause, with a view of bringing about a mistrial of the cause aforesaid; or otherwise accomplish such purpose."

That Day employed the Agency through W. Sherman Burns, an officer then in New York; on the following day fifteen named operatives were assembled in Washington and assigned to spy upon, investigate, and shadow jurors. They continued so to do until November 2nd.

That William J. Burns then actively engaged in conducting the affairs of the Detective Agency visited Washington October 12 and 13th and arranged for the intended operations. November 3rd he returned and in pursuance of the general plan, procured a false affidavit concerning the conduct of Juror Glasscock which was presented to the trial Judge.

That operatives and employees of the Detective Agency investigated encumbrances on the home of one juror,

also the affairs of his neighbors; made an investigation of the brother and father of another juror; and one of them [McMullin] falsely reported that Juror Glasscock was seen in conference with an attorney for the United States.

That the operatives reported daily to their superior officer who disclosed the result to Day and Sinclair, the original reports being sent to W. Sherman Burns, New York City.

" That, at all times hereinbefore mentioned, each of the persons above named as respondents to this petition well knew all the premises aforesaid, and well knew that said criminal prosecution was being conducted in said court as aforesaid, that said prosecution was not finished, that said jurors were sworn jurors trying the issues in said cause in said court as aforesaid; that they the said respondents were not, as in fact they were not, called upon or authorized by said court, or by anybody in authority, to spy upon said jurors or any of them, or to bribe, molest, intimidate, or influence said jurors or any of them, or to do anything calculated to interfere with or impede said jurors of [or] any of them in the unbiased discharge of their said duties, or to influence, pervert, prevent, or in any manner, or to any extent, impede, the due administration of justice in said court in the trial of said criminal prosecution, either by corruptly influencing said jurors to decide the issues of said prosecution in favor of the defendants therein, or to disagree as to said issues, by unlawfully spying upon said jurors or any of them for the purpose of concocting false charges against one or more of said jurors, in case such a course should seem advantageous to said defendants in said cause, with a view of bringing about a mistrial of the cause aforesaid."

The rule issued. Appellants presented separate answers under oath.

They challenged the sufficiency of the petition to charge anything done in the presence of the court or near thereto

which obstructed or impeded due administration of justice, or tended so to do. They denied any purpose to establish "contact" between an operative and a juror, or that there was such contact; also any purpose to exert improper influence. They asserted the legal right under the circumstances to shadow jurors without contact; admitted employment of detectives who diligently followed the jurors while without the court room and made daily reports in respect of them.

The answer of William J. Burns stated that since August, 1921, he had not actively directed the affairs of the Detective Agency and was not aware until October 31st, 1927, when advised by a newspaper correspondent, that it had been employed to shadow the jury. He admitted presence in Washington October 12th and 13th, 1927, but denied that his visit had any connection with employment by Sinclair or his representatives. He also denied improper connection with the false affidavit concerning juror Glasscock by William J. McMullin, alias Long, also any association, directly or indirectly, with that operative until after the mistrial. And further: "This respondent says that had his advice been sought upon the subject he would unhesitatingly have advised that such employment was a lawful and proper practice frequently followed by the Bureau of Investigation of the Department of Justice of the United States on behalf of the Government, as well as by private litigants, both plaintiffs and defendants, in instances where juries are not kept together during the trial of a cause."

The answer of W. Sherman Burns admitted that he was secretary and treasurer of the Detective Agency and with his brother directed its operation; that on October 18th he accepted employment from Day to watch individual members of the jury and to report whether any person sought or established contact with them, but he averred that all operatives obeyed their strict instruction to do

nothing calculated to interfere with or intimidate any juror. He denied that he procured the making of any false affidavit or was guilty of improper conduct. And further: "If by the statement in said petition that 'they, the said respondents, were not, as in fact they were not, called upon or authorized by said court or by anybody in authority' to spy upon the said jurors or any of them, it is meant to charge or to imply that the right to exercise surveillance of a jury empanelled in any cause is a right reserved exclusively to, and one that can be exercised only by, the government of the United States or its prosecuting officers, this respondent is advised by counsel that there is no warrant in law therefor, and this respondent is further advised by counsel that the Agency and its officers and operatives were strictly within the letter and spirit of the law in accepting the employment hereinbefore described and defined, and in doing the work thereunder, and that no contempt of this honorable court was committed thereby."

The answer of Harry F. Sinclair admitted that he authorized the employment through Day of operatives of the Detective Agency for the purpose of shadowing the members of the jury without establishing contact, and that some fifteen operatives were assembled in Washington on October 19th who for a number of days thereafter kept the jurors under surveillance and made daily reports. He averred that he had cause to believe he had been under surveillance by representatives of the United States and feared efforts would be made unlawfully to influence the jury. Also that in the circumstances he rightly put the jury under observation. And further: "Having in mind the matters and things herein set forth, and believing that in cases involving great public interest the government from time to time had kept jurors under surveillance during the time of such trials, and, entertaining such belief that the government of the United States had exercised

such right and privilege, he believed that he, as a citizen of the United States, had the same right and privilege."

The answer of Henry Mason Day admitted that by direction of Sinclair he engaged the services of the Detective Agency, supervised their activities, received their reports and forwarded the same to Sinclair as deemed expedient. He alleged that he had reason to believe an attempt would be made unlawfully to influence the jury and that he had the right to cause the operatives to observe the jurors with the view of detecting any unlawful interference. He admitted that detectives were assembled in Washington and assigned to shadow the jurors and make reports; but he expressly denied any purpose improperly to influence or permit any operatives to establish contacts with them. He further said: "As the representative, friend and business associate of Harry F. Sinclair, this respondent, after consultation with him and instructions from him, did take part in the employment of the said Burns International Detective Agency, as he had a right to do, and this respondent did, as he had a right to do, give instructions to representatives of the said Burns International Detective Agency who were in charge of its operatives, to observe as far as they lawfully could, what persons, if any, came in contact with the said jurors during the recesses of Court, and detect, so far as it was lawfully possible so to do, whether any person or persons, endeavored or undertook improperly and unlawfully to approach and communicate with any of said jurors for the purpose of improperly influencing them in the decision of the said cause."

It is not questioned that counsel for the United States presented evidence to the court showing the activities of Burns detectives in shadowing jurors, also the misconduct of one of the jurors, and that by reason of these things a mistrial was entered on November 2d in *United States* v. *Sinclair & Fall.*

Trial upon the charge of contempt under the petition and answers above summarized commenced December 5th, 1927, and terminated February 21st, 1928. Much evidence was taken in open court—the condensation for the record occupies more than 750 printed pages. The appellants, except Sinclair, testified; also the fourteen operatives who shadowed the jurymen. Their daily reports were presented—more than 200 of them. These showed the details of the shadowing of each juror—except Flora, described in the sketch of him as a "bull-headed man." More than a hundred witnesses were called. During the hearing on question of guilt counsel made proffer of many witnesses to come from all parts of the United States for the purpose of showing that for a long time United States attorneys throughout the Union, under direction of the Department of Justice, by agents of the Department as distinguished from local marshals, had indulged in the custom of shadowing jurors, also to show indulgence in such practices on different occasions. This proffer was rejected.

Charged with conspiracy to defraud, Sinclair and Fall were put on trial October 17th, in the Supreme Court, District of Columbia. The jury—ten men and two women—was selected and finally sworn about mid-day October 18th. The Court made no order to lock them up. There was no request therefor. Immediately thereafter (about 3:30 o'clock) Sinclair gave biographical sketches of the jurors, secured by counsel before the trial began, to Day and instructed him to employ the William J. Burns International Detective Agency to supply a corps of operatives who should shadow them. On the 19th some fifteen operatives, including a manager, field men, etc., were assembled in Washington. One of them was assigned to each juror, except Flora, with instructions to go to the court room, identify and thereafter to keep his subject under as strict surveillance as possible "outside of the court" and report to the manager.

Day delivered the biographical sketches to Manager Ruddy. The latter testified: "At the first meeting with Mr. Day he told me that he wished daily reports made from each operative. We did that. I designated the jurors to the operatives by numbers that I obtained from the list given me by Mr. Day. As I understand it was the position they sat in in the jury box, and they counted from left to right. I was never in the court room. I had a newspaper photograph of the jurors. I told the operatives which of the jurors they were to follow. I did not show them the picture at that time. I got it later. It was not given me by Mr. Day. I instructed each one of the agents to come down to the court room to pick up his particular juror. When the jurors left the court room, the operatives were instructed to hold them under surveillance until they went home, and up to a reasonable hour at night. All the operatives reported to me each day."

For some days these instructions were carried out. Jurors were kept under strict surveillance from early morning until late at night—11, 12, 3 o'clock, whenever not actually within the court house; daily reports were turned in and their contents conveyed to Day. On October 24th a majority of the operatives were sent away and the remainder concentrated their efforts upon three jurors whose history did not indicate strength of character. Investigation was made concerning encumbrances upon the home of one of these; also to determine whether another had indicated his views during the trial. A report by Operative McMullin October 22, 1927, purposely and falsely stated that the third (Glasscock) had consulted a representative of the United States.

The evidence does not disclose that any operative was instructed to approach, or did approach a juror, nor does it disclose that any juror actually knew that he was being

shadowed. Some were suspicious. The court did not know, nor does it appear that Sinclair's counsel knew, the jury was being shadowed.

Called as a witness, Day gave rather full account of himself from his youth up, including his army service. He was not permitted to say that he had knowledge of a practice by United States Attorneys to shadow juries in criminal cases after they were sworn.

He testified: The first conversation I had with Sinclair upon the subject of shadowing the jury was about 3 P. M. on October 18, 1927, " after Mr. Sinclair had come back from court. . . . We were at the Mayflower Hotel in Suite 1031, and Mr. Sinclair stated that he was terribly disappointed that the jury had not been locked up, and that he was very much exercised, that some of his enemies, competitors, and those who had written us so many malicious letters might in some way try to influence this jury, and stated he wanted me to tell one of the secretaries to call up Jeffries in New York and ask him to have one of the Burnses communicate with me at a place which would be convenient for me, and that he wanted from 12 to 14 operatives, with a lieutenant and a captain, sent to Washington to cover those who were sworn as jurors in this case. He said they were to cover these jurors, not to approach them, not to speak to them, not to in any way come in contact with them. They were simply to observe and report any suspicious acts which in their opinion might be done by the respective jurors, or those coming in contact with them, and to report also, if it was feasible, the people who did come in contact with them in a way which the operatives could do without arousing suspicion. That is the substance of the instructions."

Sinclair did not take the stand. The operatives severally testified that they were instructed in harmony with Sinclair's directions to Day and acted accordingly.

On November 2nd and 3rd William J. Burns was in Washington apparently with the purpose of doing something to off-set criticism of the Detective Agency aroused by the disclosures concerning surveillance of the jury. He consulted with Operative McMullin and procured the making of an affidavit by the latter based upon the false report of October 22, 1927, concerning Juror Glasscock and caused it to be presented to the presiding judge. A few days later he spoke of efforts by parties representing the United States to tamper with the jury and the affidavit of McMullin to that effect.

The trial judge held the petition stated a case upon which appellants might be adjudged guilty of contempt and the evidence showed their guilt. Among other things, he said: "I cannot escape the conviction, therefore, that respondent Sinclair, respondent Day, respondent Sherman Burns and respondent W. J. Burns, have been, perhaps in different degrees, all involved, more or less directly involved, in the establishment of this surveillance, a surveillance which I have already announced in my opinion constituted an obstruction to the administration of justice by this court. If it had not been for that surveillance, from aught that appears in this testimony, there never would have been a mistrial in this case, a surveillance that at least in part, together with the publication of the affidavit regarding it, but at least in part, necessitated a mistrial."

After close of the evidence and arguments and after the court had declared appellants were guilty of contempt counsel announced that upon the question of mitigation they re-offered the evidence tendered but excluded during the main case as to the custom of the Department of Justice to place juries under surveillance. This was overruled. Before sentence each appellant was called upon to make such statement as he might desire.

W. Sherman Burns was sentenced to pay a fine of One Thousand Dollars ($1000); Sinclair to imprisonment for six months; Day for four months; and William J. Burns for fifteen days.

Appeal was taken to the Court of Appeals. That court certified certain questions here for instructions. Thereafter, we directed the entire record to be sent up for our consideration.

Both Sinclair and William J. Burns were in Washington on October 12th and 13th, 1927, but there is no evidence of communication between them at that time. Sinclair had been a client of the Burns Agency. Circumstances connected with the making and filing of the false affidavit by McMullin, alias Long, based upon his false report of October 22nd concerning Juror Glasscock, and its presentation to the court on November 4th, also certain statements then or thereafter made by him, might reasonably cause one to suspect William J. Burns was party to the plan for surveillance. But he emphatically denied this and we can find no material evidence to support the charge against him. As to him, the judgment below must be reversed.

The Act of Congress approved March 2, 1831, 4 Stat. Chap. 99, p. 487, provides—

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, wit-

ness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

Section 2 is in the margin.*

Section 1, of that Act, became R. S. § 725; Judicial Code § 268; U. S. Code, Title 28, § 385. The substance of § 2 appears in §§ 5399 and 5404, R. S.; Federal Criminal Code § 135; U. S. Code, Title 18, § 241. See *Ex parte Terry,* 128 U. S. 289; *Savin, Petitioner,* 131 U. S. 267.

Counsel maintain that the petition does not adequately charge and the record fails to show misbehavior by appellants which obstructed the administration of justice within § 268, Judicial Code, since there is neither averment nor evidence that any operative actually approached or communicated with a juror, or attempted so to do, or that any juror was conscious of observation. The insistence is that to establish misbehavior within that section it was essential to show some act both known by a juror and probably sufficient to influence his mind. We cannot accept this view. It would destroy the power of courts adequately to protect themselves—to enforce their right of self-preservation. Suppose, for example, some litigant should endeavor to shoot a juror while sitting in the box during progress of the cause. He might escape punishment for contempt if some quick-witted attendant quietly thwarted

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*"SEC. 2. *And be it further enacted,* That if any person or persons shall, corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence."

the effort and kept the circumstances secret until the trial ended.

Toledo Newspaper Company v. *United States,* 247 U. S. 402, 418, 421, adjudged the Company guilty of contempt by publishing, in the city where the court was sitting, articles concerning a pending equity case. Counsel there maintained that it was not alleged, proved, or found that any of the publications was brought into the court building or read by the judge and, therefore, he lacked power to punish under § 268, Judicial Code. Also that publication of newspaper articles outside the court room was not misbehavior amounting to contempt unless actually known to the judge. Replying, this Court, through Mr. Chief Justice White, said:—

"Clarified by the matters expounded and the ruling made in the Marshall Case [*Marshall* v. *Gordon,* 243 U. S. 521], there can be no doubt that the provision [§ 268] conferred no power not already granted and imposed no limitations not already existing. . . . The provision therefore, conformably to the whole history of the country, not minimizing the constitutional limitations nor restricting or qualifying the powers granted, by necessary implication recognized and sanctioned the existence of the right of self-preservation, that is, the power to restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judical power given by summarily treating such acts as a contempt and punishing accordingly. The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty,—a conclusion which necessarily sustains the view of the statute taken by the courts below. . . .

"True, it is urged that, although the matters which were made the basis of the findings were published at the place where the proceedings were pending and under the cir-

cumstances which we have stated, in a daily paper having large circulation, as it was not shown that they had been seen by the presiding judge or had been circulated in the court room, they did and could form no basis for an inference of guilt. But the situation is controlled by the reasonable tendencies of the acts done and not by extreme and substantially impossible assumptions on the subject. Again, it is said there is no proof that the mind of the judge was influenced or his purpose to do his duty obstructed or restrained by the publications and, therefore, there was no proof tending to show the wrong complained of. But here again not the influence upon the mind of the particular judge is the criterion but the reasonable tendency of the acts done to influence or bring about the baleful result is the test. In other words, having regard to the powers conferred, to the protection of society, to the honest and fair administration of justice and to the evil to come from its obstruction, the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case. The wrongdoer may not be heard to try the power of the judge to resist acts of obstruction and wrongdoing by him committed as a prelude to trial and punishment for his wrongful acts."

Under the doctrine so stated, we think the trial judge rightly held it unnecessary to allege or show actual contact between an operative of the Detective Agency and a juror, or that any juror had knowledge of being observed. The reasonable tendency of the acts done is the proper criterion. Neither actual effect produced upon the juror's mind nor his consciousness of extraneous influence was an essential element of the offense.

That the acts here disclosed, and for which three of the appellants were certainly responsible, tended to obstruct the honest and fair administration of justice we cannot

doubt. The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law. The most exemplary resent having their footsteps dogged by private detectives. All know that men who accept such employment commonly lack fine scruples, often wilfully misrepresent innocent conduct and manufacture charges. The mere suspicion that he, his family, and friends are being subjected to surveillance by such persons is enough to destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration. If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will either shun the burdens of the service or perform it with disquiet and disgust. Trial by capable juries, in important cases, probably would become an impossibility. The mistrial of November 2nd indicates what would often happen. We can discover no reason for emasculating the power of courts to protect themselves against this odious thing. See *United States* v. *Shipp*, 203 U. S. 563, 575.

The acts complained of were sufficiently near the court. Most of them were within the court room, near the door of the court house, or within the city. Certainly, they were not more remote than the publication denounced in *Toledo Newspaper Company* v. *United States*. There was probable interference with an appendage of the court while in actual operation; the inevitable tendency was towards evil, the destruction, indeed, of trial by jury. *In re Savin, Petitioner, supra.*

During the hearing and before conviction of guilt counsel proffered many witnesses by whom they proposed to show a practice of the Department of Justice to cause its officers to shadow jurors. This evidence was rightly excluded. That Department is not a lawmaker and mis-

takes or violations of law by it give no license for wrongful conduct by others.

After the judge had declared the appellants guilty, counsel offered in mitigation of punishment the same evidence concerning the alleged custom of the Department of Justice theretofore tendered on the issue of guilt. The tender was refused. Very many witnesses, who it was said would testify to such custom, had been proffered and the proposed evidence rejected; all were again tendered. The offer did not limit the proposal to the appellants' knowledge or belief or mental state. They had answered under oath, with full opportunity to present whatever they deemed important. Before sentence each was accorded opportunity to make a statement. There was no request for permission to file affidavits. Counsel were fully heard. In the circumstances, the court did not exceed the limits of proper discretion.

Cooke v. *United States,* 267 U. S. 517, 537, 538, is relied upon. There, we declared: "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. . . . In cases like this, where the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed, the court can not exclude evidence in mitigation."

By this language we did not intend to lay down any new or hard and fast rule concerning evidence to be heard in mitigation in proceedings for contempt; and certainly there was no purpose to restrict the discretion of the trial

judge in such cases more narrowly than in ordinary criminal trials. See Wharton's Criminal Procedure, 10th ed., § 1890. Moreover, the conscious purpose of Cooke was regarded as an essential element of the offense charged.

Always the language used in an opinion must be read in the light of the issues presented. Cooke was not accorded due opportunity at any stage of the proceedings to state the facts which might excuse or mitigate his conduct and the words quoted were addressed to that situation. Here there was abundant opportunity for presentation of anything really important.

Under the circumstances here disclosed to hear the many witnesses offered by counsel would have required unnecessary and intolerable extension of the long drawn out trial without material benefit. The answers relied or might have relied upon the knowledge possessed by appellants. By short affidavit or verbal statement any appellant could have advised the court again concerning facts within his knowledge, his beliefs, or general state of mind—matters which might possibly affect the degree of guilt.

The exclusion of some other evidence is assigned as error; but we think the claim is without merit and demands no extended comment.

Objections are offered to the admission of certain evidence. In answer, we need only refer to what was said in *The United States* v. *King,* 7 How. 833, 854, 855: "In some unimportant particulars, the evidence objected to was not admissible. But where the court decides the fact and the law without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment, nor is it properly the subject of a bill of exceptions. If evidence appears to have been improperly admitted, the appellate court will reject it, and proceed to decide the cause as if it was not in the record."

Considering the whole record, we think appellants had a patient hearing upon adequately defined issues, with abundant opportunity to put forward all proper defenses and explanations. With the exception already stated, there is ample evidence to support the judgment; the punishments imposed are not excessive; the court kept within the limits of its reasonable discretion and did nothing which injuriously affected the substantial rights of the parties. Judicial Code, § 269; U. S. Code, Title 28, § 391.

The judgment as to William J. Burns must be reversed; as to the other appellants it is affirmed.

Mr. Justice Stone took no part in the consideration or determination of this cause.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al. v. UNITED STATES et al.

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

No. 466. Argued April 11, 1929.—Decided June 3, 1929.

The plaintiff railroad offered standard rates on wheat over its line from Dodge City to Kansas City, a primary grain market, and from Kansas City to the Gulf, and a through rate from Dodge City via Kansas City to the Gulf which was lower than the sum of the standard rates. Under the practice known as "through rates with transit privilege," owners of wheat which, within a certain period, had been shipped from Dodge City to Kansas City without other destination and for the standard rate between those points, could reship the same or substituted wheat from Kansas City to the Gulf by paying only a "proportional rate" or "balance of the through rate," allowing them a discount equal to the difference between the through rate from Dodge City to the Gulf and the sum of the standard rates. To overcome the competition of a railroad with a line from Kansas City to the Gulf which offered a lower rate from Kansas City to the Gulf on

wheat which had originated in Dodge City, the plaintiff filed a tariff increasing its standard rate from Dodge City to Kansas City applicable only to such wheat as should later be reshipped from Kansas City to the Gulf over the competing line; and it contended that the Interstate Commerce Commission was without power to set aside the increase, though unreasonable and discriminatory, because, by so doing, it compelled the plaintiff to participate in a through route and rate with the competing carrier and thereby short-haul itself, in disregard of the limitations imposed by paragraph 4 of § 15 of the Interstate Commerce Act on the Commission's power to establish through routes. *Held:*

1. That in ordering cancellation of the proposed increase the Commission exercised only its function of determining the reasonableness of rates. P. 776.

2. The Commission's power to declare rates unreasonable applies alike to all rates, be they joint, local, or proportional; and in controversies involving through rates, it may if it sees fit deal with one factor only of the combination of rates which make up the through rates. P. 776.

3. In conferring the restricted power to establish through routes, Congress did not intend to limit the theretofore unrestricted power of the Commission to pass upon the reasonableness of rates. P. 777.

4. The inbound and outbound movements of the Kansas City grain to which the proportional rate applied, were wholly independent and distinct, and the fiction of a "through rate with transit privilege" could not convert them legally into a through movement from Dodge City to the Gulf. P. 777.

5. There is no rule of law or practice which gives to a carrier the right to recapture traffic which it originated. P. 780.

6. A finding of the Commission that a rate is unreasonable is binding on this Court when supported by evidence. P. 781.

7. In a suit to set aside an order of the Commission canceling a rate proposed by the plaintiff carrier, failure of the Commission to suspend and cancel a rate of a competing carrier is not subject to review. P. 781.

33 F. (2d) 345, affirmed.

APPEAL from a decree of a District Court of three judges denying an injunction and dismissing the bill in a suit to set aside an order of the Interstate Commerce Commission canceling proposed tariffs.

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Mr. R. S. Outlaw, with whom *Messrs. A. B. Enoch, H. H. Larimore, E. E. McInnis, M. L. Bell, W. F. Dickinson,* and *E. J. White* were on the brief, for appellants.

Mr. Daniel W. Knowlton, with whom *Attorney General Mitchell* and *Mr. Elmer B. Collins,* Special Assistant to the Attorney General, were on the brief, for appellees United States and Interstate Commerce Commission.

Mr. Frank H. Towner, with whom *Messrs. Silas H. Strawn, Frank H. Moore,* and *Wm. E. Davis* were on the brief, for appellees Kansas City Southern Railway Company et al.

Mr. Justice Brandeis delivered the opinion of the Court.

This suit was brought in the federal court for northern Illinois, under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220, to enjoin and annul an order of the Interstate Commerce Commission entered July 6, 1927. That order directed the Atchison, Topeka and Santa Fe and two other railroads to cancel proposed tariffs increasing the respective grain rates from numerous country points in Colorado, Kansas and Nebraska to Kansas City, Missouri, and Wichita, Kansas. *Grain and Grain Products from Colorado, Kansas and Nebraska to Gulf Ports for Export,* 129 I. C. C. 261. Those three carriers are the plaintiffs. Besides the United States and the Commission, the Kansas City Southern, and certain other carriers, which compete with the plaintiffs for the grain export traffic from Kansas City to Gulf ports, are the defendants. The District Court, three judges sitting, denied the injunction and dismissed the bill. 33 F. (2d) 345. The case is here on direct appeal from the final decree. We are of opinion that it should be affirmed.

The legal question presented is not dependent upon the fact that the tariffs challenged are those of three inde-

pendent railroads; nor upon the fact that the rates are different for wheat than for some other grain; nor upon the fact that the tariff of each railroad includes differing rates from numerous country points in each of the three States; nor upon the fact that some of the rates from those points are for transportation to Kansas City, and some to Wichita; nor upon the fact that there are several railroads which, as competitors of the plaintiffs for traffic from those cities to several Gulf ports, are affected by the rates challenged. The statement of the facts may, therefore, be simplified by limiting it to a single rate of one of the plaintiff carriers for wheat to Kansas City; and showing the effect of that increased rate on one of that carrier's competitors for traffic from that market to a single Gulf port.

The Santa Fe has a line direct from Dodge City, Kansas, to the Gulf via which its through rate on wheat for export is 47 cents per 100 pounds. It has also a line from Dodge City via Kansas City to the Gulf on which its through rate, prior to 1924, was 51 cents, being the sum (or combination) of the local rate from Dodge City to Kansas City (20.5 cents) and the standard proportional rate from Kansas City to the Gulf (30.5 cents).[1] Usually, the volume of grain in storage at Kansas City is large, as it is an important primary grain market. The Kansas City Southern has no line from Dodge City to Kansas City.

[1]A through rate is ordinarily lower than the combination of the local rates. When a through rate is made by combination of rates for intermediate distances the rate for the later link in the shipment is, when lower than the local, spoken of as a proportional rate. See *Hocking Valley Ry. Co.* v. *Lackawanna Coal & Lumber Co.*, 224 Fed. 930, 931. Also, *Railroad Commissioners of Kansas* v. *A. T. & S. F. Ry. Co.*, 22 I. C. C. 407; *Swift & Co.* v. *Director General*, 66 I. C. C. 409; *Kansas City Board of Trade* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 69 I. C. C. 185; *Rates on Bunker Coal*, 73 I. C. C. 62; *Lumber from San Francisco Bay Points*, 78 I. C. C. 760; *Wichita Chamber of Commerce* v. *Alabama & Vicksburg Ry. Co.*, 109 I. C. C. 368.

But it has a line from Kansas City to the Gulf; and its standard proportional rate also is 30.5 cents per 100 pounds. Prior to 1924, the Southern was in a position to compete on equal terms with the Santa Fe for the transportation to the Gulf of the grain from Dodge City on storage in Kansas City. In that year, the Santa Fe reduced its through rate from Dodge City to the Gulf via Kansas City to 47 cents. Thereby the Santa Fe's net proportional rate from Kansas City to the Gulf was reduced 4 cents, that is, from 30.5 cents to 26.5 cents. For, under a practice prevailing at primary grain markets, known as the through rates with transit privilege, one who re-ships grain on the same railroad which had brought it into the market is entitled to re-ship on what is called the balance of the through rate. That is, a discount is allowed equal to the difference between the through rate from the point of its origin to the destination ultimately selected and the sum of the standard inbound and outbound rates.

Thus, the Southern was disabled from competing with the Santa Fe for the transportation from Kansas City to the Gulf of grain in storage at Kansas City which had come from Dodge City. For the Santa Fe refused to establish a similar through route via the Southern from Kansas City; and the Commission did not order it. Compare *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136. The Southern undertook to help itself. It filed a tariff with what is called a varying proportional rate by lowering to 26.5 its own rate from Kansas City to the Gulf on such grain as had come to Kansas City from Dodge City.[2] The Santa Fe protested to the Com-

[2] This varying proportional rate was less advantageous to the Southern than if a joint rate had been established by agreement with the Santa Fe. For in acting alone, the Southern was obliged to absorb the whole of the 4-cent reduction; whereas, if the Santa Fe had joined with the Southern in establishing a through route and a joint rate, the 4-cent reduction would presumably have been divided between the two carriers.

mission against the Southern's varying proportional rate; but the Commission refused to suspend it.[3] Then, the Santa Fe, in order to exclude the Southern, filed the tariff here in question, imposing the 4-cent addition to its Kansas City rate on any Dodge City grain that should later be re-shipped over the Southern's line. It is this conditional addition of 4 cents to the Dodge City-Kansas City rate which the Commission ordered cancelled.

The order followed extensive hearings before the Commission, had after suspension of the tariffs pursuant to paragraph 7 of § 15 of the Interstate Commerce Act. Since the proposed tariff involved an increase in the rate, the burden of justifying the increase before the Commission was imposed upon the carrier by paragraph 7 of § 15, if applicable. Moreover, to make an additional charge for having brought merchandise into a city if it should afterwards be shipped out, is on its face unreasonable. And it is discriminatory to make that additional charge only

[3] Varying proportional rates had been approved in *Export Rates on Grain,* 31 I. C. C. 616. The occasion for such rates and their operation are described in *Southern Kansas Grain Association* v. *Chicago, Rock Island & Pacific Ry. Co.,* 139 I. C. C. 641, 653. "The method of publication may be briefly explained by the statement that proportional rates are provided from Kansas City in varying amounts depending upon the point of origin of the grain, which, when added to the local rates into Kansas City, are equal to the specific rates published by the lines which originate the grain. If these varying proportionals or balances were not maintained the lines which serve Kansas City, but not the grain fields, would be compelled to apply the flat proportional rate of 30.5 cents from that market to the Gulf ports. That flat proportional exceeds the balances maintained by other lines and therefore would attract little, if any, traffic. By providing these varying proportionals the lines serving Kansas City have placed themselves on a competitive basis for the outbound movement of grain stored at that point." Compare *Grain and Grain Products from Kansas and Missouri to Gulf Ports,* 115 I. C. C. 153.

if the outbound shipment is over one of several possible railroads. The Santa Fe made no attempt to justify the increase. It contended that the general rules of law concerning reasonableness of rates are not applicable; and that the Commission lacked power to order the rate cancelled, because by so doing it compelled the Santa Fe to participate in a through route and rate and thereby short haul itself, in disregard of the limitations imposed by paragraph 4 of § 15 upon the Commission's power to establish through routes. Compare *United States* v. *Missouri Pacific R. R.*, 278 U. S. 269.

The Santa Fe, regarding the grain in storage at Kansas City as tonnage which, although temporarily held in abeyance, is in the course of a through movement and, as such, is to be held on its lines, makes this argument: At the time that the cancelled tariff was filed, the Santa Fe had a through route on its own lines from Dodge City via Kansas City to the Gulf; and there existed no through route from Dodge City to the Gulf via the Southern from Kansas City. The Santa Fe was therefore legally entitled to carry to the Gulf at the through rate all Dodge City grain stored at Kansas City, which had been brought in by it. The Southern's varying proportional rate on Dodge City grain enabled the Southern to secure some of this grain. The Santa Fe's proposed varying rate was essential to prevent that invasion of its right not to be short hauled on Dodge City grain. By ordering its proposed tariff cancelled, the Commission made possible a through route via the Southern which compelled the Santa Fe to short haul itself. As the Commission was prohibited by paragraph 4 of § 15 from establishing a through route via the Southern which would short haul the Santa Fe, Congress must have intended to deny to it also the power to cancel as unreasonable a tariff which was essential to the preservation of the Santa Fe's long haul.

A supplemental argument is made by the Santa Fe to overcome the finding of the Commission that, at the time when the tariff here in question was filed, there already existed (without any order by the Commission) a through route for grain over the Santa Fe from Dodge City to Kansas City and thence to the Gulf via the Southern. Compare *St. Louis Southwestern Ry. Co.* v. *United States,* 245 U. S. 136, 139; *Virginian Ry.* v. *United States,* 272 U. S. 658, 666. The supplemental argument is this: Since the Commission could not have ordered this through route via the Southern, it could not prevent the Santa Fe's withdrawing from the same.[4] Its proposed tariff was in effect a withdrawal. For, as the bill alleges, the rates were "published, not for the purpose of facilitating movement via the routes in connection with which they were published, but were published by plaintiffs to preclude and prevent movement via such routes." We have no occasion to consider the issue of fact whether there was in existence when the Santa Fe filed its proposed tariff a through route from Dodge City via the Southern from Kansas City; nor need we consider the issue of law whether, if there was such a route in existence, the Commission would have been powerless, by reason of paragraph 4 of § 15, to prevent the Santa Fe's withdrawal

[4] In support of this proposition the Santa Fe relies upon *Marble Rates from Vermont Points,* 29 I. C. C. 607; *Ogden Gateway Case,* 35 I. C. C. 131; *Ocean-and-Rail Rates to Charlotte, N. C.,* 38 I. C. C. 405; *West Coast Lumber Mfgs. Ass'n* v. *S. P. & S. Ry. Co.,* 45 I. C. C. 230; *Routing on Sheep from K. C., M. & O. Texas Points,* 69 I. C. C. 4; *Restrictions in Routings over S. L. & U. R. R.,* 115 I. C. C. 357; *Port of New York Authority* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 144 I. C. C. 514. But see *Lake & Lake Rate Cancellations,* 42 I. C. C. 513, 516; *Western Pacific R. R.* v. *Southern Pacific Co.,* 55 I. C. C. 71, 73; *Routing on Coal from Western Maryland Ry. Mines,* 66 I. C. C. 103; *Armour & Co.* v. *D. L. & W. R. R.,* 66 I. C. C. 445; *Fruits & Vegetables from Texas Points,* 74 I. C. C. 575, 578–579.

from it. For we are of opinion that, although the Santa Fe brought the grain into Kansas City, there is nothing in the situation which precluded the Commission from cancelling the Santa Fe's proposed tariff as being unreasonable.

First. In ordering cancellation of the proposed tariff the Commission exercised only its function of determining the reasonableness of rates. It made a rate order to which the matter of routing was merely an incident. The Santa Fe calls the proposed rate by which it undertook to add 4 cents to the Dodge City-Kansas City rate, if the grain should be re-shipped on the Southern, proportional. To call it proportional is misleading.[5] But if it were truly a part of a through rate, the fact would be without legal significance. The Commission's power to declare rates unreasonable applies alike to all rates, be they joint, local or proportional. The Commission may, and in controversies involving through rates often does, deal with one factor only of the combination of rates which make up the through rate. And that factor may be a proportional rate.[6]

The broad power to pass on the reasonableness of rates conferred upon the Commission in 1887 has not been in terms limited by any amendatory act. On the other hand, there has been much legislation designed to make the power more effective.[7] The special power to establish

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[5] See note 1.

[6] Compare *Cairo Board of Trade* v. *C. C. C. & St. L. Ry. Co.*, 46 I. C. C. 343; *Atchison Board of Trade* v. *A. T. & S. F. Ry. Co.*, 80 I. C. C. 350; *Basing Rates on Paving Brick*, 100 I C. C. 390.

[7] Act of June 29, 1906, c. 3591, § 4, 34 Stat. 584; Act of June 18, 1910, § 12, c. 303, 36 Stat. 539; Act of August 9, 1916, c. 301, 39 Stat. 441; Act of August 9, 1917, c. 50, § 4, 40 Stat. 270; Act of February 28, 1920, c. 91, § 418, 41 Stat. 484; Joint Resolution, approved January 30, 1925, 43 Stat. 801; Act of March 4, 1927, c. 510, § 2, 44 Stat. 1446.

through routes and joint rates was not conferred until 1906. Act of June 29, 1906, c. 3591, § 4, 34 Stat. 584. There is not in that Act as amended, see *United States* v. *American Express Co.*, 265 U. S. 425, 430, note 2, or in any decision of this Court construing it;[8] or in any of the decisions of the Commission applying it, to which attention has been called,[9] the slightest basis for the suggestion that in conferring the restricted power to establish through routes, Congress intended to limit the theretofore unrestricted power of the Commission to pass upon the reasonableness of rates. Compare *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Tennessee,* 262 U. S. 318, 323.

Second. The contention that the Santa Fe's cancelled tariff was legally part of a through rate is also unsound. The argument rests upon a fiction—the fiction of a through rate with transit privilege. As applied here, the fiction is inconsistent with every fact of legal significance. When grain is shipped from a country point to a primary market its ultimate disposition is rarely known. Who the owner of the grain will be when it reaches the primary market is uncertain. It may be sold en route before arrival there. While stored there, it may be resold several times. Some of it may be consumed in local flour mills. Most of that stored in local elevators will probably be shipped out. But until the grain is shipped out it will not be known to what place or even in what direc-

[8] See *Interstate Commerce Commission* v. *Northern Pacific Ry.*, 216 U. S. 538; *Louisville & Nashville R. R.* v. *United States,* 238 U. S. 1, 18; *St. Louis S. W. Ry. Co.* v. *United States,* 245 U. S. 136; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457; *New England Divisions Case,* 261 U. S. 184; *United States* v. *Illinois Central R. R.*, 263 U. S. 515; *United States* v. *Missouri Pacific R. R.*, 278 U. S. 269.

[9] See cases in note 4, *supra;* also, *Wichita Board of Trade* v. *A. & S. Ry. Co.*, 28 I. C. C. 376; *Restriction in Routing of Traffic from Pacific Northwest,* 73 I. C. C. 305; *Lemon-Cove-Woodlake Ass'n* v. *A. T. & S. F. Ry. Co.*, 139 I. C. C. 239.

tion or by what railroad it will be carried. *Southern Kansas Grain Ass'n* v. *Chicago, Rock Island & Pacific Ry. Co.*, 139 I. C. C. 641, 666. The treatment of substantially all grain coming from the country point is this: The bill of lading is for a shipment from the country point to the primary market. There is nothing in any of the papers connected with that transportation to indicate that the grain has a destination beyond the primary market. Upon arrival there, the owner requires delivery to be made at such elevator or other place as he selects. The freight charges are paid; the amount being the full local rate for transportation from the country point to the primary market.[10] The car is then released. And the movement—called inbound—ends.

The practice by which grain shipped to a primary market is given when shipped out the benefit of the low rate which would normally have applied if the grain had actually been shipped from the country point through to its ultimate destination antedates the enactment of the Interstate Commerce Act, *Transit Case*, 24 I. C. C. 340, 348. The benefit attaching to grain shipped into the primary market is commonly so broad that it is transferable not only to another owner of the same grain, but to like grain coming from the same country point. Thus, the owner of any grain in Kansas City can get the benefit of the proportional rate out for Dodge City grain by making proof that he had brought from there into the market, within the period of twelve months, an equivalent quantity of like grain. This he may do although it appears that the grain which he brought in was actually consumed

[10] If the then owner has directed delivery of the car to some local elevator, not on the line of the carrier which brought the grain to Kansas City, he pays the switching charge.

in Kansas City.[11] *Alleged Unlawful Rates and Practices in the Transportation of Grain and Grain Products,* 7 I. C. C. 240, 247; *In re Substitution of Tonnage at Transit Points,* 18 I. C. C. 280; *Transit Case,* 24 I. C. C. 340.[12] The practice prevails often even where the haul to the primary market is out-of-line; that is, is not on the direct route from the point of origin to the point which ultimately becomes the destination of the grain.

When the outbound shipment from Kansas City is made the grain goes forward on a new bill of lading at the balance of the through rate. Obviously, this practice cannot convert the independent shipment of grain from Kansas City to the Gulf via the Southern into a through movement from Dodge City to the Gulf. The two transportation services are not only entirely distinct, but they are often rendered in respect to wholly different merchandise. This convenient fiction is employed as a justifica-

[11] The outbound proportional as so reduced is spoken of as the transit balance. The proof that the shipper brought grain into the market entitling him to the reduction is made by presentation of what is called "expense bills." This substitution has by some carriers been extended to grain coming from other country points with rates equally favorable to the carrier. The validity of that practice has at times been questioned. See *In re Substitution of Tonnage at Transit Points,* 18 I. C. C. 280, 284–285. Compare *Alleged Unlawful Rates,* 7 I. C. C. 240, 244; *Transit Case,* 24 I. C. C. 340, 350; *Lathrop-Marshall Grain Co.* v. *Chicago & Northwestern Ry. Co.,* 144 I. C. C. 227, 228. As to rate-breaking points, see *Wichita Board of Trade* v. *Abilene & Southern Ry. Co.,* 29 I. C. C. 376; *Mississippi R. R. Commission* v. *Alabama & Vicksburg Ry. Co.,* 93 I. C. C. 435, 444.

[12] Compare *Nonapplication of Transit Privileges on Deficiencies in Weight of Grain,* 69 I. C. C. 19; *Southern Kansas Grain Assn.* v. *Chicago, Rock Island & Pacific Ry. Co.,* 139 I. C. C. 641, 646; *Lathrop-Marshall Grain Co.* v. *Chicago & Northwestern Ry. Co.,* 144 I. C. C. 227; *Omaha Corporation Commission* v. *Abilene & Southern Ry. Co.,* 148 I. C. C. 316, 320.

tion for the discrimination involved in giving rates lower than those ordinarily applicable to the service outbound. It is, of course, true that a carload of grain might be shipped from Dodge City to the Gulf as a through shipment, although under the transit privilege it is to break bulk at Kansas City, and the grain is not only to be stored there, but is to be treated or even converted into flour, before it proceeds on its journey to the Gulf. See *Central R. R. Co.* v. *United States,* 257 U. S. 217, 237. Compare *Texas & New Orleans R. R.* v. *Sabine Tram Co.,* 227 U. S. 111; *Baltimore & Ohio Southwestern R. R.* v. *Settle,* 260 U. S. 166; *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95. But the grain with which the carriers are here concerned is not that so shipped from Dodge City to the Gulf. It is grain whose only destination, when shipped from Dodge City, was Kansas City. Such reshipment under the transit privilege is also entirely unlike the through shipment effected under the reconsignment or diversion privilege. See *Reconsignment Case,* 47 I. C. C. 590; *Wood* v. *New York, Philadelphia & Norfolk R. R.* 53 I. C. C. 183, 185; *Carolina Portland Cement Co.* v. *Director General,* 83 I. C. C. 388, 391.

The grain, while in storage at Kansas City, is, in every sense, free grain. When delivered to elevators in Kansas City the Santa Fe's charges for the carriage to Kansas City were fully paid. Its legal interest therein ended then. If the consignee or his successor in title should at any time thereafter conclude to ship elsewhere grain which he had brought into Kansas City, he was at liberty to select not only the destination, but the carrier by which it should be transported. And every railroad serving Kansas City had like liberty to compete for the traffic. There is no rule of law or practice which gives to a carrier the right to recapture traffic which it originated. Compare *United States* v. *Illinois Central R. R. Co.,* 263 U. S. 515, 523; *United States* v. *American Ry. Express Co.,* 265 U. S.

425. Moreover, here the competition is not for transportation of the identical merchandise.

Third. In this Court, there is a faint contention that the evidence before the Commission did not support the finding of unreasonableness. It was not made either before the Commission or the District Court and is clearly unfounded. See *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 665; *Assigned Car Cases,* 274 U. S. 564, 580. There is also a suggestion that the Commission should have suspended and ordered cancelled the Southern's varying proportional rate. Its action in that respect is not subject to review in this proceeding.

Affirmed.

BALTIMORE & OHIO RAILROAD COMPANY ET AL. *v.* UNITED STATES ET AL.

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

No. 563. Argued April 24, 1929.—Decided June 3, 1929.

After this Court had reversed a decree of the District Court of three judges erroneously refusing to vacate an order of the Interstate Commerce Commission by which appellant railroads (plaintiffs below) were required to absorb transfer charges on certain traffic moving west at St. Louis, (277 U. S. 291), and by its mandate had directed such further proceedings in the case, in conformity with this Court's opinion and decree, as according to right and justice and the laws of the United States ought to be had, the appellants applied to the District Court for a decree in accordance with the mandate, including restitution by the appellee railroads of the amounts which the appellants had borne and paid under the order because of the erroneous decree, and for a reference to a master to ascertain such amounts. The District Court reversed that decree, set aside the Commission's order, retained jurisdiction, and later entered its final decree denying the restitution and reference. *Held:*

1. The decree denying the application for restitution and for reference to a master, was appealable to this Court under the Urgent Deficiencies Act of October 22, 1913. P. 784.

2. The application for restitution was in effect an equity suit resulting in a final decree. P. 785.

3. When a lower federal court refuses to give effect to or misconstrues a mandate of this Court, its action may be controlled by this Court. P. 785.

4. Under the Act, a court of three judges was required for the entry of decree on mandate; its jurisdiction necessarily included power to make all orders required to carry on the suit and enforce the rights and obligations of the parties arising in it. And appeal from the decree refusing restitution rested on the same foundation as the first appeal. P. 785.

5. The appellants were entitled to restitution of the amounts paid under the original erroneous decree, with interest at the rate established by the law of the State. P. 785.

6. The District Court should have retained jurisdiction and awarded restitution, in avoidance of a multiplicity of suits and the virtual denial of justice that would result if each claim must be separately litigated at law. P. 786.

7. The district judges should give their reasons in deciding important cases. P. 787.

Reversed.

APPEAL from a decree of the District Court of three judges denying an application for restitution and for a reference to a master. The proceedings below occurred after the receipt of the mandate issued by this Court pursuant to its decision upon a former appeal. 277 U. S. 291.

Mr. Frederic D. McKenney, with whom *Messrs. Morison R. Waite, Theodore Schmidt,* and *John S. Flannery* were on the brief, for appellants.

Messrs. Charles S. Burg and *Henry H. Larimore,* with whom *Messrs. Morris G. Roberts* and *Wallace T. Hughes* were on the brief, for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is the second appeal in this case; the first was heard and determined at last term. 277 U. S. 291. The

appellants and appellees are the same here as they were on that appeal. The former are called the east side roads and the appellee carriers are called the west side roads. The western termini of the appellants are at East St. Louis and the eastern termini of the appellee carriers are at St. Louis. For many years the east side roads and the west side roads have exchanged traffic by means of the facilities of the Terminal Railroad Association. *United States* v. *St. Louis Terminal,* 224 U. S. 383. *Ex parte United States,* 226 U. S. 420. *United States* v. *St. Louis Terminal,* 236 U. S. 194. *Terminal R. R. Ass'n* v. *United States,* 266 U. S. 17.

The west side roads in order to meet the competition of other rail carriers west of the river whose lines reached East St. Louis made the same rates to both cities and absorbed and bore the cost of transferring all freight across the river. On most of the traffic the east side roads made the same rates to both cities; but on through traffic moving on combination rates through both points, their rates applied only to East St. Louis.

After the decision of this court in *Terminal R. R. Ass'n* v. *United States,* 266 U. S. 17, the west side roads made complaint to the Interstate Commerce Commission and secured its order requiring the east side roads to absorb the charges for transfer across the river on all westbound through traffic moving on combination rates which were the same on St. Louis as on East St. Louis. 113 I. C. C. 681. The east side roads brought this suit against the United States to set aside the order; the Commission and west side roads intervened. The court, consisting of three judges, dismissed the suit for want of equity. This court reversed the decree and by its mandate directed that such further proceedings be had in the case, in conformity with the opinion and decree, as according to right and justice and the laws of the United States ought to be had.

The mandate having been filed in the district court, the appellants applied for a decree in conformity with it.

They averred that, by reason of the erroneous dismissal of the suit, they had been compelled, up to the time our decree of reversal went into effect, to comply with the order of the Commission from its effective date, December 11, 1926, and had paid the transfer charges covered by the order. They prayed that the decree require the west side roads severally to restore to the respective east side roads the amounts which, because of the erroneous decree of dismissal, they had borne and paid, and that the case be referred to a master to ascertain the amounts.

After hearing, the district court, as before consisting of three judges, vacated its earlier decree and set aside the order of the Commission. The court found that appellants had complied with the order of the Commission as alleged, retained jurisdiction of the case and later entered its final decree denying appellants' application for restitution and for reference to a master. This appeal was taken from such denial.

The west side roads move to dismiss on the ground that the part of the decree complained of is not reviewable here on this appeal.

The Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219,* provides that no decree setting aside any order of the Commission shall be granted by any district court unless the case shall be heard and determined by three judges. And the Act gives aggrieved parties the right to appeal to this court from a final decree in any suit brought to set aside such orders. There is no question as to the

* " . . . No interlocutory injunction suspending . . . or setting aside . . . any order made . . . by the Interstate Commerce Commission shall be . . . granted by any district court of the United States . . . unless the application for the same . . . shall be heard and determined by three judges. . . .

An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case . . .

And upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same

jurisdiction of this court on the first appeal or as to the validity of its mandate. The present controversy concerns the construction and effect to be given to the mandate.

Appellants' application for restitution was in effect an equity proceeding resulting in a final decree. *Perkins* v. *Fourniquet,* 14 How. 328, 330. When a lower federal court refuses to give effect to or misconstrues our mandate, its action may be controlled by this court, either upon a new appeal or by writ of mandamus. *In re Potts,* 166 U. S. 263, 265. *In re Sanford Fork & Tool Co.,* 160 U. S. 247, 255, and cases cited. It is well understood that this court has power to do all that is necessary to give effect to its judgments. The Act authorizes this appeal.

Moreover the proceeding below out of which the denial of restitution arose is incidental to and in effect a part of the main suit. Under the Act a court of three judges was required for the entry of the decree on the mandate. *Ex parte United States, supra,* 424. *Ex parte Metropolitan Water Co.,* 220 U. S. 539, 544. The jurisdiction of the court so constituted necessarily includes power to make all orders required to carry on such suits and to enforce the rights and obligations of the parties that arise in the litigation. This appeal rests on the same foundation as did the first. *Arkadelphia Co.* v. *St. Louis S. W. Ry.,* 249 U. S. 134, 142.

The east side roads are entitled to restitution. The order should have been set aside in the first instance. As a result of the erroneous refusal of the court, the burden of the transfer charges in question was shifted from the

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requirement as to judges and the same procedure as to expedition and appeal shall apply.

A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States . . . and such appeals may be taken in like manner as appeals are taken under existing law in equity cases." [Paragraphing added] U. S. C., Tit. 28, § § 47, 47a.

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west side roads to the east side roads and was by them borne until the order was set aside on the reversal of the decree dismissing the bill. All payments made by appellants in compliance with the invalid order enured to the benefit of the west side roads just as if made directly to them.

The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. And, while the subject of the controversy and the parties are before the court, it has jurisdiction to enforce restitution and so far as possible to correct what has been wrongfully done. *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216, 219. *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co., supra*, 145. *Ex parte Linclon Gas Co.*, 256 U. S. 512, 516. When the erroneous decree was reversed and the invalid order was set aside, the law raised an obligation against each of the west side roads to make restitution of the payments made by the east side roads in compliance with the order. And thereupon each of the east side roads became entitled to have the amounts so paid by it together with interest thereon from the dates of such payments at the rate established by the law of the State in which such sums were paid.

Before the reversal of the erroneous decree, there was transferred across the river a very great number of shipments covered by the order. The transfer charge on each constitutes a claim in favor of an east side road and against a west side road. If each claim is treated as a separate cause of action enforceable only at law, the number of suits and the burden of maintaining them would be so enormous that the relegation of the east side roads to that remedy would be a virtual denial of justice. It was the duty of the court to retain jurisdiction of the case, enter a decree that appellants are entitled to restitution,

and refer the case to a master as prayed in appellants' motion. *Ex parte Lincoln Gas Co., supra,* 517.

The lower court entered its decree dismissing the suit and, after reversal here, denied restitution without opinion, statement of reasons or citation of authority. The questions were important, and the amounts involved were large. The judges should have given the reasons on which they rested their decisions. *Virginian Ry.* v. *United States,* 272 U. S. 658, 675. *Lawrence* v. *St. L.-S. F. Ry.,* 274 U. S. 588, 596. *Arkansas Commission* v. *Chicago, etc. R. R.,* 274 U. S. 597, 603. *Cleveland, etc. Ry.* v. *United States,* 275 U. S. 404, 414. *Hammond* v. *Schappi Bus Line,* 275 U. S. 164.

Decree reversed.

ATLANTIC COAST LINE RAILROAD COMPANY *v.* DRIGGERS.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 225. Argued January 18, 1929. Reargued April 9, 10, 1929.—Decided June 3, 1929.

1. In an action under the Federal Employers' Liability Act, if it appears from the record that under the applicable principles of law as interpreted by the federal courts, the evidence was not sufficient in kind or amount to warrant a finding that the negligence of the Railroad Company was the cause of the death, the judgment must be reversed. P. 788.
2. Upon the facts of this case, *held* that death of a railway switchman who stepped from the foot-board of a moving switch engine and fell or was thrown against the side of another engine drawing a passenger train on an adjacent track, was attributable solely to his own negligence and not to any negligence of the railway company. P. 792.
3. In an action for death of a railway employee under the Federal Employers' Liability Act, if there is no support for the contention that the death was caused by the negligence of the Railway Com-

pany in any respect in which it owed a duty to the decedent, a verdict for the Company should be directed. P. 792.
151 S. C. 164, reversed.

CERTIORARI, 278 U. S. 587, to a judgment of the Supreme Court of South Carolina sustaining a recovery of damages by an administratrix in an action under the Federal Employers' Liability Act.

Mr. Thomas W. Davis, with whom *Messrs. Simeon Hyde, R. McC. Figg, Jr.,* and *V. E. Phelps* were on the brief, for petitioner.

Mr. Louis M. Shimel, with whom *Messrs. J. D. E. Meyer* and *Sidney Rittenberg* were on the brief, for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

William A. Driggers, an employee of the Railroad Company, suffered personal injuries that resulted in his death. The administratrix of his estate brought this action against the Railroad Company in a common pleas court of South Carolina. At the conclusion of the evidence the Railroad Company moved for a directed verdict. This was denied. The jury found for the administratrix; and the judgment entered on the verdict was affirmed by the Supreme Court of the State.

It is unquestioned that the case is controlled by the Federal Employers Liability Act, under which it was prosecuted. Therefore, if it appears from the record that under the applicable principles of law as interpreted by the federal courts, the evidence was not sufficient in kind or amount to warrant a finding that the negligence of the Railroad Company was the cause of the death, the judgment must be reversed. *Atlantic Coast Line* v. *Davis,* 279 U. S. 34, 35; and cases cited.

Driggers had been employed by the Railroad Company for about five years, and for about six months had been a member of a switching crew. He was injured by stepping off the footboard of the switch engine while it was in motion and striking the engine of a local passenger train that was passing along an adjacent track.

The scene of the accident was about three miles north of Charleston, within the yard limits, at a point where the Railroad Company has parallel double tracks, running north and south; the eastern being the northbound main line; and the western, the southbound main line. These lines are about 12 feet apart measured from center to center, with a clearance of 7 feet 8½ inches from rail to rail. The tracks are practically straight, and for a distance of about 2,000 feet to the north there is no obstruction to the view along the tracks. Leading from the northbound main line there is a spur track—called the Etiwan Lead—running in a northeasterly course, on a northerly curve, to a coal yard. The switch for this spur track is controlled by a lever on the east side of the main line. In leaving the main line and proceeding along the spur track for about three car lengths, that is about 120 feet, the view to the north along the main line tracks was unobstructed; but beyond this distance there was shrubbery and a billboard on the north side of the track which obstructed the view to the north. This spur track was used by the switching crew every day, sometimes more than once. On the day of the accident—which was clear and bright—the switch engine left Charleston and went up the northbound main line for the purpose of transferring some cars on the Etiwan Lead to a connection point with the Southern Railway that was some distance to the north. To do this it was necessary to go on the spur track, cut out a car, return to the northbound main line with the cars to be transferred, and shove them up that line to the connection point where the cars were to be delivered.

On approaching the Etiwan Lead the conductor of the switching crew, after telling Driggers—who was the brakeman—to cut out a car, got down and opened the switch for the spur track. He then left the switch open,[1] and walked across the north and south lines and adjoining double tracks of the Southern Railway, to a point about 15 or 20 feet west of the Southern Railway tracks, to look for a train.

Meanwhile the switch engine went on the spur track, and after doing the necessary switching work, returned with the attached cars to the main line, moving at about six miles an hour, upgrade. The engine was in front—facing the switch. Driggers was standing on the righthand footboard in front of the engine. In going over the last portion of the spur track, where the vision to the north was unobstructed, he was facing nearly south, and could not see to the northward without looking back. He was expecting that after the switching train had gone on the northbound line the cars would be shoved back up that line to the connection point. But as the switch had been left open it would not have to be turned until the cars had passed down the main line beyond it, when it would have to be closed so that the train might pass back up the line.

Just as the switch engine reached the northbound main line, proceeding southwardly down that line, the conductor, who had heard the whistle of a passenger train on the southbound main line and saw the approaching train, tried to call the attention of Driggers—who was looking at him at the time—to the train, pointed to it and told him to stay on the footboard. The exhaust on the switch engine prevented him from hearing what the conductor said. The signal which the conductor gave to show him

[1] This automatically threw a red signal on the line at a point to the south.

that the passenger train was coming was the same signal which would tell him that the switching train was to back up the northbound main line. The only answer that Driggers gave was a nod of the head, indicating that he understood that the switching train was to be shoved back up that line. Thereupon, despite the noise from the exhaust of the switch engine, without looking back to see whether any train was approaching, and without having received any signal to dismount from the switch engine for any purpose whatever, and while the switch engine was in motion entering upon the southbound line, Driggers stepped off the right end of the footboard in the space between the northbound and southbound lines and swung or was thrown into the pilot sill of the engine of the passenger train on the southbound line, which was passing at that moment, and was instantly crushed and killed.

The undisputed evidence shows that Driggers had no duty which required him to dismount from the switch engine at that time, but was supposed to remain on the engine, although it was optional for him to get off and throw the switch.

On the other hand, the undisputed evidence shows that the passenger train, which was a few minutes behind time, and was running from 35 to at least 50 miles an hour, had a clear and unobstructed right of way on the southbound line. The engineer was on the lookout ahead, and had blown signals at a point about 2,000 feet to the north, and again before reaching the scene of the accident; and the automatic bell on the engine, which he had set in motion, was ringing continuously up to the time of the accident. There was no obstruction whatever on the line ahead. Although the engineer saw the switch engine about to enter in a southerly direction on the northbound main line, there was nothing to indicate that any member of its crew would attempt to dismount between the two lines; and Driggers suddenly struck the side of the engine behind

the pilot, in a position where he was not and could not have been seen by the engineer, and when it was impossible to stop the train.

Under these circumstances, it is clear that Driggers, by his own negligence, as the sole and direct cause of the accident, brought on his own death, and that there is no ground upon which the liability of the Railroad Company may be predicated. Compare *Atlantic Coast Line* v. *Davis, supra,* p. 39; and cases cited.

The rate of speed at which the passenger train was running was, plainly, not a proximate cause of the injury, as the engine of that train did not run into Driggers, but he, as the result of his own action, was thrown against the side of the engine as it was passing. See *Patterson* v. *Director General,* 115 S. C. 390, 396.

The contention that his death was caused by the negligence of the Railroad Company in any respect in which it owed a duty to him is without any substantial support; and the jury should have been instructed to find for the Railroad Company.

The judgment is reversed, and the cause remanded to the Supreme Court of South Carolina for further proceedings not inconsistent with this opinion.

Reversed.

MARYLAND CASUALTY COMPANY *v.* JONES.

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

No. 524. Argued April 18, 1929.—Decided June 3, 1929.

1. In a case at law tried in the District Court without a jury under Rev. Stats. §§ 649, 700, rulings made in the progress of the trial on questions of law, such as rulings admitting or rejecting evidence, denying a motion for a nonsuit or referring the case to a special master to take further testimony and state an account, are reviewable, and the right to review them is not lost because of the fact

that a general finding or special findings sufficient apparently to support the judgment are thereafter made by the court. P. 795.

2. A motion for a nonsuit at the close of such a trial, upon the ground that the evidence, with every inference of fact that may be drawn from it in favor of the plaintiff, is insufficient to sustain a judgment in his favor, presents a question of law reviewable by the appellate court. P. 795.
3. Where the Circuit Court of Appeals considered only a part of the assignments of error, treating them as all that were in the case, it is not to be assumed that the others were deemed to have been waived under its rules through not having been specified in the brief, where there is nothing in that court's opinion or in the record referring to such a waiver. P. 796.
4. This Court can not go out of the record to examine a copy of a brief used in the Circuit Court of Appeals, for the purpose of determining whether assignments of error in that court were deemed to have been waived by a failure to specify them in the brief. P. 796.
5. Where a failure of the Circuit Court of Appeals to consider assignments of error is unexplained and apparently erroneous, the case will be remanded with instructions to consider them and, unless they have been waived, take further proceedings in the case. P. 796.

27 F. (2d) 521, reversed.

CERTIORARI, 278 U. S. 596, to review a judgment of the Circuit Court of Appeals affirming a recovery in the District Court in an action on an indemnity bond.

Mr. Walter L. Clark, with whom *Messrs. John Ralph Wilson, W. G. Bonta,* and *Roszel C. Thomsen* were on the brief, for petitioner.

Mr. Nat Schmulowitz, with whom *Messrs. Ernest L. Brune* and *Frederick T. Hyde* were on the brief, for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The respondent brought an action at law against the petitioner in a superior court of California, to recover upon an indemnity bond. The case was removed to the federal

District Court; and was there tried by the court, without the intervention of a jury, which was duly waived by a written stipulation of the parties. Rev. Stat. § 649. The District Court made special findings of fact on which it gave judgment against the defendant. Upon a writ of error this judgment was affirmed by the Circuit Court of Appeals. 27 F. (2d) 521. The case is here for limited review, on the question whether that court 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. 278 U. S. 596.

In the progress of the trial the court made various rulings adverse to the defendant in respect to the admission and exclusion of evidence; denied a motion for nonsuit made by the defendant at the close of the evidence, based on the asserted lack of evidence as to various matters essential to a recovery on the bond; and referred the case to a special master to take further testimony and state an account. To each of these rulings the defendant excepted at the time; and all of these exceptions were duly presented by a bill of exceptions.

After the coming in of the report of the special master the court made special findings of fact, upon which it entered judgment against the defendant. There was no exception to these findings; nor any request for different findings.

In connection with the writ of error the defendant filed twenty-one assignments of error. Some of these were directed to special findings made by the court, and others were specifically directed to the rulings of the court on the admission and rejection of evidence, the denial of the motion for nonsuit, and the reference to the special master.

Despite the fact that all of these assignments of error appeared in the record, the Circuit Court of Appeals stated in its opinion that "All the assignments of error are based

upon the insufficiency of the testimony to support the special findings," and—after stating that on the record presented the court could not consider the sufficiency of the testimony to support the special findings, and that it was not contended that the findings were in themselves insufficient to support the judgment,—affirmed the judgment of the District Court, without referring to or considering the assignments of error relating to the rulings of the court in the progress of the trial.

1. Upon the record in this case the action of the Circuit Court of Appeals appears to have been erroneous. Sec. 700, Rev. Stats., specifically provides that when an issue of fact in a civil cause is found and determined by the court without the intervention of a jury, according to § 649, " the rulings of the court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed." The right granted by the statute to a review of the rulings made during the progress of the trial, is not lost because of the fact that a general finding or special findings sufficient apparently to support the judgment are thereafter made by the court. See *Fleischmann Co.* v. *United States,* 270 U. S. 349, 355, 356; *Lewellyn* v. *Elec. Reduction Co.,* 275 U. S. 243, 248.

Here the rulings of the court to which the defendant excepted and as to which it assigned errors, plainly related to matters of law. The motion for nonsuit—which corresponded to a motion for a directed verdict—presented the question whether the evidence, with every inference of fact that might be drawn from it in favor of the plaintiff, was sufficient in matter of law to sustain a judgment. See *Central Transp. Co.* v. *Pullman's Car Co.,* 139 U. S. 24, 38. This presented a question of law which is reviewable—just as a motion by the plaintiff at the close of a trial without the intervention of a jury, for a declaration

that he is entitled to judgment, presents a question of law which is reviewable by the appellate court. *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 96; *Bank of Waterproof* v. *Fidelity & Deposit Co.*, 299 Fed. 478, 482; *Griffin* v. *Thompson* (C. C. A.), 10 F. (2d) 127, 128; *Sartoris* v. *Utah Construction Co.*, 21 F. (2d) 1, 2. The statement made in *Humphreys* v. *Third National Bank* (C. C. A.) 75 Fed. 852, 855, quoted in *Fleischmann Co.* v. *United States, supra,* p. 356, on which the plaintiff relies, has, plainly, no reference to the review of a ruling made in the progress of a trial as to such a question of law, but relates merely to the mode of presenting for review the conclusions of law involved in special findings.

2. It is urged that the action of the Circuit Court of Appeals in stating that the assignments of error related only to the special findings and in failing to consider the assignments relating to the rulings of the court during the trial, is to be explained by the fact that all the assignments of error except those relating to the special findings had been waived, under the rules of the court, by the failure of the defendant to set them forth in the specifications of error contained in its brief. And for the purpose of determining this question we are asked to examine a copy of the defendant's brief in the Circuit Court of Appeals which has been tendered as an exhibit to the plaintiff's brief in this Court. This is not a part of the record and cannot be looked to by us. The record, to whose consideration we are limited, discloses no waiver of any of the assignments of error that had been filed. Nor does the court in its opinion refer to any waiver as a reason for not considering the assignments.

3. Since on the face of the record the failure of the Circuit Court of Appeals to consider the assignments of error relating to rulings at the hearing is unexplained, and its action appears to have been erroneous, its judgment must be reversed. And the case will be remanded to that

court, with instructions to consider the several assignments of error relating to the rulings of the trial court in the progress of the trial, and—unless they have been waived—take further proceedings in regard thereto. See *Krauss Bros. Co.* v. *Mellon,* 276 U. S. 386, 394; *Buzynski* v. *Luckenbach S. S. Co.,* 277 U. S. 226, 228.

Reversed and remanded.

KIRK, SUPERINTENDENT OF PUBLIC WORKS, ET AL. *v.* MAUMEE VALLEY ELECTRIC COMPANY.

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

No. 674. Argued April 25, 26, 1929.—Decided June 3, 1929.

The State of Ohio constructed and owned a canal for the primary purpose of navigation and for the incidental and subordinate purpose of permitting use of its surplus water for hydraulic power. An Act of March 23, 1840, authorized the leasing of such surplus water for hydraulic purposes when not required for navigation, and subject to resumption of use by the State whenever its use for hydraulic purposes should injuriously affect navigation. Having acquired leases under the Act and improved the canal at large expense under a contract with the State, the plaintiff employed the water leased in the business of generating and selling electricity. Later, an Act of May 11, 1927, directed that a section of the canal above the plaintiff's intake and upon which plaintiff was dependent for its water, should be abandoned for both canal and hydraulic purposes and be held by the State for the purpose of constructing a highway upon the lands occupied by the canal. *Held:*

1. That such abandonment did not impair the obligation of the contracts in the leases or deprive the lessee of property without due process, the leases being only incidental to the use and maintenance of the canal for purposes of navigation and imposing no obligation on the State to maintain the canal for any purpose. P. 802.

2. The making of such leases by administrative officers under the granting act after the canal had ceased to be used by the public

for navigation, but before the passage of the Act providing for its abandonment, did not constitute an abandonment of the navigation purpose by the State and a devotion of the canal by the State to the sale of water rights free from reserved power to abandon the canal and devote it to other uses. P. 804.

33 F. (2d) 318, reversed.

APPEAL from a final decree of a District Court of three judges enjoining the appellants from interfering with the flow of water in part of a canal in such manner as to infringe certain water rights claimed by the appellee.

Mr. George W. Ritter, with whom *Messrs. Gilbert Bettman,* Attorney General of Ohio, *L. F. Laylin, Joseph A. Godown, Leroy Hunt, Martin S. Dodd,* and *Dudley F. Smith* were on the brief, for appellants.

Mr. U. G. Denman, with whom *Mr. Karl E. Burr* was on the brief, for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

This is a direct appeal under § 266 of the Judicial Code from a final decree, following an interlocutory decree, of a district court of three judges for southern Ohio. The decree enjoined appellants, the Superintendent of Public Works of Ohio, a state officer, the City of Toledo, certain villages in Ohio, and the Board of County Commissioners of Lucas County, Ohio, from draining or otherwise interfering with the flow of water in a section of the Miami & Erie Canal in such manner as to interfere with rights of appellee to take surplus water from the canal under certain leases and a grant acquired by it or its assignors from the state. Appellee contends that the Act of the Ohio legislature of May 11, 1927, under which appellants purport to act, is in violation of the Federal Constitution.

The section of the canal in question extends from a point on the Maumee River northeasterly along the river

to Toledo and thence to Lake Erie. The water from the river enters this section of the canal at its western end and flows past the Providence Mills involved in No. 675, *Kirk* v. *Providence Mill Co., post,* p. 807. Some sixteen miles from the inlet is a side-cut through which water may be discharged into the river and so diverted from the rest of the canal. The section from the inlet to this side-cut is described as Lineal Part 2. Appellee's plant is located on Lineal Part 1 which extends from the side-cut northeasterly to the outlet at Toledo, and is thus dependent for its supply of water on a continuous flow through Lineal Part 2.

The several leases were granted by the state, acting through its Board of Public Works, in 1895, 1901, two in 1903, and 1906. Each for a specified consideration or a stipulated rental, purported to grant for a period of thirty years, with privilege of renewal, the right to take from the canal specified amounts of water for hydraulic purposes. In 1910 the lease of 1895 was supplemented and amended to provide for an increased amount of water. For present purposes, we may assume that all rights under these leases and any extension or renewal of them are vested in appellee.

The canal in question and the waters passing through it are the property of the state and all the leases were granted under the provisions of the Act of March 23, 1840, 38 Ohio Laws, 87, authorizing, upon specified terms, disposition for hydraulic purposes of the surplus waters of the canals of the state not required for navigation. By § 22 of that act it was provided that no right to use the waters should be disposed of "except such as shall accrue from the surplus water of the canal . . . after supplying the full quantity necessary for the purposes of navigation" and by § 23 it was enacted that the leases should contain, as did the present leases in substance, a stipu-

lation that the state or its authorized agents " may at any time resume the privilege or right to the use of water, or any portion thereof, whenever it may be deemed necessary for the purpose of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect the navigation. . ."

Following the acquisition of its first lease in 1900, appellee constructed a small hydraulic electric plant on land adjacent to Lineal Part 1. In 1910, appellee, having secured three of the other leases, reconstructed its plant and, pursuant to an agreement with the state, improved the canal at large expense and is now using the water from it in the business of generating and selling electric light and power.

By Act of May 11, 1927, 112 Ohio Laws, 360–363, §§ 14178 to 14178–12 of General Code of Ohio, it was directed that that portion of the Miami & Erie Canal known here as Lineal Part 2 be abandoned for both canal and hydraulic purposes and held by the state for the purpose of constructing a highway upon lands occupied by the canal. It transferred the abandoned part to the supervision and control of the State Highway Director and directed him within sixty days after the Act should take effect, to drain the water from the abandoned part of the canal and to prevent water from flowing into or through that part. Section 4, provided that all leases previously granted for canal or hydraulic purposes on the part of the canal referred to " shall become and be null and void on and after sixty days from the taking effect of this Act." Since Lineal Part 1, from which appellee withdraws water from the canal under its several leases, is fed only by the water flowing from Lineal Part 2, compliance with the statute will also result in draining the water from Lineal Part 1 of the canal and will deprive appellee of the use of the water which it has been withdrawing under its leases.

Appellee asserts, as the district court held, that the effect of the Act of 1927 is to impair the obligation of the contracts embodied in its leases in violation of § 10, Art. I, and to deprive it of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

By Act of January 22, 1920, 108 Ohio Laws, Part 2, 1138, the Ohio Legislature had declared that Lineal Part 1 of the canal should be abandoned. By the same act, purchase of this section by the City of Toledo was authorized, subject to the rights of owners of existing leases. It was provided that if the city should deprive the lessees of " their water privileges " the city should pay them " a fair compensation for the loss of the water to which they are entitled " [1] and the conveyance to the city should so provide. Under this statute Lineal Part 1 was sold and conveyed to the city. Upon the adoption of a resolution by the city council directing that the water be shut off from Lineal Part 1, and upon refusal of the city to pay appellee for the deprivation of its use of the water, appellee brought suit in the Western Division of the Northern District of Ohio for an injunction restraining the city from cutting off the water. A decree of that court denying an injunction was reversed by the Court of Appeals for the Sixth Circuit. *Maumee Valley Electric Co.* v. *City of Toledo,* 13 F. [2d] 98. That court declined to pass upon the power and right of the state to abandon the canal and cut off the water from the lessees but held that the city had entered into a contract with the state for the benefit of appellee to permit the water to flow through the canal unless compensation was paid. The bill of complaint in the present suit sets up the contract with the city and the

[1] Similar legislation authorizing the purchase of Lineal Part 2 by the county commissioners of Lucas County was enacted March 27, 1925, 111 O. L. 367. The option to purchase has not been exercised.

decree in the suit in the northern district, but that decree is not before us for review. It does not appear that the city threatens to violate the decree or that there are any circumstances entitling appellee to any further relief against it upon the contract for its benefit, or that the state through its legislation and conveyance of Lineal Part 1 to the City of Toledo intended to surrender or has surrendered any of its rights in or powers over Lineal Part 2, or has subjected itself to any new or additional obligation to maintain the canal or continue the flow of water through it.

The present suit, therefore, must turn upon the nature and extent of the right to withdraw water from the canal which appellee acquired under the grant and its several leases. To establish that its constitutional rights are infringed, it must show that compliance with the Act of 1927 is inconsistent with and infringes the rights conferred upon it by them. They are public grants by the state, to be construed in the light of the statute of 1840 authorizing them, and the other laws of the state. What the state has granted it may not take away, but the exercise of powers reserved to it under the grant cannot infringe either the contract or due process clauses of the Constitution.

The section of the canal now in question was originally constructed and operated by the state as a part of a larger canal system for purposes of navigation. By Act of February 23, 1820, 18 Ohio Laws 147, commissioners were appointed to locate a canal between Lake Erie and the Ohio River. The canal was constructed under the Act of February 4, 1825, 23 Ohio Laws 50, which created a board of canal commissioners and empowered them to construct a navigable canal, including the section presently involved, to take and use the waters of the state for that purpose, to establish reasonable tolls for the use of that canal and to provide for their collection. Provision was first made for the use of the surplus waters of the

canal for hydraulic power by Act of February 18, 1830, 28 Ohio Laws 58, which was superseded by the Act of March 23, 1840, 38 Ohio Laws 87, under which the present leases were granted.

The paramount object of the state in constructing the canal was to effect navigable communication between Lake Erie and the Ohio River. See *State* v. *Railway Company,* 37 Ohio St. 157. The use of the water for hydraulic purposes was only incidental and subordinate to the declared purpose of the state to promote navigation and was expressly made so by the Leasing Act of 1840, which limited all leases to the use of surplus water not required for purposes of navigation and provided for their abrogation whenever the use of the water for hydraulic purposes interfered with navigation. Leases of surplus water, granted under the Act of 1840 and similar in terms to those involved in the present litigation, have been repeatedly construed by the highest court of the State of Ohio, which has uniformly held that they were only incidental to the use and maintenance of the canal for purposes of navigation; that they imposed no obligation on the state to maintain the canal either for navigation or other purposes and when abandoned by the state the right of lessees to surplus water ceased. *Hubbard* v. *City of Toledo* [1871], 21 Ohio St. 379; *Elevator Co.* v. *Cincinnati* [1876], 30 Ohio St. 629; *Fox* v. *Cincinnati* [1878], 33 Ohio St. 492; *Vought* v. *Railroad Co.* [1898], 58 Ohio St. 123, 161. In *Fox* v. *Cincinnati, supra,* it was held that a lease of surplus waters in the Miami & Erie Canal under the Act of 1840 was subject to the power of the state to abandon the *locus in quo* for purposes of navigation and to convert it into a city highway. On writ of error, this Court affirmed the judgment of the state court, 104 U. S. 783, saying by Chief Justice Waite [p. 785]:

"The use of the water for hydraulic purposes is but an incident to the principal object for which the canal was

built; to wit, navigation. The large expenditures of the State were to furnish, not water-power, but a navigable highway for the transportation of persons and property. The authority of the board of public works to contract in respect to power was expressly confined to such water as remained after the wants of navigation had been supplied; and it never could have been intended in this way to impose on the State an obligation to keep up the canal, no matter what the cost, for the sole purpose of meeting the requirements of its water leases. There was certainly no duty resting on the State to maintain the canal for navigation any longer than the public necessities seem to require. When it was no longer needed, it might be abandoned; and, if abandoned, the water might be withdrawn altogether."

The court below, recognizing that such had been the established construction of surplus water leases, thought nevertheless that as at the time of appellee's first lease, 1895, navigation on the canal had very much diminished and at the time of the later leases had ceased, the state, by continuing to grant leases of surplus water under the Act of 1840 must be taken to have abandoned the use of the canal for navigation and to have made use of it only as a source of water for sale for hydraulic purposes. Hence it concluded that the leases could no longer be construed as were the earlier leases by this and the state court, but that they must be taken as grants of the right to use the water without any power reserved in the state to abandon the canal or to devote it to other uses.

Even if it be assumed that there was a complete nonuse by the public of the canal for purposes of navigation as early as 1895, which seems to be in dispute, neither the court below nor the appellee points to any act or omission on the part of the state indicating abandonment of the canal by it as an instrument of navigation before the act of the Legislature of 1927, or any act devot-

ing it to other purposes, other than the making of leases or grants which, as before, purported to deal only with surplus waters not required for navigation. Instead, reliance is placed on the fact that there had been a gradual abandonment of the use of the canal for navigation by the public.

If, under the local law, the state might abandon the canal, while still used for navigation, by appropriate legislative action and by such abandonment terminate the rights of lessees under the Act of 1840, which appellee does not deny, it is difficult to see how the failure of the public to use the canal and the continued practice of granting leases of surplus waters by administrative officials under the Act of 1840, which the courts of Ohio had repeatedly held were subject to the power of the state to abandon the canal, evidenced a change of state policy or forfeited the right which had resided in it from the beginning to abandon the canal and devote it to other purposes.

The power to abandon the canal as an instrument of navigation resided in the state legislature and has been exercised from time to time with respect to designated sections.[2] That it had not, before the Act of 1927, abandoned the section of the canal now in question as such an instrumentality appears from the Act of the Legislature of April 25, 1898, 93 Ohio Laws 370, authorizing the board of public works to grant leases or licenses to persons or corporations to operate boats in the canal by electric power and requiring them to propel the boats of others for hire and by the Act of April 9, 1902, 95 Ohio Laws 118, declaring it to be the settled policy of the state to maintain the

[2] Act of March 24, 1863, 60 O. L. 44 (involved in *Fox* v. *Cincinnati*, *supra*); Act of March 26, 1864, 61 O. L. 74; Act of April 12, 1888, 85 O. L. 207; Act of March 3, 1891, 88 O. L. 72; Act of January 22, 1920, 108 O. L. Part 2, 1138; Act of March 25, 1925, 111 O. L. 208; Act of March 27, 1925, 111 O. L. 367; Act of April 21, 1927, 112 O. L. 388; Act of May 11, 1927, 112 O. L. 360.

Miami & Erie Canal as a public canal and providing that boats built for use upon it for freight transportation should be purchased by the state at their fair value if, in the future, the policy of the state should be changed by abandonment of the canal so as to make the boats useless for transportation.

These statutes exhibit a continuing purpose of the legislature to stimulate and encourage the use of the canal for purposes of navigation for which it was established. The fact that such stimulation was found necessary or desirable and that it ultimately failed of its object, does not indicate, in event of failure, a purpose on the part of the state to relinquish its power to abandon the canal and devote it to other purposes unhindered by the leases of surplus waters.

We find in this case no circumstances differentiating it from the earlier decisions in this and the Ohio courts. In each, as in the present case, the failure of the public to make sufficient use of a particular sector for transportation led to its abandonment and appropriation to other purposes and to the necessary termination of all rights under grants of surplus water which, being but incidents to the maintenance of the canal for navigation, ceased when that purpose was abandoned. The fact that some of the earlier cases involved other state canals on which there was still some navigation at the time of the granting of the leases there involved, and the additional fact that the present appellee under its supplemental agreement with the state bears the expense of maintaining and patroling the canal, we do not regard as sufficient to distinguish this case from those so long acquiesced in. Nor can the case of *State ex rel. Crabbe* v. *Middletown Hydraulic Co.,* 114 Ohio St. 437, be taken to have overruled, *sub silentio,* the rule announced in the former cases which was not involved in its decision.

The grant was of water to be taken from the river near the entrance to the canal. Appellee admits that of itself the grant imposed no obligation on the state to continue the canal in use. The only claim made by appellee under this grant is of the right to have the specified amount of water come to it through the canal so long as it is maintained as such. Consequently, appellee has no right under this grant, apart from the right claimed under its leases, to have the state maintain the canal, which latter we find to be non-existent, and we need not decide what effect in other respects, if any, the Act of 1927 had upon the grant.

The decree below will be reversed, but the decree to be entered will be without prejudice to the rights of appellee against the City of Toledo under the Ohio statute of January 22, 1920, and under the conveyance to the City of Toledo made pursuant to it, and without prejudice to the rights of appellee under the final decree of the District Court for Northern Ohio, entered on the mandate of the Court of Appeals for the Sixth Circuit in the suit entitled *Maumee Valley Electric Company* v. *The City of Toledo, et al.*

Reversed.

KIRK, SUPERINTENDENT OF PUBLIC WORKS, ET AL. *v.* THE PROVIDENCE MILL COMPANY.

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

No. 675. Argued April 26, 1929.—Decided June 3, 1929.

A grant of the right to use surplus water from a state canal, *held* subject to the right of the State to abandon the canal and devote it to other purposes—on the authority of *Kirk* v. *Maumee Valley Co., ante,* p. 797. P. 809.

Reversed.

APPEAL from a final decree of the District Court of three judges enjoining the appellants from interfering with the flow of water in part of a canal in such manner as to infringe certain water rights claimed by the appellee.

Mr. Gilbert Bettman, Attorney General of Ohio, with whom *Messrs. L. F. Laylin, Joseph A. Godown,* and *Leroy W. Hunt* were on the brief, for appellants.

Mr. Karl E. Burr, with whom *Messrs. U. G. Denman* and *T. W. Christian* were on the brief, for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

This is a direct appeal, under § 266 of the Judicial Code, from a final decree, following an interlocutory decree, of a district court of three judges for southern Ohio, enjoining appellants, the state director of highways, the superintendent of public works of Ohio, and county commissioners, from draining or otherwise interfering with the flow of water in a section of the Miami & Erie Canal, in such manner as to interfere with the rights of appellee to take surplus water under a grant from the state to appellee's predecessor in interest. The questions presented are the same as those in No. 674, *Kirk* v. *Maumee Valley Electric Company, ante,* p. 797, decided this day, the only difference being in the nature of the grant under which appellee derives its rights to the water.

The grant here involved is embraced in an indenture of September 1, 1842, between the commissioner of the Board of Public Works and one Minor, as readjusted on February 23, 1846. By it Minor, a riparian owner, released and quit claimed to the state all claims against it arising out of the use and occupation by the state of water from the Maumee River and of lands used in the construction and operation of the Wabash & Erie canal,

now the Miami & Erie. This release was made in consideration of a perpetual grant by the state, made after the passage of the Act of March 23, 1840, 38 O. L. 87, discussed at length in our opinion in No. 674, *Kirk* v. *Maumee Valley Electric Company, supra.* By the grant the state sold and conveyed a specified quantity of water "except when otherwise necessary for the navigation of the canal" and the contract as readjusted was similarly restricted. The grant was subject to the limitations of the Statute of 1840, and the rights conferred under it did not, for present purposes, differ from those considered in No. 674. They were likewise subject to the reserved power of the state to abandon the canal and devote it to other purposes, which was exercised by the Act of the Ohio Legislature of May 11, 1927, 112 Ohio Laws 350, for the reasons discussed at length in No. 674, and equally applicable here, the judgment below is

Reversed.

DECISIONS PER CURIAM, FROM FEBRUARY 19, 1929, TO AND INCLUDING JUNE 3, 1929.*

No. 645. WILCOX *v.* UNITED STATES. See *post,* p. 834.

No. 666. STILZ *v.* BETHLEHEM SHIPBUILDING CORP'N. See *post,* p. 834.

No. 696. THOMAS *v.* MAINE CENTRAL R. CO. See *post,* p. 835.

No. 591. OSAGE INDIANS *v.* UNITED STATES. Appeal from the Court of Claims, 66 Ct. Cls. 64. Submitted February 18, 1929. Decided February 25, 1929. *Per Curiam:* The appeal is dismissed for lack of jurisdiction on the authority of the Act of February 13, 1925 (43 Stat. 936). The petition for writ of certiorari is denied. *Messrs. C. H. Merillat, C. J. Kappler,* and *T. J. Leahy* for appellants. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. George T. Stormont,* for the United States.

No. 572. BURKE *v.* OREGON. Appeal from the Supreme Court of Oregon, 126 Ore. 651. Jurisdictional statement submitted February 25, 1929. Decided March 5, 1929. *Per Curiam:* The appeal is dismissed for want of jurisdiction, for the reason that the federal question presented is frivolous, on the authority of *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toup* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Town of Graham,* 253 U. S. 193, 195; *Quong Ham Wah* v. *Industrial Comm'n,* 255 U. S. 445, 449. *Mr. Thomas Mannix* for appellant. *Messrs. Stanley Myers, Leon W. Behrman,* and *George Mowry* for appellee.

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* For decisions on applications for certiorari, see *post,* pp. 827, 834.

No. 321. SAMPERE *v.* NEW ORLEANS. Error to and appeal from the Supreme Court of Louisiana, 166 La. 776. Argued February 28, March 1, 1929. Decided March 5, 1929. *Per Curiam:* Affirmed on the authority of (1) *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; (2) *Sperry & Hutchison Co.* v. *Rhodes*, 220 U. S. 502, 505; *Williams* v. *Walsh*, 222 U. S. 415, 420. *Mr. William Winans Wall* for plaintiff in error and appellant. *Mr. Bertrand I. Cahn,* with whom *Messrs. Henry B. Curtis* and *Francis P. Burns* were on the brief, for defendant in error and appellee.

No. 355. UNITED STATES ET AL. *v.* ANCHOR COAL CO. ET AL.;

No. 356. BARTON COAL CO. ET AL. *v.* SAME;

No. 357. PITTSBURGH OPERATORS' LAKE RATE COMMITTEE ET AL. *v.* SAME; and

No. 358. BALTIMORE & OHIO R. CO. ET AL. *v.* SAME. Appeals from the District Court of the United States for the Southern District of West Virginia, 25 F. (2d) 462. Argued February 19, 20, 1929. Decided March 5, 1929. *Per Curiam:* These appeals have been fully argued and considered, but in the present situation we find that they present moot issues and that further proceedings upon the merits can neither be had here nor in the court of first instance. To dismiss the appeals would leave the injunction in force, at least apparently so, notwithstanding that the basis therefor has disappeared. Our action must, therefore, dispose of the cause, not merely of the appellate proceedings which brought it here. The practice now established by this Court under similar conditions and circumstances is to reverse the decree below and remand the cause with directions to dismiss the bill. The order will be, therefore, that the decree is reversed with directions to the District Court

to dismiss the bill of complaint without costs, because the controversy involved has become moot and, therefore, is no longer a subject appropriate for judicial action. *United States* v. *Hamburg American Co.*, 239 U. S. 466, 475; *Berry* v. *Davis*, 242 U. S. 468, 470; *Board of Public Utility Comm'rs* v. *Compania General de Tabacos de Filipinas*, 249 U. S. 425; *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *Heitmuller* v. *Stokes*, 256 U. S. 359; *Brownlow* v. *Schwartz*, 261 U. S. 216; *Alejandrino* v. *Quezon*, 271 U. S. 528, 535; *Norwegian Co.* v. *Tariff Comm'n*, 274 U. S. 106, 112. Mr. Justice Sanford took no part in the consideration or decision of this cause. *Mr. Luther M. Walter*, Special Assistant to the Attorney General, with whom *Mr. Daniel W. Knowlton* was on the brief, for appellants United States and Interstate Commerce Commission. *Messrs. Ernest S. Ballard* and *August G. Gutheim*, with whom *Mr. Frank E. Harkness* was on the brief, for appellants Barton Coal Company and Pittsburgh Operators' Lake Rate Committee et al. *Mr. Henry Wolf Biklé*, with whom *Messrs. Clyde Brown, William N. King, Andrew P. Martin, Frederic D. McKenney, Atlee Pomerene, James Stilwell*, and *Charles R. Webber* were on the brief, for appellants Baltimore & Ohio Railroad Company et al. *Messrs. John W. Davis* and *J. V. Norman*, with whom *Messrs. E. L. Greever, G. F. Graham*, and *Robert E. Quirk* were on the brief, for appellees Anchor Coal Company et al. *Mr. C. R. Hillyer* for appellees Whiting-Plover Paper Company et al.

No. 514. Ohio Oil Co. *v.* Conway. Appeal from the District Court of the United States for the Eastern District of Louisiana, 28 F. (2d) 441. Argued February 26, 1929. Decided March 5, 1929. *Per Curiam:* This is a suit to prevent the enforcement against the plaintiff of a statute of Louisiana (Act 5 of 1928) amending a prior

statute (Act 140 of 1922) imposing a severance tax on the production of oil as a natural product of the soil. The prior act fixed the tax at 3 per cent. of the market value of the oil at the time and place of severance, and the amendatory act makes it a graduated tax ranging from 4 to 11 cents per barrel according to the gravity of the oil. As applied to the plaintiff's operations the tax fixed by the amendatory act is about $12,000 more in each period of three months than the tax under the prior act would be for the like period. While admitting the validity of the prior act and declaring a willingness and readiness to pay the tax imposed thereby, the plaintiff alleges that the change and enlarged tax imposed by the amendatory act is invalid in that that act as applied to the plaintiff's operations contravenes the equal protection clause of the fourteenth amendment to the Constitution of the United States, and also a provision of the Constitution of the State requiring that severance taxes be predicated upon "either the quantity or value" of the product at the time and place of its severance.

The parties are citizens of different States and the matter in controversy exceeds in value the jurisdictional requirement. On bringing the suit, the plaintiff applied for an interlocutory injunction restraining the enforcement against it of the amendatory act pending the decree on final hearing; but the District Court, composed of three judges conformably to § 380 of Title 28 of the United States Code, denied the application. An appeal from that order brings it under review.

The application for an interlocutory injunction was submitted on ex parte affidavits which are harmonious in some particulars and contradictory in other. The affidavits, especially those for the defendant, are open to the criticism that on some points mere conclusions are given instead of primary facts. But enough appears to make it plain that there is a real dispute over material questions

of fact which can not be satisfactorily resolved upon the present affidavits and yet must be resolved before the constitutional validity of the amendatory statute can be determined.

The statute provides for the enforced payment of the tax quarterly in each year. If the tax be paid during the pendency of the suit, and the statute be adjudged invalid by the final decree, the plaintiff will be remediless. The laws of the State afford no remedy whereby restitution of the money so paid may be enforced, even where the payment is under both protest and compulsion.

Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted. *Love* v. *Atchison, Topeka & Santa Fe R. Co.*, 185 Fed. 321, 331–332.

Under this rule and in view of the entire absence under the local law of any remedy enforceable by the plaintiff if the tax be paid and afterwards held invalid by the final decree, we are of opinion that the application for an interlocutory injunction should have been granted, and that this should have been done upon terms requiring that the plaintiff (*a*) punctually and regularly pay the tax fixed by the prior act, (*b*) give an adequate bond whereby, in the event the amendatory act is adjudged valid by the final decree, the plaintiff and its surety will be obligated to pay, with interest and without other penalty, such further amounts as may be necessary, with the prior payments, to satisfy the tax fixed by that act, and (*c*) prosecute the suit with reasonable expedition to a final decree.

The order is accordingly vacated with directions for further proceedings in conformity with this opinion. *Mr. S. L. Herold,* with whom *Messrs. S. P. Sousin* and *R. L. Benoit* were on the brief, for appellant. *Mr. Wood H. Thompson,* Assistant Attorney General of Louisiana, with whom *Mr. Percy Saint,* Attorney General, was on the brief, for appellee.

No. 15, original. UNITED STATES *v.* UTAH. Motion submitted March 5, 1929. Decided March 11, 1929.

ORDER

On consideration of the motion by the United States for the appointment of a Special Master to take the evidence in this case and report the same to this Court with his findings of fact, conclusions of law, and recommendations for a decree,

It is now here ordered that Charles Warren, of Washington, D. C., be, and he is hereby, appointed a Special Master with the powers of a Master in Chancery, as provided in the rules of this Court, to take the evidence *viva voce* or by deposition and to report the same to the Court with his findings of fact, conclusions of law, and recommendations for a decree—all subject to examination, consideration, approval, modification, or other disposal by the Court.

The Special Master shall have authority (1) to employ competent stenographic and clerical assistants, (2) to fix the times and places of taking the evidence and to limit the time within which each party shall present its evidence, and (3) to issue subpœnas to secure the attendance of witnesses and to administer oaths. Depositions of witnesses residing at any place may be taken upon stipulation of the parties, or by the mode provided in the rules of practice for the Courts of Equity of the United States, or as provided by §§ 863, 865–867 of the Revised Statutes for

the taking of depositions *de bene esse* in the District Courts, or as may be directed by the Master. They may be returned in the first instance to the Master. When the Special Master's report of his findings of fact, conclusions of law, and recommendations for a decree is completed, the Clerk of the Court shall cause the same to be printed; and when the same is presented to the Court in printed form, the parties will 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 proportions as the Court hereafter may 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.

Attorney General Mitchell for the United States. No appearance for defendant.

No. 728. BUNDY *v.* BUNDY. See *post*, p. 842.

No. 631. UNITED STATES EX REL. WENGER *v.* MATHUES. Appeal from the Circuit Court of Appeals for the Third Circuit, 29 F. (2d) 1023. Jurisdictional statement submitted March 5, 1929. Decided March 11, 1929. *Per Curiam:* The appeal is dismissed on the authority of § 240 (b) and (c) of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 938), for lack of jurisdiction. *Mr. Joseph Blank* for appellant. *Attorney General Mitchell* for appellee.

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No. 74. LUN ET AL. *v.* BOND ET AL. Error to the Supreme Court of Mississippi, 148 Miss. 467. Argued March 5, 1929. Decided March 11, 1929. *Per Curiam:* The judgment is reversed, with directions to the Circuit Court of Coahoma County, Miss., to dismiss the petition for mandamus without costs, because the controversy involved has become moot. *Atherton Mills* v. *Johnston,* 259 U. S. 13; *Brownlow* v. *Schwartz,* 261 U. S. 216; *Alejandrino* v. *Quezon,* 271 U. S. 528, 535; *Norwegian Co.* v. *Tariff Commission,* 274 U. S. 106, 112. *Messrs. James M. Flowers, Earl Brewer,* and *Edward C. Brewer* submitted for plaintiffs in error. *Mr. James A. Lauderdale,* with whom *Messrs. Rush H. Knox,* Attorney General of Mississippi, and *Mr. E. C. Sharp* were on the brief, for defendants in error.

No. —, original. EX PARTE CITY OF CAPE MAY. Motion submitted March 11, 1929. Decided April 8, 1929. *Per Curiam:* Motion for leave to file petition for writ of mandamus denied. *Mr. Edmond C. Fletcher* for petitioner.

No. 634. JENSEN *v.* CONTINENTAL LIFE INS. CO. Appeal from the Circuit Court of Appeals for the Third Circuit, 28 F. (2d) 545. Jurisdictional statement submitted March 11, 1929. Decided April 8, 1929. *Per Curiam:* The appeal is dismissed on the authority of § 240 (b) and (c) of the Judicial Code as amended by the act of February 13, 1925 (43 Stat. 938), for lack of jurisdiction. *Mr. Charles A. Donnelly* for appellant. *Mr. W. Calvin Chesnut* for appellee.

No. 662. KLAR *v.* ERIE R. CO. ET AL. Appeal from the Supreme Court of Ohio, 118 Oh. St. 612. Jurisdictional statement submitted March 11, 1929. Decided April 8, 1929. *Per Curiam:* The appeal is dismissed on the au-

thority of § 237 (a) of the Judicial Code, as amended by the act of February 13, 1925 (43 Stat. 936, 937), for lack of jurisdiction and the absence of a federal question. Treating the appeal as an application for certiorari the same is also denied. *Mr. Don F. Reed* for appellant. *Messrs. E. A. Foote* and *D. B. Holt* for appellees.

No. 220. JOHNSON *v.* UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION. Argued February 21, 1929. Restored to Docket April 8, 1929. *Per Curiam:* This cause is restored to the docket for reargument and is set down for hearing with No. 676, United States Shipping Board Merchant Fleet Corporation *v.* Lustgarten, the two cases to be argued as one. The Court especially invites argument on the following questions:

1. Is the United States Shipping Board Merchant Fleet Corporation, as an agency of the United States, immune from suit for the tortious acts of persons whom it has employed to carry on the operation of merchant vessels of the United States, and who have been selected by it with due care?

2. Are the remedies given against the United States Shipping Board Emergency Fleet Corporation by the suits in admiralty act of March 9, 1920, exclusive of all other remedies, whether at law or in admiralty, for liabilities of the Fleet Corporation growing out of the operation of merchant vessels of the United States?

3. Is the two-year period of limitation prescribed in the suits in admiralty act applicable to the present suit?

Mr. Myron Scott, pro hac vice, by special leave of Court, with whom *Messrs. Silas B. Axtell* and *Charles A. Ellis* were on the brief, for petitioner. *Mr. J. Frank Staley,* with whom *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Mr. Chauncey G. Parker,* General Counsel, Emergency Fleet Corporation, were on the brief, for respondent.

No. 632. FARMERS LOAN & TRUST CO. *v.* MINNESOTA. Appeal from the Supreme Court of Minnesota. (Reported below as *"In re Estate of Henry R. Taylor,"* 175 Minn. 310, s. c., 176 Minn. 634.) Jurisdictional statement submitted April 8, 1929. Decided April 15, 1929. *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 Stat. 936, 937), for lack of jurisdiction, on the ground that the judgment 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. *Messrs. George W. Morgan* and *Cleon Headley* for appellant. No appearance for appellee.

No. 322. MCKAY *v.* MCINNES ET AL. Appeal from the Supreme Judicial Court of Maine, 127 Me. 110. Submitted April 8, 1929. Decided April 15, 1929. *Per Curiam:* Affirmed on the authority of *Ownbey* v. *Morgan,* 256 U. S. 94, 109; *Coffin Bros.* v. *Bennett,* 277 U. S. 29, 31. *Messrs. Robert E. Quirk, George F. Graham,* and *Ralph B. Fleharty* were on the brief for appellant. *Messrs. Carroll S. Chaplin* and *Sidney St. F. Thaxter* were on the brief for appellees.

No. 7, original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;
No. 11, original. MICHIGAN *v.* SAME; and
No. 12, original. NEW YORK *v.* SAME. April 16, 1929. *Per Curiam:* Leave granted to file suggestions by the City of Chicago in reply to brief in opposition to motion of the City of Chicago for leave to intervene as a party defendant.

Mr. Samuel A. Ettelson in support of the motion.

No. 13, original. CONNECTICUT *v.* MASSACHUSETTS. Motion submitted April 15, 1929. Decided April 22, 1929. *Per Curiam:* Motion to cite the Secretary of War and Chief of Engineers of the United States Army as parties defendant denied. *Mr. Ernest L. Averill* for complainant, in support of the motion. *Mr. Bentley W. Warren* for defendant in opposition thereto.

No. 7, original. WISCONSIN ET AL. *v.* ILLINOIS ET AL.;
No. 11, original. MICHIGAN *v.* SAME; and
No. 12, original. NEW YORK *v.* SAME. Motion submitted April 15, 1929. Decided April 22, 1929. *Per Curiam:* Motion of the City of Chicago for leave to intervene denied. *Mr. Samuel A. Ettelson* in support of the motion. *Mr. Hamilton Ward* for complainant New York; and *Mr. Herman L. Ekern* for complainant Wisconsin, in opposition thereto.

No. 495. ATLANTA & CHARLOTTE AIR LINE R. CO. ET AL. *v.* GREEN. On writ of certiorari to the Supreme Court of South Carolina. Argued April 16, 1929. Decided April 22, 1929. *Per Curiam:* Reversed on the authority of *Davis* v. *Green,* 260 U. S. 349; *St. Louis-San Francisco Ry.* v. *Mills,* 271 U. S. 344; *Atlantic Coast Line* v. *Southwell,* 275 U. S. 64; and cause remanded for further proceedings. *Mr. Sidney R. Prince,* with whom *Messrs. H. O'B. Cooper, F. G. Tompkins, L. E. Jeffries,* and *H. E. DePass* were on the brief, for petitioners. *Mr. C. Erskine Daniel,* with whom *Messrs. I. C. Daniel* and *Horace L. Bomar* were on the brief, for respondent.

No. 843. DAVIDSON *v.* CALIFORNIA. See *post,* p. 856.

No. 715. WILSON *v.* MCLANE ET AL.; and

No. 716. HARVIE, DOING BUSINESS UNDER THE NAME AND STYLE OF AUTOMATIC SALES COMPANY, *v.* HEISE ET AL. Appeals from the Supreme Court of South Carolina, 150 S. C. 277. Jurisdictional statement submitted April 22, 1929. Decided April 29, 1929. *Per Curiam:* The appeals are dismissed for want of a properly presented substantial federal question on the authority of *Miller* v. *Cornwall R. R.*, 168 U. S. 131, 134; *Thomas* v. *Iowa*, 209 U. S. 258, 263; *Bowe* v. *Scott*, 233 U. S. 658, 665. *Mr. P. A. Bonham* for appellants. No appearance for appellees.

No. 721. BOOHER *v.* WASHINGTON. Error to the Supreme Court of Washington. Return to rule submitted April 29, 1929. Decided May 13, 1929. *Per Curiam:* Upon consideration of the informal return to the rule to show cause heretofore issued in this case, miscalled a motion to reinstate, and upon examination of the unprinted record herein submitted, the Court finds no federal question, or jurisdiction in this Court, and the appeal is therefore dismissed. *Mr. Frank R. Jeffrey* for plaintiff in error. No appearance for defendant in error.

No. 854. RICHARDSON ET AL. *v.* UNITED STATES. See *post*, p. 859.

No. 261. WALLACE *v.* MOTOR PRODUCTS CORP'N. See *post*, p. 859.

No. 718. INTERNATIONAL SHOE CO. *v.* FEDERAL TRADE COMM'N. See *post*, p. 832.

No. 19, original. EX PARTE ATLANTIC COAST LINE R. CO. Return to rule presented April 22, 1929. Decided May 20, 1929. *Per Curiam:* Upon examination of the returns to the rule to show cause, the Court finds that the reasons

given by the respondent, the District Judge for the Northern District of Florida, that the case is likely to become moot, are not sufficient to justify his failure, immediately upon application, to call to his assistance, to hear and determine the application, two other judges, in accord with the provisions for direct review by this Court of the District Court, under § 4 of 238 of the Judicial Code, as amended by the act of February 13, 1925, c. 229, 43 Stat. 936. See *Virginian Ry.* v. *United States,* 272 U. S. 658, 672. And the rule against the respondent is made absolute, and directed to be certified to him for due observance thereof. We assume it will not be necessary to issue a formal writ. *Messrs. F. B. Grier, W. E. Kay,* and *Robert C. Alston* for petitioner.

No. —, original. NEW JERSEY *v.* STATE OF NEW YORK ET AL. Motion submitted May 13, 1929. Decided May 20, 1929. *Per Curiam:* Motion for leave to file a bill of complaint herein is granted, and process is ordered to issue, returnable on Monday, May 27 next. *Messrs. Duane E. Minard* and *Williams A. Stevens* for complainant. *Messrs. Hamilton Ward,* Attorney General of New York, and *Albert J. Danaher* for the State of New York.

No. —, original. NEW JERSEY *v.* CITY OF NEW YORK. Motion submitted May 13, 1929. Decided May 20, 1929. *Per Curiam:* Motion for leave to file a bill of complaint herein is granted, and process is ordered to issue, returnable on Monday, May 27 next. *Messrs. Duane E. Minard* and *Williams A. Stevens* for complainant. *Messrs. Arthur J. W. Hilley* and *J. Joseph Lilly* for defendant.

No. 754. PERRY ET AL. *v.* CHELAN ELECTRIC CO. ET AL. Appeal from the Supreme Court of Washington, 148 Wash. 353. Return to rule submitted May 13, 1929.

Decided May 20, 1929. *Per Curiam:* The return to the rule to show cause is held insufficient and 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. Frank Reeves* and *Crooker Perry, pro se,* for appellants. *Messrs. Thomas Balmer* and *Charles S. Albert* for appellees.

No. 873. GREEN ET AL. *v.* AETNA LIFE INS. CO. See *post,* p. 861.

No. 759. TEFFT *v.* GRANT, RECEIVER, ET AL. Appeal from the Supreme Court of Washington, 148 Wash. 195. Jurisdictional statement submitted May 13, 1929. Decided May 20, 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. *Mr. L. J. Tefft, pro se.* No appearance for appellees.

No. 746. SUPERIOR CONFECTION CO. *v.* CRAIG ET AL.; and

No. 747. KISER *v.* HEISE ET AL. Appeals from the Supreme Court of South Carolina, 150 S. C. 277. Jurisdictional statement submitted May 13, 1929. Decided May 20, 1929. *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. Treating the appeals as applications for certiorari, the same are denied. The motions for a rule to show cause and for the enforcement of the order of supersedeas are therefore also denied. *Mr. Joseph A. Tolbert* for appellants. No appearance for appellees.

No. 905. BUZYNSKI *v.* LUCKENBACH S. S. Co., INC., ET AL. See *post*, p. 867.

No. 791. KEMP *v.* SEATTLE. Appeal from and error to the Supreme Court of Washington, 149 Wash. 197. Jurisdictional statement submitted May 20, 1929. Decided May 27, 1929. *Per Curiam:* The appeal and writ of error 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. Treating the appeal and writ of error as an application for certiorari the same is denied. *Mr. G. Ward Kemp, pro se. Messrs. Thomas J. L. Kennedy* and *J. Ambler Newton* for respondent.

No. —, original. NEW JERSEY *v.* DELAWARE. Motion submitted May 27, 1929. Decided June 3, 1929. *Per Curiam:* The motion for leave to file a bill of complaint in this case is granted, and process is ordered to issue returnable on Monday, July 1 next. *Mr. Duane E. Minard* for complainant. No appearance for defendant.

No. —, original. EX PARTE HOBBS, COMMISSIONER OF INSURANCE, ET AL. Motion submitted May 27, 1929. Decided June 3, 1929. *Per Curiam:* The motion for leave to file petition for a writ of mandamus is granted, and a rule is ordered to issue returnable on Monday, July 1 next. *Mr. John G. Egan* for petitioners.

No. 931. JUMER *v.* SMITH ET AL. Appeal from the Supreme Court of Washington. Motion submitted May 27, 1929. Decided June 3, 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, which is therefore dismissed. Treating the appeal as an application for certiorari, the same is 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. *Barbara J. Jumer, pro se.* No appearance for respondents.

No. 935. ALDERMAN *v.* UNITED STATES. See *post,* p. 869.

No. 571. WHEELER LUMBER BRIDGE & SUPPLY CO. *v.* UNITED STATES; and

No. 576. INDIAN MOTOCYCLE CO. *v.* UNITED STATES. On certificates from the Court of Claims. Argued April 25, 1929. Restored to docket June 3, 1929. *Per Curiam:* It is now here ordered by this Court that these cases be, and they are hereby, restored to the docket for reconsideration, and that the judgments heretofore entered herein be, and they are hereby, revoked and set aside, and that the opinion announced in these cases on Monday, May 27 last, be, and it is hereby, ordered to be withdrawn. *Mr. Jesse I. Miller* for Wheeler Lumber Bridge & Supply Company. *Attorney General Mitchell, Assistant Attorney General Galloway, Messrs. Alfred A. Wheat* and *Gardner P. Lloyd,* Special Assistants to the Attorney General, and *Mr. Joseph H. Sheppard* were on the brief for the United States in No. 571. *Mr. Monte Appel,* with whom *Mr. Frederick Schwertner* was on the brief, for Indian Motocycle Company. *Attorney General Mitchell,* and *Messrs. Alfred A. Wheat* and *Gardner P. Lloyd,* Special Assistants to the Attorney General, were on the brief for the United States in No. 576.

PETITIONS FOR CERTIORARI GRANTED, FROM FEBRUARY 19, 1929, TO AND INCLUDING JUNE 3, 1929.

No. 619. CHESAPEAKE & OHIO R. Co. *v.* MIHAS. February 25, 1929. Petition for writ of certiorari to the Appellate Court of Illinois, First District, and the Supreme Court of Illinois granted. *Mr. David H. Leake* for petitioner. *Mr. John P. Bramhall* for respondent.

No. 621. KANSAS CITY SOUTHERN R. Co. *v.* GUARDIAN TRUST CO. ET AL. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. F. H. Moore, Cyrus Crane, A. F. Smith,* and *Samuel W. Moore* for petitioner. No appearance for respondents.

No. 622. GENERAL INS. Co. *v.* NORTHERN PACIFIC R. Co. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. James B. Howe* for petitioner. *Mr. D. F. Lyons* for respondent.

No. 629. LINDGREN, ADMINISTRATOR, *v.* UNITED STATES ET AL. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. Jacob L. Morewitz* for petitioner. No appearance for respondents.

No. 647. BARRY, SERGEANT AT ARMS OF THE U. S. SENATE, ET AL. *v.* UNITED STATES EX REL. CUNNINGHAM. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted.

Mr. George W. Wickersham for petitioners. *Messrs. Benjamin M. Golder* and *Ruby R. Vale* for respondent.

No. 672. GUNNING *v.* COOLEY. March 5, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. H. Prescott Gatley, Benjamin S. Minor,* and *Arthur P. Drury* for petitioner. *Mr. Alvin L. Newmyer* for respondent.

No. 676. U. S. SHIPPING BOARD MERCHANT FLEET CORPORATION, ETC., ET AL. *v.* LUSTGARTEN. March 5, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Attorney General Mitchell, Assistant Attorney General Farnum,* and *Messrs. J. Frank Staley, Chauncey G. Parker,* and *F. R. Conway* for petitioners. *Mr. Silas B. Axtell* for respondent.

No. 678. O'CONNOR *v.* ANDERSON, COLLECTOR OF INTERNAL REVENUE. March 5, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. D. Basil O'Connor, pro se. Attorney General Mitchell* for respondent.

No. 686. OHIO EX REL. POPOVICI, VICE CONSUL OF ROUMANIA, *v.* AGLER ET AL. March 11, 1929. Petition for writ of certiorari to the Supreme Court of Ohio granted. *Messrs. Atlee Pomerene* and *Frank Harrison* for petitioner. No appearance for respondents.

No. 693. WABASH R. CO. ET AL. *v.* BARCLAY AND WILLOUGHBY CO.; and

No. 694. AUSTIN *v.* BARCLAY AND WILLOUGHBY CO. March 11, 1929. Petitions for writs of certiorari to the

Circuit Court of Appeals for the Second Circuit granted. *Messrs. Charles E. Hughes, Winslow S. Pierce* and *F. C. Nicodemus, Jr.*, for Wabash Railway Company et al. *Mr. Charles E. Hughes* for Austin. *Messrs. Wm. R. Begg, Ellis Ames Ballard,* and *Joseph S. Clark* for respondents.

No. 723. DISTRICT OF COLUMBIA *v.* THOMPSON. March 11, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. William W. Bride* for petitioner. No appearance for respondent.

No. 711. WHEELER *v.* GREENE, RECEIVER, ETC. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted, and the case advanced and assigned for argument on Monday, October 7, next. *Messrs. Henry Jackson Darby* and *Joseph V. Quarles* for petitioner. *Messrs. Edwin S. Mack* and *Arthur W. Fairchild* for respondent.

No. 739. ANGLO & LONDON PARIS NATIONAL BANK OF SAN FRANCISCO *v.* CONSOLIDATED NATIONAL BANK OF TUCSON. April 15, 1929. Petition for writ of certiorari to the Supreme Court of Arizona and Superior Court of Pima County, State of Arizona, granted. *Messrs. Frederic R. Coudert* and *Mahlon B. Doing* for petitioner. *Mr. Samuel L. Kingan* for respondent.

No. 752. HENRY FORD & SON, INC. *v.* LITTLE FALLS FIBRE CO. ET AL. April 15, 1929. Petition for writ of certiorari to the Supreme Court of New York granted.

Messrs. Robert E. Whalen and *Charles E. Nichols, Jr.*, for petitioner. *Mr. Thomas O'Connor* for respondents.

No. 762. KOTHE *v.* R. C. TAYLOR TRUST. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Frank H. Pardee* for petitioner. *Mr. Thomas Hovey Gage* for respondent.

No. 766. CARPENTER ET AL. *v.* SHAW, STATE AUDITOR. April 15, 1929. Petition for writ of certiorari to the Supreme Court of Oklahoma granted. *Mr. J. B. Moore* for petitioners. No appearance for respondent.

No. 772. GULF, MOBILE & NORTHERN R. Co. *v.* WILLIAMS, ADMINISTRATRIX. April 15, 1929. Petition for writ of certiorari to the Supreme Court of Alabama granted. *Messrs. J. N. Flowers* and *J. G. Hamilton* for petitioner. *Messrs. Gregory L. Smith* and *Harry H. Smith* for respondent.

No. 782. INTERSTATE COMMERCE COMMISSION *v.* UNITED STATES EX REL. CITY OF LOS ANGELES. April 15, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Mr. Daniel W. Knowlton* for petitioner. No appearance for respondent.

No. 776. COMMISSIONER OF INTERNAL REVENUE *v.* HOWARD. April 22, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Alfred A. Wheat* for petitioner. *Mr. W. J. Howard, pro se.*

No. 764. LUCKENBACH STEAMSHIP CO. *v.* UNITED STATES. April 29, 1929. Petition for writ of certiorari to the Court of Claims granted. *Messrs. George A. King, William B. King,* and *George R. Shields* for petitioner. *Attorney General Mitchell, Assistant Attorney General Galloway,* and *Messrs. Alfred A. Wheat* and *Louis R. Mehlinger* for the United States.

No. 793. FEDERAL SUGAR REFINING CO. *v.* UNITED STATES. April 29, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Oscar R. Houston* for petitioner. *Attorney General Mitchell, Assistant Attorney General Farnum,* and *Messrs. Alfred A. Wheat* and *J. Frank Staley* for the United States.

No. 799. REINECKE, COLLECTOR OF INTERNAL REVENUE, *v.* SPALDING. April 29, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Attorney General Mitchell,* and *Messrs. Alfred A. Wheat, Clarence M. Charest,* and *T. H. Lewis, Jr.,* for petitioner. *Messrs. John M. Zane* and *Alfred T. Carton* for respondent.

No. 807. BREWSTER *v.* GAGE, COLLECTOR OF INTERNAL REVENUE. May 13, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Gurdon W. Fitch* for petitioner. *Attorney General Mitchell* for respondent.

No. 813. WILBUR, SECRETARY OF THE INTERIOR, *v.* UNITED STATES EX REL. KRUSHNIC. May 13, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Attorney General Mitchell*

and *Messrs. Alfred A. Wheat, E. C. Finney,* and *Randolph S. Collins* for petitioner. *Messrs. Charles S. Thomas, Chester I. Long, Langdon H. Larwill, George K. Thomas,* and *Peter Q. Nyce* for respondent.

No. 847. CLARKE, COLLECTOR OF INTERNAL REVENUE *v.* THE HABERLE CRYSTAL SPRINGS BREWING CO. May 13, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat* and *Harvey R. Gamble* for petitioner. No appearance for respondent.

No. 718. INTERNATIONAL SHOE CO. *v.* FEDERAL TRADE COMMISSION. May 20, 1929. The petition for a rehearing in this case is granted. The order heretofore issued denying the petition for a writ of certiorari is revoked and the writ is ordered to issue. *Messrs J. D. Williamson, Frank Y. Gladney,* and *Charles Nagel* for petitioner. *Attorney General Mitchell,* and *Messrs. Alfred A. Wheat, Robert E. Healy, Adrien F. Busick,* and *Gardner P. Lloyd* for respondent. See *post,* p. 849.

No. 846. COMMISSIONER OF INTERNAL REVENUE *v.* AMERICAN CODE CO. INC. May 20, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat, John Vaughan Groner, Clarence M. Charest,* and *P. S. Crewe* for petitioner. No appearance for respondent.

No. 851. MINERALS SEPARATION NORTH AMERICAN CORPORATION *v.* MAGMA COPPER CO. May 20, 1929. Petition for writ of certiorari to the Circuit Court of Appeals

for the First Circuit granted. *Messrs. Henry D. Williams, William Houston Kenyon, Lindley M. Garrison,* and *Frederic D. McKenney* for petitioner. *Messrs. William H. Davis* and *Merton W. Sage* for respondent.

No. 850. KING *v.* UNITED STATES. May 27, 1929. The petition for a writ of certiorari in this case to the Circuit Court of Appeals for the Ninth Circuit is granted, and the case is advanced and assigned for argument on Monday, October 21 next, after the cases heretofore assigned for that day. *Mr. Clarence Wood* for petitioner. *Attorney General Mitchell, Assistant Attorney General Luhring,* and *Messrs. Alfred A. Wheat* and *Harry S. Ridgely* for the United States.

No. 863. NEW YORK CENTRAL R. CO. *v.* AMBROSE, ADMINISTRATRIX. May 27, 1929. Petition for writ of certiorari to the Circuit Court of Hudson County, State of New Jersey, granted. *Messrs. Albert C. Wall* and *John A. Hartpence* for petitioner. No appearance for respondent.

No. 874. ILLINOIS CENTRAL R. CO. *v.* CRAIL, DOING BUSINESS AS P. McCOY FUEL CO. May 27, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Edward C. Craig, Edwin C. Brown,* and *R. V. Fletcher* for petitioner. *Mr. Stanley B. Houck* for respondent.

No. 877. WILBUR, SECRETARY OF THE INTERIOR, *v.* UNITED STATES EX REL. KADRIE ET AL. June 3, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Attorney General Mitchell,* and *Messrs. Alfred A. Wheat, Seth W. Richardson, E. C. Finney,* and *Pedro Capo-Rodriguez* for petitioner. *Mr. Webster Ballinger* for respondents.

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No. 879. MOORE, TREASURER OF GRANT COUNTY, INDIANA, *v.* MITCHELL ET AL. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Russell H. Robbins* for petitioner. *Mr. Graham Sumner* for respondents.

No. 934. CHESAPEAKE & OHIO R. CO. *v.* BRYANT, ADMINISTRATOR. June 3, 1929. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia granted. *Mr. J. M. Perry* for petitioner. *Mr. Charles Curry* for respondent.

PETITIONS FOR CERTIORARI DENIED OR DISMISSED FROM FEBRUARY 19, 1929, TO AND INCLUDING JUNE 3, 1929.

No. 645. WILCOX *v.* UNITED STATES. On petition for writ of certiorari to the Court of Appeals of the District of Columbia. February 25, 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. Cornelius H. Doherty* for petitioner. No appearance for the United States.

No. 666. STILZ *v.* BETHLEHEM SHIPBUILDING CORPORATION, LTD. On petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. February 25, 1929. *Per Curiam:* The motion for leave to proceed fur-

ther 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. Harry B. Stilz, pro se.* No appearance for the Shipbuilding Corporation.

No. 696. THOMAS *v.* MAINE CENTRAL R. Co. On petition for writ of certiorari to the Supreme Judicial Court of Maine. February 25, 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. Edmund P. Mahoney* for petitioner. No appearance for the Railroad Company.

No. 591. OSAGE INDIANS *v.* UNITED STATES. See *ante*, p. 811.

No. 208. MORGAN *v.* WISCONSIN TAX COMMISSION. February 25, 1929. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Messrs. Wm. E. Black, Charles C. Russell,* and *Perry J. Stearns* for petitioner. *Messrs. John W. Reynolds,* Attorney General of Wisconsin, and *Franklin E. Bump,* Assistant Attorney General, for respondent.

No. 587. RUSSELL *v.* UNITED STATES; and

No. 624. ADAMS *v.* SAME. February 25, 1929. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. James A. Branch* and *Wm. Schley Howard* for Russell. *Mr. Alex. W. Smith, Jr.,* for Adams. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 597. FISLER *v.* UNITED STATES. February 25, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. George E. Hamilton* and *John F. McCarron* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 603. MCMILLAN, GARNISHEE, *v.* NATIONAL WOOL WAREHOUSE & STORAGE CO. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Oliver A. Haga* for petitioner. *Mr. Fremont Wood* for respondent.

No. 604. FALK MERCANTILE CO. ET AL. *v.* NATIONAL WOOL WAREHOUSE & STORAGE CO. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Oliver A. Haga* for petitioners. *Mr. Fremont Wood* for respondent.

No. 606. LAKE ET AL. *v.* CENTRAL SAVINGS BANK OF OAKLAND. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Charles Reagh* for petitioners. *Messrs. R. M. Fitzgerald* and *Charles A. Beardsley* for respondent.

No. 610. BROWN *v.* LANE COTTON MILLS CO. ET AL. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Norman I. Miller* for petitioner. No appearance for respondents.

No. 611. BROWN *v.* LANE COTTON MILLS CO. ET AL. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Norman I. Miller* for petitioner. No appearance for respondents.

No. 614. FEATHER RIVER LUMBER CO. *v.* UNITED STATES. February 25, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Joseph C. Trimble* and *Jerry A. Mathews* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Lisle A. Smith* for the United States.

No. 615. ARIASI *v.* ORIENT INSURANCE CO. ET AL. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Roy L. Daily* for petitioner. *Mr. Milton T. U'Ren* for respondents.

No. 620. NEW YORK & NEW JERSEY STEAMBOAT CO. *v.* SCHOMBURG. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Clarence Bishop Smith* for petitioner. *Mr. Chauncey I. Clark* for respondent.

No. 626. ERB *v.* CLAREMONT LABORATORIES, INC., ET AL. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied.

Messrs. R. H. Yeatman and *Wilton J. Lambert* for petitioner. *Mr. C. P. Goepel* for respondents.

No. 627. STEARNS BROTHERS, INC., *v.* SOUTHERN RAILWAY CO. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Robert F. Cogswell* for petitioner. *Mr. John M. Robinson* for respondent.

No. 628. DAVEY *v.* DELAWARE, LACKAWANNA AND WESTERN R. CO. ET AL. February 25, 1929. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. Dougal Herr* for petitioner. *Mr. Reynier J. Wortendyke, Jr.,* for respondents.

No. 636. KAR-LAC CO. ET AL *v.* THE GILCHRIST CO. ET AL. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Hervey S. Knight* and *George L. Wilkinson* for petitioners. *Mr. Fred Gerlach* for respondents.

No. 637. MURPHY *v.* INDIA TIRE & RUBBER CO. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Wm. M. Pardue* for petitioner. *Mr. John Davis* for respondent.

No. 638. MADONNA ET AL., ADMINISTRATORS, *v.* WHEELING STEEL CORPORATION. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Raymond Gordon* for petitioners. No appearance for respondent.

No. 639. FOREMAN TRUST & SAVINGS BANK, ADMINISTRATOR, *v.* GRAND TRUNK WESTERN R. Co. February 25, 1929. Petition for writ of certiorari to the Appellate Court of Illinois, First District, and/or Supreme Court of Illinois denied. *Mr. Herbert H. Patterson* for petitioner. *Messrs. Charles Y. Freeman* and *Louis L. Dent* for respondent.

No. 640. DICKEY *v.* VOLKER ET AL. February 25, 1929. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. James T. Blair, Leland Hazard, John T. Barker,* and *Maurice H. Winger* for petitioner. *Messrs. Henry L. McCune, Henry A. Bundschu, Cyrus Crane, I. N. Watson, Samuel W. Sawyer, Harry N. Ess, George O. Pratt,* and *Mat J. Holland* for respondents.

No. 641. BOYD ET AL. *v.* UNITED STATES. February 25, 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* and *Assistant Attorney General Willebrandt* for the United States.

No. 643. FULLERTON ET AL. *v.* THE EAGLE-PICHER LEAD Co. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. George S. Ramsey* and *Ray McNaughton* for petitioners. *Mr. A. C. Wallace* for respondent.

No. 644. BROWN, ADMINISTRATOR, ET AL. *v.* GAMBLE, RECEIVER; and

No. 680. PERKINS ET AL. *v.* GAMBLE, RECEIVER. February 25, 1929. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied.

Mr. W. E. Haymond for Brown, Administrator, et al. *Mr. P. S. Perkins, pro se. Mr. D. C. T. Davis, Jr.,* for respondent.

No. 646. COLONNA SHIPYARD, INC. *v.* DUNN. February 25, 1929. Petition for writ of certiorari to the Special Court of Appeals of Virginia and/or the Supreme Court of Appeals of Virginia denied. *Messrs. Robert F. Cogswell* and *Harvey D. Jacob* for petitioner. *Mr. J. F. Dunn, pro se.*

No. 651. FEDERAL SURETY CO. *v.* CITY OF STAUNTON, ILLINOIS, FOR THE USE OF MCWANE CAST IRON PIPE CO. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Walter Brower, John Landon,* and *George W. Yancey* for petitioner. *Mr. E. H. Cabaniss* for respondent.

No. 654. GRAHAM ET AL. *v.* CROZIER-STRAUB, INC., ET AL.;

No. 655. MELMOD ET AL. *v.* SAME; and

No. 656. DOWNER *v.* SAME. February 25, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Allen S. Olmsted, 2d,* and *Walter Biddle Saul* for petitioners. No appearance for respondents.

No. 657. DELOSS *v.* COMMISSIONER OF INTERNAL REVENUE. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Chester I. Long, Peter Q. Nyce, Charles P. Swindler,* and *Samuel W. McIntosh* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Clarence M. Charest* and *Allen H. Pierce* for respondent.

No. 660. NORTON *v.* UNITED STATES. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles R. Pierce* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Parmenter,* and *Messrs. E. O. Patterson* and *E. T. Burke* for the United States.

No. 670. ERA ELECTRICAL SUPPLY CORPORATION *v.* METROPOLITAN DEVICE CORPORATION. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. O. Ellery Edwards* for petitioner. *Mr. D. Anthony Usina* for respondent.

No. 671. FIMAN, RECEIVER, *v.* SOUTH DAKOTA. February 25, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Howard G. Fuller* for petitioner. *Mr. Ray F. Drewry* for respondent.

No. 616. PENNSYLVANIA MINING CO. *v.* UNITED MINE WORKERS OF AMERICA ET AL. March 5, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Daniel Davenport, Walter Gordon Merritt,* and *John W. Simpson, 2d,* for petitioner. *Mr. Henry Warrum* for respondents.

No. 648. VAN CAMP SEA FOOD CO., INC. *v.* WESTGATE SEA PRODUCTS CO. March 5, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Nathan Newby* for petitioner. *Mr. William S. Graham* for respondent.

No. 649. DONOVAN *v.* COMERFORD. March 5, 1929. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. A. D. Gash* for petitioner. No appearance for respondent.

No. 658. JENSEN *v.* CONTINENTAL LIFE INSURANCE CO. March 5, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles A. Donnelly* for petitioner. *Mr. W. Calvin Chesnut* for respondent.

No. 659. OSWEGO AND SYRACUSE R. CO. *v.* COMMISSIONER OF INTERNAL REVENUE. March 5, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William S. Jenney* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Morton P. Fisher* for respondent.

No. 664. NEW YORK, CHICAGO AND ST. LOUIS R. CO. *v.* PEELE. March 5, 1929. Petition for writ of certiorari to the Appellate Court of the State of Indiana denied. *Messrs. Russell P. Harker* and *Walter A. Eversman* for petitioner. *Mr. Albert Ward* for respondent.

No. 665. VILLAGE OF LOWELLVILLE *v.* EAST END TRACTION CO. March 5, 1929. Petition for writ of certiorari to the Court of Appeals of Mahoning County, State of Ohio, denied. *Mr. P. J. Melillo* for petitioner. *Mr. Union C. DeFord* for respondent.

No. 728. BUNDY *v.* BUNDY. On petition for a writ of certiorari to the Supreme Court of Washington. March 11, 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 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. *Ruth Anne Bundy, pro se.* No appearance for respondent.

No. 625. CORNING DISTILLING CO. *v.* UNITED STATES. March 11, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Levi Cooke* and *George R. Beneman* for petitioner. *Attorney General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 661. GOLTRA *v.* DAVIS, SECRETARY OF WAR. March 11, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Joseph T. Davis* for petitioner. *Attorney General Mitchell* and *Mr. Lon O. Hocker* for respondent.

No. 669. MINERICH *v.* UNITED STATES. March 11, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Joseph W. Sharts* for petitioner. *Attorney General Mitchell* and *Assistant to the Attorney General Donovan* for the United States.

No. 673. TOWNSEND ESTATES, INC., ET AL. *v.* KERNER INCINERATOR CO. March 11, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Harry Frease* for petitioners. *Mr. Lawrence A. Janney* for respondent.

No. 677. MATTHEWS, ADMINISTRATRIX, *v.* SOUTHERN RAILWAY CO. March 11, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Robert M. McConnell* for petitioner. *Messrs. L. E. Jeffries, S. R. Prince,* and *H. O'B. Cooper* for respondent.

No. 679. MASSACHUSETTS FIRE & MARINE INSURANCE CO. *v.* SCHNEIDER. March 11, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Theodore A. Hammond, Alex W. Smith, Jr.,* and *W. M. Howard* for petitioner. *Mr. Rodney S. Cohen* for respondent.

No. 681. RICHMOND HOSIERY MILLS *v.* COMMISSIONER OF INTERNAL REVENUE. March 11, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Sam E. Whitaker* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. John Vaughan Groner, Clarence M. Charest,* and *Percy S. Crewe* for respondent.

No. 683. RED STAR TOWING & TRANSPORTATION CO. *v.* NEW JERSEY SHIPBUILDING AND DREDGING CO. ET AL. March 11, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Chauncey I. Clark* for petitioner. *Mr. Edward Ash* for respondents.

No. 684. ELVIDGE *v.* STELWAGON MANUFACTURING CO., INC. March 11, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Paul Armitage* for petitioner. *Mr. Harry W. Mack* for respondent.

No. 705. SILL, RECEIVER, *v.* PENNINGTON. March 11, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Victor L. Smith* for petitioner. *Mr. Marion Smith* for respondent.

No. 722. AMERICAN VALVE & METER CO. ET AL. *v.* FAIRBANKS, MORSE & Co. March 11, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. F. A. Whitely, Richard P. Ernst,* and *Alfred C. Cassatt* for petitioners. *Mr. Fred L. Chappell* for respondent.

No. 662. KLAR *v.* ERIE R. CO. ET AL. See *ante,* p. 818.

No. 650. SINCO ET AL. *v.* LONGA ET AL. April 8, 1929. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Claro M. Recto* for petitioners. No appearance for respondents.

No. 653. CHAMBERLAIN *v.* UNITED STATES. April 8, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. James J. Hayden* for petitioner. *Attorney General Mitchell, Assistant Attorney General Galloway,* and *Mr. Gardner P. Lloyd* for the United States.

No. 685. LEHIGH VALLEY R. CO. *v.* EGYED. April 8, 1929. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Clifton P. Williamson* for petitioner. No appearance for respondent.

No. 688. BLAINE ET AL. *v.* UNITED STATES;
No. 689. ROBINSON *v.* SAME;
No. 690. BLAINE ET AL. *v.* SAME; and

No. 691. IRVINE *v.* SAME. April 8, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Jed C. Adams* and *W. B. Harrell* for petitioners. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 692. GERAHTY ET AL. *v.* UNITED STATES. April 8, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. John Philip Hill* for petitioners. *Attorney General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 700. JONAS, DOING BUSINESS UNDER THE NAME OF J. H. JONAS & SON, *v.* HILL COUNTY COTTON OIL CO. April 8, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John T. Gano* for petitioner. *Mr. W. C. Wear* for respondent.

No. 701. SOUTHLAND LIFE INS. CO. *v.* U. S. FIDELITY AND GUARANTY CO. April 8, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John T. Gano* for petitioner. No appearance for respondent.

No. 740. DISTRICT OF COLUMBIA *v.* RIGGS NATIONAL BANK. April 8, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Wm. W. Bride* and *F. H. Stephens* for petitioner. *Messrs. Frank J. Hogan* and *Wm. H. Donovan* for respondent.

No. 695. VUKICH *v.* UNITED STATES. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Lawrence H. Brown* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Alfred A. Wheat* for the United States.

No. 697. CULVER *v.* WAKEM AND MCLAUGHLIN, INC., ET AL. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edwin C. Brandenburg* for petitioner. *Messrs. Louis L. Dent* and *Warner M. Pomerene* for respondents.

No. 698. MARYLAND CASUALTY CO. *v.* CITY NATIONAL BANK; and

No. 741. CITY NATIONAL BANK *v.* MARYLAND CASUALTY CO. April 15, 1929. Petitions for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Walter L. Clark* for the Maryland Casualty Company. *Messrs. John W. Green, J. A. Fowler,* and *John K. Shields* for the City National Bank.

No. 699. SOUTHERN PACIFIC CO. *v.* THE BANK OF AMERICA. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John A. Sheean* for petitioner. *Messrs. Edward R. Johnston* and *Henry Jackson Darby* for respondent.

No. 702. ADMIRAL-ORIENTAL LINE, INC. *v.* UNITED STATES ET AL. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit

denied. *Mr. Cletus Keating* for petitioner. *Attorney General Mitchell, Assistant Attorney General Farnum,* and *Messrs. Alfred A. Wheat* and *J. Frank Staley* for the United States.

No. 703. C. B. Fox Company, Inc. *v.* United States. April 15, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. A. A. Hoehling, Earle W. Wallick,* and *Ben Jenkins* for petitioner. No appearance for the United States.

No. 704. The Cuyahoga Abstract Title & Trust Co. *v.* Blair, Commissioner of Internal Revenue. April 15, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. A. A. Hoehling, Earle W. Wallick,* and *Ben Jenkins* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat* and *Harvey R. Gamble* for respondent.

No. 706. Berkower *v.* Mielziner, Trustee. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frederick A. Henry* for petitioner. No appearance for respondent.

No. 707. The Barstow San Antonio Oil Co. *v.* Whitney et al. April 15, 1929. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Frank E. Green* for petitioner. No appearance for respondents.

No. 708. White *v.* Barnard et al. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Roland Gray* for petitioner. *Mr. Lowell A. Mayberry* for respondents.

No. 709. SADOWSKY *v.* ANDERSON, COLLECTOR OF INTERNAL REVENUE. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Eli S. Wolbarst* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat* and *Millar E. McGilchrist* for respondent.

No. 710. MARSH *v.* UNITED STATES. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Irving K. Baxter* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat* and *John J. Byrne* for the United States.

No. 717. OLMSTEAD *v.* UNITED STATES April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Martin L. Pipes* for petitioner. *Attorney General Mitchell, Assistant Attorney General Farnum,* and *Messrs. Alfred A. Wheat* and *Harry S. Ridgely* for the United States.

No. 718. INTERNATIONAL SHOE CO. *v.* FEDERAL TRADE COMMISSION. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. J. D. Williamson, Frank Y. Gladney,* and *Charles Nagel* for petitioner. *Attorney General Mitchell,* and *Messrs. Alfred A. Wheat, Robert E. Healy, Adrien F. Busick,* and *Gardner P. Lloyd* for respondent. Certiorari granted on rehearing, see *ante,* p. 832.

No. 719. ABELL ET AL. *v.* TAIT, COLLECTOR OF INTERNAL REVENUE. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit

denied. *Mr. Robert N. Miller* for petitioners. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Alfred A. Wheat* for respondent.

No. 724. LEWY *v.* UNITED STATES. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Edward J. Brundage, Benson Landon,* and *Robert N. Holt* for petitioner. *Attorney General Mitchell, Assistant Attorney General Luhring,* and *Messrs. Alfred A. Wheat* and *Harry S. Ridgely* for the United States.

No. 725. UNITED STATES EX REL. ALBRO, ETC., *v.* KARNUTH, DIRECTOR OF IMMIGRATION, ET AL.; and

No. 726. GRABER *v.* KARNUTH, DISTRICT DIRECTOR OF IMMIGRATION. April 15, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Preston Albro* for petitioners. *Attorney General Mitchell, Assistant Attorney General Luhring,* and *Messrs. Alfred A. Wheat* and *Harry S. Ridgely* for respondents.

No. 727. HOOKS *v.* CANADIAN HOLDING CO. ET AL. April 15, 1929. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. H. A. Ledbetter* for petitioner. *Mr. J. C. Luster* for respondents.

No. 729. TUDOR *v.* SCHINDLER, RECEIVER, ET AL. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Earl B. Barnes* and *Conrad Wolf* for petitioner. *Messrs. Asa J. Smith* and *Shepard J. Crumpacker* for respondents.

No. 731. GREAT NORTHERN R. Co. *v.* CASHMERE FRUIT GROWERS UNION ET AL.;

No. 732. SAME *v.* SAME;

No. 733. SAME *v.* SAME;

No. 734. SAME *v.* SAME;

No. 735. SAME *v.* WENATCHEE FEDERATED GROWERS, INC., ET AL.

No. 736. SAME *v.* SAME; and

No. 737. SAME *v.* WOOD ET AL. April 15, 1929. Petition for writs of certiorari to the Supreme Court of Washington denied. *Messrs. Harry Weinberger* and *Charles S. Albert* for petitioner. *Mr. Henry Elliott, Jr.,* for respondents.

No. 742. LAZZARA *v.* WISCONSIN BOXING CLUB ET AL. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Raymond J. Cannon* and *Frank L. Fawcett* for petitioner. *Mr. George A. Burns* for respondents.

No. 744. MINNESOTA MUTUAL LIFE INS. Co. *v.* MARSHALL. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Wilfrid E. Rumble* and *Charles Bunn* for petitioner. *Mr. Seth W. Richardson* for respondent.

No. 745. EDELSTEIN *v.* GODDARD, DISTRICT JUDGE. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Nathan Burkan* for petitioner. *Emily C. Holt* for respondent.

No. 749. ANDERSON, ADMINISTRATOR *v.* PERE MARQUETTE R. Co. April 15, 1929. Petition for writ of cer-

tiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James C. McShane* for petitioner. No appearance for respondent.

No. 750. MEYER *v.* BIELASKI, TRUSTEE IN BANKRUPTCY. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Copal Mintz* for petitioner. *Mr. Graham Sumner* for respondent.

No. 751. HARRIS ET AL. *v.* NORTH BRITISH & MERCANTILE INS. CO. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Wm. L. Erwin* and *Lamar C. Rucker* for petitioners. *Messrs. Theodore A. Hammond* and *Alex. W. Smith, Jr.,* for respondent.

No. 753. MARYLAND CASUALTY CO. *v.* FOUTS, RECEIVER. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Walter L. Clark* and *James S. Manning* for petitioner. *Messrs. F. G. Awalt* and *George P. Barse* for respondent.

No. 755. ST. LOUIS, BROWNSVILLE & MEXICO R. CO. ET AL. *v.* BOOKER. April 15, 1929. Petition for writ of certiorari to the Court of Civil Appeals, First Supreme Judicial District, State of Texas, denied. *Messrs. Frank Andrews, W. L. Cook,* and *Robert H. Kelley* for petitioners. No appearance for respondent.

No. 756. NEW YORK LIFE INS. CO. *v.* ROSS, EXECUTRIX. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied.

Mr. John B. Keeble for petitioner. *Messrs. John A. Pitts* and *K. T. McConnico* for respondent.

No. 757. BRUNN *v.* STATE OF WASHINGTON. April 15, 1929. Petition for writ of certiorari to the Supreme Court of Washington denied. *Messrs. John J. Sullivan* and *John F. Dore* for petitioner. *Mr. Ewing Dean Colvin* for respondent.

No. 758. ROUSS *v.* BOWERS. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. James S. Y. Ivins* and *F. C. Nicodemus, Jr.,* for petitioners. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat, Barham R. Gary,* and *Clarence M. Charest* for respondent.

No. 760. TRANSCONTINENTAL OIL CO. *v.* MID-KANSAS OIL AND GAS CO. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Wm. L. Frierson, Nelson Phillips,* and *J. C. Adams* for petitioner. No appearance for respondent.

No. 761. DAVIDSON ET AL. *v.* FLOOD BROS. ET AL. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. S. Hasket Derby* for petitioners. *Messrs. Louis T. Hengstler* and *Frederick W. Dorr* for respondents.

No. 765. INSURANCE COMPANY OF NORTH AMERICA *v.* FOURTH NATIONAL BANK OF ATLANTA. April 15, 1929. Petition for writ of certiorari to the Circuit Court of

Appeals for the Fifth Circuit denied. *Messrs. T. A. Hammond* and *John M. Slaton* for petitioner. *Messrs. Hoke Smith* and *Marion Smith* for respondent.

No. 767. FERGUS *v.* KINNEY, TREASURER OF ILLINOIS. April 15, 1929. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Ray E. Lane* for petitioner. *Messrs. Oscar E. Carlstrom* and *Albert D. Rodenberg* for respondent.

No. 779. PENNSYLVANIA R. Co. *v.* MACKENZIE. April 15, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Chauncey I. Clark* and *D. P. Williams* for petitioner. *Mr. William F. Purdy* for respondent.

No. 174. VERDE RIVER IRRIGATION & POWER Co. *v.* WILBUR, SECRETARY OF THE INTERIOR, ET AL. April 22, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Charles H. Merillat* and *James W. Beller* for petitioner. No appearance for respondents.

No. 763. CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC R. Co. *v.* DEPARTMENT OF PUBLIC WORKS OF WASHINGTON ET AL. April 22, 1929. Petition for writ of certiorari to the Supreme Court of Washington denied. *Messrs. F. M. Dudley* and *O. W. Dynes* for petitioner. *Messrs. John H. Dunbar, H. C. Brodie,* and *S. J. Wettrick* for respondents.

No. 769. PRUDENTIAL INS. Co. *v.* BACIOCCO. April 22, 1929. Petition for writ of certiorari to the Circuit Court

of Appeals for the Ninth Circuit denied. *Mr. F. Eldred Boland* for petitioner. No appearance for respondent.

No. 770. REILLY, TRUSTEE IN BANKRUPTCY, *v.* MESSINGER. April 22, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel C. Duberstein* for petitioner. No appearance for respondent.

No. 771. LESSER-GOLDMAN COTTON CO. *v.* MISSOURI PACIFIC R. CO. April 22, 1929. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Otto Wolff, Jr.,* for petitioner. *Mr. Thomas J. Railey* for respondent.

No. 774. TIDAL OSAGE OIL CO. *v.* WILBUR, SECRETARY OF THE INTERIOR. April 22, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Wallace C. Franklin* for petitioner. *Attorney General Mitchell,* and *Messrs. Alfred A. Wheat, E. C. Finney* and *Pedro Capo-Rodriquez* for respondent.

No. 775. LOFT, INC. *v.* BOWERS, COLLECTOR OF INTERNAL REVENUE. April 22, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. A. S. Gilbert* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Alfred A. Wheat* for respondent.

No. 777. WOODMAN *v.* UNITED STATES. April 22, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. H. E. Kahn* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat* and *Barham R. Gary* for respondent.

No. 780. RUSSELL *v.* HOLT, ADMINISTRATOR, ET AL. April 22, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. T. J. Wills* for petitioner. *Mr. Albert S. Bozeman* for respondents.

No. 789. BARTLESVILLE ZINC CO. *v.* INTERSTATE COMMERCE COMMISSION. April 22, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Harry C. Barnes* for petitioner. *Messrs. Daniel W. Knowlton* and *E. M. Reidy* for respondent.

No. 796. ATCHISON, T. & S. F. R. CO. *v.* KEDDY. April 22, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Robert O. Brennan, E. E. McInnis,* and *Edgar W. Camp* for petitioner. *Mr. H. F. Keddy, pro se.*

No. 843. DAVIDSON *v.* CALIFORNIA. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. April 29, 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. William Caine Davidson, pro se.* No appearance for respondent.

No. 712. MINNESOTA MUTUAL LIFE INS. CO. *v.* UNITED STATES. April 29, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. A. R. Serven* and

John G. Carter for petitioner. *Attorney General Mitchell, Assistant Attorney General Galloway,* and *Messrs. Alfred A. Wheat, Lisle A. Smith, Clarence M. Charest,* and *E. H. Horton* for the United States.

No. 730. THE FORMER CORPORATION, FORMERLY PHILIPSBORN'S, *v.* UNITED STATES. April 29, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. Clarence N. Goodwin* for petitioner. *Attorney General Mitchell, Assistant Attorney General Galloway,* and *Messrs. Alfred Wheat* and *John E. Hoover* for respondent.

No. 778. CARTER ET AL. *v.* LUSTER ET AL. April 29, 1929. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. W. E. Disney* for petitioners. *Mr. J. C. Luster, pro se.*

No. 784. LACROIX *v.* RIVARD ET AL.;
No. 785. SAME *v.* SAME;
No. 786. SAME *v.* LACROIX;
No. 787. SAME *v.* DEZIEL; and
No. 788. SAME *v.* DEZIEL ET AL. April 29, 1929. Petition for writs of certiorari to the Supreme Court of Michigan denied. *Messrs. William Look* and *Edwin C. Brandenburg* for petitioner. *Messrs. Alfred Lucking, William Lucking,* and *Thomas G. Long* for respondents.

No. 790. WATSON, ADMINISTRATRIX, *v.* GEORGIA SOUTHERN & FLORIDA R. CO. April 29, 1929. Petition for writ of certiorari to the Supreme Court of Georgia denied. *Mr. John R. L. Smith* for petitioner. *Mr. John E. Hall* for respondent.

No. 798. NORTH CAROLINA ETC. *v.* SOUTHERN R. Co. ET AL. April 29, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Aubrey L. Brooks* and *Dennis G. Brummitt* for petitioner. *Messrs. S. R. Prince, G. H. Hastings,* and *L. E. Jeffries* for respondents.

No. 802. SCHNELL ET AL. *v.* UNITED STATES. April 29, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Joffe* for petitioners. *Attorney General Mitchell, Assistant Attorney General Farnum,* and *Messrs. Alfred A. Wheat* and *J. Frank Staley* for the United States.

No. 804. PEOPLES BANK OF KEYSER, WEST VIRGINIA, *v.* INTERNATIONAL FINANCE CORPORATION. April 29, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. C. B. Garnett* for petitioner. *Mr. Hugh H. Obear* for respondent.

No. 812. AMERICAN TOBACCO CO. *v.* PORTO RICAN AMERICAN TOBACCO CO. April 29, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Martin Conboy* and *Jonathan H. Holmes* for petitioner. *Mr. H. Lewis Brown* for respondent.

No. 815. BOARD OF PUBLIC UTILITY COMMISSIONERS OF NEW JERSEY *v.* PLAINFIELD-UNION WATER CO. April 29, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John O. Bigelow* for petitioner. *Mr. Frank Bergen* for respondent.

No. 854. RICHARDSON ET AL. *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit. May 13, 1929. *Per Curiam:* The motion to print the record 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. *Mr. Lester L. Sargent* for petitioners. No appearance for the United States.

No. 261. WALLACE *v.* MOTOR PRODUCTS CORP'N ET AL. On writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. Argued April 23, 24, 1929—Decided May 13, 1929. *Per Curiam:* After full consideration the Court finds that the writ of certiorari heretofore issued in this case was improvidently granted, and it is dismissed. *Mr. Alfred Lucking,* with whom *Messrs. Harold W. Hanlon* and *Howell Van Auken* were on the brief, for petitioner. *Mr. Charles E. Hughes,* with whom *Messrs. Charles B. Warren, Sherwin A. Hill, Leo M. Butzel, Frederick H. Wood, Hoyt A. Moore,* and *William W. Robison* were on the brief, for respondents.

No. 768. GEREN *v.* CECIL. May 13, 1929. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. Charles E. McPerren* for petitioner. *Messrs. Thomas H. Owen* and *M. A. Looney* for respondent.

No. 773. ADVANCE AUTOMOBILE ACCESSORIES CORPORATION *v.* UNITED STATES. May 13, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. George M. Wilmeth* for petitioner. *Attorney General Mitchell,*

Assistant Attorney General Galloway, and *Messrs. Alfred A. Wheat, George C. Butte,* and *Ralph C. Williamson* for the United States.

No. 783. CUTTING *v.* BRYAN. May 13, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Peter F. Dunne* for petitioner. *Mr. John L. McNab* for respondent.

No. 800. GLOBE INDEMNITY CO. *v.* SOUTHERN PACIFIC CO. May 13, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur H. Stetson* for petitioner. *Messrs. Van Vechten Veeder* and *Eugene Underwood* for respondent.

No. 806. SOUTHERN R. CO. *v.* BLUE RIDGE POWER CO. May 13, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. S. R. Prince* and *L. E. Jefferies* for petitioner. *Messrs. H. L. Bomar* and *C. W. Tillett* for respondent.

No. 808. WOOLLEY ET AL. *v.* MALLEY, FORMER COLLECTOR OF INTERNAL REVENUE; and

No. 809. SAME *v.* SAME. May 13, 1929. Petition for writs of certiorari to the United States Circuit Court of Appeals for the First Circuit denied. *Mr. Harry LeBaron Sampson* for petitioners. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat* and *Barham R. Gary* for respondent.

No. 817. RED WING LINSEED CO. *v.* BLAIR, COMMISSIONER OF INTERNAL REVENUE. May 13, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for

the Eighth Circuit denied. *Messrs. Raymond S. Pruitt, Oswald D. Luby,* and *John J. Grealis* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat, Harvey R. Gamble, Clarence M. Charest* and *Shelby S. Faulkner* for respondent.

No. 818. Tootal Broadhurst Lee Co. *v.* Commissioner of Internal Revenue. May 13, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. F. Morse Hubbard* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Alfred A. Wheat* for respondent.

No. 819. Hurst *v.* Nagle, Commissioner. May 13, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. George W. Hott* and *Stephen M. White* for petitioner. *Attorney General Mitchell, Assistant Attorney General Luhring,* and *Messrs. Alfred A. Wheat* and *Harry S. Ridgely* for respondent.

No. 873. Green et al. *v.* Aetna Life Ins. Co. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. May 20, 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 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. J. W. Cocke* for petitioners. No appearance for respondent.

No. 746. SUPERIOR CONFECTION CO. *v.* CRAIG ET AL.; and

No. 747. KISER *v.* HEISE ET AL. See *ante*, p. 824.

No. 743. S. S. WHITE DENTAL MANUFACTURING CO. *v.* UNITED STATES. May 20, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. John F. McCarron* for petitioner. *Attorney General Mitchell, Assistant Attorney General Galloway,* and *Messrs. Alfred A. Wheat* and *Charles R. Pollard* for the United States.

No. 803. A. H. BULL STEAMSHIP CO. *v.* HUDSON ET AL.; and

No. 892. HUDSON ET AL. *v.* BULL STEAMSHIP CO. May 20, 1929. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. John W. Crandall, George Whitefield Betts, Jr.,* and *Joseph W. Henderson* for A. H. Bull Steamship Company. *Mr. H. Alan Dawson* for Hudson et al.

No. 811. TRENT TRUST CO. *v.* ISENBERG, ET AL. May 20, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Oscar Lawler* and *Alfred Sutro* for petitioner. *Messrs. John Francis Neylan* and *Grove J. Fink* for respondents.

No. 814. OREGON EXPLORATION CO. *v.* REEVES ET AL. May 20, 1929. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Messrs. M. D. Leehey* and *Samuel Herrick* for petitioner. *Mr. A. E. Reames* for respondents.

No. 816. MACONDRAY & Co. *v.* W. R. GRACE & Co. May 20, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Louis T. Hengstler* for petitioner. *Mr. W. H. Orrick* for respondent.

No. 820. AUSTIN-BAGLEY CORPORATION ET AL. *v.* UNITED STATES; and

No. 831. FINGERHOOD *v.* SAME. May 20, 1929. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Lewis Landes* for Austin-Bagley Corporation et al. *Mr. Louis Marshall* for Fingerhood. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat* and *John J. Byrne* for the United States.

No. 822. URIAS *v.* TEXAS. May 20, 1929. Petition for writ of certiorari to the County Court of El Paso County, State of Texas, denied. *Mr. Edward D. Tittman* for petitioner. No appearance for respondent.

No. 823. DAY *v.* UNITED STATES. May 20, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Will Steel* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat, Gardner P. Lloyd,* and *Barham R. Gary* for the United States.

No. 824. RIVERSIDE MANUFACTURING CO. *v.* UNITED STATES. May 20, 1929. Petition for writ of certiorari to the Court of Claims denied. *Messrs. James Craig Pea-*

cock and *John W. Townsend* for petitioner. *Attorney General Mitchell, Assistant Attorney General Galloway,* and *Mr. Frank K. Dyar* for the United States.

No. 825. ANDERSON, ETC. *v.* SHIPOWNERS' ASSOCIATION OF THE PACIFIC COAST ET AL. May 20, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. H. W. Hutton* for petitioner. *Messrs. Herman Phleger* and *Maurice E. Harrison* for respondents.

No. 827. KEHOTA MINING CO. *v.* HEINER, COLLECTOR OF INTERNAL REVENUE; and

No. 828. SAME *v.* LEWELLYN, FORMERLY COLLECTOR OF INTERNAL REVENUE. May 20, 1929. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Edwin W. Smith, Wm. A. Seifert,* and *Maynard Teall* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Alfred A. Wheat* for respondents.

No. 829. PERE MARQUETTE R. CO. v. RUSSELL. May 20, 1929. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Messrs. John C. Shields, George W. Weadock, John Vincent Weadock, Jerome Weadock,* and *Arthur Weadock* for petitioner. *Mr. Miles J. Purcell* for respondent.

No. 830. ELLERD *v.* GRIFFITH ET AL. May 20, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Reuben M. Ellerd, pro se.* No appearance for respondents.

No. 832. AMERICAN SURETY CO. *v.* BOWERS, COLLECTOR OF INTERNAL REVENUE. May 20, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Leo Oppenheimer* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat* and *Morton P. Fisher* for respondent.

No. 833. PICARD ET AL. *v.* S. S. "CALENDONIER," ET AL.; and

No. 834. JONAS & NAUMBURG, INC. *v.* SAME. May 20, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Theodore L. Bailey* for petitioners. *Mr. Homer L. Loomis* for respondents.

No. 836. O'NEILL *v.* GRAY, ADMINISTRATRIX. May 20, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles D. Lewis* and *Thomas J. O'Neill* for petitioner. No appearance for respondent.

No. 837. HASS *v.* UNITED STATES. May 20, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frank J. Hennessy* for petitioner. *Attorney General Mitchell, Assistant Attorney General Luhring,* and *Messrs. Alfred A. Wheat* and *Harry S. Ridgely* for the United States.

No. 838. GRAFFENREID *v.* YOUNT-LEE OIL CO. ET AL. May 20, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. R. H. Ward* for petitioner. No appearance for respondents.

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No. 840. ESTATE OF BILLWILLER *v.* COMMISSIONER OF INTERNAL REVENUE. May 20, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Henry J. Richardson* and *L. L. Hamby* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat* and *John Vaughan Groner* for respondent.

No. 842. HUDSON, ADMINISTRATRIX, *v.* NORFOLK & WESTERN R. Co. May 20, 1929. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. *Mr. Randolph C. Bias* for petitioner. No appearance for respondent.

No. 844. TILLITSON *v.* SMITH, ATTORNEY GENERAL OF KANSAS. May 20, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Hal M. Black* for petitioner. *Messrs. Wm. A. Smith* and *Roland Boynton* for respondent.

No. 848. AMERICAN GLYCERIN CO. *v.* BURLESON ET AL. May 20, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry Tom King* for petitioner. No appearance for respondents.

No. 852. GIBSON *v.* UNITED STATES; and

No. 859. BROWER ET AL. *v.* SAME. May 20, 1929. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Nelson T. Hartson, Edmund L. Jones,* and *Maurice A. Langhorne* for Gibson. *Mr. Rufus W. Pearson* for Brower et al. *Attor-*

ney General Mitchell, Assistant Attorney General Willebrandt, and *Messrs. Alfred A. Wheat* and *Barham R. Gary* for the United States.

No. 871. VIRGINIA *v.* MARSHALL & ILLSLEY BANK, EXECUTOR. May 20, 1929. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. Henry R. Miller, Jr.,* for petitioner. *Mr. J. Vaughan Gary* for respondent.

No. 872. LARKIN ET AL. *v.* WASHINGTON LOAN & TRUST CO. May 20, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Paul Sleman* for petitioners. *Messrs. Arthur Peter, John J. Hamilton, Frank S. Bright,* and *R. Preston Shealey* for respondent.

No. 905. BUZYNSKI *v.* LUCKENBACH S. S. CO. ET AL. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. May 27, 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. William E. Price* for petitioner. No appearance for respondents.

No. 791. KEMP *v.* CITY OF SEATTLE. See *ante,* p. 825.

No. 805. JAMES CLARK DISTILLING CO. *v.* UNITED STATES. May 27, 1929. Petition for writ of certiorari to the Court of Claims denied. *Mr. Charles Markell* for petitioner. *Attorney General Mitchell, Assistant Attorney General Galloway,* and *Messrs. Alfred A. Wheat* and *Frank K. Dyar* for the United States.

No. 835. LOLITA HOLDING CO. *v.* ARONSON & CO. ET AL. May 27, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Will R. King* for petitioner. *Mr. Jefferson P. Chandler* for respondents.

No. 853. SMITH *v.* MUTUAL LIFE INS. CO. May 27, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Joseph D. Barksdale, Albert H. Van Hook,* and *Howard B. Warren* for petitioner. *Messrs. Richard B. Montgomery* and *Frederick L. Allen* for respondent.

No. 855. MORRISON ET AL. *v.* REGUS, TRUSTEE IN BANKRUPTCY. May 27, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Henry P. Dart, Jr.,* for petitioners. No appearance for respondent.

No. 856. INDEPENDENCE INDEMNITY CO. *v.* BARBER, GUARDIAN, ET AL. May 27, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. Ormonde Hunter* for petitioner. No appearance for respondents.

No. 858. UNITED STATES EX REL. ULRICH *v.* STIMSON, SECRETARY. May 27, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia

denied. *Mr. Joseph Koletsky* for petitioner. *Attorney General Mitchell, Assistant Attorney General Luhring,* and *Messrs. Alfred A. Wheat* and *Harry S. Ridgely* for respondents.

No. 861. McKenna *v.* Anderson, Collector. May 27, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Marshall* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat* and *Andrew D. Sharpe* for respondent.

No. 866. Jacobs *v.* United States. May 27, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Lewis Landes* for petitioner. *Attorney General Mitchell, Assistant Attorney General Luhring,* and *Messrs. Alfred A. Wheat* and *Harry S. Ridgely* for the United States.

No. 887. Harlow, Executor, et al., *v.* Cowles, Administratrix. May 27, 1929. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Messrs. John S. Barbour* and *Leo P. Harlow* for petitioners. *Messrs. Daniel Thew Wright* and *Raymond B. Dickey* for respondent.

No. 931. Jumer *v.* Smith et al. See *ante,* p. 825.

No. 935. Alderman *v.* United States. On petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. June 3, 1929. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examina-

tion 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. H. M. Carr* for petitioner. No appearance for the United States.

No. 821. ELSINORE PERFUME CO., INC. *v.* CAMPBELL, PROHIBITION ADMINISTRATOR, ET AL. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Lewis Landes* and *Charles Dickerman Williams* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Alfred A. Wheat* for respondent.

No. 860. MAX LEVY & CO., INC. *v.* KARTZ. June 3, 1929. Petition for writ of certiorari to the Appellate Court for the First District, State of Illinois, denied. *Mr. Joshua R. H. Potts* for petitioner. *Messrs. Vernon E. West* and *Ephraim Banning* for respondent.

No. 862. PELICAN BAY LUMBER CO. *v.* BLAIR, COMMISSIONER OF INTERNAL REVENUE. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. T. T. C. Gregory* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat* and *Millar E. McGilchrist* for respondent.

No. 864. PARROTT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit

denied. *Mr. F. Eldred Boland* for petitioners. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat, John Vaughan Groner,* and *Clarence M. Charest* for respondent.

No. 865. FAHEY *v.* SAPIO ET AL. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Frank S. Anderson* and *Mart H. Royston* for petitioner. *Mr. W. T. Armstrong* for respondents.

No. 867. CORNISH ET AL. *v.* O'DONOGHUE ET AL. June 3, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Louis Marshall* and *Wm. E. Leahy* for petitioners. *Messrs. Jesse C. Adkins, Frank F. Nesbit,* and *Lucien H. Mercier* for respondents.

No. 868. RUSSELL ET AL. *v.* WALLACE ET AL. June 3, 1929. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Louis Marshall* and *Wm. E. Leahy* for petitioners. *Messrs. Jesse C. Adkins, Frank F. Nesbit,* and *Lucien H. Mercier* for respondents.

No. 870. CONKLIN, ZONNE, LOOMIS CO. *v.* BLAIR, COMMISSIONER OF INTERNAL REVENUE. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. B. Faegre* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Alfred A. Wheat* for respondent.

No. 876. HARLEY & LUND CORPORATION *v.* MURRAY RUBBER CO. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward F. Unger* for petitioner. *Mr. Robert Kelly Prentice* for respondent.

No. 881. HASKELL *v.* PERKINS ET AL.; and

No. 882. SAME *v.* SAME. June 3, 1929. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Robert H. McCarter* for petitioner. *Messrs. Charles E. Hughes, George W. Schurman, Forrest Hyde,* and *Philip M. Payne* for respondents.

No. 883. WHITE *v.* UNITED STATES. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Samuel L. White, pro se. Attorney General Mitchell, Assistant Attorney General Luhring,* and *Messrs. Alfred A. Wheat* and *Harry S. Ridgely* for the United States.

No. 884. KRAUSS BROTHERS LUMBER CO. *v.* MELLON, DIRECTOR GENERAL. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Brenton K. Fisk* for petitioner. *Messrs. Alexander M. Bull* and *Sidney F. Andrews* for respondent.

No. 888. NEUSS, HESSLEIN & CO., INC., *v.* EDWARDS, COLLECTOR OF INTERNAL REVENUE. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Richard S. Holmes* for petitioner. *Attorney General Mitchell, Assistant At-*

torney General Willebrandt, and *Messrs. Alfred A. Wheat, Randolph C. Shaw,* and *Clarence M. Charest* for respondent.

No. 898. FARRINGTON ET AL., EXECUTORS, *v.* COMMISSIONER OF INTERNAL REVENUE. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Marvin Farrington* for petitioners. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat* and *Barham R. Gary* for respondent.

No. 899. LISANSKY ET AL. *v.* UNITED STATES. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Isaac Lobe Straus* for petitioners. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat* and *John Vaughan Groner* for respondent.

No. 902. FIRESTONE TIRE & RUBBER CO. ET AL. *v.* FAYETTE BANK & TRUST CO. ET AL.;

No. 903. SAME *v.* SAME; and

No. 904. FAYETTE BANK & TRUST CO. ET AL. *v.* HEROD ET AL. June 3, 1929. Petitions for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Harvey J. Elam, Howard S. Young,* and *Willis Bacon* for Firestone Tire & Rubber Company et al. *Messrs. George L. Wire* and *Solon J. Carter* for Fayette Bank & Trust Company et al. *Mr. William P. Herod, pro se. Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat* and *John Vaughan Groner* for Herod et al.

No. 910. SIMMS OIL CO. *v.* DAY, SHERIFF AND EX OFFICIO TAX COLLECTOR. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. S. L. Herold* for petitioner. No appearance for respondent.

No. 912. FEEDERS' SUPPLY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Theodore B. Benson* for petitioner. *Attorney General Mitchell, Assistant Attorney General Willebrandt,* and *Messrs. Alfred A. Wheat* and *Arthur W. Henderson* for respondent.

No. 918. ORIENT POINT WHARF CO. ET AL. *v.* MACHIAS LUMBER CO. ET AL. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. E. Curtis Rouse* for petitioners. *Mr. Edward Ash* for respondents.

No. 926. SOUTHERN TRUST CO. *v.* AUSTIN ET AL. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Kent V. Gay* and *William E. Allen* for petitioner. *Messrs. Stanley Boykin* and *H. C. Ray* for respondents.

No. 929. SAITTA *v.* S. S. "FLORINDA" ET AL. June 3, 1929. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Joffe* for petitioner. *Mr. L. DeGrove Potter* for respondents.

No. 932. ATLANTIC GULF AND WEST INDIES S. S. LINES *v.* INTEROCEAN OIL CO. June 3, 1929. Petition for writ

of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Roscoe H. Hupper* and *Frederic Conger* for petitioner. *Messrs. Stuart S. Janney* and *Robert W. Williams* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM FEBRUARY 19, 1929, TO AND INCLUDING JUNE 3, 1929.

No. 617. PORTER, COMMISSIONER OF FINANCE OF THE STATE OF IDAHO *v.* UNITED STATES. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. February 25, 1929. Dismissed pursuant to paragraph 2 of rule 13. *Messrs. Leslie J. Aker, Frank L. Stephan,* and *Charles E. Hughes* for petitioner. No appearance for the United States.

No. 195. UNITED STATES *v.* PERSSON. On writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. March 11, 1929. Judgment reversed, and the cause remanded to the District Court of the United States for the Eastern District of Louisiana for further proceedings in conformity with the opinion of this Court in the case of *McDonald* v. *United States, ante,* p. 12, per stipulation of counsel, on motion of *Mr. Alfred A. Wheat* in that behalf. *Messrs. J. Harry Covington* and *Dean Acheson* for respondent.

No. 196. UNITED STATES *v.* NICOLICH. On writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. March 11, 1929. Judgment reversed, and the cause remanded to the District Court of the United States for the Eastern District of Louisiana for further proceedings in conformity with the opinion of this Court in the case

of *McDonald* v. *United States, ante,* p. 12, per stipulation of counsel, on motion of *Mr. Alfred A. Wheat* in that behalf. *Messrs. J. Harry Covington, Dean Acheson* and *Walker B. Spencer* for respondent.

No. 407. COMMISSIONER OF INTERNAL REVENUE *v.* OLD COLONY RAILROAD. On writ of certiorari to the Circuit Court of Appeals for the First Circuit. April 15, 1929. Dismissed with costs, on motion of *Mr. Alfred A. Wheat* for petitioner. *Messrs. James S. Y. Ivins* and *Kingman Brewster* for respondent.

No. 795. HARDWICK REALTY CO., Inc. *v.* COMMISSIONER OF INTERNAL REVENUE. On petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit. April 15, 1929. Dismissed on motion of *Messrs. Brison Howie* and *Frank S. Bright* for petitioner.

No. 148. MAGNOLIA GAS CO. *v.* LEEPER, SECRETARY OF STATE. Error to and appeal from the Supreme Court of Oklahoma. April 15, 1929. Dismissed with costs, per stipulation of counsel. *Messrs. B. B. Blakeney* and *W. H. Francis* for plaintiff in error and appellant. *Mr. Edward Dabney,* Attorney General of Oklahoma, for defendant in error and appellee.

No. 839. ADLER *v.* RECTOR, SHERIFF, ET AL. Appeal from the Supreme Court of South Carolina. May 20, 1929. Dismissed with costs, pursuant to paragraph 4 of rule 12. *Mr. Sam J. Nicholls* for appellant. No appearance for appellees.

No. 904. FAYETTE BANK & TRUST CO. ET AL. *v.* HEROD ET AL. May 27, 1929. Petition for writ of certiorari dismissed as to Fidelity and Casualty Company of New York, a respondent, on motion of *Mr. George L. Wire* for petitioners.

No. 913. UNITED STATES *v.* SKINNER. Appeal from the District Court of the United States for the Southern District of Florida. June 3, 1929. Dismissed on motion of *Attorney General Mitchell* for the United States.

SUMMARY STATEMENT OF BUSINESS OF THE SUPREME COURT OF THE UNITED STATES FOR OCTOBER TERM, 1928.

Original Docket

Cases pending at beginning of term	15
New cases docketed during term	6
Cases finally disposed of	3
Cases not finally disposed of	18

Appellate Docket

Cases pending at beginning of term	175
New cases docketed during term	772
Cases finally disposed of	822
Cases not finally disposed of	125

The number of pending cases, original and appellate, was thus decreased by 47.

Interlocutory decisions, and adverse decisions upon applications for leave to file, as in mandamus, prohibition, etc., are not here included.

INDEX.

ABANDONMENT. See **Waters.**

ACQUIESCENCE. See **Treaties,** 7.

ADMIRALTY. See **Aliens,** I, 1; II, 7, 8.

1. *Source of Jurisdiction* is in grant of judicial power by Constitution, Art. III, § 2, and is not dependent on interstate or foreign commerce. *London Guarantee Co.* v. *Comm'n,* 109.

2. *Maritime Employment.* Test of, in case of seaman. *Id.*

3. *Place of Maritime Employment.* Need not be on board vessel in case of death of seaman employed on navigable waters. *Id.*

4. *Commerce Within Admiralty Jurisdiction.* Exists where persons are transported by vessel for hire on pleasure trips over navigable waters. *Id.*

5. *State Compensation Act.* Inapplicable to claim for death of seaman in case involving no interstate or foreign commerce but having no features other than those characteristically maritime. *Id.*

6. *Limited Liability Act.* To be construed broadly and applies to stockholders who by state law become proportionately liable for obligation of corporation owning vessel. *Flink* v. *Paladini,* 59.

7. *Maritime Liens.* Ship Mortgage Act gives lien on vessel for necessaries furnished on order of owner or agent, without necessity of proof that credit was given to vessel. *W. A. Marshall & Co.* v. *The President Arthur,* 564.

8. *Id.* No other change in general maritime lien law intended by Ship Mortgage Act. *Id.*

9. *Waiver of Lien.* Lien of Ship Mortgage Act may be waived without express renunciation. *Id.*

10. *Id.* Lien *held* waived where libellant made specific contracts for an express security. *Id.*

ADVERSE POSSESSION. See **Limitations.**

ADVICE OF COUNSEL. See **Criminal Law,** 5.

ADVISORY DECISIONS. See **Courts,** 3.

ALIENS.

Discrimination against in state taxation. See **Treaties.**

I. **Entry and Deportation.**

1. *Entry.* Alien seaman shipping on American vessel for round trip voyage to foreign port makes "entry" on return. *U. S. ex rel. Claussen* v. *Day,* 398.

2. *Id.* Connotes arrival from foreign port or place. *Id.*

3. *Deportation.* Provision for arrest and deportation because of crime (§ 19), extends to alien declarant. *Id.*

II. **Naturalization.**

1. *Construction of Acts.* Statutes prescribing qualifications and governing procedure for admission construed to favor and support government. *United States* v. *Schwimmer,* 644.

2. *Procedure.* Court's function is to receive testimony, compare it with law, and judge on both law and fact. *Id.*

3. *Burden of Proof.* Upon applicant to show qualifications. *Id.*

4. *Sufficiency of Evidence.* The government is entitled to the benefit of any doubt as to any essential matter of fact, and when such exists the application should be denied. *Id.*

5. *Qualifications.* Opinions and beliefs of applicant as to armed defense a proper subject of inquiry. *Id.*

6. *Id.* Application *held* properly denied on ground of refusal to bear arms in defense of country. *Id.*

7. *Residence.* Service as seaman on vessel of foreign registry not residence in United States for naturalization purposes. *McDonald* v. *United States,* 12.

8. *"Place Within U. S."* American vessel on high seas or in foreign waters not such within meaning of Act. *U. S. ex rel. Claussen* v. *Day,* 398.

9. *"Immigrants."* Meaning of term under § 3 of Naturalization Act. *Karnuth* v. *United States,* 231.

10. *Temporary Visitors on "Business."* Does not include aliens coming to labor for hire. *Id.*

ANTI-TRUST ACTS. See **Packers & Stockyards Act.**

Appeals Under. Must be direct to Supreme Court in suits in which the United States is complainant. *United States* v. *California Canneries,* 553.

APPEAL AND ERROR. See **Jurisdiction; Procedure.**

ARGUMENT OF COUNSEL. See **Jury; Procedure,** 6.

ARMY. See **Pay.**

ARREST. See **Aliens,** I, 3; **Congressional Committees,** 1–2.

BANKRUPTCY.

1. *Discharge.* Barred by obtaining credit on materially and grossly incorrect financial statement. *Morimura, A. & Co.* v. *Taback,* 24.

2. *Evidence.* Examination of in absence of concurrent findings below. *Id.*

3. *Special Master.* Weight of findings. *Id.*

BANKS AND BANKING. See **Executors and Administrators,** 1–3.

Statutory Presumption of Fraud in every case of insolvency, casting burden of proof on officers prosecuted, is unconstitutional. *Manley* v. *Georgia,* 1.

BONDS. See **Constitutional Law,** VIII, 1; **Taxation,** II, (A), 11–13; III, 4, 6.

BOYCOTT. See **Packers & Stockyards Act.**

BREACH OF TRUST. See **Patents for Inventions,** 1.

BURDEN OF PROOF. See **Aliens,** II, 3; **Criminal Law; Evidence; Presumptions; Taxation,** I, 2.

CALIFORNIA.

Liability of Stockholders, under state constitution and Civil Code for obligations of corporation owning vessel. *Flink* v. *Paladini,* 59.

CARRIERS. See **Employers' Liability Act; Interstate Commerce Acts; Negligence; Railroads.**

CERTIORARI. See **Jurisdiction.**

Parties. Respondent who did not seek certiorari may not question correctness of decree of court below. *Lucas* v. *Alexander,* 573.

CHARITABLE BEQUESTS. See **Taxation,** II, B, 1–2.

CHILD LABOR LAWS. See **Employers' Liability Act,** 4.

CITIZENS. See **Aliens; Constitutional Law,** VI, 3.

COMMERCE. See **Admiralty; Constitutional Law,** VII; **Interstate Commerce Acts; Trade Marks.**

COMPENSATION. See **Constitutional Law,** IX, 1–2; XI, (C); **Pay.**

CONGRESSIONAL COMMITTEES. See **Constitutional Law,** IV, (A), (B). See also, *McGrain* v. *Daugherty,* 273 U. S. 135.

1. *Process.* Senate has inherent power to issue warrant of arrest to compel attendance of witness without subpœna. *Barry* v. *U. S. ex rel. Cunningham,* 597.

2. *Id.* Presumption of regularity attends issuance of warrant. *Id.*

3. *Id.* Judicial interference with process of Senate may be invoked only upon clear showing of abuse of power. *Id.*

4. *Administration of Oaths* to witnesses. *Sinclair* v. *United States,* 263.

5. *Recusant Witnesses.* When punishable under R. S. § 102. *Id.*

6. *Rights of Witnesses.* Constitutional limits on interrogation. *Id.*

7. *Id.* Right to bail. *Barry* v. *U. S. ex rel. Cunningham,* 597.

8. *Subject Matter of Investigation.* Inquiry into disposal of naval oil lands may be authorized by Senate, for the protection of the public lands and to ascertain whether further legislation to that end is needed. *Sinclair* v. *United States,* 263.

9. *Mistakes* in reference made by one resolution to another may be corrected by the context and circumstances. *Id.*

10. *Prosecution of Witness* under R. S. § 102 for refusal to answer. See **Criminal Law.**

CONSTITUTIONAL LAW. See **Admiralty; California; Congressional Committees; Jurisdiction; Justices of the Peace; Missouri; Philippine Islands; Treaties.**

I. Principles of Construction, p. 885.
II. Judiciary, p. 885.
III. Enactment of Laws; Executive Function, p. 885.
IV. Powers of Senate, p. 886.
  (A) Investigations Concerning Future Legislation and Public Lands, p. 886.
  (B) Concerning Elections and Qualifications of Senators, p. 886.
V. Taxing Power, p. 886.
VI. War Power, p. 886.
VII. Commerce Clause, p. 887.
VIII. Contract Clause, p. 887.
IX. Fourth and Fifth Amendments, p. 887.
X. Sixth Amendment, p. 888.

CONSTITUTIONAL LAW—Continued.

XI. Fourteenth Amendment, p. 888.
(A) In General, p. 888.
(B) Privileges and Immunities, p. 888.
(C) Due Process Clause, p. 888.
(D) Equal Protection Clause, p. 889.
XII. Sixteenth Amendment, p. 889.

I. **Principles of Construction.**

Executive and Legislative Practice. Influence of in construction of Constitution. *Pocket Veto Case,* 655.

See **Statutes.**

II. **Judiciary.** See **Admiralty; Jurisdiction.** See also *infra,* IV, (A), 3; (B), 5; XI, (A), 3, 4.

1. *Constitutional and Legislative Courts.* Distinction between as regards jurisdiction, tenure, and subjection to power of Congress. *Ex parte Bakelite Corp'n,* 438.

2. *Id. Case or Controversy* essential in constitutional but not in legislative court. *Id.*

3. *"Court of the United States,"* not necessarily a constitutional court. *Id.*

4. *Court of Customs Appeals.* Not a constitutional court. *Id.*

5. *Collateral Legislative and Judicial Powers.* Authority of Congress to investigate subjects involved in litigation. *Sinclair* v. *United States,* 263.

6. *Legislative Investigations.* Intervention of courts to protect rights of individuals. *Barry* v. *U. S. ex rel. Cunningham,* 597.

7. *Admiralty Jurisdiction.* Arises from Constitution, Art. III, § 2, independently of federal powers over commerce. *London G. & A. Co.* v. *Commission,* 109.

8. *State Workmen's Compensation Act.* Inapplicable to claim for death of seaman within exclusive admiralty jurisdiction. *Id.*

III. **Enactment of Laws. Executive Function.**

1. *Consideration and Return of Bill by President.* Ten calendar days allowed, exclusive of Sundays, for its consideration, and its return if not approved. (§ 7, Art. I.) *Pocket Veto Case,* 655.

2. *Id.* House to which return of disapproved bill is made must be in session; return to its officer or agent not authorized. *Id.*

3. *Effect of Adjournment of Congress,* preventing return of bill in 10 days, is that bill does not become a law. *Id.*

CONSTITUTIONAL LAW—Continued.

4. *"Adjournment"* meant is not limited to final adjournment; includes anything that prevents such return. *Id.*

5. *Veto Power.* Duty of President with regard to, can not be restricted by Congress. *Id.*

IV. **Powers of Senate.**

See also **Congressional Committees; Criminal Law.**

(A) Investigations Concerning Future Legislation and Public Lands.

1. *Power to Interrogate Witnesses,* through authorized committee, as to facts pertinent to dispositions of public reserved land, where the object is to protect the public property interests and to find out whether further legislation may be needed to that end. *Sinclair* v. *United States,* 263.

2. *Rights of Witnesses.* Refusal to answer questions. *Id.*

3. *Relation of Legislative Power to Judicial Power.* That the subject of inquiry is embraced in pending litigation does not take away committee's power to interrogate witnesses on the facts. *Id.*

(B) Concerning Elections and Qualifications of Senators.

1. *Jurisdiction of Senate.* Exclusive power to pass upon elections, returns and qualifications of members. *Barry* v. *U. S. ex rel. Cunningham,* 597.

2. *Id.* Attaches when credentials presented. *Id.*

3. *Procedure.* Senate may dispense with committee at any stage and conduct inquiry directly. *Id.*

4. *Witnesses.* When may be brought for examination at bar of Senate by warrant of arrest without preliminary subpœna. *Id.*

5. *Intervention of Courts* for protection of arrested witnesses, how limited. *Id.*

6. *Seating of Member* may be postponed pending the inquiry. *Id.*

7. *Id. Right of State* to equal suffrage in Senate not infringed by such postponement. *Id.*

V. **Taxing Power.** See *infra,* VII, VIII, XI; **Taxation,** II, (A), 5; III, 1–18.

Priority of Claim of United States over that of State against insolvent debtor. *County of Spokane* v. *United States,* 80.

VI. **War Power.**

1. *Regulation of Private Contracts,* including the fixing of prices, during war. *Highland* v. *Russell C. & S. P. Co.,* 253.

CONSTITUTIONAL LAW—Continued.

2. *Wide Discretion of Congress and President* in exercise of war power; strong presumption of validity of their acts; not set aside unless clearly arbitrary and unconstitutional. *Id.*

3. *National Defense.* Duty of citizens by force of arms to defend government is fundamental. *United States* v. *Schwimmer,* 644.

VII. **Commerce Clause.** See *supra,* II, 7; **Admiralty.**

1. *State Taxes* on oil purchased for export and moved by rail to port of embarkation, not leviable while oil temporarily stored awaiting vessels. *Carson Petroleum Co.* v. *Vial,* 95.

2. *Id. Interstate Ferries.* State tax on gasoline used for motive power unconstitutional, although confined to such part as is used within the State. *Helson & R.* v. *Kentucky,* 245.

3. *Id. Franchise Tax.* Not violation of commerce clause where apportioned to business or property of corporation within State. *International Shoe Co.* v. *Shartel,* 429.

4. *Id. Tax in Kind.* Exaction of privilege tax on oyster business in empty shells not violation of commerce clause though some oysters come from other States. *Leonard & L.* v. *Earle,* 392.

VIII. **Contract Clause.**

1. *Exemption from Taxation.* State tax on income of county and municipal bonds exempt by statutory contract of State, invalid. *Macallen Co.* v. *Massachusetts,* 620.

2. *Surplus Water Grants.* Abandonment of navigation canal for highway by State, not impairment of obligation of contract. *Kirk* v. *Maumee Valley Co.,* 797; *Kirk* v. *Providence Mill Co.,* 807.

3. *Public Utilities.* Customers' contracts subject to modification by State under police power. *Sutter Butte Canal Co.* v. *Commission,* 125.

IX. **Fourth and Fifth Amendments.**

1. *Regulation of Private Contracts Under War Power. Highland* v. *Russell C. & S. P. Co.,* 253.

2. *Id. Price-fixing* for private dealings in coal valid during war, where the government might have expropriated the coal and the price fixed would have sufficed for just compensation. *Id.*

3. *Witnesses before Congressional Committees.* When obliged to answer questions. See *supra,* IV, (A); **Congressional Committees.**

CONSTITUTIONAL LAW—Continued.

X. **Sixth Amendment.**

1. *Venue of Criminal Prosecution* for offense committed before dividing judicial district. *Lewis* v. *United States,* 64.

2. *Id. Jurors.* From what territory drawn. *Id.*

XI. **Fourteenth Amendment.** See **Taxation.**

Preliminary injunction in rate controversy. See **Injunctions.**

(A) In General.

1. *Legislation Generally.* Not invalid merely because compliance is burdensome. *Standard Oil Co.* v. *Marysville,* 582.

2. *Id.* Not unduly discriminatory merely because not as comprehensive or as effective as might be. *Roschen* v. *Ward,* 337.

3. *Id.* Balancing considerations of advantage and disadvantage not for courts. *Id.*

4. *Id.* Reasonableness, wisdom or propriety of legislation under police power not for determination of courts. *Standard Oil Co.* v. *Marysville,* 582.

5. *Police Power.* Legislation reasonably within, will be sustained. *Id.*

6. *Id.* Contracts of public utilities subject to modification under. *Sutter Butte Canal Co.* v. *Commission,* 125.

(B) Privileges and Immunities.

Discrimination Against Non-residents with respect to right to sue in state courts, valid where based on rational considerations. *Douglas* v. *N. Y., N. H. & H. R. Co.,* 377.

(C) Due Process Clause.

1. *Surplus Water Grants.* Abandonment of navigation canal for highway by State *held* not denial of due process to lessee or grantee. *Kirk* v. *Maumee Valley Co.,* 797; *Kirk* v. *Providence Mill Co.,* 807.

2. *Fire Hazards.* Ordinance requiring gasoline and kerosene storage tanks to be buried underground *held* valid. *Standard Oil Co.* v. *Marysville,* 582.

3. *Tax in Kind.* Exaction, as privilege tax on oyster business, of part of empty shells, and use of owner's premises to store shells until removed by the State, is not taking of private property for public use without compensation. *Leonard & L.* v. *Earle,* 392.

4. *Statutory Presumption of Guilt* casting burden of proof on accused, invalid if based on facts from which guilt cannot reasonably be inferred. *Manley* v. *Georgia,* 1.

CONSTITUTIONAL LAW—Continued.

5. *Statutory Presumption of Negligence,* against railroad from mere fact of collision at grade crossing, invalid. *Western & A. R. Co.* v. *Henderson,* 639.

(D) Equal Protection Clause.

1. *Corporate Franchise Tax.* Distinction between par value and non-par value stock in respect of method of computing tax, *held* reasonable classification consistent with equal protection clause. *New York* v. *Latrobe,* 421.

2. *Privilege Tax.* Placing oyster packers in separate class for purpose of tax valid. *Leonard & L.* v. *Earle,* 392.

3. *Optician Business.* Statute requiring attendance of specialist where spectacles are sold at retail *held* valid. *Roschen* v. *Ward,* 337.

XII. **Sixteenth Amendment.** See **Taxation,** II, (A).

CONSTRUCTION. See **Constitutional Law,** I; **Statutes; Treaties.**

CONTEMPT. See **Congressional Committees,** 5; **Criminal Law.**

1. *Surveillance of Jurors.* By procurement of defendant in criminal case *held* obstruction of justice and criminal contempt. *Sinclair* v. *United States,* 749.

2. *Id.* Similar practice by Department of Justice in other cases no defense. *Id.*

3. *Advice of Counsel.* Good faith and advice of counsel not a defense. *Sinclair* v. *United States,* 263.

CONTRACTS. See **Constitutional Law,** VIII.

CO-OPERATIVE ASSOCIATIONS. See **Packers & Stockyards Act.**

CORPORATIONS. See **Constitutional Law,** VII, 3; XI, (D), 1–2. **Jury,** 1; **Taxation,** III, 8–16.

1. *Foreign Corporations.* Venue in suits against. *Louisville & N. R. Co.* v. *Chatters,* 320.

2. *Id.* Not suable in State where not doing business. *Morris & Co.* v. *Skandinavia Ins. Co.,* 405.

3. *What Constitutes Doing Business.* Company making compacts of reinsurance relating to property in another State is not doing business in latter. *Id.*

4. *Statutory Agent.* Designation of as consent to suit. *Louisville & N. R. Co.* v. *Chatters,* 320; *Morris & Co.* v. *Skandinavia Ins. Co.,* 405.

5. *Limited Liability* of stockholders for obligation of corporation owning vessel. *Flink* v. *Paladini,* 59.

COUNSEL. See **Contempt**, 3; **Criminal Law**, 5; **Jury**, 1; **Procedure**, 6.

COURT OF CUSTOMS APPEALS. See **Constitutional Law**, II, 4; **Jurisdiction**, V.

COURTS. See **Jurisdiction; Justices of the Peace.**

1. *Constitutional and Legislative Courts,* their subjects matter, tenure of judges, etc. See *Ex parte Bakelite Corp'n,* 438.

2. *Opinions.* Judges of district courts should give reasons for decisions in important cases. *Baltimore & O. R. Co.* v. *United States,* 781.

3. *Advisory Decisions.* Duty to render may be imposed on legislative but not on constitutional court. *Ex parte Bakelite Corp'n,* 438.

CRIMINAL LAW. See **Contempt; Jurisdiction**, IV, 1–3; **Presumptions.**

1. *Contempt* in refusal to answer questions before Congressional Committee, by witness who has voluntarily appeared, though not subpœnaed, is punishable under R. S. § 102. *Sinclair* v. *United States,* 263.

2. *Rights of Witness and Power of Committee* at such inquiries. *Id.*

3. *Pertinency of the Questions* to the subject of authorized inquiry—burden on the United States to prove in order to overcome presumption of innocence. *Id.*

4. *Id.* Pertinency a question for the court and not the jury. *Id.*

5. *Id. Good Faith and Advice of Counsel,* not an excuse for refusal to answer. *Id.*

6. *Sentence* on several counts, when sustained if conviction under any of them is valid. *Id.*

7. *Evidence in Mitigation.* Hearing evidence in mitigation of punishment in proceedings for contempt *held* within discretion of trial court. *Sinclair* v. *United States,* 749.

CROSS-EXAMINATION. See **Evidence.**

CUSTOMS APPEALS, COURT OF. See **Jurisdiction**, V.

Status. Court of Customs Appeals is legislative and not constitutional court. *Ex parte Bakelite Corp'n,* 438.

DEATH. See **Admiralty**, 3, 5.

DECEIT. See **Employers' Liability Act**, 1.

DENMARK. See **Treaties**, 8–9.

DEPORTATION. See **Aliens**, I.

DISCRIMINATION. See **Constitutional Law**, XI, (B), (D); **Packers & Stockyards Act**, 2–3; **Secretary of Agriculture**; **Treaties**, 8.

DOMICILE. See **Aliens**, 7–8.

Non-resident. Term may be used to include citizens of State not actually resident there. *Douglas* v. *N. Y., N. H. & H. R. Co.*, 377.

DROIT DE DÉTRACTION. See *Nielsen* v. *Johnson*, 47.

ELECTIONS. See **Constitutional Law**, IV, (B).

EMPLOYERS' LIABILITY ACT. See **Jurisdiction**, VIII, 4.

1. *Effect of Fraud in Procuring Employment.* Bars recovery under Act. *Minneapolis, St. P. & S. S. M. R. Co.* v. *Rock*, 405.

2. *Negligence.* No right of action under Act except upon theory of negligence. *Chesapeake & O. R. Co.* v. *Stapleton*, 587.

3. *Id.* Whether violation of state statute is negligence *per se* under Act is a federal question. *Id.*

4. *Id.* Violation of state child labor law by carrier *held* not negligence *per se*. *Id.*

5. *Theory of Case* pursued in courts below as to place of accident can not be changed on review. *Delaware, L. & W. R. Co.* v. *Koske*, 7.

6. *Dangers of Employment.* Company not guilty of breach of duty to employee in maintaining drainage ditch in railway yard. *Id.*

7. *Id.* Assumption of risk. *Id.*

8. *Negligence of Employee.* Leaving safe place to work and exposing himself to danger. *Atlantic C. L. R. Co.* v. *Davis*, 34.

9. *Id.* Death of railway switchman *held* attributable solely to his negligence, barring recovery. *Atlantic C. L. R. Co.* v. *Driggers*, 78.

10. *Sufficiency of Evidence.* Judgment reversed where evidence insufficient to warrant finding of negligence. *Id.*

11. *Id. Verdict.* Direction of for defendant where evidence insufficient. *Delaware, L. & W. R. Co.* v. *Koske*, 7; *Atlantic C. L. R. Co.* v. *Davis*, 34; *Atlantic C. L. R. Co.* v. *Driggers*, 787.

ENTRY. See **Aliens**, I, 1–2.

EQUITY. See **Injunctions.**

Multiplicity of Suits. Duty of district court to retain jurisdiction to prevent multiplicity of suits and virtual denial of justice. *Baltimore & O. R. Co.* v. *United States*, 781.

ESTATE TAX. See **Taxation**, II, (B).

ESTOPPEL. See **Insurance**, 2.

By Judgment. Decree of state court protecting undisclosed invention from breach of trust *held* estoppel in suit by defendant to enjoin infringement. *Becher* v. *Contoure Laboratories*, 388.

EVIDENCE. See **Bankruptcy**, 2; **Criminal Law**; **Judicial Notice**; **Presumptions.**

1. *Proof of Physical Injury.* Plaintiff must show that defendant's negligence caused the physical impairment complained of. *New York C. R.* v. *Johnson*, 310.

2. *Id. Cross Examination.* Competent for defendant to show by cross examining plaintiff's witnesses that latter's physical condition was due to disease as independent cause. *Id.*

EXECUTION.

Power to Award. Courts authorized to review decisions of Board of Tax Appeals have power to award execution of judgments. *Old Colony Trust Co.* v. *Comm'r*, 716.

EXECUTORS AND ADMINISTRATORS.

1. *What Law Governs.* Conformity with state law in administration of estate by consolidated national bank required. *Ex parte Worcester County Nat'l Bank*, 347.

2. *Succession to Executorship.* Whether consolidated national bank succeeded to executorship held by merged company, *held* governed by decision of state court. *Id.*

3. *Id.* Consolidated national bank should apply for appointment by probate court in order to succeed to executorship held by merged trust company. *Id.*

EXPORTS. See **Taxation**, III, 7.

FEDERAL EMPLOYERS' LIABILITY ACT. See **Employers' Liability Act.**

FERRIES. See **Constitutional Law**, VII, 2; **Taxation**, III, 2.

FISH AND GAME. See **Constitutional Law**, VII, 4; **Taxation**, III, 13, 14.

FINDINGS. See **Bankruptcy**, 2–3.

FOREIGN CORPORATIONS. See **Corporations**, 1–4; **Railroads**, 2; **Taxation**, 8–12, 15–19.

FRAUD. See **Bankruptcy**, 1; **Banks and Banking**; **Employers' Liability Act**, 1; **Presumptions.**

IMMIGRATION. See **Aliens.**

INDIANS.

Statute of limitations in Oklahoma under Mansfield's Digest, § 4471. See *Grayson* v. *Harris,* 300.

INDICTMENT. See **Jurisdiction,** IV, 1, 2.

INHERITANCE. See **Limitations; Taxation,** II, (B).

INJUNCTIONS.

1. *Interlocutory Injunction.* Under what circumstances allowable. *Ohio Oil Co.* v. *Conway,* 813.

2. *Id.* Granting of by federal court in controversy over rates between street railways and city and state authorities, *held* an abuse of discretion where grave doubt existed as to whether the existing rates were not adequate, or contractually binding, and the rights of the parties involved complicated contracts and questions of state law, which there had been ample opportunity to present to the state courts. *Gilchrist* v. *Interborough R. T. Co.,* 159.

3. *Id.* Jud. Code, § 266, as amended, requiring that applications in certain cases be determined by three judges, and allowing appeal to this court, does not affect rule that such applications are to sound discretion of court and that orders granting or denying them will not be disturbed on appeal where discretion was not abused. *Alabama* v. *United States,* 229.

4. *Laches.* Equitable relief against imitative negro fraternal order *held* barred by laches. *Ancient Egyptian Order* v. *Michaux,* 737.

INSOLVENCY. See **Bankruptcy; Jurisdiction,** IV, 4, 5; **Taxation,** I, 1.

INSURANCE. See **Taxation,** II, (A), 1, 7, 8.

1. *Marine Insurance.* Co-insurance principle *held* applicable to general average loss under a valued policy on cargo. *Gulf Refining Co.* v. *Atlantic Mut. Ins. Co.,* 708.

2. *Id.* Application of agreed value to adjustment of loss does not depend on estoppel. *Id.*

INTEREST.

1. *Recapture Suit.* Where carrier unsuccessfully, but bona fide, defends recapture suit, interest prior to final order of district court should not be imposed. *St. Louis & O'Fallon R. Co.* v. *United States,* 461.

2. *Restitution.* Right to recover interest on payments made under decree subsequently reversed. *Baltimore & O. R. Co.* v *United States,* 781.

INTERNATIONAL LAW. See **Treaties.**

INTERSTATE COMMERCE. See **Admiralty**, 1; **Constitutional Law**, VII; **Interstate Commerce Acts**; **Taxation**, III, 2, 7, 12; **Trade Marks.**

INTERSTATE COMMERCE ACTS. See **Anti-Trust Acts**; **Employers' Liability Acts**; **Jurisdiction**, II, (A), 1, 3, 5; II, (C), 1; VIII, 2; **Packers and Stockyards Act.**

1. *Intrastate Rates.* Power of Commission to establish to avoid undue discrimination and prejudice to interstate commerce. *Alabama* v. *United States*, 229.

2. *Carriage of Mails.* Commission has power to date increase of compensation from time when railroad filed petition therefor. *United States* v. *New York C. R. Co.*, 73.

3. *Personal Injury.* Limitation of liability in tariff binds carrier and passenger. *Louisville & N. R. Co.* v. *Chatters*, 320.

4. *Unreasonable Rates.* Power of Commission to declare rates unreasonable applies to all rates—joint, local, or proportional. *Atchison, T. & S. F. R. Co.* v. *United States*, 768.

5. *Id.* Restricted power of Commission to establish through routes not a limitation on power to declare rates unreasonable. *Id.*

6. *Through Shipment.* Inbound and outbound movement cannot be converted into through movement by fiction of "through rate with transit privilege." *Id.*

7. *Recapturing Traffic.* Carrier has no legal right to recapture traffic which it originated. *Id.*

8. *Trackage Agreement* between carriers *held* not abrogated by authorized abandonment of line. *Central N. E. R. Co.* v. *Boston & A. R. Co.*, 415.

9. *Valuation.* Reproduction costs must be given consideration. *St. Louis & O'Fallon R. Co.* v. *United States*, 461.

10. *Id.* Weight to be accorded reproduction costs for recapture purposes *held* not before Court in this case. *Id.*

11. *Recapture of Excess Earnings.* Not dependent upon prior fixing of general level of rates. *Id.*

12. *Recapture Order.* Invalid where reproduction costs not considered. *Id.*

13. *Id.* Invalid order cannot be sustained on ground that income permitted is sufficient to negative suggestion of confiscation. *Id.*

INTERSTATE COMMERCE ACTS—Continued.

14. *State Regulation.* Carrier should apply to state commission for permission, as required by statute, before abandoning intrastate service. *St. Louis, S. F. R. Co.* v. *Comm'n,* 560.

15. *Id.* Discontinuance of intrastate service without permission of state commission *held* not to justify exposing carrier and employees to statutory penalties. *Id.*

16. *Id.* State commission should determine application of carrier to discontinue intrastate service without prejudice because of failure to apply earlier. *Id.*

17. *False Entries in Records.* Provision of Act imposing penalty for making, *held* not applicable to company icing refrigerator cars under contract with carrier. *United States* v. *Fruit Growers Express Co.,* 370.

JUDGES.

1. *Tenure.* Judges of constitutional courts hold office during good behavior. *Ex parte Bakelite Corp'n,* 438.

2. *Id.* Judges of legislative courts hold office for such term as Congress provides. *Id.*

JUDGMENTS. See **Estoppel; Execution; Jurisdiction,** II, (E), 4–5; IV, 5.

1. *Conclusiveness.* Respondent in certiorari who did not seek review may not question correctness of decree of court below. *Lucas* v. *Alexander,* 573.

2. *Id.* Effect of judgment by default. *Riehle* v. *Margolies,* 218.

3. *Res Judicata.* Where remedies are pursued contemporaneously in both District Court and Circuit Court of Appeals, that judgment which is first rendered is final. *Old Colony Trust Co.* v. *Comm'r,* 716.

4. *Interpretation.* Language of opinion must be read in light of issues presented. *Sinclair* v. *United States,* 749.

JUDICIAL NOTICE.

1. *Common Knowledge.* Dangerously inflammable character of gasoline and kerosene. *Standard Oil Co.* v. *Marysville,* 582.

2. *Id.* Time of sunrise. *Delaware, L. & W. R. Co.* v. *Koske,* 7.

3. *Judicial Records.* Notice taken of proceedings in trial court as shown by record of case in this Court at earlier stage. *United States* v. *California Canneries,* 553.

4. *Local Conditions.* Purpose of statute empowering Governor General of Philippine Islands to transfer justices of the peace. *Alberto* v. *Nicolas,* 139.

JURISDICTION. See **Admiralty**, 1, 4; **Congressional Committees; Constitutional Law**, II, 7; IV, (B), 1–2; X, 1; **Injunctions; Procedure.**

I. In General, p. 896.
II. Jurisdiction of This Court, p. 897.
(A) Generally, p. 897.
(B) Over Circuit Courts of Appeals, p. 898.
(C) Over District Courts, p. 898.
(D) Over Supreme Court of Philippine Islands, p. 898.
(E) Over State Courts, p. 899.
III. Jurisdiction of Circuit Courts of Appeals, p. 899.
IV. Jurisdiction of District Courts, p. 899.
V. Jurisdiction of Court of Customs Appeals, p. 900.
VI. Jurisdiction of Court of Appeals, District of Columbia, p. 900.
VII. Jurisdiction of Supreme Court of Philippine Islands, p. 900.
VIII. Jurisdiction of State Courts, p. 900.

References to particular subjects under this title:

Administrative decisions. I, 5; II, (A), 1–3; III, 1.
Amount in controversy. II, (D), 3.
Case or controversy. I, 4–5; III, 1; V.
Certificate. II, (B).
Equity. IV, 6; V.
Federal questions. I, 6; II, (A), 4; II, (D), 1–2; II, (E), 1–2.
Finality of judgments. II, (E), 4–5.
Findings. I, 7.
Injunction. II, (C), 2–3.
Local questions. II, (A), 6; II, (D), 4; VIII, 1–4.
Mandamus. II, (A), 8.
Mandate. II, (A), 8; II, (C), 4–5.
Moot case. II, (A), 9, 10.
Prohibition. II, (A), 7.
Receiverships. IV, 4–5.
Removal. I, 3; IV, 8.
Three-judge court. II, (C), 1.
Venue. I, 1; IV, 1–3.

I. In General.

1. *Venue.* Foreign corporation not suable without its consent on cause of action arising outside of State and not connected with act or business of the corporation within the State. *Morris & Co.* v. *Skandinavia Ins. Co.*, 405; *Louisville & N. R. Co.* v. *Chatters*, 320.

JURISDICTION—Continued.

2. *Id. Consent.* Effect of designation of statutory agent. *Id.*

3. *Objection to Jurisdiction.* Removal of cause or plea in abatement because of other action pending does not constitute waiver. *Morris & Co.* v. *Skandinavia Ins. Co.,* 405.

4. *Case or Controversy.* Jurisdiction of legislative courts not limited by provision of Art. III, § 2, of Constitution. *Ex parte Bakelite Corp'n,* 438.

5. *Id.* Proceeding begun by administrative or executive determination. *Old Colony Trust Co.* v. *Comm'r,* 716.

6. *Federal Question.* Whether violation of state statute is negligence *per se* under Employers' Liability Act. *Chesapeake & O. R. Co.* v. *Stapleton,* 587.

7. *Findings.* Though apparently sufficient to support judgment, review of rulings of trial court on questions of law not lost. *Maryland Casualty Co.* v. *Jones,* 792.

8. *Nonsuit.* Ruling on motion for nonsuit because of insufficiency of evidence reviewable. *Id.*

II. **Jurisdiction of this Court.**

(A) Generally.

1. *Scope of Review.* Conclusion of I. C. C. and District Court that carriers were not under common control, accepted here. *St. Louis & O'F. R. Co.* v. *United States,* 461.

2. *Id.* This Court not bound by legislative or judicial designation of nature of state tax. *Macallen Co.* v. *Massachusetts,* 620.

3. *Id.* Finding of Interstate Commerce Commission that rate is unreasonable *held* conclusive. *Atchison, T. & S. F. R. Co.* v. *United States,* 768.

4. *Id.* Constitutional question not presented below cannot be considered here. *White River L. Co.* v. *Arkansas,* 692.

5. *Id.* In suit to set aside order of I. C. C. canceling unreasonable rate, failure of Commission to cancel rate of competing carrier not subject to review. *Atchison, T. & S. F. R. Co.* v. *United States,* 768.

6. *Id.* Interpretation of order of utilities commission by highest court of State is binding on this Court. *Sutter Butte Canal Co.* v. *Comm'n,* 125.

7. *Prohibition.* Power of this Court to issue writ need not be determined where not proper remedy. *Ex parte Bakelite Corp'n,* 438.

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JURISDICTION—Continued.

8. *Procedure Following Mandate.* Action of lower federal court refusing to give effect to, or misconstruing mandate, may be controlled by new appeal or mandamus. *Baltimore & O. R. Co.* v. *United States,* 781.

9. *Moot Case.* Action to compel state officer to license business for year already passed *held* not moot. *Leonard & L.* v. *Earle,* 392.

10. *Id.* Case held moot and further proceedings on merits denied. *United States* v. *Anchor Coal Co.,* 812.

(B) Over Circuit Courts of Appeals.

Certificate. Certificate by Circuit Court of Appeals of question of law in review of decision of Board of Tax Appeals *held* within appellate jurisdiction of this Court. *Old Colony Trust Co.* v. *Comm'r,* 716.

(C) Over District Courts.

1. *Interstate Commerce Commission Order.* Final decree of three judge court in suit to annul, reviewable here. *St. Louis & O'F. R. Co.* v. *United States,* 461.

2. *Preliminary Injunction.* Order denying, made by court of three judges (Jud. Code, § 266, as amended) not disturbed on appeal if discretion was not abused. *Alabama* v. *United States,* 229.

3. *Id. Aliter* where abuse of discretion is plain. *Gilchrist* v. *Interborough R. T. Co.* 159.

4. *After Mandate.* Decree denying relief in accordance with mandate of this Court appealable. *Baltimore & O. R. Co.* v. *United States,* 781.

5. *Id.* Application for relief in accordance with mandate *held* in effect an equity suit. *Id.*

(D) Over Supreme Court of Philippine Islands.

1. *Federal Question.* Certiorari lies where construction of Act of Philippine Legislature turns on construction of Organic Act. *Alberto* v. *Nicolas,* 139.

2. *Id.* Question of validity under Organic Act of tax on stock dividends reviewable here. *Posados* v. *Warner, B. & Co.,* 340.

3. *Amount in Controversy.* Certiorari lies where amount in controversy exceeds $25,000. *Pampanga Sugar Mills* v. *Trinidad,* 211.

JURISDICTION—Continued.

4. *Local and Factual Questions.* Judgment of territorial court on, reversible only for clear error. *Compañía General* v. *Collector,* 306.

(E) Over State Courts.

1. *Federal Adoption of State Statute.* Arkansas statute adopted by Congress for Indian Territory, now in Oklahoma, is, with its prior construction, a federal act, to be construed by this Court independently on review of decision of state court. *Grayson* v. *Harris,* 300.

2. *Federal Right.* Question whether state court denied, or did not give due recognition to, reviewable here. *Ancient Egyptian Order* v. *Michaux,* 737.

3. *Id.* This Court may inquire whether right denied directly or indirectly. *Id.*

4. *Final Judgment.* Denial of certiorari by highest court of State makes judgment of intermediate court final. *Minneapolis, St. P. & S. S. M. R. Co.* v. *Rock,* 410.

5. *Id.* Certiorari properly directed to intermediate state court where by local practice its judgment is final. *Central N. E. R. Co.* v. *Boston & A. R. Co.,* 415.

III. **Jurisdiction of Circuit Courts of Appeals.**

1. *Decisions of Board of Tax Appeals.* Review of *held* to present "case or controversy" within jurisdiction. *Old Colony Trust Co.* v. *Comm'r,* 716.

2. *Id.* Fact that same tax may be litigated in District Court does not oust jurisdiction. *Id.*

IV. **Jurisdiction of District Courts.** See *supra,* I, 7–8; II, (C).

1. *Crimes.* Venue for indictment and trial, after creation of new district, of offenses committed before. *Lewis* v. *United States,* 63.

2. *Id. Grand and Petit Jurors.* How drawn. *Id.*

3. *Id. Presumption* that removal from jury box of names from certain counties was authorized in writing by District Judge. *Id.*

4. *Insolvency. Receiverships.* Court can not stay suit against debtor pending in state court when receiver was appointed. *Riehle* v. *Margolies,* 218.

5. *Id. Judgment of State Court.* Conclusive effect of as claim against debtor in receivership proceedings in federal court. *Id.*

6. *Equity.* Duty to retain jurisdiction in order to avoid multiplicity of suits and denial of justice. *Baltimore & O. R. Co.* v. *United States,* 781.

JURISDICTION—Continued.

7. *Tax Suits.* Jurisdiction over under Board of Tax Appeals Act. *Old Colony Trust Co.* v. *Comm'r,* 716.

8. *Removal of Cause* does not waive objection to jurisdiction. *Morris & Co.* v. *Skandinavia Ins. Co.,* 405.

V. **Jurisdiction of Court of Customs Appeals.**

Tariff Commission. Appeal from findings of Tariff Commission within jurisdiction, though not case or controversy. *Ex parte Bakelite Corp'n,* 438.

VI. **Jurisdiction of Court of Appeals of District of Columbia.**

Anti-Trust Act. No jurisdiction over appeal from order in suit brought by the United States under the Anti-Trust Act. *United States* v. *California Canneries,* 553.

VII. **Jurisdiction of Supreme Court of Philippine Islands.**

Divided Court. Equal division where ninth judge is disqualified, does not operate as an affirmance under § 138, Administrative Code of 1917. *Pampanga Sugar Mills* v. *Trinidad,* 211.

VIII. **Jurisdiction of State Courts.**

1. *Administration of Estates.* Whether consolidated national bank succeeded to executorship held by merged trust company, *held* matter of state law. *Ex parte Worcester County Nat'l Bank,* 347.

2. *Suits Between Carriers.* State court has jurisdiction of suit to enforce payments under trackage contract, notwithstanding order of Interstate Commerce Commission permitting abandonment of track connections. *Central N. E. R. Co.* v. *Boston & A. R. Co.,* 415.

3. *Undisclosed Invention.* Suit to protect from breach of trust *held* not under patent laws and within jurisdiction. *Becher* v. *Contoure Laboratories,* 388.

4. *Federal Employers' Liability Act.* State court not bound to entertain jurisdiction as against otherwise valid excuse. *Douglas* v. *New York, N. H. & H. R. Co.,* 377.

JURY. See **Constitutional Law,** X, 2; **Contempt,** 1–2; **Criminal Law,** 4; **Employers' Liability Act,** 11; **Jurisdiction,** IV, 2–3.

1. *Improper Argument.* Arguments reflecting improperly on conduct of opposing counsel and calculated to arouse prejudice in jury and sectional feelings against defendant as a foreign railroad corporation, should be suppressed by court. *New York C. R. Co.* v. *Johnson,* 310.

JURY—Continued.

2. *Id. Effect on Verdict. Exceptions.* Failure of court to suppress improper argument held ground for setting aside verdict on review. *Id.*

JUSTICES OF THE PEACE. See **Philippine Islands**, 2.

Nature of Office. Principle of preserving independence of judiciary applies less strictly to justices of the peace than to judges of superior court jurisdiction. *Alberto* v. *Nicolas,* 139.

LACHES. See **Injunctions**, 4.

LAND GRANT ACTS.

1. *Railroads.* Obligation as to transportation of property of United States at reduced rates. *United States* v. *Galveston, H. & S. A. R. Co.,* 401.

2. *Id.* Horses furnished by army officers not property of United States within meaning of Acts. *Id.*

LEASE. See **Constitutional Law**, VIII, 2; XI, (C), 1. **Waters.**

LEGACIES. See **Taxation**, II, (B), 1–2.

LIENS. See **Admiralty**, 7–10; **Taxation**, I, 1.

LIFE EXPECTANCY. See **Taxation**, II, (B), 4.

LIMITATIONS. See **Taxation**, II, (A), 11–13.

Suits to Recover Land. Limitation of 7 years "after title or cause of action accrued," does not run against heir from time of inheritance, where no cause of action had then accrued, as by adverse possession. *Grayson* v. *Harris,* 300.

LIMITED LIABILITY. See **Admiralty**, 6; **Railroads**, 3.

LOCAL PREJUDICE. See **Jury**, 1.

MAILS. Compensation for transporting. See **Interstate Commerce Acts**, 2.

MANDAMUS. See **Procedure**, 10.

MANDATE. See **Jurisdiction**, II, (A), 8; II, (C), 4–5.

MARINE CORPS. See **Pay.**

MARINE INSURANCE. See **Insurance.**

MARITIME LIENS. See **Admiralty**, 7–10.

MARITIME TORTS. See **Admiralty**, 3, 5.

MERCHANTS. See **Taxation**, III, 20.

MISSOURI.

Stock Corporation Act of 1921. Not violation of provision of state constitution limiting bills to single subject (§ 28, Art. IV). *International Shoe Co.* v. *Shartel,* 429.

MULTIPLICITY OF SUITS. See **Equity.**

NATIONAL DEFENSE. See **Constitutional Law,** VI, 3.

NATURALIZATION. See **Aliens,** II.

NAVIGABLE WATERS. See **Admiralty; Waters.**

NAVY. See **Congressional Committees,** 8; **Pay.**

NEGLIGENCE. See **Employers' Liability Act; Evidence; Presumptions; Railroads.**

1. *Violation of Law.* Violation of state statute *held* not negligence *per se. Chesapeake & O. R. Co.* v. *Stapleton,* 587.

2. *Theory of Case* pursued in courts below as to place of accident can not be changed on review. *Delaware, L. & W. R. Co.* v. *Koske,* 7.

OATHS. See **Congressional Committees,** 4.

OPTOMETRY. See **Constitutional Law,** XI, (D), 3.

OYSTERS. See **Constitutional Law,** XI, (C), 3; (D), 2; **Taxation,** III, 13–14.

PACKERS & STOCKYARDS ACT.

1. *Scope of Act.* Association held within protection of Act notwithstanding certain limitations of its powers. *United States* v. *American Livestock Comm'n Co.,* 435.

2. *Unfair Practice.* Boycott of dealer by others on live-stock exchange may constitute violation of Act. *Id.*

3. *Id.* General boycott of duly registered market agency not justified merely because part of dealings were *ultra vires. Id.*

PARTIES. See **Certiorari.**

PASSENGERS. See **Railroads,** 1, 3–5.

PATENTS FOR INVENTIONS. See **Estoppel; Jurisdiction,** VIII, 3.

1. *Undisclosed Invention* protected without patent against breach of trust. *Becher* v. *Contoure Laboratories,* 388.

2. *Infringement.* Plaintiff in suit to enjoin *held* estopped by judgment. *Id.*

PAY.

Longevity and Base Pay of officers of Marine Corps. *Leonard* v. *United States,* 40.

PHILIPPINE ISLANDS. See **Jurisdiction,** II, (D); **Taxation,** III, 16–23.

1. *Taxing Power.* Legislature has power to lay tax on stock dividends. *Posados* v. *Warner, B. & Co.,* 340.

2. *Justices of the Peace.* Power of the Governor General to transfer without advice and consent of the Philippine Senate. *Alberto* v. *Nicolas,* 139.

PHYSICIANS AND SURGEONS. See **Constitutional Law,** XI, (D), 3.

POLICE POWER. See **Constitutional Law,** XI.

POST OFFICE. Mails. See **Interstate Commerce Acts,** 2.

POWER OF ATTORNEY. See **Corporations,** 4; **Railroads,** 2.

PRESUMPTIONS. See **Congressional Committees; Constitutional Law; Criminal Law; Statutes.**

Statutory Presumptions of fraud and negligence, when invalid. *Manley* v. *Georgia,* 1; *Western & A. R. Co.* v. *Henderson,* 639.

PRICE-FIXING. See **Constitutional Law,** VI, 1.

PROBATE COURTS. See **Executors and Administrators.**

PROCEDURE. See **Aliens,** II, 2–3; **Anti-Trust Acts; Bankruptcy; Certiorari; Congressional Committees,** 1–3, 9; **Constitutional Law,** IV, (A), 1–3; (B), 3–6; X, 1–2; XI, (C), 4–5; **Corporations,** 1–2; **Criminal Law,** 3, 7; **Employers' Liability Act,** 5, 10–11; **Equity; Evidence, Executors and Administrators,** 3; **Injunctions,** 3; **Interstate Commerce Acts,** 14–16; **Judicial Notice,** 3; **Jurisdiction; Jury,** 1; **Negligence,** 2; **Railroads,** 1; **Restitution; Stare Decisis; Taxation,** I, 2.

1. *Preliminary Injunction.* When order of court of three judges (Jud. Code, § 266, as amended) may be disturbed on appeal. *Alabama* v. *United States,* 229; *Gilchrist* v. *Interborough R. T. Co.,* 159.

2. *Assignments of Error.* Not waived because not specified in brief. *Maryland Casualty Co.* v. *Jones,* 792.

3. *Id.* Failure of Circuit Court of Appeals to consider *held* error. *Id.*

PROCEDURE—Continued.

4. *Matters Outside Record.* This Court will not inquire into, to determine whether assignments of error waived. *Id.*

5. *Examination of Evidence* in absence of concurrent findings below. *Morimura, A. & Co.* v. *Taback,* 24.

6. *Arguments.* Duty of counsel to be adequately prepared and to be fair and candid in argument. *New York C. R. Co.* v. *Johnson,* 310. See **Jury.**

7. *Special Master.* Weight of findings. *Id.*

8. *Local and Factual Questions.* Judgment of teritorial court on, reversible only for clear error. *Compañía General* v. *Collector,* 306.

9. *Expediting Act.* Appeal in suit under Anti-Trust Act in which United States is complainant must be direct. *United States v. California Canneries,* 553.

10. *Mandate.* Action of lower court refusing to give effect to or misconstruing mandate of this Court may be controlled by new appeal or mandamus. *Baltimore & O. R. Co.* v. *United States,* 781.

11. *Theory of Case* pursued in courts below as to place of accident, can not be changed on review. *Delaware, L. & W. R. Co.* v. *Koske,* 7.

12. *Moot Case.* Procedure upon finding that controversy has become moot, where injunction is in force. *United States* v. *Anchor Coal Co.,* 812.

PROHIBITION, WRIT OF.

1. *Power to Issue Writ.* Need not be determined where not proper remedy. *Ex parte Bakelite Corp'n,* 438.

2. *When Proper Remedy.* Writ does not lie to court proceeding within limits of its jurisdiction. *Id.*

PROVISO. See **Statutes,** 6.

PUBLIC LANDS. See **Constitutional Law,** IV, (A); **Land Grant Acts.**

Inquiries by Congress as to unlawful dispositions of naval oil reserves. *Sinclair* v. *United States,* 263.

PUBLIC UTILITIES. See **Constitutional Law,** VIII, 3; **Injunctions,** 2; **Interstate Commerce Acts.**

RAILROADS. See **Constitutional Law,** XI, (C), 5; **Employers' Liability Act; Injunctions; Interstate Commerce Acts; Jury; Land Grant Acts.**

RAILROADS—Continued.

1. *Negligence. Venue* in action against foreign corporation for personal injuries received by passenger in another State. *Louisville & N. R. Co.* v. *Chatters,* 320.

2. *Power of Attorney* to receive service of process in State where foreign corporation does business. *Id.*

3. *Limitation of Liability* for personal injuries fixed by interstate tariff not subject to waiver. *Id.*

4. *Connecting Carriers* which sold through ticket not liable jointly for injury to passengers from defective cars occurring on line of third carrier over which ticket read, but each liable only for its own negligence. *Id.*

5. *Res Ipsa Loquitur.* Inapplicable to fasten liability on initial carrier for accident to passenger due to defect in car occurring after the car had passed into control of a second connecting carrier. *Id.*

RATES. See **Injunctions,** 2; **Interstate Commerce Acts.**

RECAPTURE. See **Interest,** 1; **Interstate Commerce Acts,** 11–13.

RECEIVERS. See **Jurisdiction,** IV, 4; **Taxation,** I, 1.

1. *Stay of Other Suits* in state court, when not within power of federal court. *Riehle* v. *Margolies,* 218.

2. *Judgment* against debtor. Conclusive effect of as claim against receiver. *Id.*

REMOVAL OF CAUSES. See **Jurisdiction,** I, 3; IV, 8.

REPRODUCTION COSTS. See **Interstate Commerce Acts,** 9–10.

RES IPSA LOQUITUR. See **Railroads,** 5.

RES JUDICATA. See **Judgments,** 3.

RESTITUTION.

Erroneous Decree. Right to recover payments made under. *Baltimore & O. R. Co.* v. *United States,* 781.

SALES. See **Taxation,** III, 20–23.

SEAMEN. See **Admiralty,** 2, 3, 5; **Aliens,** I, 1.

SECRETARY OF AGRICULTURE.

Packers & Stockyards Act. Secretary has authority to order discontinuance of discriminatory practices between market agencies. *United States* v. *American Livestock Comm'n Co.,* 435.

SENATE. See **Congressional Committees; Constitutional Law,** III, IV.

SENTENCE. See **Criminal Law,** 6.

SHIP MORTGAGE ACT. See **Admiralty,** 7–10.

SPECIAL MASTER. See **Bankruptcy,** 3.

STARE DECISIS.

Effect of Doctrine. Does not apply with full force prior to decision of court of last resort. *Posados* v. *Warner, B. & Co.,* 340.

STATES. See **Constitutional Law,** IV, (B), 7.

STATUTES. See **California; Missouri; Treaties.**

1. *Construction.* Statute must be so construed as to avoid doubts of its constitutionality. *Lucas* v. *Alexander,* 573.

2. *Id.* Naturalization laws construed to favor and support the government. *United States* v. *Schwimmer,* 644.

3. *Id.* Presumption that constitutional construction will be adopted. *Douglas* v. *N. Y., N. H. & H. R. Co.,* 377.

4. *Retroactive Construction* from subsequent statute rejected. *Pampanga Sugar Mills* v. *Trinidad,* 211.

5. *Consistency.* Terms presumed to be used throughout statute in sense in which at first defined. *Id.*

6. *Provisos.* General construction and application of. *McDonald* v. *United States,* 12.

7. *Adopted Statute.* Statute of Arkansas adopted by Congress for Indian Territory to be treated as an Act of Congress and its construction presents federal questions. *Grayson* v. *Harris,* 300.

8. *Limiting Bills to Single Subject.* Designed to simplify measures and guard against inadvertence, stealth and fraud in legislation. *International Shoe Co.* v. *Shartel,* 429.

9. *Id.* Provision complied with where title of Act gives notice of the general character of the legislation. *Id.*

10. *Limited Liability Acts.* Broadly construed. *Flink* v. *Paladini,* 59.

STOCK. See **Corporations; Philippine Islands; Taxation,** III, 8–11, 16–19.

STOCKHOLDERS. See **Admiralty,** 6; **California.**

STOCKYARDS. See **Packers & Stockyards Act.**

STREET RAILWAYS. See **Injunctions,** 2.

SUBPŒNA. See **Congressional Committees,** 1; **Constitutional Law,** IV, (B), 4.

TAXATION. See **Constitutional Law**, V; VII, 1–4; VIII, 1; XI, (C), 3; (D), 1–2; **Jurisdiction**, III, 2; IV, 7; **Philippine Islands**, 1; **Treaties**, 8.

I. In General, p. 907.
II. Federal Taxation, p. 907.
(A) Income Tax, p. 907.
(B) Estate Tax, p. 908.
III. State and Territorial Taxation, p. 908.

I. **In General.**

1. *Priority of Claim* of United States for payment of income taxes out of funds of insolvent in hands of receiver, over property taxes assessed by State. *County of Spokane* v. *United States*, 80.

2. *Burden of Proof* on taxpayer seeking to recover tax. *Compañia General* v. *Collector*, 306.

II. **Federal Taxation.**

(A) Income Tax.

1. *What is Income.* Profit or gain upon premium investment, resulting from exercise of option in policy by insured during lifetime, is taxable income. *Lucas* v. *Alexander*, 573.

2. *Tax Paid by Another.* Income taxes paid by employer for employee *held* additional taxable income of latter. *Old Colony Trust Co.* v. *Comm'r*, 716.

3. *Id.* Question whether Government's theory of assessment will operate as tax upon a tax *held* not presented. *Id.*

4. *Id.* Tax paid by lessee *held* additional taxable income of lessor. *United States* v. *Boston & M. R. Co.*, 732.

5. *Period of Accrual.* Provisions of tax statute used as aids in determining, must be construed so as to avoid doubts as to validity. *Lucas* v. *Alexander*, 573.

6. *Computing Gain.* Value as of March 1, 1913, may be disregarded unless serving to measure gain accruing subsequent to statute. *Id.*

7. *Id.* Value as of March 1, 1913, of insurance policy on which insured subsequently realized gain over premium investment, *held* to be such part of amount realized as can fairly be said to have accrued prior to that date. [Revenue Act of 1918, § 202 (A) (1).] *Id.*

8. *Id.* Sum of insurance reserve liability and dividend accumulations provisionally apportioned to insurance policy on March 1, 1913, provides adequate basis for ascertaining accrued value on that date. *Id.*

TAXATION—Continued.

9. *Allowances.* Estimated obsolescence of buildings not deductible by lessee. *Weiss* v. *Wiener,* 333.

10. *Retroactive Effect.* Gain accruing prior to effective date of Sixteenth Armendment *held* not taxable by statutes enacted thereunder. *Lucas* v. *Alexander,* 573.

11. *Limitations.* Not applicable to suit on bond given by taxpayer pending decision of claim of abatement. *United States* v. *John Barth Co.,* 370.

12. *Id.* Giving of bond pending decision of claim of abatement *held* waiver of limitations otherwise applicable. *Id.*

13. *Id.* That statute extinguishes liability as well as remedy does not affect action on bond given pending decision of claim of abatement. *Id.*

(B) Estate Tax.

1. *Deductions.* Charitable bequests from gross income under Act of 1918. *Ithaca Trust Co.* v. *United States,* 151.

2. *Id.* Charitable bequests out of residuary estate not rendered too uncertain for deduction, where postponed till death of life tenant who may draw on principal but only within a fixed pecuniary standard. *Id.*

3. *Valuation.* Tax being on act of testator, estate must be valued as of time of his death. *Id.*

4. *Id.* Valuation of life estate must be on basis of life expectancy at time of testator's death. *Id.*

III. **State and Territorial Taxation.**

1. *Constitutional Limitations* upon taxing power of States may not be evaded by indirection. *Macallen Co.* v. *Massachusetts,* 620.

2. *Interstate Commerce.* State tax on gasoline used for motive power by interstate ferry is unconstitutional. *Helson & R.* v. *Kentucky,* 245.

3. *Federal Securities.* State tax on federal securities invalid, regardless of amount of tax. *Macallen Co.* v. *Massachusetts,* 620.

4. *Id.* State cannot tax instrumentalities or bonds of the United States, or income derived therefrom, either directly or indirectly, though held by corporation. *Id.*

5. *Id.* Amendment to tax statute operating to impose burden upon non-taxable securities theretofore free, *held* invalid. *Id.*

TAXATION—Continued.

6. *Id.* Avoidance of discrimination against national banks not ground for upholding state tax on income of United States bonds held by ordinary corporations. *Id.*

7. *Exports.* State tax on oil purchased for export and moved by rail to port of embarkation, not leviable while oil is temporarily stored there awaiting vessels of foreign consignees. *Carson Petroleum Co.* v. *Vial,* 95.

8. *Franchise Tax.* Computation on basis of flat rate per share of issued capital stock, apportioned to property and business within State, valid. *New York* v. *Latrobe,* 421.

9. *Id.* Kind and number of shares of foreign corporation proper element for consideration in assessing. *Id.*

10. *Id.* Distinction between par value and non-par value shares in respect of method of computing tax *held* valid. *Id.*

11. *Id.* Assignment of specific value to non-par shares for purpose of measuring tax *held* valid. *International Shoe Co.* v. *Shartel,* 429.

12. *Id.* Where apportioned to business done or property owned within State, commerce clause not violated. *Id.*

13. *Privilege Tax.* Business of oyster packing proper subject of. *Leonard & L.* v. *Earle,* 392.

14. *Id.* State may require payment of privilege tax on oyster business in shells or in money, at its election. *Id.*

15. *Back Tax Law.* Not invalid because limited to lands of corporations. *White River L. Co.* v. *Arkansas,* 692.

16. *Philippine Stock Dividends Tax.* Graduated rates apply only to individuals. *Posados* v. *Warner, B. & Co.,* 340.

17. *Id.* Objection to as violative of rule of uniformity of Organic Act *held* not available to corporation. *Id.*

18. *Id.* Provision of Organic Act limiting bills to single subject not violated by inclusion of tax on stock dividends in income tax law. *Id.*

19. *Id.* Former decision of Philippine Supreme Court holding stock dividends not taxable *held* not binding as rule of property. *Id.*

20. *Philippine Tax on Sales* by "merchants" *held* applicable where one in the business of milling on shares sugar cane grown by others, sells his share in ordinary course of trade. *Pampanga Sugar Mills* v. *Trinidad,* 211.

TAXATION—Continued.

21. *Id.* "Producer," excepted from the tax, is the grower and not the manufacturer. *Id.*

22. *Double Taxation,* resulting from later statute, not reason for contrary construction of earlier one. *Id.*

23. *Philippine Tax on Income* received from "sources within the Islands" by foreign corporations doing local business, applies to receipts from exports to the United States, when sales required confirmation by the Philippine office to become effective. *Compañia General* v. *Collector,* 306.

TERRITORIAL COURTS. See **Jurisdiction,** VII; **Procedure,** 8.

TITLE. See **Limitations.**

TRADE MARKS.

1. *Act of 1905.* No remedy under for infringement within State not affecting interstate or foreign commerce. *U. S. Printing & L. Co.* v. *Griggs, C. & Co.,* 151.

2. *Id.* Does not enlarge common law rights. *Id.*

TREATIES.

1. *Construction and Interpretation.* Treaties prevail over inconsistent state legislation. *Nielsen* v. *Johnson,* 47.

2. *Id.* Liberal construction to be preferred. *Id.*

3. *Id.* Recourse to antecedent diplomatic negotiations and correspondence for interpretation. *Id.*

4. *Annulment by War.* Depends on intrinsic character of stipulations. *Karnuth* v. *United States,* 231.

5. *Treaty with Great Britain, 1794.* Provisions allowing subjects and citizens freely to pass and repass into respective territories of the contracting parties in North America, was abrogated by War of 1812. *Id.*

6. *"Permanent" Articles.* Meaning of term in treaty. *Id.*

7. *Acquiescence* by our Government after War of 1812 in continued passing and repassing of international boundary by Canadians, not ground for presuming a revival of the treaty provisions in that regard. *Id.*

8. *Discriminatory State Tax on Inheritance.* Discrimination against alien heirs of resident decedent forbidden by treaty with Denmark. *Nielsen* v. *Johnson,* 47.

9. *Droit dé Detraction.* Bearing upon Treaty of 1826 with Denmark. *Id.*

TRUSTS. See **Anti-Trust Acts; Estoppel.**

ULTRA VIRES. See **Packers & Stockyards Act**, 3.

UNFAIR COMPETITION. See **Packers & Stockyards Act**, 2–3.

VALUATION. See **Interstate Commerce Acts**, 9, 10.

VENUE. See **Constitutional Law**, X; **Jurisdiction**, IV, 1; **Railroads**, 1.

VERDICT. See **Employers' Liability Act**, 11; **Jury**, 2.

VETO POWER. See **Constitutional Law**, III, 5.

WAR. See **Constitutional Law**, VI; **Treaties**, 4, 5.

WAIVER. See **Admiralty**, 9–10; **Railroads**, 3; **Taxation**, II, (A), 12.

WATERS. See **Admiralty.**

Navigation Canal. Leases and grants of surplus water of *held* subject to power of State to abandon canal. *Kirk* v. *Maumee Valley Co.*, 797; *Kirk* v. *Providence Mill Co.*, 807.

WITNESSES. See **Congressional Committees**, 1, 4–7; **Constitutional Law**, IV, (A); **Criminal Law**; **Evidence**, 2.

WORKMEN'S COMPENSATION ACTS. See **Admiralty**, 5.

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