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VOLUME 252

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1919

FROM MARCH 1, 1920, TO APRIL 19, 1920

ERNEST KNAEBEL

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.[1]

EDWARD DOUGLASS WHITE, CHIEF JUSTICE.
JOSEPH McKENNA, ASSOCIATE JUSTICE.
OLIVER WENDELL HOLMES, ASSOCIATE JUSTICE.
WILLIAM R. DAY, ASSOCIATE JUSTICE.
WILLIS VAN DEVANTER, ASSOCIATE JUSTICE.
MAHLON PITNEY, ASSOCIATE JUSTICE.
JAMES CLARK McREYNOLDS, ASSOCIATE JUSTICE.
LOUIS D. BRANDEIS, ASSOCIATE JUSTICE.
JOHN H. CLARKE, ASSOCIATE JUSTICE.

A. MITCHELL PALMER, ATTORNEY GENERAL.
ALEXANDER C. KING, SOLICITOR GENERAL.
JAMES D. MAHER, CLERK.
FRANK KEY GREEN, MARSHAL.

[1] For allotment of The Chief Justice and Associate Justices among the several circuits see next page.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES, OCTOBER TERM, 1916.[1]

ORDER: There having been an Associate Justice of this court appointed since the adjournment of the last term,

It is ordered, That the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz:

For the First Circuit, OLIVER WENDELL HOLMES, Associate Justice.

For the Second Circuit, LOUIS D. BRANDEIS, Associate Justice.

For the Third Circuit, MAHLON PITNEY, Associate Justice.

For the Fourth Circuit, EDWARD D. WHITE, Chief Justice.

For the Fifth Circuit, J. C. MCREYNOLDS, Associate Justice.

For the Sixth Circuit, WILLIAM R. DAY, Associate Justice.

For the Seventh Circuit, JOHN H. CLARKE, Associate Justice.

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

For the Ninth Circuit, JOSEPH MCKENNA, Associate Justice.

October 30, 1916.

[1] For next previous allotment see 241 U. S., p. iv.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1919.

JETT BROS. DISTILLING COMPANY *v.* CITY OF CARROLLTON.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 106. Argued December 19, 1919.—Decided March 1, 1920.

An objection that a tax is void under the Fourteenth Amendment because of systematic discrimination by officials in making assessments, but which does not draw in question before the state court the validity of the statute or authority under which they acted, will not support a writ of error from this court under Jud. Code, § 237, as amended. P. 5.

A petition for rehearing, merely overruled by the state court without opinion, is not a basis for a writ of error. P. 6.

Writ of error to review 178 Kentucky, 561, dismissed.

THE case is stated in the opinion.

Mr. Helm Bruce, with whom *Mr. Geo. B. Winslow* was on the briefs, for plaintiff in error, argued, *inter alia*, that the point that the tax was void and without authority because assessed in violation of due process of law after

the whiskey had ceased to be the property of the Distilling Company, was sufficiently raised and was necessarily decided by the state court, because, while on this point the Constitution was not invoked *eo nomine* in the complaint, the facts from which the deduction of unconstitutionality must follow were specifically set forth and the constitutional claim was specifically made in a petition for rehearing.

The reason for holding that a federal question made for the first time in a petition for a rehearing is not generally sufficient, is that, as a general rule, new grounds for decisions will not be allowed to be presented in a petition for a rehearing; and therefore if the state court in overruling such a petition is silent on the subject of a federal question, it will not be presumed that it passed on the federal question. *Texas & Pacific Ry. Co.* v. *Southern Pacific Co.*, 137 U. S. 48, 53. In view, however, of the practice of the Kentucky court, which allows new grounds of decision to be presented by petition for a rehearing, the basis being in the record, *Elsey* v. *People's Bank of Bardwell*, 168 Kentucky, 701, the denial of the petition here necessarily imports an adverse decision of the constitutional claim.

It has often been held that where a federal question is distinctly made in the court of original jurisdiction, and where the court of last resort in the State must necessarily have decided the question in order to make the decision it did make, this is sufficient to give this court jurisdiction, even though the state court was silent on the subject. *Steines* v. *Franklin County*, 14 Wall. 15, 21. In like manner, where it is evident from the record and the practice of a state court, that a federal question made in a petition for a rehearing must have been decided in passing upon the petition, that should be sufficient to give this court jurisdiction.

Mr. A. E. Stricklett, with whom *Mr. J. A. Donaldson*, *Mr. G. A. Donaldson* and *Mr. J. L. Donaldson* were on the briefs, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

The City of Carrollton brought suit against Jett Bros. Distilling Company to recover balances alleged to be due as taxes upon distilled spirits belonging to the company held in a bonded warehouse in that city. The taxes sued for were those for the years 1907 to 1916, inclusive. It appears that during those years the City Assessor undertook to assess for taxation the distilled spirits in the bonded warehouse and the city taxes were paid as thus assessed. This suit was brought to recover taxes for the above mentioned years upon the theory that during that period the spirits should have been valued by the State Board of Valuation and Assessment as provided by the statutes of Kentucky. (Kentucky Stats., §§ 4105, 4114.) It was alleged that the valuation by the City Assessor was without authority of law, by mistake and for a much less sum than that fixed for each of said years by the State Board. It was also alleged that the company had notice of the valuation fixed by the State Board; that the City Assessor was without authority to assess spirits in bonded warehouses; that the value fixed by him was an inconsiderable sum and much less than that fixed by the State Board in accordance with the Kentucky statutes. The Distilling Company took issue upon the petition. It pleaded the original levies for the years in question and the payment of the taxes for each and all of the said years. It pleaded that the whiskey which it was sought to tax under the new levy of 1915–1916 had been removed from the bonded warehouse of the company, and was no longer its property, and that it could no longer protect itself as it could have done had the tax been levied while the spirits were in its possession.

In the nineteenth paragraph of the answer a defense was set up upon a ground of federal right under the Constitution. It was averred that during all the years covered by the amended petition it had been the rule, custom, habit, practice and system in the City of Carrollton to assess and cause to be assessed the real estate therein at an average of not more than forty per cent. of its fair cash value, and to assess and cause to be assessed personal property in that city at an average of not more than thirty per cent. of its fair cash value; that the assessment made by the State Board upon which taxes were sought to be recovered was made at 100 per cent. of the fair cash value of the whiskey, and that the attempt of the plaintiff to collect the same was in violation of the defendant's right under the constitution of the State of Kentucky and the Fourteenth Amendment of the Constitution of the United States.

The Circuit Court gave judgment in favor of the city for the amounts claimed under the new levy of 1916, giving credit for the amounts paid under the original levies for the preceding years. The company appealed to the Court of Appeals of Kentucky, where the judgment of the Circuit Court was affirmed. 178 Kentucky, 561. There was no other reference to the Federal Constitution than that contained in the answer, so far as we have been able to discover, and the Court of Appeals dealt with the federal question, deemed to be before it, as follows (178 Kentucky, 566):

"It is further asserted that the recent cases of *Greene* v. *Louisville & Interurban Railroad Co.* and *Greene* v. *Louisville Railway Co.*, decided by the Supreme Court of the United States and reported by 37 Supreme Court Reports, 673, uproot the contention that the act is constitutional, and hold that the State Board of Valuation, and the city assessor and Board of Supervisors, acting independently of each other, and fixing different valuations

of the same property, work a discrimination, inimical both to the federal and state constitutions. In this, however, appellant is in error. It must be borne in mind that complaint is only made of the assessment. The warehouseman had his remedy, in case of an excessive or unfair valuation, by appearing before the Board of Valuation and Assessment at the time he received notice of the valuation fixed, and there make complaint as provided in section 4107, Kentucky Statutes. This appellant failed to do but acquiesced in the assessment by paying taxes both to the county and state on the valuation fixed by the State Board. This being true, it cannot be heard to complain now."

The case is brought here by the allowance of a writ of error. As the judgment was rendered after the Act of September 6, 1916, c. 448, 39 Stat. 726, Judicial Code, § 237, became effective, that act must determine the right to have a review in this court.

If the case can come here by writ of error, it is because there was drawn in question the validity of a statute, or authority, exercised under the State on the ground of their being repugnant to the Constitution, laws, or treaties of the United States. Before the petition for rehearing the contentions based upon constitutional grounds, by the plaintiff in error, were those embraced in the nineteenth paragraph of the answer, to which we have referred, and such as were deemed to be before the Court of Appeals of Kentucky in the portion of the opinion from which we have quoted. Neither the answer nor the opinion of the Court of Appeals shows that any claim under the Federal Constitution was made assailing the validity of a statute of the State, or of an authority exercised under the State, on the ground of repugnancy to the Federal Constitution. The answer, in the nineteenth paragraph, set up discrimination because of different valuations of the property of others, claimed to violate

rights secured by the Fourteenth Amendment to the Constitution of the United States. The opinion of the Court of Appeals likewise discussed the discriminatory action alleged by the plaintiff in error.

Drawing in question the validity of a statute or authority as the basis of appellate review has long been a subject of regulation in statutes of the United States, as we had occasion to point out in *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445, 450, 451. What is meant by the validity of a statute or authority was discussed by this court in *Baltimore & Potomac R. R. Co.* v. *Hopkins*, 130 U. S. 210, in which this court, speaking by Mr. Chief Justice Fuller, said: "Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise." And the Chief Justice added upon the authority of *Millingar* v. *Hartupee*, 6 Wall. 258, 261, 262, that the word "authority" stands upon the same footing.

In order to give this court jurisdiction by writ of error under amended § 237, Judicial Code, it is the validity of the statute or authority which must be drawn in question. The mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis of a writ of error from this court. There must be a substantial challenge of the validity of the statute or authority upon a claim that it is repugnant to the Federal Constitution, treaties, or laws so as to require the state court to decide the question of validity in disposing of the contention. *Champion Lumber Co.* v. *Fisher*, *supra*, and cases cited.

In the present case no such claim of the invalidity of a state statute or authority was raised in a manner requiring the court below to pass upon the question in disposing of the rights asserted. As we have said, whatever the effect of a petition for rehearing, it came too late

to make the overruling of it, in the absence of an opinion, the basis of review by writ of error. It follows that the allowance of the writ of error in the present case did not rest upon a decision in which was drawn in question the validity of a statute of the State or any authority exercised under it because of repugnancy to the Federal Constitution, and the writ of error must be dismissed, and it is so ordered.

Dismissed.

FARNCOMB ET AL. v. CITY AND COUNTY OF DENVER ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 110. Argued January 14, 1920.—Decided March 1, 1920.

As construed by the Supreme Court of Colorado, §§ 300 and 328 of the charter of the City and County of Denver gave property owners an opportunity to be heard before the Board of Supervisors respecting the justice and validity of local assessments for public improvements proposed by the Park Commission, and empowered the board itself to determine such complaints before the assessments were made. P. 9.

Parties who did not avail themselves of such opportunity can not be heard to complain of such assessments as unconstitutional. P. 11.

64 Colorado, 3, affirmed.

THE case is stated in the opinion.

Mr. T. J. O'Donnell, with whom *Mr. J. W. Graham* was on the briefs, for plaintiffs in error.

Mr. James A. Marsh, with whom *Mr. Norton Montgomery* was on the briefs, for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

Suit was brought in the District Court of the City and County of Denver by the plaintiffs in error to enjoin the City from enforcing an assessment ordinance passed to raise the necessary means to pay for certain park improvements and the construction of boulevards and streets in the City of Denver.

The charter of the City of Denver was before this court in *Londoner* v. *Denver*, 210 U. S. 373. Sections 298 and 299 of the charter provide that the Board of Local Improvements shall prepare a statement showing the costs of improvements, interest, cost of collection, etc., and apportion the same upon each lot or tract of land to be assessed, shall cause the same to be certified by the president, and filed in the office of the clerk. The clerk shall then by advertisement in some newspaper of general circulation, published in the city and county, notify the owners of the real estate to be assessed and all persons interested that said improvements have been or will be completed, and shall specify the whole cost of the improvement, and the share so apportioned to each lot, or tract of land, or person, and any complaint or objection that may be made in writing by such persons or owners to the Board of Supervisors, and filed with the clerk within sixty days from the first publication of such notice, shall be heard and determined by the Board of Supervisors at its first regular meeting after sixty days, and before the passage of any ordinance assessing the cost of the improvements.

Section 300 provides: "At the meeting specified in said notice, or any adjournment thereof, the board of supervisors, sitting as a board of equalization, shall hear and determine all such complaints and objections, and may recommend to the board of public works any modification of their apportionments; the board of public

works may thereupon make such modifications and changes as to them may seem equitable and just, or may confirm the first apportionment and shall notify the council of their final decision; and the council shall thereupon, by ordinance, assess the cost of said improvements against all the real estate in said district and against such persons, respectively, in the proportions above mentioned."

Section 328 of the charter provides: "When the cost of any such park site or parkway is definitely determined, the park commission shall prepare, certify and file with the clerk a statement showing the cost thereof as required in Section 298 hereof; the clerk shall thereupon give the notice required by Section 299 hereof; and thereupon the same proceedings required in Section 300 hereof shall be had, except that the proceedings therein provided to be observed by the board shall be observed by the park commission; and the council shall thereupon by ordinance assess the cost against the other real estate as aforesaid, in the district, in accordance with said apportionments."

The federal question, brought before us by the writ of error, concerns the constitutionality of § 300, above set forth,—the contention being that it does not give interested property owners the opportunity to be heard where the property is to be specially assessed for making improvements of the character in question, as the hearing provided is before a board which has no power to decide any complaint which the property owner may have or make with respect to the validity or falseness of such assessment, or to correct any error in such assessment, but only has power to recommend to the power or authority, originally making the assessment, any modifications of portions of such assessment. That is that the Board of Supervisors has only the power to recommend to the Board of Park Commissioners the apportionment to be made in the assessment. It is the contention of the plaintiffs in error that the hearing thus afforded does not

give due process of law within the meaning of the Fourteenth Amendment to the Constitution. The Supreme Court of Colorado, affirming the judgment of the District Court, denied this contention, and affirmed the judgment of the District Court sustaining the validity of the assessment. 64 Colorado, 3.

The Supreme Court of Colorado held that the question had already been disposed of by its own previous decision, affirmed as to the constitutional point by our decision in *Londoner* v. *Denver*, 210 U. S., *supra*. In *Londoner* v. *Denver* the section of the charter now involved was before this court, being then § 31 of the charter. Section 300 to all intents is the same in terms as § 31, except that the Board of Supervisors, sitting as a board of equalization, is substituted for the City Council.

This court when dealing with the constitutionality of state statutes, challenged under the Fourteenth Amendment, accepts the meaning thereof as construed by the highest court of the State. *St. Louis & Kansas City Land Co.* v. *Kansas City*, 241 U. S. 419, 427.

In *Londoner* v. *Denver* this court accepted, as it was bound to do, the construction of the charter made by the state court, and upon that construction determined its constitutional validity. The City Charter was construed in the Supreme Court in 33 Colorado, 104. In the opinion in that case, after discussing the steps required in making improvements of the character involved here, the court, in dealing with § 31, said (p. 117): "Notwithstanding the apparently mandatory words employed in Section 31, *supra*, we do not think that thereby the legislative power and discretion of the city council is taken away and vested in the board of public works, but that the former, in the exercise of its functions, is empowered to pass an assessing ordinance charging property with the cost of an improvement, which, according to its judgment, would be just and equitable."

Adopting this construction of the section, and considering the objection urged that it would not afford due process of law, this court, by Mr. Justice Moody, said (p. 379): "The ninth assignment questions the constitutionality of that part of the law which authorizes the assessment of benefits. It seems desirable, for the proper disposition of this and the next assignment, to state the construction which the Supreme Court gave to the charter. This may be found in the judgment under review and two cases decided with it. *Denver* v. *Kennedy*, 33 Colorado, 80; *Denver* v. *Dumars*, 33 Colorado, 94. From these cases it appears that the lien upon the adjoining land arises out of the assessment; after the cost of the work and the provisional apportionment is certified to the city council the landowners affected are afforded an opportunity to be heard upon the validity and amount of the assessment by the council sitting as a board of equalization; if any further notice than the notice to file complaints and objections is required, the city authorities have the implied power to give it; the hearing must be before the assessment is made; this hearing, provided for by § 31, is one where the board of equalization 'shall hear the parties complaining and such testimony as they may offer in support of their complaints and objections as would be competent and relevant,' 33 Colorado, 97; and that the full hearing before the board of equalization excludes the courts from entertaining any objections which are cognizable by this board. The statute itself therefore is clear of all constitutional faults."

Plaintiffs in error did not avail themselves of the privilege of a hearing as provided by this section, but after the assessing ordinance had been passed began this proceeding in the District Court to test the constitutionality of the law. As we have said, the question as to what should be a proper construction of the charter provision was not for our decision; that matter was within the

sole authority of the state court, and was disposed of, as the Supreme Court of Colorado held, by the former cases reported in 33 Colorado, and by our decision based upon that construction in *Londoner* v. *Denver*, 210 U. S., *supra*. As the plaintiffs in error had an opportunity to be heard before the board duly constituted by § 300, they cannot be heard to complain now. It follows that the judgment of the Supreme Court of Colorado must be

Affirmed.

GOLDSMITH ET AL. *v.* GEORGE G. PRENDERGAST CONSTRUCTION COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 127. Argued January 13, 14, 1920.—Decided March 1, 1920.

In apportioning the cost of a sewer, the assessing authorities excluded therefrom a city park from part of which the drainage was naturally toward, and was to some extent conducted into, the sewer; but the amount so conducted was not shown to be considerable, nor did it appear that such drainage could not be disposed of by other means. The state courts having sustained the exclusion as within the discretion of the assessing authorities, *held*, that it could not be regarded as so arbitrary and unequal in operation and effect as to render assessments on other property invalid under the Fourteenth Amendment. P. 17.

Refusal to transfer a cause from a division of the Supreme Court of Missouri to the court *in banc* does not violate any constitutional right. P. 18.

273 Missouri, 184, affirmed.

THE case is stated in the opinion.

Mr. David Goldsmith for plaintiffs in error:

The failure of the municipal authorities to include any part of the Tower Grove Park property in the sewer

district in question, if arbitrary, violated § 1 of the Fourteenth Amendment. *Masters* v. *Portland*, 24 Oregon, 161; *Hanscom* v. *Omaha*, 11 Nebraska, 37, 43, 44; *Fraser* v. *Mulany*, 129 Wisconsin, 377; *Lawrence* v. *Grand Rapids*, 166 Michigan, 134; *Title Guarantee & Trust Co.* v. *Chicago*, 162 Illinois, 505; *Van Deventer* v. *Long Island City*, 139 N. Y. 133; *Tulsa* v. *McCormick*, 63 Oklahoma, ——; *Whitley* v. *Fawcett*, Style's Rep., 13.

The facts found by the trial court are sufficient to establish that such omission was arbitrary. *Lawrence* v. *Grand Rapids*, *supra*; *Mt. St. Mary's Cemetery* v. *Mullins*, 248 U. S. 501.

The conclusions of law upon which the trial court based its judgment were erroneous because the omission of the park property from the sewer district warranted a finding of fact that the members of the Municipal Assembly were actuated by motives which constitute legal fraud; and because the motives of the Municipal Assembly were immaterial. *Soon Hing* v. *Crowley*, 113 U. S. 703; *Brown* v. *Cape Girardeau*, 90 Missouri, 377; *Kansas City* v. *Hyde*, 196 Missouri, 498; *Kerfoot* v. *Chicago*, 195 Illinois, 229; *Potter* v. *McDowell*, 31 Missouri, 62.

The refusal of Division No. 2 of the Supreme Court of Missouri to transfer this cause to the court *in banc* was arbitrary, and violated § 1 of the Fourteenth Amendment. Amendment to the Constitution of Missouri, adopted in 1890, § 4; *Moore* v. *Missouri*, 159 U. S. 673.

The action of said Division No. 2 was the action of the State, within the purview of the Federal Constitution, and, if arbitrary, violated § 1 of the Fourteenth Amendment. *Ex parte Virginia*, 100 U. S. 339; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278; *Hovey* v. *Elliott*, 167 U. S. 409; *Ex parte Nelson*, 251 Missouri, 63.

Moreover, if no federal question had been involved, the Supreme Court of Missouri would have had no juris-

diction of this case. *Barber Asphalt Paving Co.* v. *Hezel*, 138 Missouri, 228; *Smith* v. *Westport*, 174 Missouri, 394; *Platt* v. *Parker-Washington Co.*, 235 Missouri, 467.

And if the judgment of the Supreme Court was rendered without jurisdiction, then that, in itself, constituted a taking of property without due process of law. *Scott* v. *McNeal*, 154 U. S. 34; *Pennoyer* v. *Neff*, 95 U. S. 714; *Lent* v. *Tillson*, 140 U. S. 316; *Old Wayne Life Association* v. *McDonough*, 204 U. S. 8.

Mr. Hickman P. Rodgers, with whom *Mr. A. R. Taylor* and *Mr. Howard Taylor* were on the brief, for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court.

Suit was brought in the Circuit Court of the City of St. Louis by the Construction Company to recover upon a special tax-bill issued by the City of St. Louis for the construction of the sewer in what is known as Manchester Road Sewer District No. 3, City of St. Louis. The Construction Company recovered a judgment on the tax-bills against the plaintiffs in error, who were owners of abutting property. Upon appeal to the Supreme Court of Missouri the judgment below was affirmed upon hearing and rehearing. 273 Missouri, 184.

The record discloses that the sewer, for the construction of which the assessment was made, was constructed in a certain boulevard known as Kingshighway Boulevard. On the east of this boulevard, and fronting on the same for a considerable distance, is a tract belonging to the city, and known as Tower Grove Park; this property was not assessed for the building of the sewer. This omission is alleged to be of such an arbitrary and discriminatory character as to render the ordinance making the assessment void as a deprivation of federal constitutional rights

secured to the plaintiffs in error by the due process and equal protection clauses of the Fourteenth Amendment.

The Circuit Court made findings of fact in which it found that there was no evidence that the Municipal Assembly of the City of St. Louis, in passing the ordinances in question, was actuated by motives of fraud or oppression; that such motives, if any, must be inferred solely from the failure to incorporate parcels or tracts of land in the sewer district, the topography of which might render it necessary or expedient to then, or thereafter, drain the water or sewage therefrom into the sewer. The court recites the nature of the title of the tract known as Tower Grove Park.

It appears that the Park had been conveyed to the city, the grantor reserving therefrom a strip 200 feet wide, surrounding the same. The court found that the western front of the tract, thus conveyed to the city, included the western gate or entrance of the Park and the strip of 200 feet in width, surrounding the Park proper, and embraced a total frontage along Kingshighway of about 1470 feet, and that none of the property included within Tower Grove Park and the strip of 200 feet in width, reserved for residence property, was included within the taxing district for such sewer construction. The court also finds that with the exception of an area composing some 300 feet, each way, located at the southwestern corner of the Park, the western part of the Park for a distance of some 600 feet east of Kingshighway is of an elevation higher than Kingshighway between Arsenal street and Magnolia avenue, and the natural drainage thereof is in the main westwardly towards Kingshighway and that before the building of the sewer in question surface water and hydrants drained from said part of the Park through drains and gutters under said street and sidewalk to a point west of Kingshighway. That whatever drains for surface and hydrant water existed in said western and north-

western portion of the Park led into that section of the sewer in question, situated in Kingshighway adjoining the Park; but the court finds that it is unable to determine from the evidence as to when such connection with said sewer was accomplished, or by whom. The court also finds that at the time the work in question was performed it was provided by the revised ordinances of the City of St. Louis that water draining from roofs of houses should not flow over sidewalks, but should be conducted through pipes to a sewer if available, and if not then through pipes below the sidewalk, and into the open gutter of the street. The court does not find from the evidence that it was not possible or feasible to drain the surface water falling upon or collected from that portion of Tower Grove Park, and the reserved strip of 200 feet, which is higher than and inclined towards Kingshighway, from the surface of said land in any other manner than through or by the district sewer constructed in Kingshighway, or that sewage from houses upon said reserved strip, if any there ever be, cannot be disposed of by means other than said sewer.

As conclusions of law the court finds that it was within the powers of the Municipal Assembly, in the passage of the ordinances establishing the sewer district wherein the work sued for was performed, to embrace and designate therein only such real estate as, in their judgment, should be benefited thereby; that the discretion vested in the Municipal Legislature was not subject to review by the court, unless the powers of the Legislature were affirmatively shown to have been exercised fraudulently, oppressively or arbitrarily. And the court found that the mere omission of the lands from said district which might, at one time, be reasonably included in the sewer district in question, or as to which it is reasonable to assume that the same would be more conveniently served by the sewer in question than any other, did not justify

the court in concluding that the Municipal Assembly, in omitting said lands from the sewer district in question, was actuated by motives of fraud, or oppression; or that the *prima facie* liability of defendants established by the certified special tax-bill is thereby rebutted and overturned.

On the facts and conclusions of law the judgment was affirmed by the Supreme Court of Missouri.

The establishment of sewer districts was committed to local authorities by the charter of the City of St. Louis which had the force and effect of a statute of the State. That charter provided that, within the limits of the district prescribed by ordinance recommended by the Board of Public Improvements, the Municipal Assembly might establish sewer districts, and such sewers may be connected with a sewer of any class or with a natural course of drainage. (See § 21, Woerner's Revised Code of St. Louis, 1907, p. 410.)

The mere fact that the court found that a part of Tower Grove Park might have been drained into the sewer, it was held by the Missouri courts, under all the circumstances, did not justify judicial interference with the exercise of the discretion vested in the municipal authorities. The court commented on the fact that it was not shown that any considerable amount of surface water was conducted away from the park by this sewer. Much less do such findings afford reason for this court in the exercise of its revisory power under the Federal Constitution to reverse the action of the state courts, which fully considered the facts, and refused to invalidate the assessment.

As we have frequently declared, this court only interferes with such assessments on the ground of violation of constitutional rights secured by the Fourteenth Amendment, when the action of the state authorities is found to be arbitrary, or wholly unequal in operation and effect.

We need but refer to some of the cases in which this principle has been declared. *Embree* v. *Kansas City Road District*, 240 U. S. 242; *Withnell* v. *Ruecking Construction Co.*, 249 U. S. 63; *Hancock* v. *Muskogee*, 250 U. S. 454; *Branson* v. *Bush*, 251 U. S. 182.

We find no merit in the contention that a federal constitutional right was violated because of the refusal to transfer the cause from the division of the Supreme Court of Missouri, which heard it, to the court *in banc*. See *Moore* v. *Missouri*, 159 U. S. 673, 679.

Affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL. *v.* WARD.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 198. Submitted January 28, 1920.—Decided March 1, 1920.

The Federal Employers' Liability Act places a co-employee's negligence, when the ground of the action, in the same relation as that of the employer as regards assumption of risk. P. 22.

It is inaccurate to charge without qualification that a servant does not assume a risk created by his master's negligence, the rule being otherwise where the negligence and danger are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them. P. 21.

But the defense of assumed risk is inapplicable when the injury arises from a single act of negligence creating a sudden emergency without warning to the servant or opportunity to judge of the resulting danger. P. 22.

Where a switchman, when about to apply the brake to stop a "cut" of freight cars was thrown to the ground by a jerk due to delay in uncoupling them from a propelling engine when the engine was slowed, *held*, that he had a right to assume that they would be uncoupled at

the proper time, as usual, and did not assume the risk of a co-employee's negligent failure to do so. *Id.*

The error of a charge that contributory negligence will prevent recovery in an action under the Federal Liability Act, being favorable to defendants, does not require reversal of a judgment against them. P. 23.

The Seventh Amendment does not forbid a jury of less than twelve in a case under the Federal Employers' Liability Act tried in a state court. *Id. St. Louis & San Francisco R. R. Co.* v. *Brown*, 241 U. S. 223.

68 Oklahoma, —, affirmed.

THE case is stated in the opinion.

Mr. R. J. Roberts, Mr. W. H. Moore, Mr. Thomas P. Littlepage, Mr. Sidney F. Taliaferro and *Mr. W. F. Dickinson* for petitioners. *Mr. C. O. Blake* and *Mr. John E. Du Mars* were on the brief.

Mr. W. S. Pendleton for respondent. *Mr. T. G. Cutlip* was on the brief.

MR. JUSTICE DAY delivered the opinion of the court.

Suit was brought in the Superior Court, Pottawatomie County, Oklahoma, against the Chicago, Rock Island & Pacific Railway Company and A. J. Carney to recover damages for injuries alleged to have been received by Ward while he was employed as a switchman of the railway company in its yards at Shawnee. He recovered a judgment which was affirmed by the Supreme Court of Oklahoma, 68 Oklahoma, —. The ground upon which recovery was sought against the railway company and Carney, who was an engine foreman, was that Ward, while engaged in his duty as a switchman, was suddenly thrown from the top of a box car upon which he was about to apply a brake. The petition alleged, and the testimony tended to show, that Ward was engaged as a switch-

man on a cut of cars which it was the duty of the engine foreman to cut loose from the engine pushing the cars in order that Ward might gradually stop the cars by applying the brake. It appears that at the time of the injury to Ward, the cut of cars had been pushed up an incline by the engine, over an elevation, and as the cars ran down the track the effect was to cause the slack to run out between them permitting them to pull apart sufficiently to be uncoupled, at which time it was the duty of the engine foreman to uncouple the cars. The testimony tended to support the allegations of the petition as to the negligent manner in which this operation was performed at the time of the injury, showing the failure of the engine foreman to properly cut off the cars at the time he directed the engineer to retard the speed of the engine, thereby causing them to slow down in such manner that, when the check reached the car upon which Ward was about to set the brake, he was suddenly thrown from the top of the car with the resulting injuries for which he brought this action.

The railway company and Carney took issue upon the allegations of the petition, and set up contributory negligence and assumption of risk as defenses. The trial court left the question of negligence on the part of the company and the engine foreman to the jury, and also instructed it as to assumption of risk by an employee of the ordinary hazards of the work in which he was engaged, and further charged the jury as follows:

"You are further instructed that while a servant does not assume the extraordinary and unusual risks of the employment yet on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows or should, in the exercise of reasonable care, know to exist. He does not, however, assume such risks as are created by the master's negligence nor such as are latent, or are only discoverable at

the time of the injury. The doctrine of an assumption of risk is wholly dependent upon the servant's knowledge, actual or constructive, of the dangers incident to his employment. Where he knew, or in the exercise of reasonable and ordinary care, should know the risk to which he is exposed, he will, as a rule, be held to have assumed them; but where he either does not know, or knowing, does not appreciate such risk, and his ignorance or non-appreciation is not due to negligence or want of due care on his part, there is no assumption of risk on the part of the servant preventing a recovery for injuries."

Treating the case, as the court below did, as one in which the injury occurred while the petitioners and respondent were engaged in interstate commerce, this charge as to the assumption of risk was not accurate, in stating without qualification that the servant did not assume the risk created by the master's negligence. We have had occasion to deal with the matter of assumption of risk in cases where the defense is applicable under the Federal Employers' Liability Act, being those in which the injury was caused otherwise than by the violation of some statute enacted to promote the safety of employees. As this case was not one of the latter class, assumption of risk was a defense to which the defendants below were entitled. *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492; *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229.

As to the nature of the risk assumed by an employee in actions brought under the Employers' Liability Act, we took occasion to say in *Chesapeake & Ohio Ry. Co.* v. *DeAtley*, 241 U. S. 310, 315: "According to our decisions, the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until

notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them." The Federal Employers' Liability Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk. 241 U. S. 313. See also *Chesapeake & Ohio Ry. Co.* v. *Proffitt*, 241 U. S. 462, 468; *Erie R. R. Co.* v. *Purucker*, 244 U. S. 320.

Applying the principles settled by these decisions to the facts of this case, the testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached. For the lack of proper care, on the part of the representative of the railway company while Ward was in the performance of his duty, he was suddenly precipitated from the front end of the car by the abrupt checking resulting from the failure to make the disconnection. This situation did not make the doctrine of assumed risk a defense to an action for damages because of the negligent manner of operation which resulted in Ward's injury, and the part of the charge complained of though inaccurate could have worked no harm to the petitioners. It was a sudden emergency, brought about by the negligent operation of that particular cut of cars, and not a condition of danger, resulting from the master's or his representatives' negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed had opportunity to know and appreciate it, and thereby assume the risk.

The trial court also charged that contributory negligence by Ward would prevent a recovery. This charge was more favorable to the petitioners than they were entitled to, as under the Federal Employers' Liability Act contributory negligence is not a defense, and only goes in mitigation of damages. The giving of this charge could not have been prejudical error requiring a reversal of the judgment.

Another assignment of error, dealt with by the Supreme Court of Oklahoma, that a jury of less than twelve returned the verdict, conforming to the state practice, does not seem to be pressed here. In any event it is disposed of by *St. Louis & San Francisco R. R. Co.* v. *Brown*, 241 U. S. 223.

We find no error in the judgment of the Supreme Court of Oklahoma and the same is

Affirmed.

PENNSYLVANIA GAS COMPANY *v.* PUBLIC SERVICE COMMISSION, SECOND DISTRICT, OF THE STATE OF NEW YORK, ET AL.

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

No. 330. Argued December 8, 9, 1919.—Decided March 1, 1920.

The transmission and sale of natural gas, produced in one State and transported and furnished directly to consumers in a city of another State by means of pipe lines from the source of supply in part laid in the city streets, is interstate commerce (p. 28); but, in the absence of any contrary regulation by Congress, is subject to local regulation of rates. P. 29. *Public Utilities Commission* v. *Landon*, 249 U. S. 236, distinguished.

225 N. Y. 397, affirmed.

THE case is stated in the opinion.

Mr. John E. Mullin, with whom *Mr. Marion H. Fisher* was on the briefs, for plaintiff in error:

The State has no power to regulate the rates in question, for such action necessarily imposes a direct burden and restraint upon interstate commerce.

The State in effect proposes to meet the plaintiff in error at the state line and to deny it freedom to import for sale a legitimate commodity of commerce except at a price to be fixed by the State. Nay more, the State apparently proposes not only to restrict the right of sale, but to compel the plaintiff in error to continue to import its Pennsylvania product for sale at the price fixed by the State. If such a regulation is not direct and substantial—if it does not restrain and burden interstate commerce, we can conceive of no action which would.

That a business is "regulated" when the return allowed on the business or the sale price of the commodity dealt in is fixed by governmental authority cannot be questioned, and such a regulation is far more substantial and burdensome than was the regulation of customers declared to be an unauthorized interference with commerce in the *Ticker Case*, 247 U. S. 105, or the inspection charge declared invalid by this court in *Western Oil Refg. Co.* v. *Lipscomb*, 244 U. S. 346. It is more direct than the state license fees upon agents selling and delivering interstate merchandise declared repugnant to the Constitution in *Stewart* v. *Michigan*, 232 U. S. 665; *Caldwell* v. *North Carolina*, 187 U. S. 622, and in *Rearick* v. *Pennsylvania*, 203 U. S. 507.

The rate or price received for the transportation and supply of the natural gas is the vital part of the transaction. Short of flat prohibition, there is no way to strike more directly at the heart of a commercial transaction than to fix the price that is to be received in it. See

Brown v. *Maryland*, 12 Wheat. 419, 447; *Leisy* v. *Hardin*, 135 U. S. 100, 108, 119–123; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 328, 329; *Lyng* v. *Michigan*, 135 U. S. 161, 166; *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 507; Judson on Interstate Commerce, § 17; *West* v. *Kansas Natural Gas Co.*, 221 U. S. 255, 256.

The validity of state action does not rest upon the discretion or good judgment of the State, nor on the reasonableness of the regulation imposed. It depends solely on the question of power. *Brown* v. *Maryland*, 12 Wheat. 419, 439; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 27; *Railroad Commission* v. *Worthington*, 225 U. S. 101, 107.

Federal functions may not be usurped under the police power, nor does the occupancy of highways by the plaintiff in error under local franchises authorize the State to regulate the price of gas moving in interstate commerce. *Leisy* v. *Hardin*, 135 U. S. 100, 108, 119–123; *Lyng* v. *Michigan*, 135 U. S. 161–166; *Wabash, St. Louis & Pacific Ry. Co.* v. *Illinois*, 118 U. S. 557.

Substantially parallel to the pipe line of the plaintiff in error, between the City of Warren, Pa., and the City of Jamestown, N. Y., an interurban trolley system is operated. This line is typical of many others, occupying city streets under local franchises. The State will hardly assert that it is able to regulate the interstate business or interstate rates of such trolley lines under the police power or because of the use of local franchises. The same rules and the same principles must be applied to the interstate business of the plaintiff in error.

This court has already held that the interstate gas business may not be regulated under the police power based on the use of highways. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229. See *Kansas Natural Gas Co.* v. *Haskell*, 172 Fed. Rep. 545.

The interstate natural gas business conducted by plaintiff in error is national, not local, in character, and the proposed state regulation thereof is not local in its operation. An interstate transaction requires national control whenever it is of such character that one State cannot control it without in effect extending its regulations into another State, or in effect assuming jurisdiction over property in another State, or leaving the transaction subject to conflicting regulations of different States.

The power of a State to enforce common-law duties, or like statutory duties, of public utilities engaged in interstate commerce does not extend to prescribing rates for interstate commerce. Subjecting interstate rates to control by a state commission is not the same as enforcing the common-law duty to serve at reasonable rates.

In fixing intrastate rates, for an interstate public utility, the State has no right to take into consideration the business of the company outside of the State, or base them on the value of the property outside the State. In fixing the gas rates in question, the State necessarily regulates the rate or return for the interstate transportation of the gas, and that is beyond its power.

Mr. Ledyard P. Hale for Public Service Commission, defendant in error.

Mr. Louis L. Thrasher for City of Jamestown *et al.*, defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

This writ of error brings before us for consideration the question whether the Public Service Commission of the State of New York has the power to regulate rates at which natural gas shall be furnished by the Pennsylvania Gas Company, plaintiff in error, to consumers in the city of Jamestown in the State of New York. The Court of

Appeals of New York (225 N. Y. 397) held that the Commission had such authority.

The statute of the State of New York, § 65, Public Service Commission Law, Laws 1910, c. 480, provides: "Every gas corporation, every electrical corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation or municipality for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction. Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess of that allowed by law or by the order of the commission is prohibited."

Consumers of gas, furnished by the plaintiff in error in the city of Jamestown, New York, filed a complaint demanding a reduction of gas rates in that city. The Public Service Commission asserted its jurisdiction which, as we have said, was sustained by the Court of Appeals of New York.

The federal question presented for our consideration involves the correctness of the contention of the plaintiff in error that the authority undertaken to be exercised by the Commission, and sustained by the court, was an attempt under state authority to regulate interstate commerce, and violative of the constitutional power granted to Congress over commerce among the States. The facts are undisputed. The plaintiff in error, the Pennsylvania Gas Company, is a corporation organized under the laws of the State of Pennsylvania and engaged in transmitting and selling natural gas in the State of New York and Pennsylvania. It transports the gas by pipe-lines about fifty miles in length from the source

of supply in the State of Pennsylvania into the State of New York. It sells and delivers gas to consumers in the city of Jamestown, in the town of Ellicott, and in the village of Falconer, all in Chautauqua County, New York. It also sells and delivers natural gas to consumers in the cities of Warren, Corry and Erie in Pennsylvania.

We think that the transmission and sale of natural gas produced in one State, transported by means of pipe-lines and directly furnished to consumers in another State, is interstate commerce within the principles of the cases already determined by this court. *West* v. *Kansas Natural Gas Co.* 221 U. S. 229; *Haskell* v. *Kansas Natural Gas Co.*, 224 U. S. 217; *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105.

This case differs from *Public Utilities Commission* v. *Landon*, 249 U. S. 236, wherein we dealt with the piping of natural gas from one State to another, and its sale to independent local gas companies in the receiving State, and held that the retailing of gas by the local companies to their consumers was intrastate commerce and not a continuation of interstate commerce, although the mains of the local companies receiving and distributing the gas to local consumers were connected permanently with those of the transmitting company. Under the circumstances set forth in that case we held that the interstate movement ended when the gas passed into the local mains; that the rates to be charged by the local companies had but an indirect effect upon interstate commerce and, therefore, the matter was subject to local regulation.

In the instant case the gas is transmitted directly from the source of supply in Pennsylvania to the consumers in the cities and towns of New York and Pennsylvania, above mentioned. Its transmission is direct, and without intervention of any sort between the seller and the buyer. The transmission is continuous and single and is, in our opinion, a transmission in interstate commerce and there-

fore subject to applicable constitutional limitations which govern the States in dealing with matters of the character of the one now before us.

The general principle is well established and often asserted in the decisions of this court that the State may not directly regulate or burden interstate commerce. That subject, so far as legislative regulation is concerned, has been committed by the Constitution to the control of the Federal Congress. But while admitting this general principle, it, like others of a general nature, is subject to qualifications not inconsistent with the general rule, which now are as well established as the principle itself.

In dealing with interstate commerce it is not in some instances regarded as an infringment upon the authority delegated to Congress, to permit the States to pass laws indirectly affecting such commerce, when needed to protect or regulate matters of local interest. Such laws are operative until Congress acts under its superior authority by regulating the subject-matter for itself. In varying forms this subject has frequently been before this court. The previous cases were fully reviewed and deductions made therefrom in the *Minnesota Rate Cases*, 230 U. S. 352. The paramount authority of Congress over the regulation of interstate commerce was again asserted in those cases. It was nevertheless recognized that there existed in the States a permissible exercise of authority, which they might use until Congress had taken possession of the field of regulation. After stating the limitations upon state authority, of this subject, we said (p. 402): "But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled

pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. . . . Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

The rates of gas companies transmitting gas in interstate commerce are not only not regulated by Congress, but the Interstate Commerce Act expressly withholds the subject from federal control. C. 309, § 7, 36 Stat. 539, 544.

The thing which the State Commission has undertaken to regulate, while part of an interstate transmis-

sion, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown in the State of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.

This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the States, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest and has not been attempted under the superior authority of Congress.

It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the State from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress enabling it to exert its superior power under the commerce clause of the Constitution.

The principles announced, often reiterated in the decisions of this court, were applied in the judgment affirmed by the Court of Appeals of New York, and we agree with that court that, until the subject-matter is regulated by congressional action, the exercise of authority conferred by the State upon the Public Service Commission is not violative of the commerce clause of the Federal Constitution.

Affirmed.

EX PARTE IN THE MATTER OF J. RAYMOND TIFFANY, AS RECEIVER, ETC., PETITIONER.

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION.

No. 26, Original. Argued January 19, 1920.—Decided March 1, 1920.

Where the District Court, in a case depending on diverse citizenship, having appointed a receiver to take charge of and disburse and distribute the assets of an insolvent state corporation, permitted a receiver later appointed for the same corporation by a court of the State to intervene and, after full hearing, denied his application to vacate the federal receivership and to have the assets turned over to him upon the ground that the proceedings in the state court had deprived the District Court of jurisdiction, *held*, that the order of the District Court denying the application was a final decision, within the meaning of Jud. Code, § 128, appealable to the Circuit Court of Appeals. P. 36.

The words "final decision" in that section mean the same thing as "final judgments and decrees," used in former acts regulating appellate jurisdiction. *Id.*

When there is a right to a writ of error or appeal, resort may not be had to mandamus or prohibition. P. 37.

Rule discharged.

THE case is stated in the opinion.

Mr. Merritt Lane, with whom *Mr. Dougal Herr* was on the brief, for petitioner:

The order of the District Court was not appealable under § 129 of the Judicial Code.

The application of the receiver in chancery was not to dissolve the injunction but that the District Court should instruct its receiver to turn over the assets to the chancery receiver before distribution to creditors.

And if application had been made to dissolve the injunctive order contained in the order appointing the receiver it would not have been appealable under § 129.

Such is the effect of the decision in *Highland Avenue & Belt R. R. Co.* v. *Columbian Equipment Co.*, 168 U. S. 627.

An order refusing to vacate a receivership is not made appealable under § 129.

The action of the District Court is not appealable under § 128. That section applies only to final judgments or decrees. The opinion of the District Court in denying petitioner's application is not appealable.

The present application is similar to that made by the petitioners in *Re Metropolitan Railway Receivership*, 208 U. S. 90, which this court determined on the merits.

If the award of the writ prayed for be a matter of discretion, we respectfully submit that the discretion should be exercised, because the matter involves a conflict between the federal and state courts which should ultimately be settled in some form of proceeding in this court. The applicant in fact represents the Court of Chancery of New Jersey, which in its turn represents the State in its sovereign capacity.

Moreover, before proceedings on appeal could be determined in the Circuit Court of Appeals, and in this court, the assets would be distributed and the questions involved would become merely academic.

Mr. Samuel Heyman for respondent:

The application to the District Court made by the chancery receiver was for an order dissolving the injunction issued by it against the corporation and its officers and for an order vacating the receivership. Such an order comes within § 129 of the Judicial Code.

The order was therefore appealable to the Circuit Court of Appeals under that section.

The order was also appealable under § 128 of the Judicial Code.

It totally excluded the chancery receiver from any

participation in the estate of the defunct corporation. Upon a final distribution of the assets, he would be totally ignored and distribution would be made to creditors direct. As he claimed title to the assets under the provisions of the New Jersey Corporation Act, the order was, as to him, a final judgment depriving him of his property and under § 128 of the Judicial Code he had the right to appeal to the Circuit Court of Appeals from this order as a final judgment. *Gumbel* v. *Pitkin*, 113 U. S. 545; *Savannah* v. *Jesup*, 106 U. S. 563; *Dexter Horton Bank* v. *Hawkins*, 190 Fed. Rep. 924; *s. c.* 194 U. S. 631.

The writ of mandamus should not be used for the purpose of appeal and should be refused where the petitioner has other appellate relief. *Ex parte Oklahoma*, 220 U. S. 191; *Ex parte Harding*, 219 U. S. 363; *In re Moore*, 209 U. S. 490.

MR. JUSTICE DAY delivered the opinion of the court.

This is an application of J. Raymond Tiffany as receiver, appointed by the Court of Chancery of New Jersey, of William Necker, Inc., for a writ of mandamus, or in the alternative a writ of prohibition, the object of which is to require the District Judge and the District Court of the United States for the District of New Jersey to order the assets of the corporation, in the hands of a federal receiver, to be turned over to applicant for administration by him as receiver appointed by the New Jersey Court of Chancery.

An order to show cause why the prayer of the petition should not be granted was issued, a return was made by the District Judge and the matter was argued and submitted. The pertinent facts are: On September 30, 1916, creditors and shareholders of William Necker, Inc., a corporation of the State of New Jersey, filed a bill in the United States District Court of New Jersey alleging the

insolvency of the corporation, praying for the appointment of a receiver, and a distribution of the corporate assets among the creditors and shareholders. The bill alleged diversity of citizenship as a ground for jurisdiction. The defendant corporation appeared and answered, admitting the allegations of the bill, and joined in the prayer that its assets be sold and distributed according to law. Upon consent the District Court appointed a receiver. The estate is insolvent, and the assets in the hands of the federal receiver are insufficient to pay creditors, and shareholders will receive nothing. On March 28, 1919, two and one-half years after the appointment of the federal receiver, creditors of William Necker, Inc., filed a bill in the Court of Chancery of New Jersey alleging the corporation's insolvency, praying that it be decreed to be insolvent, that an injunction issue restraining it from exercising its franchises, and that a receiver be appointed to dispose of the property, and distribute it among creditors and shareholders. A decree was entered in said cause adjudging the corporation insolvent, and appointing the petitioner, J. Raymond Tiffany, receiver. Thereupon Tiffany made application to the United States District Court asking that its injunction enjoining the corporation and all of its officers, and all other persons from interfering with the possession of the federal receiver, be dissolved; that the federal receivership be vacated, and that the federal receiver turn over the assets of the company then in his hands, less administration expenses, to the chancery receiver for final distribution,—the contention being that the appointment of the chancery receiver and the proceedings in the state court superseded the federal proceeding, and deprived the federal court of jurisdiction.

The federal receiver had made various reports and conducted the business of the corporation up until the time of the application in the Court of Chancery of New

Jersey, in which the applicant was appointed receiver. It appears that the applicants in the state court also filed their verified claims with the federal receiver, and that no creditor or shareholder made objection to the exercise of the jurisdiction of the federal court until the application in the state court.

The Federal District Court permitted the chancery receiver to intervene, heard the parties, and delivered an opinion in which the matter was fully considered. As a result of such hearing and consideration an order was entered in which it was recited that Tiffany, the state receiver, had made an application to the Federal District Court for an order directing it to turn over to the chancery receiver all of the assets of the corporation in the possession of the federal receiver, and the District Court ordered, adjudged and decreed that the said application of J. Raymond Tiffany, receiver in chancery "be and the same hereby is denied."

By the Judicial Code, § 128, the Circuit Court of Appeals is given appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, with certain exceptions not necessary to be considered. It is clear that the order made in the District Court refusing to turn over the property to the chancery receiver was a final decision within the meaning of the section of the Judicial Code to which we have referred, and from which the chancery receiver had the right to appeal to the Circuit Court of Appeals. By the order the right of the state receiver to possess and administer the property of the corporation was finally denied. The words: "final decisions in the district courts" mean the same thing as "final judgments and decrees" as used in former acts regulating appellate jurisdiction. Loveland on Appellate Jurisdiction of Federal Courts, § 39. This conclusion is amply sustained by the decisions of this court. *Savannah* v. *Jesup*, 106 U. S. 563; *Gumbel* v. *Pitkin*, 113 U. S. 545;

Krippendorf v. *Hyde*, 110 U. S. 276, 287. See also a well considered case in the Circuit Court of Appeals, Ninth Circuit—*Dexter Horton National Bank* v. *Hawkins*, 190 Fed. Rep. 924.

It is well settled that where a party has the right to a writ of error or appeal, resort may not be had to the extraordinary writ of mandamus or prohibition. *Ex parte Harding*, 219 U. S. 363; *Ex parte Oklahoma*, 220 U. S. 191. As the petitioner had the right of appeal to the Circuit Court of Appeals he could not resort to the writ of mandamus or prohibition. It results that an order must be made discharging the rule.

Rule discharged.

SHAFFER v. CARTER, STATE AUDITOR, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

Nos. 531, 580. Argued December 11, 12, 1919.—Decided March 1, 1920.

When, upon application for a preliminary injunction, the District Court not only refuses the injunction but dismisses the bill, appeal to this court should be under Jud. Code, § 238, from the final decree, and not under § 266. P. 44.

Equity may be resorted to for relief against an unconstitutional tax lien, clouding the title to real property, if there be no complete remedy at law. P. 46.

Quære: Whether the Oklahoma laws afford an adequate legal remedy in a case where the constitutionality of the state income tax law is in question. *Id.*

The Oklahoma taxing laws afford no legal remedy for removing a cloud caused by an invalid lien for an income tax. P. 48.

Having acquired jurisdiction, equity affords complete relief. *Id.*

Governmental jurisdiction in matters of taxation depends upon the power to enforce the mandate of the State by action taken within its borders either *in personam* or *in rem*. P. 49.

A State may tax income derived from local property and business owned and managed from without by a citizen and resident of another State (pp. 49–55): such power is consistent with Const., Art. IV, § 2, guaranteeing privileges and immunities and the equal protection clause of the Fourteenth Amendment. Pp. 53–56.

The constitutionality of such a tax depends on its practical operation and effect, and not on mere definitions or theoretical distinctions respecting its nature and quality. P. 54.

The fact that the Oklahoma income tax law permits residents to deduct from their gross income losses sustained without as well as those sustained within the State, while non-residents may deduct only those occurring within it, does not make the law obnoxious to the privileges and immunities clause, *supra*, or the equal protection clause of the Fourteenth Amendment. P. 56.

Net income derived from interstate commerce is taxable under a state law providing for a general income tax. P. 57.

The Oklahoma gross production tax, imposed on oil and gas producing companies, was intended as a substitute for the *ad valorem* property tax, and payment of it does not relieve the producer from taxation under the state income tax law. *Id.*

The Constitution, including the Fourteenth Amendment, does not forbid double taxation by the States. P. 58.

Without deciding whether it would be consistent with due process to enforce a tax on the income derived by a non-resident from part of his property within a State by imposing a lien on all his property, real and personal, there situate, *held*, that in this case the State was justified in treating the various properties and business of a producer of oil and natural gas, who went on with their operation after the income tax law was enacted, as an entity, producing the income and subject to the lien. *Id.*

No. 531, appeal dismissed.

No. 580, decree affirmed.

THE case is stated in the opinion.

Mr. Malcolm E. Rosser, with whom *Mr. George S. Ramsey*, *Mr. Edgar A. de Meules*, *Mr. Villard Martin* and *Mr. J. Berry King* were on the brief, for appellant:

The tax is directed against the income as such, entirely separate from the business or property out of which it

arises. Therefore it is not an excise tax within the meaning of the Oklahoma constitution; but, even if it were, it cannot be lawfully laid unless the situs of the income is in Oklahoma.

This tax is not laid on any theory of protection but on ability to pay. *Income Tax Cases*, 148 Wisconsin, 456. Its very nature shows that it is directed against wealthy people. A thousand whose combined income equals appellant's would have no income tax to pay, though their income was from the same sort of business. Appellant's income is taxed only because it is large and is all going to one man. Appellant is not in Oklahoma; therefore the State does not protect him. It protects his property and business, but no more than if they were owned by a thousand instead of one. It gives his income, as such, no protection at all, but on the other hand seeks to diminish it merely because it is large. Appellant's income is from a number of leases. If the income from each lease went to a different man there would be no tax. What difference can it make to Oklahoma whether it all goes to one man or not, if the recipient does not live in Oklahoma? *Maguire* v. *Tax Commissioner*, 230 Massachusetts, 503; *Brady* v. *Anderson*, 240 Fed. Rep. 665.

The provisions of the law show that the tax is intended as a tax on persons rather than property. So the similar law of Wisconsin has been construed. *Manitowoc Gas Co.* v. *Wisconsin Tax Commission*, 161 Wisconsin, 111; *State ex rel. Sallie F. Moon Co.* v. *Wisconsin Tax Commission*, 166 Wisconsin, 287; *U. S. Glue Co.* v. *Oak Creek*, 161 Wisconsin, 211; *s. c.* 247 U. S. 321; *Peck & Co.* v. *Lowe*, 247 U. S. 165. And see *Brady* v. *Anderson*, *supra*.

Under the facts of this case appellant's income is never in Oklahoma. Its situs is in Illinois. It appears that the appellant manages his business from his office in Chicago; devotes his time, energy and judgment to

it; makes his purchases of supplies and materials, with minor exceptions, from that office, buying outside of Oklahoma and having his purchases shipped in; the contracts for the sale of oil are made by him in Chicago with non-residents of Oklahoma, and these non-residents pay him by checks drawn at their offices, outside of Oklahoma, on banks outside of that State and send the checks to him in Chicago. The actual money constituting his income is never in Oklahoma. The net income, which is all the State is attempting to tax, is never there. He does not call on the State to assist him in collecting his income, and if any of the non-residents to whom he sells oil should breach their contracts he would not call on the courts of Oklahoma for redress. Unless the income tax is a tax on the source of the income, and not on the income itself, considered as a separate entity, the subject of taxation in this case is in Chicago.

An income is not a chose in action—a mere promise or expectation. It is something already derived or received, in the hands of the owner at the time it is derived. It springs into existence when received; or if there is a difference, the money from which the income is made up is with the owner before it has taken the form of net income. The owner gets the gross proceeds, pays some expenses, and the remainder constitutes the taxable income under the Oklahoma law. There is no taxable income until the owner has received the money and paid expenses out of it.

The property or business out of which an income arises is in no way representative of the income. The value of the property, or the volume of the business, has no necessary relation to the amount of net income. A man may have property and business and lose money on both.

The income is not a chose in action but in possession and in this case, in fact as well as in law, is at the resi-

dence of the owner. The usual rule that movables follow and have their situs at the residence of the owner is in some cases a mere fiction adopted for the purpose of convenience and can be changed by the legislature when it has any jurisdiction at all. But there is a limit to this power. Situs is determined by the facts. See *Adams* v. *Colonial &c. Mortgage Co.*, 82 Mississippi, 263.

It is not possible to escape the conclusion that the law is attempting to tax appellant simply because he made money in Oklahoma. The State has no jurisdiction over either his person or his income and it cannot tax his business for the reason that it is not taxing any similar business of residents, except by the gross production tax, and appellant has paid that.

Oklahoma cannot tax property not in the State. To do so would be to take property without due process of law. Inheritance taxes rest on entirely different bases. *Blackstone* v. *Miller*, 188 U. S. 189; *United States* v. *Perkins*, 163 U. S. 625; *Union National Bank* v. *Chicago*, 3 Biss. 82.

The jurisdiction of the State over incomes of non-residents is not like that of the Federal Government over incomes of aliens.

Oklahoma cannot tax the business, skill, ability and energy of appellant. *Stratton's Independence* v. *Howbert*, 231 U. S. 399. There is a difference between corporations and individuals in this regard. *Adams Express Co.* v. *Ohio*, 166 U. S. 185.

The provisions of the statute attempting to create a lien on all of appellant's property in Oklahoma to secure payment of the income tax are void. *Dewey* v. *Des Moines*, 173 U. S. 193; *City of New York* v. *McLean*, 170 N. Y. 374.

If the tax is held to be an excise, the payment by appellant of the gross production tax required by c. 39, Laws of 1916, relieves him from liability. That chapter

repeals the income tax law so far as the income is derived from the production of oil and gas.

If the tax is an excise, it is void because it deprives appellant of privileges and immunities enjoyed by citizens of Oklahoma, and because it denies him the equal protection of the laws and takes his property without due process of law. *County of Santa Clara* v. *Southern Pacific R. R. Co.*, 18 Fed. Rep. 385; *Slaughter-House Cases*, 16 Wall. 36; *Ward* v. *Maryland*, 12 Wall. 418; *Chalker* v. *Birmingham & Northwestern Ry. Co.*, 249 U. S. 522; *Wiley* v. *Parmer*, 14 Alabama, 627; *Sprague* v. *Fletcher*, 69 Vermont, 69.

The income tax law of Oklahoma permits residents to deduct from their gross income, not only losses within the State, but also losses from business or in any other way, sustained outside of Oklahoma. It does not permit non-residents to deduct their losses from their business outside of the State, from their profits on business carried on inside of the State. It seems to us that this question is controlled by the *Slaughter-House Cases, supra; Ward* v. *Maryland, supra;* and *Southern Ry. Co.* v. *Greene*, 216 U. S. 400. If the resident can deduct losses outside of the State while the non-resident is not permitted to do so, there is discrimination. Here there is no subject-matter to uphold the tax as a privilege unless the court shall hold that there are two distinct privileges in every business, one to run the business and another to make money out of it. An excise tax on the business of a natural person, the business being lawful, not the subject of license nor exercised through a franchise, cannot be graduated in proportion to the net profits. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, and *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, distinguished.

A great part of the net profit is earned outside of the State. There is no way to divide the profits between Oklahoma and Chicago, and Oklahoma has not at-

tempted to formulate a plan. Under any view this tax must fall. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 30.

If the tax is a privilege or excise tax it is void because it lays a burden on interstate commerce. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 695; *Minnesota Rate Cases*, 230 U. S. 352; *Kansas City &c. Ry. Co.* v. *Kansas*, 240 U. S. 227; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1. If the tax is considered an excise on business, rather than an income tax proper, it is not governed by *U. S. Glue Co.* v. *Oak Creek, supra;* nor by *Peck & Co.* v. *Lowe, supra.*

Mr. S. P. Freeling, Attorney General of the State of Oklahoma, and *Mr. C. W. King*, Assistant Attorney General of the State of Oklahoma, with whom *Mr. W. R. Bleakmore*, Assistant Attorney General of the State of Oklahoma, was on the brief for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

These are two appeals, taken under circumstances that will be explained, from a single decree in a suit in equity brought by appellant to restrain the enforcement of a tax assessed against him for the year 1916 under the Income Tax Law of the State of Oklahoma, on the ground of the unconstitutionality of the statute.

A previous suit having the same object was brought by him in the same court against the officials then in office, in which an application for an interlocutory injunction heard before three judges pursuant to § 266, Judicial Code, was denied, one judge dissenting. *Shaffer* v. *Howard*, 250 Fed. Rep. 873. An appeal was taken to this court, but, pending its determination, the terms of office of the defendants expired, and, there being no law of the

State authorizing a revival or continuance of the action against their successors, we reversed the decree and remanded the cause with directions to dismiss the bill for want of proper parties. 249 U. S. 200.

After such dismissal the present defendant Carter, as State Auditor, issued another tax warrant and delivered it to defendant Bruce, Sheriff of Creek County, with instructions to levy upon and sell plaintiff's property in that county in order to collect the tax in question; and the sheriff having threatened to proceed, this suit was commenced. An application for an interlocutory injunction, heard before three judges, was denied upon the authority of the decision in 250 Fed. Rep. and of certain recent decisions of this court. The decree as entered not only disposed of the application but dismissed the action. Plaintiff, apparently unaware of this, appealed to this court under § 266, Judicial Code, from the refusal of the temporary injunction. Shortly afterwards he took an appeal under § 238, Judicial Code, from the same decree as a final decree dismissing the action. The latter appeal is in accord with correct practice, since the denial of the interlocutory application was merged in the final decree. The first appeal (No. 531) will be dismissed.

The constitution of Oklahoma, besides providing for the annual taxation of all property in the State upon an *ad valorem* basis, authorizes (Art. 10, § 12) the employment of a variety of other means for raising revenue, among them income taxes.

The act in question is c. 164 of the Laws of 1915. Its first section reads as follows: "Each and every person in this State, shall be liable to an annual tax upon the entire net income of such person arising or accruing from all sources during the preceding calendar year, and a like tax shall be levied, assessed, collected and paid annually upon the entire net income from all property owned, and of every business, trade or profession carried on in this

State by persons residing elsewhere." Subsequent sections define what the term "income" shall include; prescribe how net income shall be computed; provide for certain deductions; prescribe varying rates of tax for all taxable incomes in excess of $3,000, this amount being deducted (by way of exemption) from the income of each individual, and for one living with spouse an additional $1,000, with further deductions where there are children or dependents, exemptions being the same for residents and non-residents; require (§ 2) a return on or before March first from each person liable for an income tax under the provisions of the act for the preceding calendar year; provide (§ 9) that the State Auditor shall revise returns and hear and determine complaints, with power to correct and adjust the assessment of income; that (§ 10) taxes shall become delinquent if not paid on or before the first day of July, and the State Auditor shall have power to issue to any sheriff of the State a warrant commanding him to levy the amount upon the personal property of the delinquent party; and (by § 11) "If any of the taxes herein levied become delinquent, they shall become a lien on all the property, personal and real, of such delinquent person, and shall be subject to the same penalties and provisions as are all *ad valorem* taxes."

Plaintiff, a non-resident of Oklahoma, being a citizen of Illinois and a resident of Chicago in that State, was at the time of the commencement of the suit and for several years theretofore (including the years 1915 and 1916) engaged in the oil business in Oklahoma, having purchased, owned, developed, and operated a number of oil and gas mining leases, and being the owner in fee of certain oil-producing land, in that State. From properties thus owned and operated during the year 1916 he received a net income exceeding $1,500,000, and of this he made, under protest, a return which showed that,

at the rates fixed by the act, there was due to the State an income tax in excess of $76,000. The then State Auditor overruled the protest and assessed a tax in accordance with the return; the present Auditor has put it in due course of collection; and plaintiff resists its enforcement upon the ground that the act, in so far as it subjects the incomes of non-residents to the payment of such a tax, takes their property without due process of law and denies to them the equal protection of the laws, in contravention of § 1 of the Fourteenth Amendment; burdens interstate commerce, in contravention of the commerce clause of § 8 of Art. I of the Constitution; and discriminates against non-residents in favor of residents, and thus deprives plaintiff and other non-residents of the privileges and immunities of citizens and residents of the State of Oklahoma, in violation of § 2 of Art. IV. He also insists that the lien attempted to be imposed upon his property pursuant to § 11 for taxes assessed upon income not arising out of the same property would deprive him of property without due process of law.

As ground for resorting to equity, the bill alleges that plaintiff is the owner of various oil and gas mining leases covering lands in Creek County, Oklahoma, and that the lien asserted thereon by virtue of the levy and tax warrant creates a cloud upon his title. This entitles him to bring suit in equity (*Union Pacific Ry. Co.* v. *Cheyenne*, 113 U. S. 516, 525; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 348; *Ogden City* v. *Armstrong*, 168 U. S. 224, 237; *Ohio Tax Cases*, 232 U. S. 576, 587; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 506), unless the contention that he has a plain, adequate, and complete remedy at law be well founded.

This contention is based, first, upon the provision of § 9 of c. 164, giving to the State Auditor the same power to correct and adjust an assessment of income that is given to the county board of equalization in cases of *ad*

valorem assessments, taken in connection with c. 107 of the Laws of 1915, which provides (Art. 1, Subdiv. B, § 2, p. 147) for an appeal from that board to the district court of the county. In a recent decision (*Berryhill* v. *Carter*, 76 Oklahoma, 248), the Supreme Court of the State held that an aggrieved income taxpayer may have an appeal under this section, and that thus "all matters complained of may be reviewed and adjusted to the extent that justice may demand." But the case related to "correcting and adjusting an income tax return," and the decision merely established the appeal to the district court as the appropriate remedy, rather than an application to the Supreme Court for a writ of certiorari. It falls short of indicating—to say nothing of plainly showing—that this procedure would afford an adequate remedy to a party contending that the income tax law itself was repugnant to the Constitution of the United States.

Secondly, reference is made to § 7 of Subdiv. B, Art. 1, of c. 107, Oklahoma Laws 1915, p. 149, wherein it is provided that where illegality of a tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person on paying the tax may give notice to the officer collecting it, stating the grounds of complaint and that suit will be brought against him; whereupon it is made the duty of such officer to hold the tax until the final determination of such suit if brought within thirty days; and if it be determined that the tax was illegally collected, the officer is to repay the amount found to be in excess of the legal and correct amount. But this section is one of several that have particular reference to the procedure for collecting *ad valorem* taxes; and they are prefaced by this statement (p. 147): "Subdivision B. To the existing provisions of law relating to the *ad valorem* or direct system of taxation the following provisions are added:" Upon this ground, in *Gipsy*

Oil Co. v. *Howard* and companion suits brought by certain oil-producing companies to restrain enforcement of taxes authorized by the gross production tax law (Sess. Laws 1916, c. 39, p. 102), upon the ground that they were an unlawful imposition upon federal instrumentalities, the United States District Court for the Western District of Oklahoma held that the legal remedy provided in § 7 of c. 107 applied only to *ad valorem* taxes, and did not constitute a bar to equitable relief against the production taxes. Defendants appealed to this court, and assigned this ruling for error, *inter alia;* but they did not press the point, and the decrees were affirmed upon the merits of the federal question. *Howard* v. *Gipsy Oil Co.*, 247 U. S. 503.

We deem it unnecessary to pursue further the question whether either of the statutory provisions referred to furnishes an adequate legal remedy against income taxes assessed under an unconstitutional law, since one of the grounds of complaint in the present case is that, even if the tax itself be valid, the procedure prescribed by § 11 of the Income Tax Law for enforcing such a tax by imposing a lien upon the taxpayer's entire property, as threatened to be put into effect against plaintiff's property for taxes not assessed against the property itself and not confined to the income that proceeded from the same property, is not "due process of law," within the requirement of the Fourteenth Amendment. For removal of a cloud upon title caused by an invalid lien imposed for a tax valid in itself, there appears to be no legal remedy. Hence, on this ground at least, resort was properly had to equity for relief; and since a court of equity does not "do justice by halves," and will prevent, if possible, a multiplicity of suits, the jurisdiction extends to the disposition of all questions raised by the bill. *Camp* v. *Boyd*, 229 U. S. 530, 551–552; *McGowan* v. *Parish*, 237 U. S. 285, 296.

This brings us to the merits.

Under the "due process of law" provision appellant makes two contentions: first, that the State is without jurisdiction to levy a tax upon the income of non-residents; and, secondly, that the lien is invalid because imposed upon all his property real and personal, without regard to its relation to the production of his income.

These are separate questions, and will be so treated. The tax might be valid, although the measures adopted for enforcing it were not. Governmental jurisdiction in matters of taxation, as in the exercise of the judicial function, depends upon the power to enforce the mandate of the State by action taken within its borders, either *in personam* or *in rem* according to the circumstances of the case, as by arrest of the person, seizure of goods or lands, garnishment of credits, sequestration of rents and profits, forfeiture of franchise, or the like; and the jurisdiction to act remains even though all permissible measures be not resorted to. *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346, 353; *Ex parte Indiana Transportation Co.*, 244 U. S. 456, 457.

It will be convenient to postpone the question of the lien until all questions as to the validity of the tax have been disposed of.

The contention that a State is without jurisdiction to impose a tax upon the income of non-residents, while raised in the present case, was more emphasized in *Travis* v. *Yale & Towne Mfg. Co.*, decided this day, *post*, 60, involving the income tax law of the State of New York. There it was contended, in substance, that while a State may tax the property of a non-resident situate within its borders, or may tax the incomes of its own citizens and residents because of the privileges they enjoy under its constitution and laws and the protection they receive from the State, yet a non-resident, although conducting a business or carrying on an occupation there, cannot

be required through income taxation to contribute to the governmental expenses of the State whence his income is derived; that an income tax, as against non-residents, is not only not a property tax but is not an excise or privilege tax, since no privilege is granted; the right of the non-citizen to carry on his business or occupation in the taxing State being derived, it is said, from the provisions of the Federal Constitution.

This radical contention is easily answered by reference to fundamental principles. In our system of government the States have general dominion, and, saving as restricted by particular provisions of the Federal Constitution, complete dominion over all persons, property, and business transactions within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses. Certainly they are not restricted to property taxation, nor to any particular form of excises. In well-ordered society, property has value chiefly for what it is capable of producing, and the activities of mankind are devoted largely to making recurrent gains from the use and development of property, from tillage, mining, manufacture, from the employment of human skill and labor, or from a combination of some of these; gains capable of being devoted to their own support, and the surplus accumulated as an increase of capital. That the State, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax the land but not the crop, the tree but not the

fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible.

Income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay. Taxes of this character were imposed by several of the States at or shortly after the adoption of the Federal Constitution. New York Laws 1778, c. 17; Report of Oliver Wolcott, Jr., Secretary of the Treasury, to 4th Cong., 2d sess. (1796), concerning Direct Taxes; American State Papers, 1 Finance, 423, 427, 429, 437, 439.

The rights of the several States to exercise the widest liberty with respect to the imposition of internal taxes always has been recognized in the decisions of this court. In *McCulloch* v. *Maryland*, 4 Wheat. 316, while denying their power to impose a tax upon any of the operations of the Federal Government, Mr. Chief Justice Marshall, speaking for the court, conceded (pp. 428–429) that the States have full power to tax their own people and their own property, and also that the power is not confined to the people and property of a State, but may be exercised upon every object brought within its jurisdiction; saying: "It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation," etc. In *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245, the court, by Mr. Justice Brewer, said (pp. 292, 293): "We have had frequent occasion to consider questions of state taxation in the light of the Federal Constitution, and the scope and limits of National interference are well settled. There is no general supervision on the part of the Nation over state taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to ob-

jects and methods." That a State may tax callings and occupations as well as persons and property has long been recognized. "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. . . . It [taxation] may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319. See also *Welton* v. *Missouri*, 91 U. S. 275, 278; *Armour & Co.* v. *Virginia*, 246 U. S. 1, 6; *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, 463.

And we deem it clear, upon principle as well as authority, that just as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the State, or their occupations carried on therein; enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders. This is consonant with numerous decisions of this court sustaining state taxation of credits due to non-residents, *New Orleans* v. *Stempel*, 175 U. S. 309, 320, *et seq.*; *Bristol* v. *Washington County*, 177 U. S. 133, 145; *Liverpool &c. Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346, 354; and sustaining federal taxation of the income of an alien non-resident derived from securities held in this country, *De Ganay* v. *Lederer*, 250 U. S. 376.

That a State, consistently with the Federal Constitution, may not prohibit the citizens of other States from carrying on legitimate business within its borders like its own

citizens, of course is granted; but it does not follow that the business of non-residents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one State has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such non-resident, although not personally yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter State. Section 2 of Art. IV of the Constitution entitles him to the privileges and immunities of a citizen, but no more; not to an entire immunity from taxation, nor to any preferential treatment as compared with resident citizens. It protects him against discriminatory taxation, but gives him no right to be favored by discrimination or exemption. See *Ward* v. *Maryland*, 12 Wall. 418, 430.

Oklahoma has assumed no power to tax non-residents with respect to income derived from property or business beyond the borders of the State. The first section of the act, while imposing a tax upon inhabitants with respect to their entire net income arising from all sources, confines the tax upon non-residents to their net income from property owned and business, etc., carried on within the State. A similar distinction has been observed in our federal income tax laws, from one of the earliest down to the present.[1] The Acts of 1861 (12 Stat. 309) and 1864 (13 Stat.

[1] Acts of August 5, 1861, c. 45, § 49, 12 Stat. 292, 309; June 30, 1864, c. 173, § 116, 13 Stat. 223, 281; July 4, 1864, Joint Res. 77, 13 Stat. 417; July 13, 1866, c. 184, § 9, 14 Stat. 98, 137–138; March 2, 1867, c. 169, § 13, 14 Stat. 471, 477–478; July 14, 1870, c. 255, § 6, 16 Stat. 256, 257; August 27, 1894, c. 349, § 27, 28 Stat. 509, 553; October 3, 1913, c. 16, § II, A. Subd. 1, 38 Stat. 114, 166; September 8, 1916, c. 463, Title I, Part I, § 1, a, 39 Stat. 756; October 3, 1917, c. 63, Title I, §§ 1 and 2, 40 Stat. 300; February 24, 1919, c. 18, §§ 210, 213 (c), 40 Stat. 1057, 1062, 1066.

281, 417) confined the tax to persons residing in the United States and citizens residing abroad. But in 1866 (14 Stat. 137–138) there was inserted by amendment the following: "And a like tax shall be levied, collected, and paid annually upon the gains, profits, and income of every business, trade, or profession carried on in the United States by persons residing without the United States, not citizens thereof." Similar provisions were embodied in the Acts of 1870 and 1894; and in the Act of 1913 (38 Stat. 166), after a clause imposing a tax upon the entire net income arising or accruing from all sources (with exceptions not material here) to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States though not a citizen thereof, the following appears: "and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere." Evidently this furnished the model for § 1 of the Oklahoma statute.

No doubt is suggested (the former requirement of apportionment having been removed by constitutional amendment) as to the power of Congress thus to impose taxes upon incomes produced within the borders of the United States or arising from sources located therein, even though the income accrues to a non-resident alien. And, so far as the question of jurisdiction is concerned, the due process clause of the Fourteenth Amendment imposes no greater restriction in this regard upon the several States than the corresponding clause of the Fifth Amendment imposes upon the United States.

It is insisted, however, both by appellant in this case and by the opponents of the New York law in *Travis* v. *Yale & Towne Mfg. Co.*, that an income tax is in its nature a personal tax, or a "subjective tax imposing personal liability upon the recipient of the income;" and that as to a

non-resident the State has no jurisdiction to impose such a liability. This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed. *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 362; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 294; *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, 463. The practical burden of a tax imposed upon the net income derived by a non-resident from a business carried on within the State certainly is no greater than that of a tax upon the conduct of the business, and this the State has the lawful power to impose, as we have seen.

The fact that it required the personal skill and management of appellant to bring his income from producing property in Oklahoma to fruition, and that his management was exerted from his place of business in another State, did not deprive Oklahoma of jurisdiction to tax the income which arose within its own borders. The personal element cannot, by any fiction, oust the jurisdiction of the State within which the income actually arises and whose authority over it operates *in rem*. At most, there might be a question whether the value of the service of management rendered from without the State ought not to be allowed as an expense incurred in producing the income; but no such question is raised in the present case, hence we express no opinion upon it.

The contention that the act deprives appellant and others similarly circumstanced of the privileges and immunities enjoyed by residents and citizens of the State of Oklahoma, in violation of § 2 of Art. IV of the Constitu-

tion, is based upon two grounds, which are relied upon as showing also a violation of the "equal protection" clause of the Fourteenth Amendment.

One of the rights intended to be secured by the former provision is that a citizen of one State may remove to and carry on business in another without being subjected in property or person to taxes more onerous than the citizens of the latter State are subjected to. *Paul* v. *Virginia*, 8 Wall. 168, 180; *Ward* v. *Maryland*, 12 Wall. 418, 430; *Maxwell* v. *Bugbee*, 250 U. S. 525, 537. The judge who dissented in *Shaffer* v. *Howard*, 250 Fed. Rep. 873, 883, concluded that the Oklahoma income tax law offended in this regard, upon the ground (p. 888) that since the tax is as to citizens of Oklahoma a purely personal tax measured by their incomes, while as applied to a non-resident it is "essentially a tax upon his property and business within the State, to which the property and business of citizens and residents of the State are not subjected," there was a discrimination against the non-resident. We are unable to accept this reasoning. It errs in paying too much regard to theoretical distinctions and too little to the practical effect and operation of the respective taxes as levied; in failing to observe that in effect citizens and residents of the State are subjected at least to the same burden as non-residents, and perhaps to a greater, since the tax imposed upon the former includes all income derived from their property and business within the State and, in addition, any income they may derive from outside sources.

Appellant contends that there is a denial to non-citizens of the privileges and immunities to which they are entitled, and also a denial of the equal protection of the laws, in that the act permits residents to deduct from their gross income not only losses incurred within the State of Oklahoma but also those sustained outside of that State, while non-residents may deduct only those incurred within the

State. The difference, however, is only such as arises naturally from the extent of the jurisdiction of the State in the two classes of cases, and cannot be regarded as an unfriendly or unreasonable discrimination. As to residents it may, and does, exert its taxing power over their income from all sources, whether within or without the State, and it accords to them a corresponding privilege of deducting their losses, wherever these accrue. As to non-residents, the jurisdiction extends only to their property owned within the State and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources. Hence there is no obligation to accord to them a deduction by reason of losses elsewhere incurred. It may be remarked, in passing, that there is no showing that appellant has sustained such losses, and so he is not entitled to raise this question.

It is urged that, regarding the tax as imposed upon the business conducted within the State, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the State. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, but only upon the net proceeds, and is plainly sustainable even if it includes net gains from interstate commerce. *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321. Compare *Peck & Co.* v. *Lowe*, 247 U. S. 165.

Reference is made to the gross production tax law of 1915 (c. 107, Art. 2, Subdiv. A, § 1; Sess. Laws 1915, p. 151), as amended by c. 39 of Sess. Laws 1916 (p. 104), under which every person or corporation engaged in producing oil or natural gas within the State is required to pay a tax equal to 3 per centum of the gross value of such product in lieu of all taxes imposed by the State, counties, or municipalities upon the land or the leases, mining rights,

and privileges, and the machinery, appliances, and equipment, pertaining to such production. It is contended that payment of the gross production tax relieves the producer from the payment of the income tax. This is a question of state law, upon which no controlling decision by the Supreme Court of the State is cited. We overrule the contention, deeming it clear, as a matter of construction, that the gross production tax was intended as a substitute for the *ad valorem* property tax but not for the income tax, and that there is no such repugnance between it and the income tax as to produce a repeal by implication. Nor, even if the effect of this is akin to double taxation, can it be regarded as obnoxious to the Federal Constitution for that reason, since it is settled that nothing in that instrument or in the Fourteenth Amendment prevents the States from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions. *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 367–368.

The contention that there is a want of due process in the proceedings for enforcement of the tax, especially in the lien imposed by § 11 upon all of the delinquent's property, real and personal, reduces itself to this: that the State is without power to create a lien upon any property of a non-resident for income taxes except the very property from which the income proceeded; or, putting it in another way, that a lien for an income tax may not be imposed upon a non-resident's unproductive property, nor upon any particular productive property beyond the amount of the tax upon the income that has proceeded from it.

But the facts of the case do not raise this question. It clearly appears from the averments of the bill that the whole of plaintiff's property in the State of Oklahoma consists of oil-producing land, oil and gas mining leaseholds, and other property used in the production of oil and gas; and that, beginning at least as early as the year 1915,

when the act was passed, and continuing without interruption until the time of the commencement of the suit (April 16, 1919), he was engaged in the business of developing and operating these properties for the production of oil, his entire business in that and other States was managed as one business, and his entire net income in the State for the year 1916 was derived from that business. Laying aside the probability that from time to time there may have been changes arising from purchases, new leases, sales, and expirations (none of which, however, is set forth in the bill), it is evident that the lien will rest upon the same property interests which were the source of the income upon which the tax was imposed. The entire jurisdiction of the State over appellant's property and business and the income that he derived from them—the only jurisdiction that it has sought to assert—is a jurisdiction *in rem;* and we are clear that the State acted within its lawful power in treating his property interests and business as having both unity and continuity. Its purpose to impose income taxes was declared in its own constitution, and the precise nature of the tax and the measures to be taken for enforcing it were plainly set forth in the Act of 1915; and plaintiff having thereafter proceeded, with notice of this law, to manage the property and conduct the business out of which proceeded the income now taxed, the State did not exceed its power or authority in treating his property interests and his business as a single entity, and enforcing payment of the tax by the imposition of a lien, to be followed by execution or other appropriate process, upon all property employed in the business.

No. 531. Appeal dismissed.
No. 580. Decree affirmed.

MR. JUSTICE MCREYNOLDS dissents.

TRAVIS, AS COMPTROLLER OF THE STATE OF NEW YORK, *v.* YALE & TOWNE MANUFACTURING COMPANY.

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

Nos. 548. Argued December 15, 16, 1919.—Decided March 1, 1920.

Shaffer v. *Carter*, *ante*, 37, followed, to the effect that a State may tax incomes of non-residents arising within her borders and that there is no unconstitutional discrimination against non-residents in confining the deductions allowed them for expenses, losses, etc., to such as are connected with income so arising while allowing residents, taxed on their income generally, to make such deductions without regard to locality. P. 75.

Such a tax may be enforced as to non-residents working within the State by requiring their employers to withhold and pay it from their salaries or wages; and no unconstitutional discrimination against such non-residents results from omitting such a requirement in the case of residents. P. 76.

A regulation requiring that the tax be thus withheld is not unreasonable as applied to a sister-state corporation carrying on local business without any contract limiting the regulatory power of the taxing State; nor is the power to impose such a regulation affected by the fact that the corporation may find it more convenient to pay its employees and keep its accounts in the State of its origin and principal place of business. *Id.*

The terms "resident" and "citizen" are not synonymous, but a general taxing scheme of a State which discriminates against all non-residents necessarily includes in the discrimination those who are citizens of other States. P. 78.

A general tax laid by a State on the incomes of residents and non-residents, which allows exemptions to the residents, with increases for married persons and for dependents, but allows no equivalent exemptions to non-residents, operates to abridge the privileges and immunities of citizens of other States, in violation of § 2 of Art. IV, of the Constitution. P. 79.

Held, that such a discrimination in the income tax law of New York is

not overcome by a provision excluding from the taxable income of non-residents annuities, interest and dividends not part of income from a local business, or occupation, etc., subject to the tax. P. 81.

An abridgment by one State of the privileges and immunities of the citizens of other States cannot be condoned by those States or cured by retaliation. P. 82.

262 Fed. Rep. 576, affirmed.

THE case is stated in the opinion.

Mr. James S. Y. Ivins and *Mr. Jerome L. Cheney*, with whom *Mr. Charles D. Newton*, Attorney General of the State of New York, and *Mr. E. C. Aiken* were on the brief, for appellant:

It might be argued that an income tax is *sui generis*—neither a tax on property, on a privilege, nor on the person—but a tax on the right to receive income (*Peck & Co.* v. *Lowe*, 247 U. S. 165); or it might be argued that it is a commutation tax or a composite tax. As a composite tax it might be said that in so far as it taxes the rent from real property it is a real property tax; in so far as it is a tax on the increased value of personalty, it is a personal property tax; in so far as it is a tax on the profits from the purchase and sale of property, it is an excise on sales or on commerce; in so far as it is a tax on income from trade, profession or labor, it is a privilege tax; and in so far as it taxes residents on income from sources without the territorial jurisdiction of the sovereign, it is a pure personal tax. The characterization of a tax by administrative officers, by the phraseology of the statute, or the opinion of other courts, is not controlling. This court will look only at the practical effect of the tax as it is enforced. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 294.

It is obvious that the tax on residents and non-residents is the same, regardless of the different phraseology, so far as both are taxed. In so far as the tax extends to income of residents from sources without the State,

there is no similar tax upon non-residents, but that is nothing for the latter to complain of. It really does not matter whether this tax be regarded (so far as non-residents are concerned) as direct or indirect, a tax on the person, on property, or on privilege. States can and do levy all three kinds. The only question is whether the State has power to enforce this tax, and its nature does not assist in determining that question.

Whether or not sovereign power to enforce a tax exists, depends solely on the ability of the State to collect it without extending its jurisdiction beyond its territorial boundaries. The sovereign can levy taxes on property which is tangible and within its boundaries, by its physical possession of that property. It can enforce taxes on privileges or rights, through preventing their exercise within its boundaries by those who do not pay. It can extend personal taxes to those over whom it has personal jurisdiction, compelling them to submit or move out. This inherent power in the sovereign extends equally to residents and to non-residents, to citizens and to aliens. *Duer* v. *Small*, 4 Blatchf. 263. It exists in each of the States except as restricted by the Federal Constitution. *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319.

With the exception of matters prohibited by the Constitution specifically (such as exports, or interstate commerce), or impliedly (such as the activities of the national government), there is no doubt of the right of the State to tax anything which is within its territorial jurisdiction. The only constitutional questions that ordinarily arise in respect to modern taxation are (1) those of the situs of intangibles, (2) those of the equal application of taxing statutes under Art. IV of Constitution and the Fourteenth Amendment, and (3) those of due process of law.

The question of the right to impose a tax on incomes of non-residents is not a question of the nature of the tax nor is it a question of whether income is property or

the acquisition of it a right or a privilege; but it is a question of the situs of the income. The doctrine that movable property follows the person for purposes of taxation has given way to the doctrine that where property has a situs, there it is taxable. *Bristol* v. *Washington County*, 177 U. S. 133.

The reason for regarding the situs of intangible property as the domicile of the person depends not on the meaning of property, but on the meaning of situs. That property is said to be taxable only at its situs is because where property is taxable—that is, wherever a sovereign can enforce a tax against it—there it has a situs. In determining whether income has a situs for purposes of taxation in a given State, we should begin, not by saying: "Where is its situs?" that we may determine whether it is taxable, but rather: "Can it be reached by taxation?" to determine whether it has a situs there. If it can be reached by taxation by a State—if the State can enforce a tax against it by due process of law—then it has a situs for taxation in that State. See *State Tax on Foreign-Held Bonds, supra; Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Tappan* v. *Merchants' National Bank*, 19 Wall. 490; *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395; *Liverpool &c. Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346, 355; *Blackstone* v. *Miller*, 188 U. S. 189; *New Orleans* v. *Stempel*, 175 U. S. 309; *Board of Assessors* v. *Comptoir National*, 191 U. S. 388; *Rogers* v. *Hennepin County*, 240 U. S. 184, 191.

A person receives income in one of three ways: It is (1) the product of property, or the money realized by the sale of such product, (2) the profit gained in the purchase and sale of property, or (3) the compensation for personal service. In each of these cases the State has power to enforce its taxes equally against residents and against non-residents.

The New York law does not deny to citizens of any State any of the privileges or immunities of citizens of the several States. Citizens of other States, as citizens, and only as such, are protected by Art. IV, § 2, cl. 1. So, if there is no discrimination against them as citizens, the provision is not violated. Distinctions are drawn between residents and non-residents, but this is regardless of citizenship—non-resident citizens of New York are treated like all other non-residents, and citizens of other sovereigns who are resident in New York are treated exactly like resident citizens. The term "reside" in the Fourteenth Amendment probably means to "be domiciled"; or to "maintain a voting residence." It does not mean to "have a place of abode,"—especially if one has several places of abode.

The terms resident and citizen are not normally synonymous and are not rendered exclusively so by the use in the Fourteenth Amendment of the word "resident" in one of its many meanings. *La Tourette* v. *McMaster*, 248 U. S. 465, 470. It is settled that where residence is a proper basis for classification, the adoption of such basis is not violative of Art. IV, § 2, cl. 1. *Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364; *Frost* v. *Brisbin*, 19 Wend. 11; *Chemung Canal Bank* v. *Lowery*, 93 U. S. 72, 76; *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618; *Central Loan & Trust Co.* v. *Campbell Commission Co.*, 173 U. S. 84; *Blake* v. *McClung*, 172 U. S. 239, 256, 257.

Classification in taxation is a proper exercise of legislative power. *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 351; *Barrett* v. *Indiana*, 229 U. S. 26, 29–30; *Giozza* v. *Tiernan*, 148 U. S. 657, 662.

This classification may discriminate between classes in rates of taxation, *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245; or in exemptions from taxation,

Beers v. *Glynn*, 211 U. S. 477; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322, 329. A taxing statute is not invalid because of simple inequality between classes. *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 210. It would seem that the only restriction on the power of classification is that there must be real differences between the situations of the different classes. *Northwestern Mutual Life Ins. Co.* v. *Wisconsin*, 247 U. S. 132, 138. What constitutes a real difference depends upon the purpose and extent of the legislation and all the circumstances of the subjects and objects thereof. *Tanner* v. *Little*, 240 U. S. 369, 382, 383.

The classification of residents and non-residents by the New York law is reasonable. *La Tourette* v. *McMaster, supra; Northwestern Mutual Life Ins. Co.* v. *Wisconsin, supra. Travellers' Ins. Co.* v. *Connecticut, supra*, is directly in point.

If the power to levy a tax exists, the rate fixed will not render it unconstitutional. *Tanner* v. *Little, supra.* The power to exempt certain things to the exclusion of others follows the same rules as the power to tax certain things, to the exclusion of others—it is only another way of stating the same proposition. And if the rate is immaterial in determining constitutionality as to taxation, so the rate of exemption is immaterial.

The different methods of collection provided by the statute for the tax on income received by way of compensation for personal services by residents and by non-residents, does not deprive any person of the equal protection of laws. *St. John* v. *New York*, 201 U. S. 633, 637. There are many decided cases in which different methods of procedure against residents and against non-residents have been upheld. *Tappan* v. *Merchants' National Bank, supra*, 505; *District of Columbia* v. *Brooke*, 214 U. S. 138; *Central Loan & Trust Co.* v. *Campbell Commission Co.*,

supra, 84, 97, 98. Many statutes taxing corporate shares and requiring the corporation to withhold at the source against non-residents but not against residents have been upheld. *Travellers' Ins. Co.* v. *Connecticut*, *supra*; *Merchants' & Manufacturers' Bank* v. *Pennsylvania*, 167 U. S. 461, 463.

The law does not deny due process of law; violate the commerce clause; or impair the obligation of contracts.

Mr. Louis H. Porter and *Mr. Archibald Cox* for appellee:

The appellee's factory and principal place of business is in Connecticut. It is authorized to do business in New York and owns property there, but it is a citizen and resident of Connecticut; and the statute, of course, applies equally to an individual in its position. It employs sundry persons, including citizens and residents of Connecticut and New Jersey, to work for it, and has contracted to pay them definite salaries for their services. These salaries are paid in different ways, in some instances by checks mailed from the office in Connecticut to the employees outside the State of New York, if that is material. And they are in accordance with contracts of employment entered into before the enactment of the law. The statute seeks to impose on the appellee a personal liability as the means of compelling it to obey.

The invalidity of the provisions for withholding the tax from the salaries seems to be directly established by *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania*, 153 U. S. 628.

A corporation, by securing authority to transact business within a State, does not thereby bring within the jurisdiction of that State transactions and properties wholly outside. It is not a matter of convenient collection, but a matter of jurisdiction. Distinguishing: *Hatch* v. *Reardon*, 204 U. S. 152; *Merchants' & Manufacturers' Bank* v. *Pennsylvania*, 167 U. S. 461; *Travellers' Ins. Co.*

v. *Connecticut*, 185 U. S. 364; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1; *Citizens National Bank* v. *Kentucky*, 217 U. S. 443.

To determine the constitutionality of this tax, it is accordingly necessary to ascertain, not colloquially but from a jurisdictional standpoint, what is taxed, and whether that is within the jurisdiction of the State of New York.

The tax is a subjective tax imposing personal liability upon the person receiving the "net income" which merely measures the burden imposed on the taxpayer *in personam*. *Brady* v. *Anderson*, 240 Fed. Rep. 665; *State ex rel. Sallie F. Moon Co.* v. *Wisconsin Tax Commission*, 166 Wisconsin, 287; *Income Tax Cases*, 148 Wisconsin, 456.

The liability is measured with reference to the net balance. And that net, from the year's experience, is used only as a measure of the general financial condition of the individual and his personal liability to pay from any resources he can control.

Even the amount of the tax varies according to the person of the recipient, and is not based upon the property or amount thereof. Thus, if the amount of income is twenty thousand dollars, it is taxed at one rate when received by one person, at another rate when received by two persons, and it is free from tax when received by twenty persons. This tax is not even measured strictly by the amount of income which a person receives. It is measured with a view to securing equality of sacrifice among taxpayers. *Income Tax Cases*, 148 Wisconsin, 456. And that the tax is personal is confirmed by the provisions for its collection, none of which sound *in rem* and all of which impose personal liability. That a tax with respect to "net incomes" is a personal tax, from the point of view of jurisdiction similar to a poll tax, is well indicated in *Maguire* v. *Tax Commissioner*, 230 Massachusetts, 503. Individual income as such, dissociated from the person of the owner, has no existence and is a purely fanciful conception.

A statute imposing a personal tax on persons over whom the State has no jurisdiction conflicts with the Fourteenth Amendment and is a taking of property without due process of law. *United States* v. *Erie Ry. Co.*, 106 U. S. 327; *Railroad Co.* v. *Collector*, 100 U. S. 595; *Dewey* v. *Des Moines*, 173 U. S. 193; *City of New York* v. *McLean*, 170 N. Y. 374; *Barhyte* v. *Shepard*, 35 N. Y. 237. The text writers are unanimous in this limitation on the taxing power of the States. Cooley, Taxation, 3d ed., p. 24; Brown, Jurisdiction of Courts, 2d ed., pp. 549, 550. See *State* v. *Ross*, 23 N. J. L. 517, 521. The source of the income does not in any respect change the nature and character of the tax imposed upon the recipient, and it is as much beyond the power of the State to impose such a personal tax upon a non-resident as it is to impose a capitation tax on him. If the State has not jurisdiction to impose a personal liability for tax on a non-resident, it is immaterial whether that non-resident is engaging in an occupation in the State from which he derives a large income or not. So, also if the State has the jurisdiction to impose a tax, it is immaterial whether the non-resident's occupation in the State is gainful in money or in health or in pleasure. The State either has or has not the jurisdiction to impose a personal liability against a non-resident for the payment of taxes. The situation here presented in its inevitable effect upon the integrity of the Union is of the same character as that considered by this court in *Crandall* v. *Nevada*, 6 Wall. 35. See *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489.

The argument that it is fair that a citizen of Connecticut earning his income in New York should pay a tax to that State for the protection afforded him therein is political and legislative rather than judicial. If this argument can be properly considered by the court, it must be weighed against the mischievous effects upon the integrity of the Union and from this standpoint the tax in question would

seem inconsistent with the very spirit of the Constitution. The provisions of the statute here cannot be sustained as a tax on property.

A "net income" under this statute is but a measure of the condition of the person receiving and enjoying it. A debt of ten thousand dollars may be paid to one person or to ten, but remains a fixed measurable amount. Ten thousand dollars paid in gross salaries means nothing as to the net income of the recipients without consideration of their number and personality. Ten thousand dollars in salaries paid to a number of recipients may after the computation yield an aggregate of net incomes entirely different from that which it yields if paid to one. The personal condition of the recipient, and not the amount or character of the payment made, constitutes and determines the fact of net income. It seems, therefore, impossible to conceive a net income for purposes of this taxation separate and distinct from the person receiving it.

The laws of New York do not create, give validity to, or affect, the income of appellee's non-resident employees. They are employed and paid in Connecticut, whose laws govern the contract of employment and whose courts enforce the contract. The services rendered are not income. The services are performed in whole or in part in New York. The net income never has any existence in New York. The gross salary here is not owing by, or to, anyone in New York. The fact that the appellee can legally transact business in New York obviously makes no difference in the situs of the obligation.

Moreover, property to be taxable in a State must have some permanency there, and not be merely temporarily within the State. *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409; *Buck* v. *Beach*, 206 U. S. 392; *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194.

In each of those cases such as *Tappan* v. *Merchants' National Bank*, 10 Wall. 490, where a tax has been sus-

tained on property of a non-resident, there were present two factors which have been universally recognized as essential to jurisdiction—(1) some definite and specific property in existence, (2) having in a real sense a situs in the taxing State. *State Tax on Foreign-Held Bonds*, 15 Wall. 300; *Board of Assessors* v. *New York Life Ins. Co.*, 216 U. S. 517; *Hawley* v. *Malden*, 232 U. S. 1; *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54; *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63.

The cases in which the courts have held that choses in action may acquire a situs different from the residence of the owner are not in point. A chose in action has not yet been paid. The debtor has only promised to pay it, and its value depends on the promise of the debtor. The actual money to pay the chose in action is in the State where he resides. Furthermore, the income tax is not assessed upon all money that comes to the recipient. It is only after the net amount has been determined after deducting from the gross receipts certain allowable expenses by way of deductions that the taxable amount is determined. Before that amount is determined and before any assessment can be laid thereon, most of the income, both gross and net, has been expended. The theory of a property tax is that it is a lien on the property taxed. Obviously the State cannot lawfully impose a tax lien upon property which is not itself in existence. The proposition is necessarily a contradiction in terms. *De Ganay* v. *Lederer*, 250 U. S. 376, distinguished.

The distinction between a tax on the income from property and a tax on the income from occupations and professions was clearly pointed out in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 635, 637. The distinction between the rights of the citizens of the several States, which are assured by the Constitution, and those of foreigners, who may be completely excluded from the United States, is pointed out in *United States* v. *Bennett*,

232 U. S. 299, and more specifically in *Railroad Co.* v. *Collector, supra.*

The provisions of the statute taxing non-residents cannot be sustained as imposing a privilege or license tax; nor on the theory that the State of New York has in fact power to collect the tax. It is not going too far to say that in every case in which this court has held unconstitutional a state law imposing a tax on persons or property outside its jurisdiction, the State had power to enforce the tax, because otherwise the case would not have been brought. *Board of Assessors* v. *New York Life Ins. Co., supra; New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania, supra; Morgan* v. *Parham*, 16 Wall. 471; *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385.

As between nations, the proposition that power to collect is the test of right to tax may be correct. Just as foreigners may be completely excluded from the United States (*United States* v. *Bennett, supra*), so anything that the United States can in fact seize it may perhaps tax. But the power of the individual States of the Union is limited by the Federal Constitution.

The tax on non-residents cannot be sustained on any theory that the State of New York protects their net income.

The provisions of the statute taxing non-residents are unconstitutional because they discriminate against citizens and residents of Connecticut and New Jersey. A materially higher tax is imposed on non-residents than upon residents.

The provisions operating to discriminate against appellee's non-resident employees conflict with § 2 of Art. IV of the Constitution and the privileges and immunities clause of the Fourteenth Amendment. A statute which in fact operates to defeat rights secured by the Constitution cannot be justified by invoking

the necessity of classification in taxation or by the fact that the words of the Constitution do not appear in the statute. *Chalker* v. *Birmingham & Northwestern Ry. Co.*, 249 U. S. 522.

There is no relevancy in cases where the State is dealing with a privilege which it may grant or withhold, such as those relating to foreign corporations doing business in the State, or succession taxes, or the nation's treatment of foreigners, because they do not deal with discrimination against persons having rights secured by the Constitution. *La Tourette* v. *McMaster*, 248 U. S. 465; *People* v. *Weaver*, 100 U. S. 539; *Sprague* v. *Fletcher*, 69 Vermont, 69.

Mr. John W. Griggs, by leave of court, filed a brief as *amicus curiæ.*

Mr. Laurence Arnold Tanzer, *Mr. William P. Burr*, *Mr. William S. Rann* and *Mr. William J. Wallin*, by leave of court, filed a brief as *amici curiae.*

Mr. Justice Pitney delivered the opinion of the court.

This was a suit in equity, brought in the District Court by appellee against appellant as Comptroller of the State of New York to obtain an injunction restraining the enforcement of the Income Tax Law of that State (c. 627, Laws 1919) as against complainant, upon the ground of its repugnance to the Constitution of the United States because violating the interstate commerce clause, impairing the obligation of contracts, depriving citizens of the States of Connecticut and New Jersey employed by complainant of the privileges and immunities enjoyed by citizens of the State of New York, depriving complainant and its non-resident employees of their

property without due process of law, and denying to such employees the equal protection of the laws. A motion to dismiss the bill—equivalent to a demurrer—was denied upon the ground that the act violated § 2 of Art. IV of the Constitution by discriminating against non-residents in the exemptions allowed from taxable income; an answer was filed, raising no question of fact; in due course there was a final decree in favor of complainant; and defendant took an appeal to this court under § 238, Judicial Code.

The act (§ 351) imposes an annual tax upon every resident of the State with respect to his net income as defined in the act, at specified rates, and provides also: "A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state." Section 359 defines gross income, and contains this paragraph: "3. In the case of taxpayers other than residents, gross income includes only the gross income from sources within the state, but shall not include annuities, interest on bank deposits, interest on bonds, notes or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article." In § 360 provision is made for deducting in the computation of net income expenses, taxes, losses, depreciation charges, etc.; but, by paragraph 11 of the same section, "In the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state; . . ." By

§ 362, certain exemptions are allowed to any resident individual taxpayer, viz., in the case of a single person a personal exemption of $1,000, in the case of the head of a family or a married person living with husband or wife, $2,000; and $200 additional for each dependent person under 18 years of age or mentally or physically defective. The next section reads as follows: "§ 363. Credit for taxes in case of taxpayers other than residents of the state. Whenever a taxpayer other than a resident of the state has become liable to income tax to the state or country where he resides upon his net income for the taxable year, derived from sources within this state and subject to taxation under this article, the comptroller shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax so payable to such other state or country was imposed; provided that such credit shall be allowed only if the laws of said state or country grant a substantially similar credit to residents of this state subject to income tax under such laws." Section 366 in terms requires that every "withholding agent" (including employers) shall deduct and withhold 2 per centum from all salaries, wages, etc., payable to non-residents, where the amount paid to any individual equals or exceeds $1,000 in the year, and shall pay the tax to the Comptroller. This applies to a resident employee, also, unless he files a certificate showing his residence address within the State.

Complainant, a Connecticut corporation doing business in New York and elsewhere, has employees who are residents some of Connecticut others of New Jersey but are occupied in whole or in part in complainant's business in New York. Many of them have annual salaries or fixed compensation exceeding $1,000 per year, and the

amount required by the act to be withheld by complainant from the salaries of such non-resident employees is in excess of $3,000 per year. Most of these persons are engaged under term contracts calling for stipulated wages or salaries for a specified period.

The bill sets up that defendant, as Comptroller of the State of New York, threatens to enforce the provisions of the statute against complainant, requires it to deduct and withhold from the salaries and wages payable to its employees residing in Connecticut or New Jersey and citizens of those States respectively, engaged in whole or in part in complainant's business in the State of New York, the taxes provided in the statute, and threatens to enforce against complainant the penalties provided by the act if it fails to do so; that the act is unconstitutional for the reasons above specified; and that if complainant does withhold the taxes as required it will be subjected to many actions by its employees for reimbursement of the sums so withheld. No question is made about complainant's right to resort to equity for relief; hence we come at once to the constitutional questions.

That the State of New York has jurisdiction to impose a tax of this kind upon the incomes of non-residents arising from any business, trade, profession, or occupation carried on within its borders, enforcing payment so far as it can by the exercise of a just control over persons and property within the State, as by garnishment of credits (of which the withholding provision of the New York law is the practical equivalent); and that such a tax, so enforced, does not violate the due process of law provision of the Fourteenth Amendment, is settled by our decision in *Shaffer* v. *Carter*, this day announced, *ante*, 37, involving the income tax law of the State of Oklahoma. That there is no unconstitutional discrimination against citizens of other States in confining the deduction of expenses, losses, etc., in the case of non-resident taxpayers, to such as are

connected with income arising from sources within the taxing State, likewise is settled by that decision.

It is not here asserted that the tax is a burden upon interstate commerce; the point having been abandoned in this court.

The contention that an unconstitutional discrimination against non-citizens arises out of the provision of § 366 confining the withholding at source to the income of non-residents is unsubstantial. That provision does not in any wise increase the burden of the tax upon non-residents, but merely recognizes the fact that as to them the State imposes no personal liability, and hence adopts a convenient substitute for it. See *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 239.

Nor has complainant on its own account any just ground of complaint by reason of being required to adjust its system of accounting and paying salaries and wages to the extent required to fulfill the duty of deducting and withholding the tax. This cannot be deemed an unreasonable regulation of its conduct of business in New York. *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania*, 153 U. S. 628, cited in behalf of complainant, is not in point. In that case the State of Pennsylvania granted to a railroad company organized under the laws of New York and having its principal place of business in that State the right to construct a portion of its road through Pennsylvania, upon prescribed terms which were assented to and complied with by the company and were deemed to constitute a contract, not subject to impairment or modification through subsequent legislation by the State of Pennsylvania except to the extent of establishing reasonable regulations touching the management of the business done and the property owned by the company in that State, not materially interfering with or obstructing the substantial enjoyment of the rights previously granted. Afterwards, Pennsylvania undertook by statute to re-

quire the company, when making payment of coupons upon bonds previously issued by it, payable at its office in the City of New York, to withhold taxes assessed by the State of Pennsylvania against residents of that State because of ownership of such bonds. The coupons were payable to bearer, and when they were presented for payment it was practically impossible for the company to ascertain who were the real owners, or whether they were owned by the same parties who owned the bonds. The statute was held to be an unreasonable regulation and hence to amount to an impairment of the obligation of the contract.

In the case at bar complainant, although it is a Connecticut corporation and has its principal place of business in that State, is exercising the privilege of carrying on business in the State of New York without any contract limiting the State's power of regulation. The taxes required to be withheld are payable with respect to that portion only of the salaries of its employees which is earned within the State of New York. It might pay such salaries, or this portion of them, at its place of business in New York; and the fact that it may be more convenient to pay them in Connecticut is not sufficient to deprive the State of New York of the right to impose such a regulation. It is true complainant asserts that the act impairs the obligation of contracts between it and its employees; but there is no averment that any such contract made before the passage of the act required the wages or salaries to be paid in the State of Connecticut, or contained other provisions in anywise conflicting with the requirement of withholding.

The District Court, not passing upon the above questions, held that the act, in granting to residents exemptions denied to non-residents, violated the provision of § 2 of Art. IV of the Federal Constitution: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"; and, notwithstand-

ing the elaborate and ingenious argument submitted by appellant to the contrary, we are constrained to affirm the ruling.

The purpose of the provision came under consideration in *Paul* v. *Virginia*, 8 Wall. 168, 180, where the court, speaking by Mr. Justice Field, said: "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this." And in *Ward* v. *Maryland*, 12 Wall. 418, holding a discriminatory state tax upon non-resident traders to be void, the court, by Mr. Justice Clifford, said (p. 430): "Beyond doubt those words [privileges and immunities] are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens."

Of course the terms "resident" and "citizen" are not synonymous, and in some cases the distinction is important

(*La Tourette* v. *McMaster*, 248 U. S. 465, 470); but a general taxing scheme such as the one under consideration, if it discriminates against all non-residents, has the necessary effect of including in the discrimination those who are citizens of other States; and, if there be no reasonable ground for the diversity of treatment, it abridges the privileges and immunities to which such citizens are entitled. In *Blake* v. *McClung*, 172 U. S. 239, 247; 176 U. S. 59, 67, the court held that a statute of Tennessee, declaring the terms upon which a foreign corporation might carry on business and hold property in that State, which gave to its creditors residing in Tennessee priority over all creditors residing elsewhere, without special reference to whether they were citizens or not, must be regarded as contravening the "privileges and immunities" clause.

The nature and effect of the crucial discrimination in the present case are manifest. Section 362, in the case of residents, exempts from taxation $1,000 of the income of a single person, $2,000 in the case of a married person, and $200 additional for each dependent. A non-resident taxpayer has no similar exemption; but by § 363, if liable to an income tax in his own State, including income derived from sources within New York and subject to taxation under this act, he is entitled to a credit upon the income tax otherwise payable to the State of New York by the same proportion of the tax payable to the State of his residence as his income subject to taxation by the New York Act bears to his entire income taxed in his own State; "provided that such credit shall be allowed only if the laws of said state . . . grant a substantially similar credit to residents of this state subject to income tax under such laws." [1]

[1] Reading the statute literally, there would appear to be an additional discrimination against non-residents in that under § 366 the "withholding agent" (employer) is required to withhold 2 per cent. from all salaries, wages, etc., payable to any individual non-resident

In the concrete, the particular incidence of the discrimination is upon citizens of Connecticut and New Jersey, neither of which States has an income tax law. A considerable number of complainant's employees, residents and citizens of one or the other of those States, spend their working time at its office in the city of New York, and earn their salaries there. The case is typical; it being a matter of common knowledge that from necessity, due to the geographical situation of that city, in close proximity to the neighboring States, many thousands of men and women, residents and citizens of those States, go daily from their homes to the city and earn their livelihood there. They pursue their several occupations side by side with residents of the State of New York—in effect competing with them as to wages, salaries, and other terms of employment. Whether they must pay a tax upon the first $1,000 or $2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference. Under the circumstances as disclosed, we are unable to find adequate ground for the discrimination, and are constrained to hold that it is an unwarranted denial to the citizens of Connecticut and New Jersey of the privileges and immunities enjoyed by citizens of New York. This is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer (see *Amoskeag*

amounting to $1,000 or more in the year; whereas by § 351 the tax upon residents (indeed, upon non-residents likewise, so far as this section goes), is only one per centum upon the first $10,000 of net income. It is said, however, that the discrepancy arose through an amendment made to § 351 while the bill was pending in the legislature, no corresponding amendment having been made in § 366. In view of this, and taking the whole of the act together, the Attorney General has advised the Comptroller that § 366 requires withholding of only one per centum upon the first $10,000 of income. And the Comptroller has issued regulations to that effect. Hence we treat the discrepancy as if it did not exist.

Savings Bank v. *Purdy*, 231 U. S. 373, 393–394; *Maxwell* v. *Bugbee*, 250 U. S. 525, 543); but a general rule, operating to the disadvantage of all non-residents including those who are citizens of the neighboring States, and favoring all residents including those who are citizens of the taxing State.

It cannot be deemed to be counterbalanced by the provision of par. 3 of § 359 which excludes from the income of non-resident taxpayers "annuities, interest on bank deposits, interest on bonds, notes or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article." This provision is not so conditioned as probably to benefit non-residents to a degree corresponding to the discrimination against them; it seems to have been designed rather (as is avowed in appellant's brief) to preserve the preëminence of New York City as a financial center.

Nor can the discrimination be upheld, as is attempted to be done, upon the theory that non-residents have untaxed income derived from sources in their home States or elsewhere outside of the State of New York, corresponding to the amount upon which residents of that State are exempt from taxation under this act. The discrimination is not conditioned upon the existence of such untaxed income; and it would be rash to assume that non-residents taxable in New York under this law, as a class, are receiving additional income from outside sources equivalent to the amount of the exemptions that are accorded to citizens of New York and denied to them.

In the brief submitted by the Attorney General of New York in behalf of appellant, it is said that the framers of the act, in embodying in it the provision for unequal treatment of the residents of other States with

respect to the exemptions, looked forward to the speedy adoption of an income tax by the adjoining States; in which event, injustice to their citizens on the part of New York could be avoided by providing similar exemptions similarly conditioned. This, however, is wholly speculative; New York has no authority to legislate for the adjoining States; and we must pass upon its statute with respect to its effect and operation in the existing situation. But besides, in view of the provisions of the Constitution of the United States, a discrimination by the State of New York against the citizens of adjoining States would not be cured were those States to establish like discriminations against citizens of the State of New York. A State may not barter away the right, conferred upon its citizens by the Constitution of the United States, to enjoy the privileges and immunities of citizens when they go into other States. Nor can discrimination be corrected by retaliation; to prevent this was one of the chief ends sought to be accomplished by the adoption of the Constitution.

Decree affirmed.

MR. JUSTICE MCREYNOLDS concurs in the result.

CHESBROUGH v. NORTHERN TRUST COMPANY, EXECUTOR OF SCHREIBER, ET AL.

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

No. 206. Argued January 30, 1920.—Decided March 1, 1920.

Judgment sustained as in accord with a stipulation to abide the final result of *Chesbrough* v. *Woodworth*, 244 U. S. 72. P. 83.

In an action in tort the amount involved is the damages claimed if the declaration discloses nothing rendering such a recovery impossible and no bad faith appears. P. 84.

After a case of that character has been removed by defendant from a state court and judgment rendered against him in the District Court and Circuit Court of Appeals, it would require very clear error to justify this court in denying the jurisdiction upon the ground that the requisite amount was not involved. *Id.*

251 Fed. Rep. 881, affirmed.

THE case is stated in the opinion.

Mr. Thomas A. E. Weadock for plaintiff in error.

Mr. Edward S. Clark, with whom *Mr. John C. Weadock* was on the brief, for defendants in error.

Memorandum opinion under direction of the court, by MR. JUSTICE MCREYNOLDS.

Each of the three defendants in error instituted a suit against plaintiff in error for damages suffered by reason of his action as a director of the Old Second National Bank, Bay City, Michigan. These were consolidated in the District Court, and thereafter all parties stipulated that, as the facts were approximately the same as in *Woodworth* v. *Chesbrough et al.* (No. 137), the

"causes shall in all respects and as to all parties therein, be governed and concluded by the final result in the said case" and "that if and when final judgment is entered upon the verdict heretofore rendered in said case Number 137, or on any verdict that may hereafter be rendered therein and when proceedings (if any) for the review of said judgment have been concluded or abandoned so that execution may be issued thereon, then judgment shall be forthwith entered and execution issued in the above entitled causes," for specified amounts.

A judgment against Chesbrough in No. 137 having been affirmed here (244 U. S. 72), the District Court, purporting to enforce the stipulation, entered judgments for defendants in error; and this action was properly approved by the Circuit Court of Appeals. 251 Fed. Rep. 881. See 195 Fed. Rep. 875; 221 Fed. Rep. 912.

Plain provisions of the stipulation were rightly applied. The objection, based upon alleged insufficiency of the amount involved, which plaintiff in error urges to the District Court's jurisdiction of the cause first instituted by Mrs. Smalley in the state court and thereafter removed upon his petition, is without merit. The action is in tort; alleged damages exceed the prescribed amount; the declaration discloses nothing rendering such a recovery impossible; no bad faith appears. At this stage of the cause it would require very clear error to justify a negation of the trial court's jurisdiction. *Smithers* v. *Smith*, 204 U. S. 632, 642, 643.

The judgment of the court below is

Affirmed.

UNITED STATES v. A. SCHRADER'S SON, INC.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

No. 567. Argued January 22, 23, 1920.—Decided March 1, 1920.

A manufacturer of patented articles sold them to its customers, who were other manufacturers and jobbers in several States, under their agreements to observe certain resale prices fixed by the vendor. *Held* that there was a combination restraining trade in violation of § 1 of the Anti-Trust Act. P. 98. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, followed; *United States* v. *Colgate & Co.*, 250 U. S. 300, distinguished.

264 Fed. Rep. 175, reversed.

THE case is stated in the opinion.

The Solicitor General and *Mr. Henry S. Mitchell*, Special Assistant to the Attorney General, for the United States:

The defendant's patents have no bearing on the case. On this point we merely refer to the opinion of the District Court, holding that the decisions of this court establish that patented and unpatented articles are on the same footing with respect to fixing resale prices; that defendant's so-called "license agreements" were mere selling agreements; and that defendant's use of the term "royalties" was merely intended to give color to its untenable theory that the patents justified what was done.

The conclusive interpretation of the indictment (*United States* v. *Carter*, 231 U. S. 492, 493; *United States* v. *Miller*, 223 U. S. 599, 602) was that it charged a system of resale price-fixing contracts, between a manufacturer and wholesalers of its products, obligating the wholesalers to adhere to uniform specified resale prices, eliminating competition between the wholesalers, enhancing their prices to re-

tailers, and enhancing the prices paid by the consuming public.

In *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, this court vigorously denounced a system of resale price-fixing contracts between a manufacturer and dealers in its products, as against the *public* interest, upon the ground that it was as if the dealers had agreed amongst themselves, as condemned in *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed Rep. 271; 175 U. S. 211, to fix prices and suppress competition.

In *United States* v. *Colgate & Co.*, 250 U. S. 300, the indictment did not charge the defendant with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company.

The District Court erroneously construed § 1 of the Sherman Act, which prohibits combinations in restraint of trade, as only applying where there is a violation of § 2, which prohibits monopolization. That construction is opposed to the declaration of this court in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 50, 57; nor is it supported by the *Colgate Case*. It is opposed to the *Dr. Miles Medical Case*.

If the statute is to be construed according to the *Dr. Miles Medical Case* as intended to prevent combinations tending to enhance prices paid by the public, the construction adopted by the District Court is untenable. For the tendency to enhance prices paid by the public not only exists in a combination, but is fulfilled although no retailers are included in the combination, but only wholesalers; and the District Court so interpreted the present indictment. The enhancement of the prices at which the wholesalers sell to the retailers is, of course, transmitted by the retailers to the public; and is ultimately borne by the public. It is analogous to the case of a price-fixing agreement between competing manufacturers, which is unlawful although the enhancement of prices is transmit-

ted to the public through dealers not in the agreement with the manufacturers.

The District Court was mistaken in considering that the construction of the Sherman Act which it adopted was supported by § 2 of the Clayton Act (38 Stat. 730). That section has no apparent bearing on resale price fixing. The District Court apparently overlooked that the enactment deals only with a person's selling prices to his customers, and in no way touches his fixing their prices to their customers, which alone is involved in this case.

Large profits can not be justified as reasonable because they encourage the distribution of articles needed by the public; for the principle of that justification would sanction taking advantage of the public necessity, *e. g.*, for coal or food. However, the reasonableness, or unreasonableness, of resale prices does not determine the legal status of the combination which fixes them.

In the *Dr. Miles Medical Case* the combination was condemned, although the court had to assume that the prices fixed were reasonable, as was expressly pointed out. (220 U. S. 412.) See *Thomsen* v. *Cayser*, 243 U. S. 66; *Salt Co.* v. *Guthrie*, 35 Oh. St. 666. All such combinations are injurious to the public interest in the extreme facility which they afford for arbitrarily advancing prices through the united action of the dealers in obedience to the will of the manufacturer. Resale price-fixing combinations are not saved from condemnation by their advantages to the participants. We may dismiss as wholly baseless the familiar contention that to condemn a resale price-fixing combination deprives the manufacturer of the advantage of exercising his undoubted right to suggest resale prices and to select as his customers those dealers who adhere to the suggested prices.

That undoubted right was referred to by this court in the *Colgate Case*. But that indictment was held bad on the ground that it did not charge the existence of agree-

ments obligating the dealers to adhere to the indicated resale prices. The manufacturer can, of course, suggest resale prices and select as his customers dealers who adhere to them, without restricting the dealers either by assurances and promises to so adhere, or by contracts obligating them to do so.

Another inadequate argument for resale price-fixing combinations is that they protect the manufacturer's legitimate interest in the good will of his products against a poor opinion of their value created by dealers selling them at ruinous prices as a bait to procure sales of other articles on which to recoup. Let us assume this practice to be harmful and dishonest, and that the manufacturer may legitimately withhold his goods from dealers addicted thereto. But, obviously, he may protect himself in that respect without creating a combination imposing absolute uniformity of price on all dealers, and thus preventing deviation from such price by efficient dealers who find smaller profits adequate and desire to content themselves with these in a manner that is fair, and honorable, and entirely beneficial to the public.

The real advantages of resale price-fixing combinations to the participants consist in the enhancement of prices which constitutes a disadvantage to the public. A liberal part of the enhanced price is distributed to the dealers in the combination in the form of profits consisting in the difference between their fixed buying prices and their fixed selling prices. This induces the dealers to promote the sales of the articles whose prices are so fixed rather than of other articles the prices of which are not fixed and are consequently kept down by competition amongst the dealers. A manufacturer is, of course, benefited when the dealers promote the sales of his products rather than of other products; and his profits are, of course, increased. But as for such considerations we merely note what this court said in the *Dr. Miles Medical Case* (p. 408), after

condemning resale price-fixing combinations as injurious to the public interest.

Mr. Frank M. Avery, with whom *Mr. Eugene V. Myers*, *Mr. Carl Everett Whitney* and *Mr. Earl A. Darr* were on the brief, for defendant in error:

The indictment does not charge an offense. There must be an unreasonable restraint of trade. A covenant in partial restraint is *prima facie* reasonable. *Northwestern Salt Co.* v. *Electrolytic Alkali Co.* (1914), A. C. 461; *Haynes* v. *Doman* (1899), 2 Ch. 13. *Thomsen* v. *Cayser*, 243 U. S. 66, showed an unreasonable combination.

The allegation that the defendant's goods are patented plus an allegation that defendant regularly sells and ships large quantities to tire manufacturers and jobbers in the Northern District of Ohio and throughout the United States, who in turn resell and reship large quantities (collectively stated) to jobbers, manufacturers, retail dealers and the public, falls far short of charging facts showing an unreasonable restraint or combination. The channels of interstate commerce may be glutted with valves, etc.; there may be many or few manufacturers thereof; defendant's agreements may be necessary, owing to the state of the trade in defendant's particular goods; there is no averment to show how many tire manufacturers or jobbers there are in Northern Ohio or in the United States, nor what proportion of them have contracted with defendant; there is nothing to show what percentage of the goods is handled by the retail trade—this retail trade not being restricted at all; there is no allegation as to what percentage of valves is sold by the tire manufacturers or jobbers to the consuming public. Furthermore, no allegation of unreasonableness or of facts upon which unreasonableness can be predicated is found in the indictment itself or as interpreted by the District Court, and the agreements annexed to the indictment show that defend-

ant has an interest in the resale price which it fixes. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, decides that where a vendor has parted with all of his interest, and has also received the full consideration, he cannot control the resale price. But here, under its license agreements, defendant has a direct and substantial property interest in the resale price, namely, certain percentages of the list prices or gross selling prices, reserved as royalties under its patents. These royalties are in addition to the initial price and are not payable unless and until the goods have been used or sold by the defendant's vendees; and the percentage of the resale price which defendant is to receive is based on the amount of the resale price which the vendee actually receives, which must not be less than a minimum price, but which may be more; and, therefore, the amount of the defendant's compensation is dependent upon the amount of the resale price when the resale comes to be made. In none of the cases which have been befcre this court did the vendor have this interest or property in the resale price.

Where a vendor has a pecuniary interest in maintaining the resale price, and no monopoly is effected, he may lawfully contract with vendees to adhere to fixed prices. *Dr. Miles Medical Co.* v. *Park & Sons Co.*, *supra*; *Fisher Flouring Mills Co.* v. *Swanson*, 76 Washington, 649; *Rawleigh Medical Co.* v. *Osborne*, 177 Iowa, 208.

At common law such agreements are valid; nothing in the Sherman Act makes them illegal; and this court has made it clear that in the cases heretofore decided it has decided no more than was directly in issue in them.

In each of those cases the vendor had received the full price for his article, all that he ever was to get for it, and still sought to annex conditions to the resale. In the case at bar the defendant has not received the full price for it, since a very substantial part depends upon the resale and upon the amount of the resale price. The hypothesis of

the Government assumes that defendant has parted with the title to the goods and therefore has no property interest in the goods when resold. This overlooks the fundamental fact that the sales are on condition, that, on resale, the vendee will pay the defendant something more. The defendant, under the circumstances, may have only a fanciful interest or no interest in the goods themselves, but it has a very real, substantial and pecuniary interest in the resale price.

It must be remembered that the defendant can legally refrain from any dealing with any person whomsoever and the consequence of this legal right is that if it chooses to deal it can deal on its own terms so long as it does not seek to project itself beyond that line where it does not have a property interest in the thing sought to be accomplished.

Until defendant receives its part of the resale price, the transaction is not without the operation of the patent law. If, under such circumstances, the patent law and the Sherman Law clash, the patent law will prevail. *Bement* v. *National Harrow Co.*, 186 U. S. 70.

Whether title passes when the goods reach the wholesalers is immaterial, the real question being whether the patentee has received the full consideration it charges for releasing the goods from the patent monopoly. In the present instance, defendant has not received any part of such consideration until after the sale by the wholesaler is made.

We think the District Court overlooked the fact that the patent right concerns itself exclusively with the right of a patentee to control goods in which he has no property interest. It has been decided many times that the law grants to the patentee no right of manufacture, use or sale which he did not have before. In other words, with regard to the patented devices which he owns, the law neither subtracts from, nor adds to, them. It is solely with

the goods which he does not own that the law concerns itself.

Bauer v. *O'Donnell*, 229 U. S. 1, announced no new doctrine, but merely an extension of an old one—that a patentee having unconditionally sold and having received the consideration for release from the patent monopoly, could not afterwards control the patented goods. Cf. *Bloomer* v. *McQuewan*, 14 How. 539; *Adams* v. *Burke*, 17 Wall. 453; *Mitchell* v. *Hawley*, 16 Wall. 544. The monopoly not being dependent upon ownership of the goods, it is clear that the mere passage of title, if it really passed in this case, does not take the goods from under the patent monopoly.

In the *Colgate Case* the manufacturer effected a practical price-fixing for his goods in the hands of his customers and could enforce these fixed prices by a refusal to deal with the customers if they did not adhere to them. Such price-fixing, in effect, was held reasonable. The question which then arises is: Would it be a crime under the Sherman Act to secure precisely this effect by means of a written agreement?

It seems to us that the *Colgate* decision is a standard by which the acts of any defendant charged with price-fixing can be measured, and that the Sherman Act should not be construed to make out a crime where the same result is secured, and the only difference is that the customer, instead of acquiescing in what the manufacturer wishes, merely says that he will acquiesce, in writing.

To put the matter in another way, it is a reasonable thing to do under the Sherman Act what a man has a perfect right to do under the general law.

This defendant has effected no result which Colgate did not effect. On the contrary, Colgate went away beyond the effect produced, or even desired, by this defendant. Defendant's main purpose is to obtain a distribution of its goods. When they are in the hands

of the retailers and widely distributed, defendant's interest ceases. The retailers may freely compete. In the *Colgate Case* the goods were in effect controlled by the manufacturer while in the hands of the retailers.

We are aware that there is a technical difference between goods which in theory may be freely sold by the dealer, and goods which in theory cannot be sold by the dealer except at a fixed price. But this distinction is merely a form of words when the actual facts are considered.

Colgate's dealers had the technical right to sell Colgate goods at any price they pleased. As a matter of fact, however, they could not sell them at any price they pleased without incurring the penalty of being unable to get more goods. Colgate's intent and purpose was to fix resale prices. Both the indictment itself and the District Court in the case at bar stated that the effect of Colgate's act was the fixation of prices and the suppression of competition.

We wish to make perfectly clear this point. Is the Sherman Act to be interpreted so that it does not cover this effectual fixation of prices by one who has the intent and purpose of fixing prices and who proceeds to adopt means to secure this result, and at the same time interpreted to include one who has the same intent and purpose and who chooses the same means with the only difference that he secures the written agreement of the dealer to observe the fixed prices? Would this be a reasonable interpretation of the act, to make a man's liberty depend upon a shadow leaving him scot-free to violate the substance of the law?

In the *Miles Case* the price-fixing contracts were so extended and so widespread as to include practically the entire trade, wholesale and retail. Such a complete and perfected system has the elements of monopoly within it and would be so dangerous to the public wel-

fare as to induce the court to believe it unreasonable, under the Sherman Act.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Defendant in error, a New York corporation, manufactured at Brooklyn, under letters patent, valves, gauges and other accessories for use in connection with automobile tires, and regularly sold and shipped large quantities of these to manufacturers and jobbers throughout the United States. It was indicted in the District Court, Northern District of Ohio, for engaging in a combination rendered criminal by § 1 of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209, which declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." After interpreting the indictment as indicated by quotations from its opinion which follow, the District Court sustained a demurrer thereto, basing the judgment upon construction of that act. 264 Fed. Rep. 175.

"The substantive allegations of this indictment are that defendant is engaged in manufacturing valves, valve parts, pneumatic-pressure gauges, and various other accessories; that it sells and ships large quantities of such articles to tire manufacturers and jobbers in the Northern District of Ohio and throughout the United States; that these tire manufacturers and jobbers resell and reship large quantities of these products to (a) jobbers and vehicle manufacturers, (b) retail dealers, and (c) to the public, both within and without the respective States into which the products are shipped; that these acts have been committed within three years next preceding the presentation of this indictment and within this district; that the defendant executed, and

caused all the said tire manufacturers and jobbers to whom it sold its said products to execute with it, uniform contracts concerning resales of such products; that every manufacturer and jobber was informed by the defendant and well knew when executing such contracts that identical contracts were being executed and adhered to by the other manufacturers and jobbers; that these contracts thus executed purported to contain a grant of a license from the defendant to resell its said products at prices fixed by it to (a) jobbers and vehicle manufacturers similarly licensed, (b) retail dealers, and (c) the consuming public; that all these contracts provided (that the) [concerning] products thus sold to tire manufacturers and jobbers (provided) that they should not resell such products at prices other than those fixed by the defendant. Copies of these contracts are identified by exhibit numbers and attached to the indictment. It is further charged that the defendant furnished to the tire manufacturers and jobbers who entered into such contracts lists of uniform prices, such as are shown in said exhibits, which the defendant fixed for the resale of its said products to (a) jobbers and vehicle manufacturers, (b) retail dealers, and (c) the consuming public, respectively; and that the defendant uniformly refused to sell and ship its products to tire manufacturers and jobbers who did not enter into such contracts and adhere to the uniform resale prices fixed and listed by the defendant. Further, that tire manufacturers and jobbers in the northern district of Ohio and throughout the United States uniformly resold defendant's products at uniform prices fixed by the defendant and uniformly refused to resell such products at lower prices, whereby competition was suppressed and the prices of such products to retail dealers and the consuming public were maintained and enhanced. . . .

"Thus it will be observed that the contract, combina-

tion, or conspiracy charged comes merely to this: That the defendant has agreed, combined, or conspired with tire manufacturers and with jobbers by the selling or agreeing to sell valves, valve parts, pneumatic pressure gauges, and various accessories, with the further understanding or agreement that in making resales thereof they will sell only at certain fixed prices. It will be further observed that the retailers, to whom the jobbers in ordinary course of trade would naturally sell rather than to the consuming public, and who in turn sell and distribute these articles to and among the ultimate consumers, are not included within the alleged combination or conspiracy. . . .

"The so-called license agreements, exhibited with the indictment, are in my opinion, both in substance and effect, only selling agreements. The title to the valves, valve parts, pneumatic pressure gauges, and other automobile accessories passed to the so-called licensees and licensed jobbers."

The court further said:

"Defendant urges that there is a manifest inconsistency between the reasoning, if not between the holdings, of these two cases [*Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, and *United States* v. *Colgate & Co.*, 250 U. S. 300]; that if the basic principles announced in the latter case are to be taken in the ordinary sense imported by the language the present case falls within the *Colgate Case*, and that, properly construed, neither section 1 nor 2 of the Sherman Anti-Trust Law makes the defendant's conduct a crime. The *Dr. Miles Medical Company Case* standing alone would seem to require that this demurrer be overruled and a holding that the Sherman Anti-Trust Law is violated and a crime committed, merely upon a showing of the making by defendant and two or more jobbers of the agreements set up in the indictment, certainly if the jobbers were competitors in the

same territory. That case has been frequently cited as establishing this proposition. . . . The retailers are not in the present case included. They may compete freely with one another and may even give away the articles purchased by them. No restriction is imposed which prevents them from selling to the consumer at any price, even though it be at a ruinous sacrifice and less than the price made to them by the jobber. Personally, and with all due respect, permit me to say that I can see no real difference upon the facts between the *Dr. Miles Medical Company Case* and the *Colgate Company Case*. The only difference is that in the former the arrangement for marketing its product was put in writing, whereas in the latter the wholesale and retail dealers observed the prices fixed by the vendor. This is a distinction without a difference. The tacit acquiescence of the wholesalers and retailers in the prices thus fixed is the equivalent for all practical purposes of an express agreement. . . .

"Granting the fundamental proposition stated in the *Colgate Case*, that the manufacturer has an undoubted right to specify resale prices and refuse to deal with anyone who fails to maintain the same, or, as further stated, the act does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to the parties with whom he will deal, and that he, of course, may announce in advance the circumstances under which he will refuse to sell, it seems to me that it is a distinction without a difference to say that he may do so by the subterfuges and devices set forth in the opinion and not violate the Sherman Anti-Trust Act; yet if he had done the same thing in the form of a written agreement, adequate only to effectuate the same purpose, he would be guilty of a violation of the law. Manifestly, therefore, the decision in the *Dr. Miles Medical Case* must rest upon some other ground than the mere fact that there were

agreements between the manufacturer and the wholesalers. . . .

"The point, however, which I wish to emphasize is that the allegations of this indictment, not alleging any purpose, or facts from which such a purpose can be inferred, to monopolize interstate trade, within the prohibition and meaning of section 2 of the Sherman Anti-Trust Act and the last clause of section 2 of the Clayton Act, does not charge a crime under section 1 of the Sherman Anti-Trust Act as that act should be construed."

Our opinion in *United States* v. *Colgate & Co.* declared quite plainly:

That upon a writ of error under the Criminal Appeals Act, (c. 2564, 34 Stat. 1246) "we have no authority to revise the mere interpretation of an indictment and are confined to ascertaining whether the court in a case under review erroneously construed the statute." "We must accept that court's interpretation of the indictments and confine our review to the question of the construction of the statute involved in its decision." That we were confronted by an uncertain interpretation of an indictment itself couched in rather vague and general language, the meaning of the opinion below being the subject of serious controversy. The "defendant maintains that looking at the whole opinion it plainly construes the indictment as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same." "The position of the defendant is more nearly in accord with the whole opinion and must be accepted. And as counsel for the Government were careful to state on the argument that this conclusion would require affirmation of the judgment below, an extended discussion of the principles involved is unnecessary." And further: "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with

the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."

The court below misapprehended the meaning and effect of the opinion and judgment in that cause. We had no intention to overrule or modify the doctrine of *Dr. Miles Medical Co.* v. *Park & Sons Co.*, where the effort was to destroy the dealers' independent discretion through restrictive agreements. Under the interpretation adopted by the trial court and necessarily accepted by us, the indictment failed to charge that Colgate & Company made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices; and it was treated "as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same."

It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties

are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States.

The principles approved in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, should have been applied. The judgment below must be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

MR. JUSTICE CLARKE concurs in the result.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS dissent.

MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY *v.* STATE OF WISCONSIN EX REL. CITY OF MILWAUKEE.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 55. Argued November 10, 1919.—Decided March 1, 1920.

When it is claimed that the obligation of a contract is impaired by a state law, this court inclines to accept the construction placed upon the contract by the Supreme Court of the State, if the matter is fairly in doubt. P. 103.

A street railway franchise declared it the duty of the grantee company "at all times to keep in good repair the roadway between the rails and for one foot on the outside of each rail as laid, and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs," unless the company and the city agreed on some other material. In the absence of such an agreement, *held*, that the company's obligation extended to the use of materials

adopted by the city in repaving the rest of the street which were not the same as the city had last used in repaving between and near the rails. P. 103.

Where a street railway company by franchise contract with a city undertakes to repave between and next its rails with such material as the city used in repaving the rest of the street, and the city's regulatory power in respect of paving has not been precluded by contract, it is for the city to determine in the first instance what kind of pavement the public necessity and convenience demand. *Held*, in such a case, that the court could not say that it was inherently arbitrary and unreasonable to require the company to instal asphalt on a concrete foundation which the city had adopted to replace macadam and which was more expensive. P. 104.

A street railway company cannot escape a contractual duty to repave between and next its tracks upon the ground that the expense will reduce its income below six per cent., claimed to be not a reasonable return upon property used and useful in its business. *Id.*

The Fourteenth Amendment in guaranteeing equal protection of the laws does not assure uniformity of judicial decisions; and there is clearly no ground for the contention that such protection is denied because the state court, after a judgment complained of, rendered another, claimed to be irreconcilable with it on a matter of law, in a suit between strangers. P. 105. *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 544, distinguished.

166 Wisconsin, 163, affirmed.

THE case is stated in the opinion.

Mr. Edwin S. Mack, with whom *Mr. George P. Miller* and *Mr. Arthur W. Fairchild* were on the brief, for plaintiff in error.

Mr. Clifton Williams for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

A petition for a writ of mandamus was brought by the City of Milwaukee in a lower court of the State of Wis-

consin to compel the Milwaukee Electric Railway and Light Company to pave at its own expense with asphalt upon a concrete foundation that portion of Center Street, called the railway zone, which lies between the tracks and for one foot outside of them. The paving had been specifically ordered on November 8, 1915, by a city ordinance after the city had laid such a pavement on all of the street except the railway zone. Theretofore the street had been paved from curb to curb with macadam. The company admitted that the railway zone was in need of repaving at that time; but it insisted that under an ordinance of January 2, 1900, which constituted its franchise to lay tracks on Center Street, it was entitled to repair with macadam and could not be compelled to repave with asphalt.

The case was heard in the trial court on a demurrer to the amended return. The demurrer was sustained; and the decision was affirmed by the Supreme Court (165 Wisconsin, 230). The company having failed after remittitur to file an amended return or take further action, judgment was entered by the trial court awarding a peremptory writ of mandamus directing it to pave the railway zone as directed in the ordinance. This judgment also was affirmed by the Supreme Court (166 Wisconsin, 163). The case comes here on writ of error under § 237 of the Judicial Code. The single question presented is whether the ordinance of November 8, 1915, is void either under § 10 of Article I of the Federal Constitution as impairing contract rights of the company or under the Fourteenth Amendment as depriving it of property without due process of law. The ordinance of January 2, 1900, which is the contract alleged to be impaired by the later ordinance, provides as follows:

"Sec. 2. . . . It shall be the duty of said railway company at all times to keep in good repair the roadway between the rails and for one foot on the outside of each rail

as laid, and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs, unless the said railway company and the board of public works of said city shall agree upon some other material, and said company shall then use the material agreed upon. . . ."

The company contends that when this section is read in connection with § 9, it clearly appears that the obligation to repave cannot be imposed.

First: The Supreme Court of the State held that the language of § 2 was not distinguishable from that involved in earlier cases in which it had held that a duty to keep "in proper repair" without qualification was broad enough to require repaving and repairing with the same material with which the street was repaved. When this court is called upon to decide whether state legislation impairs the obligation of a contract, it must determine for itself whether there is a contract, and what its obligation is, as well as whether the obligation has been impaired. *Detroit United Railway* v. *Michigan*, 242 U. S. 238, 249. But, as stated in *Southern Wisconsin Ry. Co.* v. *Madison*, 240 U. S. 457, 461, "the mere fact that without the state decision we might have hesitated is not enough to lead us to overrule that decision upon a fairly doubtful point." Among the cases relied upon by the state court is *State ex rel. Milwaukee* v. *Milwaukee Electric Ry. & Light Co.*, 151 Wisconsin, 520, which was cited by this court in the *Madison Case* (p. 461) as a "persuasive decision [s] that the obligation to keep the space 'in proper repair' . . . extends to" repaving the railway zone with asphalt when the rest of the street is being repaved with that material. But the company points to the clause in the ordinance of January 2, 1900, which provides for repair "with the same material as the city shall have last used to pave or repave these spaces and the street,"

and insists that its obligation is, in any event, limited to repaving with such material as the city had last used between the rails. This would put upon the city the burden of paving the whole street in case of any innovation in paving save by agreement of the company and the city. It is not a reasonable construction of the provision.

Second: Granted the duty to repave, and to repave with material other than that last used in the space between the tracks, was it reasonable for the city to require that the pavement be of asphalt upon a concrete foundation—a pavement which involved larger expense? The city alleged in its petition that the use of macadam by the railway was unreasonable, and that it is physically impossible to make a water-tight bond between the water-bound macadam and the asphalt, so as to prevent water from seeping through under the asphalt, causing it to deteriorate in warm weather and to be lifted by freezing in cold weather. The allegation was not expressly admitted by the return and must be deemed to have been covered by its general denial of all allegations not expressly admitted; but neither party took steps to have this formal issue disposed of. The case differs, therefore, in this respect from the *Madison Case*, where there was an express finding that repavement of the railway zone with stone would have been unsuitable when the rest of the street was of asphalt (p. 462). The difference is not material. As the ordinance did not, as a matter of contract, preclude regulation in respect to paving, it was for the city to determine, in the first instance, what the public necessity and convenience demanded. Compare *Fair Haven & Westville R. R. Co.* v. *New Haven*, 203 U. S. 379. We cannot say that its requirement that the railway zone be paved like the rest of the street with asphalt upon a concrete foundation was inherently arbitrary or unreasonable.

Third: The company insists that the ordinance of

November 8, 1915, is unreasonable and void, also, for an entirely different reason. It alleges in its return that for a long time prior to that date the earnings from its street railway system in Milwaukee were considerably under six per cent. of the value of the property used and useful in the business and were less than a reasonable return. It contends that this allegation was admitted by the demurrer; and that to impose upon the company the additional burden of paving with asphalt will reduce its income below a reasonable return on the investment and thus deprive it of its property in violation of the Fourteenth Amendment. The Supreme Court of the State answered the contention by saying, "The company can at any time apply to the railroad commission and have the rate made reasonable." The financial condition of a public service corporation is a fact properly to be considered when determining the reasonableness of an order directing an unremunerative extension of facilities or forbidding their abandonment. *Mississippi Railroad Commission* v. *Mobile & Ohio R. R. Co.*, 244 U. S. 388; *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345, 350. But there is no warrant in law for the contention that merely because its business fails to earn full six per cent. upon the value of the property used, the company can escape either obligations voluntarily assumed or burdens imposed in the ordinary exercise of the police power. Compare *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 279; *Chicago, Rock-Island & Pacific Ry. Co.* v. *Arkansas*, 219 U. S. 453; *Missouri Pacific Ry. Co.* v. *Omaha*, 235 U. S. 121.

Fourth: The company also insists that the ordinance is void because it denies equal protection of the laws. The contention rests upon the fact that since entry of the judgment below the Supreme Court of the State had decided *Superior* v. *Duluth Street Ry. Co.*, 166 Wisconsin, 487, which the company alleges is not reconcilable with

its decision in this case. The similarity of the ordinances and conditions in the two cases does not seem to us as clear as is asserted. But, however that may be, the Fourteenth Amendment does not in guaranteeing equal protection of the laws, assure uniformity of judicial decisions, *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 569, any more than in guaranteeing due process it assures immunity from judicial error, *Central Land Co.* v. *Laidley*, 159 U. S. 103; *Tracy* v. *Ginzberg*, 205 U. S. 170. Unlike *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 544, where protection was afforded to rights acquired on the faith of decisions later overruled, the company seeks here to base rights on a later decision between strangers which, it alleges, is irreconcilable on a matter of law with a decision theretofore rendered against it. The contention is clearly unsound.

As we conclude that there was a contractual duty to repave arising from the acceptance of the franchise, we have no occasion to consider whether there was, as contended, also a statutory duty to do so arising under § 1862, Wisconsin Statutes, which provides that street railways shall "be subject to such reasonable rules and regulations . . . as the proper municipal authorities may by ordinance, from time to time, prescribe."

Affirmed.

MR. JUSTICE PITNEY and MR. JUSTICE MCREYNOLDS dissent.

McCLOSKEY v. TOBIN, SHERIFF OF BEXAR COUNTY, TEXAS.

ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

No. 79. Submitted November 12, 1919.—Decided March 1, 1920.

The rights under the Fourteenth Amendement of a layman engaged in the business of collecting and adjusting claims are not infringed by a state law prohibiting the solicitation of such employment. P. 108.

Affirmed.

THE case is stated in the opinion.

Mr. R. H. Ward for plaintiff in error.

Mr. B. F. Looney, Attorney General of the State of Texas, and *Mr. Luther Nickels*, Assistant Attorney General of the State of Texas, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Article 421 of the Penal Code of Texas defined, with much detail, the offence of barratry. In *McCloskey* v. *San Antonio Traction Co.*, 192 S. W. Rep. 1116 (Texas), a decree for an injunction restraining the plaintiff in error from pursuing the practice of fomenting and adjusting claims was reversed on the ground that this section had superseded the common law offence of barratry and that by the Code "only an attorney at law is forbidden to solicit employment in any suit himself or by an agent." Article 421 was then amended (Act of March 29, 1917, c. 133) so as to apply to any person who "shall seek to ob-

tain employment in any claim, to prosecute, defend, present or collect the same by means of personal solicitation of such employment . . ." Thereafter McCloskey was arrested on an information which charged him with soliciting employment to collect two claims, one for personal injuries, the other for painting a buggy. He applied for a writ of *habeas corpus* which was denied both by the County Court and the Court of Criminal Appeals. The case comes here under § 237 of the Judicial Code, McCloskey having claimed below as here, that the act under which he was arrested violates rights guaranteed him by the Fourteenth Amendment.

The contention is, that since the State had made causes of action in tort as well as in contract assignable, *Galveston &c. Ry. Co.* v. *Ginther*, 93 Texas, 295, they had become an article of commerce; that the business of obtaining adjustment of claims is not inherently evil; and that, therefore, while regulation was permissible, prohibition of the business violates rights of liberty and property and denies equal protection of the laws. The contention may be answered briefly. To prohibit solicitation is to regulate the business, not to prohibit it. Compare *Brazee* v. *Michigan*, 241 U. S. 340. The evil against which the regulation is directed is one from which the English law has long sought to protect the community through proceedings for barratry and champerty. Co. Litt. p. 368 (Day's Edition, 1812, vol. 2, § 701 [368, b.]); 1 Hawkins Pleas of the Crown, 6th ed., 524; *Peck* v. *Heurich*, 167 U. S. 624, 630. Regulation which aims to bring the conduct of the business into harmony with ethical practice of the legal profession, to which it is necessarily related, is obviously reasonable. *Ford* v. *Munroe*, 144 S. W. Rep. 349 (Texas). The statute is not open to the objections urged against it.

Affirmed.

LEE v. CENTRAL OF GEORGIA RAILWAY COMPANY ET AL.

CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

No. 150. Argued January 16, 1920.—Decided March 1, 1920.

A rule of state pleading and practice, applied without discrimination to cases of personal injury arising under the federal and state employers' liability laws, which prevents an injured employee from suing jointly, in a single count, the railroad company under the federal statute and a co-employee at common law, does not infringe any right of such plaintiff derived from the federal statute. P. 110.

21 Ga. App. 558, affirmed.

THE case is stated in the opinion.

Mr. Alexander A. Lawrence, with whom *Mr. Wm. W. Osborne* was on the briefs, for petitioner.

Mr. H. W. Johnson, with whom *Mr. T. M. Cunningham, Jr.*, was on the brief, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

An injured employee brought an action in a state court of Georgia jointly against a railroad and its engineer, and sought in a single count, which alleged concurring negligence, to recover damages from the company under the Federal Employers' Liability Act, and from the individual defendant under the common law. Each defendant filed a special demurrer on the ground of misjoinder of causes of action and misjoinder of parties defendant. The de-

murrers were overruled by the trial court. The Court of Appeals—an intermediate appellate court to which the case went on exceptions—certified to the Supreme Court of the State the question whether such joinder was permissible. It answered in the negative (147 Georgia, 428). Thereupon the Court of Appeals reversed the judgment of the trial court (21 Ga. App. 558); and certiorari to the Supreme Court of the State was refused. The plaintiff then applied to this court for a writ of certiorari on the ground that he had been denied rights conferred by federal law; and the writ was granted.

Whether two causes of action may be joined in a single count or whether two persons may be sued in a single count are matters of pleading and practice relating solely to the form of the remedy. When they arise in state courts the final determination of such matters ordinarily rests with the state tribunals, even if the rights there being enforced are created by federal law. *John* v. *Paullin*, 231 U. S. 583; *Nevada-California-Oregon Railway* v. *Burrus*, 244 U. S. 103. This has been specifically held in cases arising under the Federal Employers' Liability Act. *Minneapolis & St. Louis R. R. Co.* v. *Bombolis*, 241 U. S. 211; *Atlantic Coast Line R. R. Co.* v. *Mims*, 242 U. S. 532; *Louisville & Nashville R. R. Co.* v. *Holloway*, 246 U. S. 525. It is only when matters nominally of procedure are actually matters of substance which affect a federal right, that the decision of the state court therein becomes subject to review by this court. *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507; *New Orleans & Northeastern R. R. Co.* v. *Harris*, 247 U. S. 367.

The Federal Employers' Liability Act does not modify in any respect rights of employees against one another existing at common law. To deny to a plaintiff the right to join in one count a cause against another employee with a cause of action against the employer, in no way abridges any substantive right of the plaintiff against the

employer. The argument that plaintiff has been discriminated against because he is an interstate employee is answered, if answer be necessary, by the fact that the Supreme Court of Georgia had applied the same rule in *Western & Atlantic R. R. Co.* v. *Smith*, 144 Georgia, 737 (22 Ga. App. 437), where it refused under the State Employers' Liability Act to permit the plaintiff to join with the employer another railroad whose concurrent negligence was alleged to have contributed in producing the injury complained of. If the Supreme Court of Georgia had in this case permitted the joinder, we might have been required to determine whether, in view of the practice prevailing in Georgia, such decision would not impair the employer's opportunity to make the defences to which it is entitled by the federal law. For, as stated by its Supreme Court in this case (147 Georgia, 428, 431): "If the carrier and its engineer were jointly liable under the conditions stated in the second question, a joint judgment would result against them, and they would be equally bound, regardless of the fact that the duties imposed upon them are not the same. The jury would have no power in such a case to specify the particular damages to be recovered of each, since Civil Code, § 4512 [providing for verdicts in different amounts against the several defendants] is not applicable to personal torts."

But we have no occasion to consider this question. Refusal to permit the joinder did not deny any right of plaintiff conferred by federal law. Cases upon which petitioner most strongly relies, *Southern Ry. Co.* v. *Carson*, 194 U. S. 136; *Alabama Great Southern Ry. Co.* v. *Thompson*, 200 U. S. 206; *Southern Ry. Co.* v. *Miller*, 217 U. S. 209, are inapplicable to the situation at bar.

Affirmed.

GRAND TRUNK WESTERN RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 153. Argued January 21, 22, 1920.—Decided March 1, 1920.

In settling with a railroad company under its current contract for mail transportation, the Postmaster General may deduct overpayments made under earlier contracts without waiting for their amount to be ascertained by suit. P. 120.

The right of the United States to recover such overpayments is not barred by time. P. 121.

The rule that a long-continued construction of a statute by a department of the Government should not readily be changed to the injury of parties who have relied upon it in contracting with the Government, does not apply to a long-continued practice of making overpayments, due to a mistake of fact. *Id.*

The obligation to carry the mail at the rates fixed by Congress attaches to a land-aided railroad like an easement or charge; a company purchasing under foreclosure takes the road with notice of the obligation; and its duty to perform is not affected by the fact that it received none of the land and obtained no benefit from the grant. *Id.*

Where a railway-aid grant is made by act of Congress to a State with the provision that over the railway to be aided the mail shall be transported at such price as Congress may by law direct, a company which before completion of its road applies to the State for the land to aid in such completion, receives the State's patent therefor, reciting that such is the purpose, and expressly assents to the terms and conditions of the granting act and proceeds to dispose of the land, is subject to the duty imposed, whether it was in fact aided by the grant in building its road or not; nor is its successor in any better position to question this effect of accepting the grant when it acquires the first company's property through a foreclosure to which that company's interest in such lands was made subject as after-acquired property covered by the mortgage. P. 122.

Where lands granted as railway-aid lands by Congress to a State are accepted by a railroad company and aid in the construction of its railroad, the obligation to carry the mails, as stipulated in the grant-

ing act, attaches to the road so aided, however disproportionate the aid to the cost of construction, and this notwithstanding the company, in accepting the land and assuming the burden, may have relied upon other lands applied for at the same time and included in the same state patent, but which it lost through decisions of the state court holding them inapplicable to its road under the granting act and the state law passed in pursuance of it. P. 123.

In such case the obligation respecting the mails cannot be escaped upon the ground that the contract between the company and the State, resting on an entire consideration, in part illegal, was void, where the United States was not a party to the contract and where its reversionary title was relinquished by Congress to the State. *Id.*

53 Ct. Clms. 473, affirmed.

THE case is stated in the opinion.

Mr. Theo. D. Halpin, with whom *Mr. Harrison Geer*, *Mr. L. T. Michener* and *Mr. P. G. Michener* were on the briefs, for appellant:

The land grant is the consideration for the promise of the railroad to carry mails at a price fixed by Congress. *Rogers* v. *P. H. & L. M. R. R. Co.*, 45 Michigan, 460; *Union Pacific R. R. Co.* v. *United States*, 104 U. S. 662; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640.

In making contracts, the United States lays aside its sovereignty and its contracts are tested as to validity by the same principles which govern in other cases.

The attempted contract between the State and the Port Huron & Lake Michigan Railroad Company, whereby the former undertook to grant lands not only east of Flint, where the railroad had already been constructed, but lands west of Flint, where it was never constructed, was void for illegality, because made in violation of the trust, in full force and effect at the time, under which the State held the land from the United States. *Bowes* v. *Haywood*, 35 Michigan, 241; *Fenn* v. *Kinsey*, 45 Michigan, 446;

Schulenberg v. *Harriman*, 21 Wall. 44; *Swann* v. *Miller*, 82 Alabama, 530. The acceptance of the railroad company failed to complete a binding contract because the major part of the consideration moving to the Port Huron & Lake Michigan Railroad Company was void for illegality and the consideration was indivisible.

There are no means to ascertain whether the promise of the railroad was induced by the legal or illegal portion of the consideration.

The act of Congress making the grant contemplated a grant of six sections per mile, or 230,400 acres for the sixty miles of road between Port Huron and Flint. The available land between Port Huron and Flint was about three per cent. of this, and less than the amount called for by the act for the construction of two miles of road. To hold the railroad to its promise in consideration of the grant of about six thousand acres, is to make an entirely different contract than that contemplated by all parties when the illegal contract was entered into.

The railroad between Port Huron and Flint was not constructed in whole or in part by a land grant made by Congress. *United States* v. *Alabama Great Southern R. R. Co.*, 142 U. S. 615. The Act of June 3, 1856, requires that the lands granted shall aid or be exclusively applied in the construction of the road—help construct it—and forbids the application of the statutes to a road not so aided or helped. The road so constructed is a land aided or land grant road, and not otherwise. 1 Ops. Asst. Atty. Gen., P. O. Dept., 777, 875, 879; 2 *ibid.*, 312; *Coler* v. *Board of Commissioners*, 89 Fed. Rep. 257; *De Graff* v. *St. Paul & Pacific R. R. Co.*, 23 Minnesota, 144; *Chicago, Milwaukee & St. Paul R. R. Co.* v. *United States*, 14 Ct. Clms. 125; *s. c.* 104 U. S. 687-689. Such aid must be established as a fact, to bind the railroad.

When the Act of July 12, 1876, went into effect, at a time when all the facts were fresh and easily ascertained,

the Post Office Department commenced to treat the road as a non-land grant road, and so continued for thirty-six years. It had been treated as a non-land grant road for twenty-four years when the plaintiff acquired it by purchase, in 1900. The sixty-six miles had been completed before the land was granted. It had been so far constructed and completed by January 1, 1872, that on that date it commenced to carry the mail under contract with the Post Office Department. It is not shown, nor was it attempted to be, that any part of the proceeds of the land aided in the construction of the road, or, in fact, ever reached the railroad company.

The Port Huron & Lake Michigan Railroad took title to the lands east of Flint as a gift or subsidy under the Act of the Michigan legislature, approved June 9, 1881, and not under the patent of May 30, 1873.

The appellant is not estopped to claim that there is no valid contract. It did not receive the lands. The reasons given for holding that the Port Huron & Lake Michigan Railroad Company was estopped, are unconvincing even as applied to that railroad. It did not seek the conveyance of the lands east of Flint except as it sought the conveyance of all the lands. It accepted the conveyance of all the lands "in terms" and proceeded to exercise control and disposition of all of them, and there is no fact in the record to show that it ever exercised control and disposition of the lands east, as separate from the lands west.

The trustee was a trustee of all the lands and the record is barren of any act of that trustee relating to the lands east of Flint, although it does show that he acted as to the lands west, involved in *Bowes* v. *Haywood, supra; Fenn* v. *Kinsey, supra.*

The road did not ask for the lands east of Flint at any time when the lands west of Flint were not included, and when it "solemnly accepted the grant," it must be borne

in mind that the acceptance was not of 6,400 acres, but of more than 36,000.

We submit that there are here none of the elements of estoppel. There has been no change of position by this claimant, or any of the previous owners of the road, to the detriment of the United States. On the contrary, all of them and the United States, until November 27, 1912, acted on the theory and in the belief that the road between Port Huron and Flint was not a land-aided road. For forty years all the parties concerned, the owning companies and the United States, acted upon a theory, a practice and a construction directly contrary to the view that the road between those points was land-aided. If the doctrine of estoppel is applicable here, it is against the United States alone.

Legal rights are not lost by the silence or inaction of one party that does not produce a change of position resulting injuriously to others. *Jones* v. *United States*, 96 U. S. 24, 29; *Pickard* v. *Sears*, 6 Ad. & El. 469, 474; *Hawes* v. *Marchant*, 1 Curtis C. C. 136, 144.

The Government is bound by the departmental construction extending over forty years. *United States* v. *Alabama Great Southern R. R. Co.*, 142 U. S. 615, and other cases.

Mr. Assistant Attorney General Spellacy, with whom *Mr. Leonard B. Zeisler* and *Mr. Charles H. Weston*, Special Assistants to the Attorney General, were on the brief, for the United States.

Mr. Justice Brandeis delivered the opinion of the court.

The railroad from Port Huron to Flint, in Michigan, sixty miles in length, was completed on December 12, 1871. It was built by the Port Huron and Lake Michigan Railroad Company. By foreclosure of a mortgage executed

by that corporation and several consolidations it became on October 31, 1900, the property of the Grand Trunk Western Railway Company and has since been a part of its system. For forty-one years after the completion of this sixty-mile road the mails were carried over it by the successive owners under the usual postal contracts and payment was made for the service quarterly at full rates. In 1912 the Postmaster General, concluding that this was a land-aided railroad within the provisions of § 13 of the Act of July 12, 1876, c. 179, 19 Stat. 78, 82,[1] restated the account for the twelve full years during which the road had been operated by the Grand Trunk Western. Twenty per cent. of the mail pay for that period was found to be $50,359.70; and this amount he deducted from sums accruing to the company under the current mail contract. He also reduced by twenty per cent. the amount otherwise payable under the current contract for carrying the mail over this part of its system. Thus he deducted altogether $52,566.87 from the amount payable on June 30, 1913. The road had in fact been built without any aid through grant of public lands. None had passed to the Grand Trunk Western when it acquired the road; and, so far as appears, that company had no actual knowledge that any of its predecessors in title had acquired any public land because of its construction. The company insisted that the $52,566.87 thus deducted from its mail pay was withheld without warrant in law, and brought this suit in the Court of Claims to recover the amount. 53 Ct. Clms. 473. Its petition was dismissed and the case comes here on appeal. Whether the company is entitled to relief depends upon the legal effect of the following facts.

[1] "Sec. 13. That rail-road-companies whose railroad was constructed in whole or in part by a land-grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only eighty per centum of the compensation authorized by this act."

By Act of June 3, 1856, c. 44, 11 Stat. 21, Congress granted to Michigan public land to aid in the construction of certain lines of railroad, a part extending easterly of Flint to Port Huron—another part, westerly of Flint to Grand Haven. The act contained in § 5 the usual mail provision.[1] In 1857 the legislature of Michigan granted these lands to two companies on condition that they accept the obligations of the grant within sixty days. [Act of February 14, 1857, Laws Mich., 1857, p. 346.] Each company filed within the specified time a partial acceptance, refusing to accede to the taxation features of the grant. Thereupon the rights of each to any part of the public lands was declared forfeited by the state authorities for failure to comply with the state legislation. Subsequently the companies filed maps of definite location in the General Land Office of the Interior Department, which were approved by that office; and on June 3, 1863, the Secretary of the Interior certified to the Governor of Michigan 30,998.76 acres of land lying west of Flint for the company which was to build the line from Grand Haven to Flint, the Detroit and Milwaukee Railway Company. On November 1, 1864, he certified 6,428.68 acres, all but 97 40/100 acres of which lay east of Flint, for the company which was to build the line from Flint to Port Huron, the Port Huron and Milwaukee Railway Company. Neither company constructed its line nor received any patent for land. The rights of way and other property of the Port Huron and Milwaukee Railway Company passed through a foreclosure sale to the Port Huron and Lake Michigan Railroad Company; and this corporation built the road in question during the years 1869, 1870 and 1871.

[1] "Sec. 5. *And be it further enacted*, That the United States mail shall be transported over said roads, under the direction of the Post-Office Department, at such price as Congress may, by law, direct: *Provided*, That until such price is fixed by law, the Postmaster-General shall have the power to determine the same."

But it made no application for any part of these lands until three weeks before the completion of the road. Then, on November 18, 1871, it petitioned the State Board of Control, which was charged with the disposition of the public lands, to confer upon it both the 30,998.76 acres west of Flint and the 6,428.68 acres east of Flint which the Secretary of the Interior had certified; and in so applying it asked for the land "for the purpose of aiding in the construction" of its contemplated railroad which was described as extending from Grand Haven to Flint and thence to Port Huron. The board approved of making the grant "for the purpose of aiding in the construction of the road;" but no further action was taken until May 1, 1873, when upon a new petition of the company which recited the former proceedings and the completion of "sixty miles of the unfinished portion of said line" the board directed the transfer of all the land to it. The resolution of the board was followed on May 30, 1873, by a patent for all the land from the Governor of the State, its formal acceptance by the company subject to the provisions of the Act of Congress of June 3, 1856, and action by it to take possession of the land and to dispose of it for the benefit of the company. In 1877 the Supreme Court of Michigan held in *Bowes* v. *Haywood*, 35 Michigan, 241, that the patent so far as it purported to transfer the 30,998.76 acres west of Flint was void under the Michigan legislation, because there had not, in fact, been any claim or pretence that the company ever contemplated building the line west of Flint; and in *Fenn* v. *Kinsey*, 45 Michigan, 446, (1881), that court held that an act of the Michigan legislature passed May 14, 1877, which purported to ratify the patent, was inoperative so far as it concerned the lands west of Flint because it impaired rights reserved to the United States by the Act of June 3, 1856. Meanwhile, Congress had relinquished to Michigan, by Joint Resolution of March 3, 1879, No. 15, 20 Stat. 490, its reversionary

interest in the lands; [1] and thereafter the legislature of Michigan (Act of June 9, 1881, Laws Mich., 1881, p. 362), ratified as to the six thousand acres east of Flint, the action theretofore taken by the state authorities, declaring also that "all deeds and conveyances heretofore executed by the Port Huron and Lake Michigan railroad company" "shall be deemed of full force and effect" and that the "rest and residue of said lands is vested in said company, its successor or assigns." Whether there remained then any land which had not been disposed of by that company or one of its successors does not appear; but it does appear that when in 1875 proceedings were taken to foreclose the mortgage under which the appellant claims title to the road, the trustee to whom the lands had been transferred for the company's benefit was joined for the purpose of including all such interest in the property to be sold.

The Act of June 3, 1856, had contemplated a grant of six sections (3,840 acres) per mile of road to be constructed. That would have been 230,400 acres for the sixty miles. The company which built them and those claiming under it received at most 6,428 acres. The case is one of apparent hardship. Was the judgment of the Court of Claims denying relief required by the applicable rules of law?

First: If the railroad was land-aided, payment of more than eighty per cent. of the full rates otherwise provided by law was unauthorized; and it was the duty of the Postmaster General to seek to recover the overpayment. Rev.

[1] Resolution of March 3, 1879, "That the United States hereby releases to the State of Michigan any and all reversionary interest which may remain in the United States in such of the lands granted to, and acquired by the said State of Michigan by act of Congress of June third, eighteen hundred and fifty-six, and certified to the said State in accordance with the said act, as were granted to aid the construction of the road from Grand Haven to Flint, and thence to Port Huron. This release shall not in any manner affect any legal or equitable rights in said lands, which have been acquired, but all such rights shall be and remain unimpaired."

Stats., § 4057. He was under no obligation to establish the illegality by suit. Having satisfied himself of the fact he was at liberty to deduct the amount of the overpayment from the monies otherwise payable to the company to which the overpayment had been made. *Wisconsin Central R. R. Co.* v. *United States*, 164 U. S. 190. There was no attempt to include in the deduction any alleged overpayment to any of appellant's predecessors in title. Balances due for carrying the mails, although arising under successive quadrennial contracts, are regarded as running accounts, and monies paid in violation of law upon balances certified by the accounting officers may be recovered by means of a later debit in these accounts. It matters not how long a time elapsed before the error in making the overpayment was discovered or how long the attempt to recover it was deferred. The statute of limitations does not ordinarily run against the United States and would not present a bar to a suit for the amount. See *United States* v. *Thompson*, 98 U. S. 486. It is true that when a department charged with the execution of a statute gives it a construction and acts upon that construction uniformly for a series of years, the court will look with disfavor upon a change whereby parties who have contracted with the Government upon the faith of that construction would be injured. *United States* v. *Alabama Great Southern R. R. Co.*, 142 U. S. 615. But here the practice long continued of paying the full rate instead of eighty per cent. thereof was not due to any construction of a statute which the department later sought to abandon, but to what is alleged to be a mistake of fact—due perhaps to an oversight. To such a case the rule of long-continued construction has no application. The appellant must be held to have taken the road with notice of the burdens legally imposed upon it.

Second: If the road was land-aided, it is immaterial that the company which later carries the mail over it received

none of the land and obtained no benefit from the grant. The obligation to carry mails at eighty per cent. of rates otherwise payable attached to the road like an easement or charge; and it affects every carrier who may thereafter use the railroad, whatever the nature of the tenure. *Chicago, St. Paul, etc., Ry. Co.* v. *United States*, 217 U. S. 180. The appellant expressly disclaims any contention that the mail clause should not apply because the quantity of land covered by the grant was small as compared with that contemplated by the Act of June 3, 1856, and with the cost of the road.

Third: It is contended that this railroad was not land-aided, because it had, in fact, been completed without the aid either of funds or of credit derived from these public lands. Whether the Port Huron and Lake Michigan Company which built the railroad was in fact aided by the land grant in so doing is immaterial. Before the road had been fully completed it asked that the land be granted to it in aid of the construction, and for this purpose only could the grant be made under the act of Congress. It accepted from the State a patent for the land which recited that such was the purpose of the conveyance; and it expressly assented to the terms and conditions of the grant imposed by the Act of June 3, 1856. Thereafter it proceeded to dispose of the land. Throughout this period the Port Huron and Lake Michigan Company remained the owner of the railroad. It had been authorized by its charter to receive the land-grant and necessarily to assent to the conditions upon which alone the grant could be made to it. It is true that the mortgage upon its property, under which appellant claims title, was executed before the company had applied for the grant; and it does not appear that the mortgage purported specifically to cover public lands; but the trustee under the mortgage claimed these lands as after acquired property and the company's interest in them was, by special proceeding, made subject

to the foreclosure proceedings. The appellant is therefore in no better position than the Port Huron and Lake Michigan Company to question the charge upon the railroad imposed by acceptance of the grant.

Fourth: Appellant points to the fact that the patent to the lands lying west of Flint was later held to be void by the Supreme Court of the State; and insists that thereby the charge or condition concerning the carriage of the mail must be held to have been relinquished. But the patent to the lands east of Flint never was declared void; the company's title to them never was questioned; and the objection to the patent to the western lands did not apply to them. That objection was that the Port Huron and Lake Michigan Railway Company was not a "competent party" to receive the western lands within the meaning of the eleventh section of the Michigan Act of 1857, because it did not propose to construct a line from Grand Haven to Owosso. *Bowes* v. *Haywood, supra,* 246. And the attempt by the legislature to make it a "competent party" through the Act of 1877 violated the obligations of the Federal Government's grant. *Fenn* v. *Kinsey, supra.* The only flaw in the title to the lands east of Flint lay in the fact that the railway had not been completed within ten years of the Act of June 3, 1856, as required by that act. This requirement, however, was a condition subsequently annexed to an estate in fee, and the title remained valid until the Federal Government should take action by legislation or judicial proceedings to enforce a forfeiture of the estate. *Schulenberg* v. *Harriman,* 21 Wall. 44, 63–64; *Railroad Land Co.* v. *Courtright,* 21 Wall. 310, 316. So far from doing so Congress relinquished by joint resolution its reversionary interest in the land, and thereby removed all possibility of objection on its part to the validity of the patent; and the State of Michigan later ratified the patent by legislation admitted to be valid.

Fifth: The appellant urges that the illegality of the pat-

ent to the western lands constituted a failure of consideration which voided the contract with the Government. The burden of the mail clause, it says, could be imposed only by contract between the Government and Port Huron and Lake Michigan Company. The contract was for land west as well as east of Flint—and the land west could legally be granted only if the company contemplated building the road westward to Grand Haven. As there was not even a pretence that it contemplated such construction, the contract was illegal. The Government's claim under the mail clause must fail, because no rights can be acquired under an illegal contract. So the appellant contends. Such a view is the result of regarding the transaction as a promise by the railway to the Government to carry the mail at a price fixed by Congress, on consideration of 36,000 acres of public land. A contract of this sort would create a purely personal obligation attaching "to the company, and not to the property,"—clearly not to a mere licensee. However, it is settled that the obligation in question is not of this nature but does attach to the property, even when used by a licensee. *Chicago, St. Paul, etc., Ry. Co.* v. *United States*, 217 U. S. 180. The obligation of a land-aided railway to carry the mail at a price fixed by Congress is a charge upon the property. The public lands were granted to Michigan to aid the construction of certain railways upon certain conditions. The legislature of Michigan could not dispose of the lands except in accordance with the terms of the grant. By the Act of February 14, 1857, it accepted the grant and enacted legislation to give legal effect to the conditions of it. Section 4 of the act is as follows:

"Said railroads shall be and forever remain public highways for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States; and the United States mail shall be transported over said railroads,

under the direction of the post-office department, at such price as Congress may by law direct. . . ."

The order of the Board of Control of May 1, 1873, directing the transfer of the land to the Port Huron and Lake Michigan Company, and the patent issued by the Governor were founded upon the authority of § 11 of this act; and under date of May 30, 1873, the company accepted the lands with the burdens they imposed. The railroad, whose owners and constructors accepted aid derived from these lands, became charged by operation of law with the burden of transporting the mails. The question whether that company would have accepted the land with its burdens if it had foreseen the invalidity of the title to the western lands, is wholly immaterial. The burden attached upon the acceptance of any aid whatsoever no matter how disproportionate to the cost of constructing the portion so aided.

The transaction called illegal was one between the company and the state authorities. The United States was no party to it. It had merely supplied property which the parties to it used. The Government never objected to the disposition made of it; and evidenced its approval by passage of the Joint Resolution of March 3, 1879. No reason exists why rights by way of charge upon the railroad which were acquired by the Government through the acceptance of six thousand acres of public land, should be invalidated by the alleged illegality of the state authorities' action in issuing a patent to a wholly different tract.

Affirmed.

CHAPMAN ET AL. *v.* WINTROATH.

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

No. 117. Argued January 9, 1920.—Decided March 1, 1920.

An inventor whose application disclosed but did not claim an invention which is later patented to another, is allowed by the patent law two years after such patent issues within which to file a second or divisional application claiming the invention; and this period may not be restricted by the courts upon the ground that so much delay may be prejudicial to public or private interests. P. 134. Rev. Stats, § 4886.

Such a second application is not to be regarded as an amendment to the orginal application and so subject to the one year limitation of Rev. Stats., § 4894. P. 138.

Nor can the right to make it be deemed lost by laches or abandonment merely because of a delay not exceeding the two years allowed by the statute. P. 139.

47 App. D. C. 428, reversed.

THE case is stated in the opinion.

Mr. John L. Jackson, with whom *Mr. Albert H. Adams* was on the brief, for petitioners:

An application for patent is a purely statutory proceeding, and an applicant is entitled to all the rights conferred by the patent statutes. *United States* v. *American Bell Tel. Co.*, 167 U. S. 224, 246.

Under Rev. Stats., § 4886, an inventor may obtain a patent for his invention provided, among other things, it was not patented more than two years prior to his application. Therefore, even if their original application be left out of consideration, the respondent's patent was not a statutory bar to the grant of a patent to petitioners.

Rev. Stats., § 4904, which is the statutory authority

for the declaration of interferences, fixes no time limit within which the applicant of a pending application must claim an invention already patented to another in order to obtain an interference with such patent, other than that the patent must be unexpired. Respondent's patent was unexpired, and therefore petitioners were lawfully entitled to contest priority with him.

It is not disputed that petitioners' original application fully discloses the subject-matter of their divisional application and of the interference issue, and was never abandoned or forfeited, but was regularly prosecuted according to law and the rules of the Patent Office. Therefore, considering their original application merely as proof of their priority over respondent, they are indubitably the first inventors of the issue of the interference. *Victor Talking Mach. Co.* v. *American Graphophone Co.*, 145 Fed. Rep. 350, 351; *Automatic Weighing Mach. Co.* v. *Pneumatic Scale Co.*, 166 Fed. Rep. 288; *Sundh Elec. Co.* v. *Interborough Rapid Transit Co.*, 198 Fed. Rep. 94; *Lemley* v. *Dobson-Evans Co.*, 243 Fed. Rep. 391.

Interferences are authorized for the sole purpose of determining the question of priority of invention. "The statute is explicit. It limits the declaration of interferences to the question of priority of invention." *Lowry* v. *Aller* 203 U. S. 476; *Ewing* v. *Fowler Car Co.*, 244 U. S. 1, 11.

It follows that, inasmuch as petitioners' applications (divisional as well as original) were filed less than two years after the grant of respondent's patent, and their priority over respondent is incontrovertibly established, judgment should have been rendered in their favor. *Ewing* v. *Fowler Car Co.*, *supra.*

The rule announced in *Rowntree* v. *Sloan*, 45 App. D. C. 207, is directly in conflict with Rev. Stats., §§ 4886, 4904. For more than forty years it has been the practice of the Patent Office to declare interferences between applicants

and patentees where the applicant made affidavit showing his conception of the invention prior to the filing of the patentee's application. Rule 51 (1870); Lowery's Annotated Interference Rules, p. 7. Moreover, until the amendment of March 3, 1897, to Rev. Stats., § 4886, which introduced the words "or more than two years prior to his application," a prior unexpired patent was never a bar to the grant of a patent to an applicant who could prove his claim to priority over it, regardless of when his application was filed. *Schreeve* v. *Grissinger*, 202 O. G. 951; C. D., 1914, 49, p. 51.

Rev. Stats., § 4904, provides for the declaration of interferences between an application and any unexpired patent, so that reading the latter section in connection with § 4886, when the Commissioner is of the opinion that an interference exists between an application and any unexpired patent issued not more than two years before the application was filed, the applicant has a statutory right to the declaration of such interference, and on proving priority, to receive his patent. *Ewing* v. *Fowler Car Co.*, *supra*.

An applicant who prosecutes his application according to law and the Patent Office rules is not chargeable with laches. *United States* v. *American Bell Tel. Co.*, 167 U. S. 224, 246; *Crown Cork & Seal Co.* v. *Aluminum Stopper Co.*, 108 Fed. Rep. 845, 851; *Columbia Motor Car Co.* v. *Duerr & Co.*, 184 Fed. Rep. 893, 895.

The time when a claim is first made is immaterial, as when made it relates back to the date of filing of the application, and if made in a divisional application, it relates back to the date of filing of the original or parent application. *Lotz* v. *Kenney*, 31 App. D. C. 205; *Von Recklinghausen* v. *Dempster*, 34 *id.*, 474.

Rev. Stats., § 4894, relates to the prosecution of applications to save them from abandonment, and has nothing whatever to do with abandonment of inventions.

The effect of the ruling in this case is that petitioners

constructively abandoned their invention to respondent, a later inventor, and that such constructive abandonment occurred while they had still pending, and were regularly prosecuting, an application for patent therefor.

The patent laws do not recognize such a thing as the constructive abandonment of an invention for which an applicant has lawfully filed, and is regularly prosecuting, an application for patent. Abandonment of an invention is a question of fact, and must be proven. *Ide* v. *Trorlicht Co.*, 115 Fed. Rep. 144; *Saunders* v. *Miller*, 33 App. D. C. 456; *Miller* v. *Eagle Mfg. Co.*, 151 U. S. 186; *Rolfe* v. *Hoffman*, 26 App. D. C. 336, 340; *Kinnear Mfg. Co.* v. *Wilson*, 142 Fed. Rep. 970, 973.

Abandonment of an invention is a very different thing from abandonment of an application for patent. *Western Elec. Co.* v. *Sperry Elec. Co.*, 58 Fed. Rep. 186, 191; *Hayes-Young Tie Plate Co.* v. *St. Louis Transit Co.*, 137 Fed. Rep. 82; *General Elec. Co.* v. *Continental Fibre Co.*, 256 Fed. Rep. 660, 663.

Abandonment of an invention completed and reduced to practice by the filing of an allowable application for patent therefor inures to the benefit of the public, and not to the benefit of a later inventor. *Ex parte Gosselin*, 97 O. G. 2977 (2979); *In re Millett*, 18 App. D. C. 186 (96 O. G. 1241).

Patent Office Rules 31, 68, 77 and 171, which provide for amendment of applications within one year from the date of the last official action of the Patent Office, all relate to abandonment of applications.

The statutes relating to constructive abandonment of inventions in all cases fix a limit of two years except when the application is filed in a foreign country more than one year before application is made in this country. Rev. Stats., §§ 4886, 4887, 4897, 4920.

The rule as to constructive abandonment in the case of applications for reissue, generally, though not invariably,

fixes a limit of two years. *Miller* v. *Brass Co.*, 104 U. S. 350; *Mahn* v. *Harwood*, 112 U. S. 354; *Wollensak* v. *Reiher*, 115 U. S. 101.

The ruling in *Rowntree* v. *Sloan*, that failure of an applicant to make the claim of an unexpired patent within one year from the date of such patent estops the applicant to make such claim at all, is arbitrary because it has no foundation in law, and is illogical because, if there be any ground for invoking the doctrine of estoppel in such a case, there is no reason why it should apply in one year rather than at any other time.

There can be no question of estoppel as between petitioners and respondent because the basic conditions to create an estoppel do not exist. There was no privity of relationship between the parties. Petitioners were unaware of respondent's application for patent. Respondent was not misled to his injury by any act or failure of petitioners.

It was not petitioners' duty, but the Commissioner's, to ascertain if there was an interference, and to declare it. *Ewing* v. *Fowler Car Co.*, *supra;* Rev. Stats., § 4904; Bigelow on Estoppel, 5th ed., pp. 26–28, 585, 594–597.

Laches or estoppel in this case is not ancillary to the question of priority.

The question of actual priority of invention having been foreclosed by respondent's admission, the Court of Appeals was without jurisdiction on an interference appeal to hear and determine petitioners' right to a patent. *Norling* v. *Hayes*, 37 App. D. C. 169; *Lowry* v. *Allen*, *supra.*

Mr. Paul Synnestvedt, with whom *Mr. H. L. Lechner* was on the briefs, for respondent:

While the patenting of an invention is purely statutory, the statute has been uniformly construed in the light of the underlying purpose of the patent system—the promotion

of the progress of science and the useful arts. *Kendall* v. *Winsor*, 21 How. 322, 328.

Diligence is an axiomatic requirement; and there is a time limit within which claims to a particular invention shown, but not claimed, in an application may be added. *Ex parte Dyson*, 232 O. G. 755; *In re Fritts*, 45 App. D. C. 211; *Victor Talking Mach. Co.* v. *Edison*, 229 Fed. Rep. 999; *Christensen* v. *Noyes*, 15 App. D. C. 94; *Bechman* v. *Wood*, *id.*, 484; *Skinner* v. *Carpenter*, 36 *id.*, 178.

The statute itself lays down a *pre*-application rule of diligence and a *post*-application rule. Rev. Stats., §§ 4886, 4887, and § 4894.

Where an applicant has an application, showing, *inter alia*, but not at any time claiming, a particular feature, pending in the Patent Office for years, he should proceed at least within one year after the issuance of a rival patent for the same invention, to copy claims therefrom for the purpose of an interference, by analogy with Rev. Stats., § 4894.

The issue of a patent is constructive notice to the public of its contents. *Boyden* v. *Burke*, 14 How. 575–83.

If petitioners' divisional application be considered independently of the present application, they are out of court in their own admission of a prior public use of more than two years. If considered as a continuation of the parent application, *post*-application rules of diligence apply and they are guilty of lack of diligence.

Petitioners were never "regularly" prosecuting an application for the invention, and there is no basis in the statute or authority for the proposition that the mere presence of a drawing or description of a feature in an application constitutes a reduction to practice thereof such as will defeat a later inventor but earlier patentee. *Pittsburgh Water Heater Co.* v. *Beler Water Heater Co.*, 228 Fed. Rep. 683; *Saunders* v. *Miller*, 33 App. D. C. 456.

Mr. Melville Church, by leave of court, filed a brief as *amicus curiæ*.

Mr. John C. Pennie, *Mr. Dean S. Edmonds*, *Mr. Charles J. O'Neill* and *Mr. Helge Murray*, by leave of court, filed a brief as *amici curiæ*.

MR. JUSTICE CLARKE delivered the opinion of the court.

In 1909 Mathew T. Chapman and Mark C. Chapman filed an application for a patent on an "improvement in deep well pumps." The mechanism involved was complicated, the specification intricate and long, and the claims numbered thirty-four. The application met with unusual difficulties in the Patent Office, and, although it had been regularly prosecuted, as required by law and the rules of the Office, it was still pending without having been passed to patent in 1915, when the controversy in this case arose.

In 1912 John A. Wintroath filed an application for a patent on "new and useful improvements in well mechanism," which was also elaborate and intricate, with twelve combination claims, but a patent was issued upon it on November 25, 1913.

Almost twenty months later, on July 6, 1915, the Chapmans filed a divisional application in which the claims of the Wintroath patent were copied, and on this application such proceedings were had in the Patent Office that on March 21, 1916, an interference was declared between it and the Wintroath patent.

The interference proceeding related to the combination of a fluid-operated bearing supporting a downwardly extending shaft, and auxiliary bearing means for sustaining any resultant downward or upward thrust of such shaft. It is sufficiently described in count three of the notice of interference:

"3. In deep well pumping mechanism, the combination with pump means including a pump casing located beneath the surface of the earth and rotary impeller means in said casing, of a downwardly extending power shaft driven from above and adapted to drive said impeller means, a fluid operated bearing coöperatively to support said shaft, said fluid operated bearing being located substantially at the top of said shaft so that the shaft depends from the fluid bearing and by its own weight tends to draw itself into a substantially straight vertical line, means for supplying fluid under pressure to said fluid bearing independently of the action of the pump means, auxiliary bearing means for sustaining any resultant downward thrust of said power shaft and auxiliary bearing means for sustaining any resultant upward thrust of said power shaft."

Wintroath admits that the invention thus in issue was clearly disclosed in the parent application of the Chapmans, but he contends that their divisional application, claiming the discovery, should be denied, because of their delay of nearly twenty months in filing, after the publication of his patent, and the Chapmans, while asserting that their parent application fully disclosed the invention involved, admit that the combination of the Wintroath patent was not specifically claimed in it.

Pursuant to notice and the rules of the Patent Office, Wintroath, on April 27, 1916, filed a statement, declaring that he conceived the invention contained in the claims of his patent "on or about the first day of October, 1910," and thereupon, because this date was subsequent to the Chapman filing date, March 10, 1909, the Examiner of Interferences notified him that judgment on the record would be entered against him unless he showed cause within thirty days why such action should not be taken.

Within the rule day Wintroath filed a motion for judgment in his favor "on the record," claiming that conduct on the part of the Chapmans was shown, which estopped

them from making the claims involved in the interference and which amounted to an abandonment of any rights in respect thereto which they may once have had. The Chapmans contended that such a motion for judgment could not properly be allowed "until an opportunity had been granted for the introduction of evidence." But the Examiner of Interferences, without hearing evidence, entered judgment on the record in favor of Wintroath, and awarded priority to him, on the ground that the failure of the Chapmans to make claims corresponding to the interference issue for more than one year after the date of the patent to Wintroath, constituted equitable laches which estopped them from successfully making such claims. This holding, based on the earlier decision by the Court of Appeals in *Rowntree* v. *Sloan*, 45 App. D. C. 207, was affirmed by the Examiner in Chief, but was reversed by the Commissioner of Patents, whose decision, in turn, was reversed by the Court of Appeals in the judgment which we are reviewing.

In its decision the Court of Appeals holds that an inventor whose parent application discloses, but does not claim, an invention which conflicts with that of a later unexpired patent, may file a second application making conflicting claims, in order to have the question of priority of invention between the two determined in an interference proceeding, but only within one year from the date of the patent, and that longer delay in filing constitutes equitable laches, which bars the later application. By this holding the court substitutes a one-year rule for a two-year rule which had prevailed in the Patent Office for many years before the *Rowntree* decision, rendered in 1916, and the principal reason given for this important change is that the second application should be regarded as substantially an amendment to the parent application, and that it would be inequitable to permit a longer time for filing it than the one year allowed by Rev. Stats.,

§ 4894, for further prosecution of an application after office action thereon.

The question presented for decision is, whether this conclusion is justifiable and sound, and the answer must be found in the statutes and rules of the Patent Office made pursuant to statute, prescribing the action necessary to be taken in order to obtain a patent,—for the whole subject is one of statutory origin and regulation.

The statute which is fundamental to all others in our patent law, (Rev. Stats., § 4886, as amended March 3, 1897, c. 391, 29 Stat. 692,) provides with respect to the effect of a United States patent upon the filing of a subsequent application for a patent on the same discovery, which is all we are concerned with here, that any discoverer of a patentable invention, not known or used by others in this country, before his invention or discovery, may file an application for a patent upon it, at any time within two years after it may have been patented in this country. Such a prior patent is in no sense a bar to the granting of a second patent for the same invention to an earlier inventor, provided that his application is filed not more than two years after the date of the conflicting patent. The applicant may not be able to prove that he was the first inventor but the statute gives him two years in which to claim that he was and in which to secure the institution of an interference proceeding in which the issue of priority between himself and the patentee may be determined in a prescribed manner.

This section, unless it has been modified by other statutes or, in effect, by decisions of the courts, is plainly not reconcilable with the decision of the Court of Appeals, and should rule it. Has it been so modified?

The section of the Revised Statutes dealing with inventions previously patented in a foreign country (Rev. Stats., § 4887, as amended March 3, 1903, c. 1019, 32 Stat. 1225), provides that no patent shall be granted on an

application for a patent if the invention has been patented in this or any foreign country *more than two years* before the date of the actual filing of the application in this country.

Section 4897 of the Revised Statutes (16 Stat. 202, c. 230, § 35), in dealing with the renewal of an application in case of failure to pay the final fee within six months of notice that a patent had been allowed, provides that another application may be made for the invention "the same as in the case of an original application." But such application must "be made *within two years* after the allowance of the original application."

And in Rev. Stats., § 4920, providing for pleadings and proofs in infringement suits it is provided that when properly pleaded and noticed the defendant may prove in defense that the patent declared on had been patented prior to the plaintiff's supposed invention "or *more than two years* prior to his application for a patent therefor," and also that the subject-matter of the patent "had been in public use or on sale in this country for *more than two years*" before the plaintiff's application for a patent.

Thus through all of these statutes runs the time limit of two years for the filing of an application, there is no modification in any of them of the like provision in Rev. Stats., § 4886, as amended, and no distinction is made between an original and a later or a divisional application, with respect to this filing right.

A brief reference to the decisions will show that until the *Rowntree Case*, the courts had left the filing right under Rev. Stats., § 4886, as untouched as the statutes thus had left it.

There is no suggestion in the record that the original application of the Chapmans was not prosecuted strictly as required by the statutes and the rules of the Patent Office and therefore, it is settled, their rights may not be denied or diminished on the ground that such delay may

have been prejudicial to either public or private interests. "A party seeking a right under the patent statutes may avail himself of all their provisions, and the courts may not deny him the benefit of a single one. These are questions not of natural but of purely statutory right. Congress, instead of fixing seventeen, had the power to fix thirty years as the life of a patent. No court can disregard any statutory provisions in respect to these matters on the ground that in its judgment they are unwise or prejudicial to the interests of the public." *United States* v. *American Bell Telephone Co.*, 167 U. S. 224, 247.

In re-issue cases, where there was no statutory time prescribed for the making of an application for the correction of a patent, and although unusual diligence is required in such cases, this court adopted the two-year rule as reasonable by analogy to the law of public use before an application for a patent. *Mahn* v. *Harwood*, 112 U. S. 354, 363; *Wollensak* v. *Reiher*, 115 U. S. 96, 101.

To this we must add that not only have later or divisional applications not been dealt with in a hostile spirit by the courts, but, on the contrary, designed as they are to secure the patent to the first discoverer, they have been favored to the extent that where an invention clearly disclosed in an application, as in this case, is not claimed therein but is subsequently claimed in another application, the original will be deemed a constructive reduction of the invention to practice and the later one will be given the filing date of the earlier, with all of its priority of right. *Smith & Griggs Manufacturing Co.* v. *Sprague*, 123 U. S. 249, 250; *Von Recklinghausen* v. *Dempster*, 34 App. D. C. 474, 476, 477.

These, a few from many, suffice to show that prior to the *Rowntree Case*, the decisions did not tend to modification of the statutory two-year rule.

The Court of Appeals recognizes all this law as applicable to an original application, but it finds warrant for

cutting the time limit to one year in the case of later applications in three reasons, viz: Because it is inequitable to allow so long a time as two years for filing a new application, claiming a discovery for which a patent has issued; because such a time allowance is contrary to public policy, as unduly extending the patent monopoly if the new application should prevail, and, finally and chiefly, as we have pointed out, because, regarding such a later application as substantially an amendment to the original application the court discovers, in analogy to the time allowed by statute for amendment to applications (Rev. Stats., § 4894), a reason for holding that the failure for more than one year to make a later, in this case a divisional, application, amounts to fatal laches.

However meritorious the first two of these grounds may seem to be they cannot prevail against the provisions of the statutes (*United States* v. *American Bell Telephone Co.*, *supra*), and the third does not seem to us persuasive because of the difference in the kind of notice which is given to the applicant under Rev. Stats., § 4894, and that given him when a patent is issued conflicting with his application.

The one-year provision of Rev. Stats., § 4894, as amended March 3, 1897, c. 391, 29 Stat. 693, is that an applicant for a patent, who shall fail to prosecute his application within one year after Patent Office action thereon, "of which notice shall have been given" him, shall be regarded as having abandoned his application, unless the Commissioner of Patents shall be satisfied that such delay was unavoidable. But when a conflict between inventions disclosed in applications escapes the attention of the Patent Office Examiners, Rev. Stats., § 4904, and a patent is issued, with claims conflicting with the disclosures of a pending application, the applicant receives only such notice of the conflict as he is presumed to derive from the publication of the patent. In the one case the notice

is actual and specific, in the other it is indefinite and constructive only. When the great number of patents constantly being issued is considered, many of them of a voluminous and complicated character, such as we have in this case, with many and variously worded claims, such an implied notice must necessarily be precarious and indefinite to a degree which may well have been thought to be a sufficient justification for allowing the longer two-year period to inventors who must, at their peril, derive from such notice their knowledge of any conflict with their applications.

As has been pointed out, the Examiner of Interferences did not permit the introduction of any evidence with respect to laches or abandonment and the Court of Appeals rests its judgment, as he did, wholly upon the delay of the Chapmans in filing their divisional application for more than one year after the Wintroath patent was issued, as this appeared "on the face of the record." While not intending to intimate that there may not be abandonment which might bar an application within the two-year period allowed for filing, yet upon this discussion of the statutes and decisions, we cannot doubt that upon the case disclosed in this record, the Chapmans were within their legal rights in filing their divisional application at any time within two years after the publication of the Wintroath patent, and therefore the judgment of the Court of Appeals must be

Reversed.

MR. JUSTICE MCREYNOLDS dissents.

NATIONAL LEAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 123. Argued January 12, 13, 1920.—Decided March 1, 1920.

Section 22 of the Act of August 27, 1894, c. 349, 28 Stat. 509, provides: "That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties," to be paid under such regulations as the Secretary of the Treasury shall prescribe. Where linseed was imported subject to a specific duty of 20 cents per bushel of 56 pounds, and made into linseed oil and oil-cake, a by-product weighing more but worth less than the oil, *held*, that the drawback on the oil-cake, which alone was exported, should be computed on the basis of the respective values of the two products and not according to their respective weights. P. 142.

Much weight is given to a contemporaneous and long-continued construction of an indefinite or ambiguous statute by the executive department charged with its administration. P. 145.

The repeated reënactment of a statute without substantial change may amount to an implied legislative approval of a construction placed upon it by executive officers. P. 146.

53 Ct. Clms. 635, affirmed.

THE case is stated in the opinion.

Mr. Alex. Britton, with whom *Mr. Evans Browne* and *Mr. F. W. Clements* were on the brief, for appellant:

Levying, in express terms, a specific duty upon linseed by weight, the act further directly contemplates the payment of a specific drawback, for the reason that it directs (§ 22) that the amount of the imported materials contained in the exported article shall be ascertained, and a drawback equal in amount to the duties paid shall be allowed. In other words, it directs that the proper govern-

ment officials estimate how much of the imported material is used in the exported article.

The duty was levied on a certain "quantity" of seed, viz., a bushel of 56 pounds. The drawback by the statute is allowed on the "quantity" of the imported material used in the exported article. In both instances the rule which governed the computation was that of "quantity" and not of "quality." Neither the duty nor the drawback was to be computed on an *ad valorem* basis.

It cannot be successfully claimed that the wording of the statute "under such regulations as the Secretary of the Treasury shall prescribe" authorizes that officer to ascertain anything but the expressly stated "quantity" of the imported materials used. A statute which directs that a "quantity" be ascertained cannot be understood as directing that a "value" be ascertained. The only inquiry which the statute permits is as to the "quantity" of the imported material in the exported article and the duty originally paid thereon.

The terms "quantity" and "value" are far from being synonymous. The former, as used in the statute, refers to the size, bulk, or weight of the material, more especially the weight, as the duty which the statute levied was on a quantity of 56 pounds. The tax was levied on 56 pounds of seed; it was not a tax on $1.62 worth of seed as fixed by the Treasury Regulations, and hence not a tax on $1.62 worth of oil and oil-cake material unseparated.

The purpose of the drawback provision is to make "duty free imports which are manufactured here and then returned" to some foreign country. *Campbell* v. *United States*, 107 U. S. 407. Oil-cake is a manufacture, of value, from an imported material (*Campbell* v. *United States*, *supra*), is returned to some foreign country, and hence should be made "duty free." The duty paid on it, as such a separate manufacture, has not been determined, although a duty has been collected. Only one material or

article has been imported, on which a single and not a proportionate duty has been levied and paid. Fifty-six pounds of material have been imported; 35 and a fraction pounds of that material are exported; a single duty was paid on the importation of that 56 pounds of material, paid according to the actual weight of that material, and yet when 35.87 pounds of that actual weight are exported the defendant offers to refund a proportionate value drawback on a quantity, upon the importation of which a single and inseparable tax was levied and collected.

The "quantity" of the imported material in the exported product is utterly disregarded and a "relative value" arbitrarily substituted. It is impossible to admit oil cake "duty free" if upon its admission a tax of 5/14 cents per pound on 35.87 pounds, or 13.52 cents, is levied and collected, and upon its exportation there is a refusal to allow a drawback of more than about one-third of that amount, and this in the very face of a statute which directs that the drawback shall be allowed upon the "quantity" composing the exported material. In other words, while collecting a duty of 7.11 cents on 19.91 pounds of oil, a refund or drawback of over twice that amount would be allowed upon the exportation of those same 19.91 pounds, when, under the quantity rule of the statute, it could not be considered as other than 19.91 pounds of the 56 pounds of imported material.

The statute cannot be given a different meaning through the construction and regulations of the Department. *Campbell* v. *United States*, *supra*; *Dean Linseed Oil Co.* v. *United States*, 78 Fed. Rep. 467, 468; *s. c.* 87 Fed. Rep. 453, 457; *St. Paul &c. Ry. Co.* v. *Phelps*, 137 U. S. 528, 536; *Morrill* v. *Jones*, 106 U. S. 466, 467. The construction was not continuous and the statute is clear.

Mr. Assistant Attorney General Davis, with whom *Mr. Chas. F. Jones* was on the brief, for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is a suit to recover the difference between the amount of drawback allowed by the Government to the appellant, a corporation, as an exporter of linseed-oil cake, and the amount to which it claims to be entitled under § 22 of the Act of Congress, effective August 27, 1894, c. 349, 28 Stat. 509, which reads as follows:

"That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties."

It is further provided in the section that the drawback due thereon shall be paid to the manufacturer, producer or exporter "under such regulations as the Secretary of the Treasury shall prescribe."

The appellant imported large quantities of linseed upon which it paid a specific duty of twenty cents per bushel of fifty-six pounds. This seed, when treated by a simple process, yielded about twenty pounds of linseed oil and about thirty-six pounds of linseed-oil cake, to the bushel. The oil was much more valuable than the oil cake, the latter being composed of the solid substance of the seed and a small amount of oil not recovered which made it valuable as a feed for stock,—it is a by-product, and, except for the small amount of oil in it, would be mere waste.

Appellant exported large quantities of oil cake, derived from seed which it had imported, and made demand in proper form for the drawback provided for by the act of Congress.

The law providing for such drawbacks has differed in form of expression from time to time but, since the Act of August 5, 1861, [c. 45, 12 Stat. 292,] it has not differed in

substance from the Act of 1894, as we have quoted it. The number of articles to which the law is applicable is very great, among them, notably, "refined sugar and syrup which come from imported raw sugar and refined sugar, and syrup which comes from imported molasses."

The Court of Claims found that:

"From August 5, 1861, down to the present time the practice of the Treasury Department where several articles are manufactured from the same imported material has always been to calculate and to pay the drawback by distributing the duty paid on the imported material between such articles in proportion to their values and not in proportion to their weights, as well where the imported material paid a specific as where it paid an ad valorem duty. Such calculation and payment has been made under Treasury Regulations."

The claim of the appellant is that the correct construction of the section, relied upon, requires that the drawback should be computed on the basis of the weights of the oil and oil cake derived by the process of manufacture from the seed, instead of on the basis of the values of the two products, as it was computed by the Government, and the question for decision is, whether the department regulation is a valid interpretation of the statute.

The act quoted provides that where imported materials are used in this country in the manufacture of articles which are exported, a drawback shall be allowed "*equal in amount to the duties paid on the materials used*" less one per centum. What was the amount of duty paid on the small amount of oil and on the large amount of solid substance, the hull and the fiber, which made up the exported oil cake? Was it substantially two-thirds of the total, determined by weight,—on thirty-six of fifty-six pounds,—or was it about one-fourth of the total as determined by the relative values of the oil and of the oil cake derived from the seed?

The terms of the provision show that the contingency of having one kind of dutiable material, from which two or more kinds of manufactured products might be derived, is not specifically provided for. Obviously only a part, the least valuable part, of the materials or ingredients of the linseed were used in the making of oil cake, and therefore the problem of determining the "drawback equal in amount to the duties paid" on the part so used—the solid parts of the seed and the small amount of oil in the oil cake—was not a simple or an easy one.

The statute, thus indefinite if not ambiguous, called for construction by the Department and the regulation adapted to cases such as we have here, commends itself strongly to our judgment.

It does not seem possible that Congress could have intended that two-thirds of the duty should be returned when one-quarter in value of the manufactured product should be exported; or that the exporter should retain twenty pounds of oil, estimated in the findings as worth about seven and a half cents a pound, derived from each bushel of seed, and recover two-thirds of the duty paid when he exported thirty-six pounds of seed cake, worth slightly more than one cent a pound, derived from the same bushel of seed. Such results—they must follow the acceptance of the appellant's contention,—should be allowed only under compulsion of imperative language such as is not to be found in the section we are considering.

We prefer the reasonable interpretation of the Department, which results in a refund of one-quarter of the duty when one-quarter of the value of the product is exported.

From *Edwards* v. *Darby*, 12 Wheat. 206, to *Jacobs* v. *Prichard*, 223 U. S. 200, it has been the settled law that when uncertainty or ambiguity, such as we have here, is found in a statute great weight will be given to the contemporaneous construction by department officials, who were called upon to act under the law and to carry its pro-

visions into effect,—especially where such construction has been long continued, as it was in this case for almost forty years before the petition was filed. *United States* v. *Hill*, 120 U. S. 169.

To this we must add that the Department's interpretation of the statute has had such implied approval by Congress that it should not be disturbed, particularly as applied to linseed and its products.

The drawback provision, under which the construction complained of originated, continued unchanged from 1861 until the revision of the statute in 1870, and the Court of Claims finds that the rule for determining the drawback on oil cake was applied during the whole of that period of almost ten years. The Tariff Act, approved July 14, 1870, c. 255, 16 Stat. 256, 265, expressly provided, in the flaxseed or linseed paragraph, "That no drawback shall be allowed on oil cake made from imported seed," and this provision was continued in the Tariff Act of March 3, 1883, c. 121, 22 Stat. 488, 513, and in the Act of October 1, 1890, c. 1244, 26 Stat. 567, 586. But in the Act of 1894, 28 Stat. 509, 523, the prohibition was eliminated, thus restoring the law on this subject as applied to this material to what it was in substance from 1861 to 1870. *United States* v. *Philbrick*, 120 U. S. 52, 59. During all the intervening twenty-four years this rule of the Department with respect to drawbacks had been widely applied to many articles of much greater importance than linseed or its derivatives, and the practice was continued, linseed included after 1894, until the petition in this case was filed. The reënacting of the drawback provision four times, without substantial change, while this method of determining what should be paid under it was being constantly employed, amounts to an implied legislative recognition and approval of the executive construction of the statute, *United States* v. *Philbrick, supra; United States* v. *G. Falk & Brother*, 204 U. S. 143, 152; *United States* v. *Cerecedo*

Hermanos y Compañia, 209 U. S. 337; for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the Government. *United States* v. *Bailey*, 9 Pet. 238, 256.

This case would not deserve even the limited discussion which we thus have given it were it not for the extensive and long continued application of the regulation of the Department to imported and exported materials other than such as are here involved. This specific case is sufficiently ruled by the clear and satisfactory decision of the Circuit Court of Appeals for the Second Circuit, rendered twenty-two years ago, in *United States* v. *Dean Linseed-Oil* Co., 87 Fed. Rep. 453, in which the Court of Claims found authority for dismissing the plaintiff's petition. The judgment of the Court of Claims is

Affirmed.

KANSAS CITY SOUTHERN RAILWAY COMPANY v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 154. Submitted January 19, 1920.—Decided March 1, 1920.

A railroad company which enters into a contract to carry the mails "upon the conditions prescribed by law," etc., is liable to fines or deductions from its compensation for failures to maintain its mail train schedules (Rev. Stats., §§ 3962, 4002; Act of June 26, 1906, c. 3546, 34 Stat. 472). P. 149.

The fact that the Post Office Department long abstained from making such deductions under Rev. Stats., § 3962, where delays were less than 24 hours, does not amount to construing that section as inapplicable to shorter delays. P. 150.

And in any event, the right to such a construction could not be claimed by a company whose contract was made soon after the Postmaster General had issued an order for deductions in future when trains arrived fifteen or more minutes late a designated number of times

per quarter, and soon after the approval of the Act of June 26, 1906, *supra*, directing him to impose and collect reasonable fines for failure of railroads to comply with their contracts respecting the times of arrival and departure of trains. P. 150.

53 Ct. Clms. 630, affirmed.

THE case is stated in the opinion.

Mr. Alex. Britton and *Mr. Evans Browne* for appellant.

Mr. Assistant Attorney General Spellacy, Mr. Leonard B. Zeisler and *Mr. Charles H. Weston*, Special Assistants to the Attorney General, for the United States.

Mr. Benjamin Carter, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE CLARKE delivered the opinion of the court.

The appellant, in its petition, alleges: That in June, 1906, it entered into contracts with the Post Office Department to transport the mails over three designated routes "upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service;" that during the fiscal year 1907 (the petition was not filed until December 19, 1912), the Department withheld from its stipulated pay $3355.48, "as a penalty imposed on account of late arrivals of . . . trains and failure to perform service on the . . . mail routes," and that such deductions were "unlawfully withheld." The prayer was for judgment for the full amount of the deductions,—which are also designated in the record as fines or penalties. The petition was dismissed by the Court of Claims.

The appellant acquiesced in the deductions when they were made, accepted the reduced compensation without protest or objection, except in one instance, when the item complained of was adjusted to its satisfaction, and continued to perform the contracts to the end of their

four-year periods without complaint as to the reasonableness of the deductions involved. And thus it comes admitting that it freely entered into the contracts, fully performed them and accepted pay for such performance, but asking judgment for deductions which it avers were "unlawfully withheld" more than five years before the petition was filed.

The contracts were of the type, familiar in many reported cases, evidenced by "distance circulars," orders establishing the routes, specific agreements on the part of the contractor that it would perform the service "upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service" and that the "adjustment" should be "subject to future orders, and to fines and deductions."

Among the applicable "conditions prescribed by law" were: Rev. Stats., § 3962, that the Postmaster General might "make deductions from the pay of contractors, for failures to perform service according to contract, and impose fines upon them for other delinquencies"; Rev. Stats., § 4002, authorizing contracts for the conveyance of the mails "with due frequency and speed"; and the Act of June 26, 1906, c. 3546, 34 Stat. 467, 472, commanding the Postmaster General to require all railroads carrying mail to comply with the terms of their contracts "as to time of arrival and departure of said mails" and "to impose and collect reasonable fines for delay" when not caused by unavoidable accidents or conditions.

It is conceded by the appellant that the Postmaster General had authority under Rev. Stats., § 3962, to make deductions from the pay when a "trip was not performed" within twenty-four hours of the stipulated time for performance. But it is contended that he had no authority to make deductions or impose fines for shorter delays,—and this is the sole question upon which this appeal is pursued into this court.

It is argued for the appellant: That power to make the disputed deductions must be found, if at all, in the provision of Rev. Stats., § 3962, that the Postmaster General may "make deductions from the pay of contractors, for failures to perform service according to contract, and impose fines upon them for other delinquencies"; that when the contracts were made, long departmental construction had limited the failure to perform service, described in the act, to twenty-four hours of delay in the arrival of trains; and that failure, from 1872, when the section was enacted, to 1907, to impose fines or deductions for shorter delays, amounted to a construction by the Department that authority to impose fines upon contractors for delinquencies did not warrant deductions for failure to maintain train schedules when the delay was less than twenty-four hours.

We need consider only this last contention, and in reply it is pointed out that the findings of fact show: that the amount and rates of compensation were determined by the Department for the various routes, between the 10th and 26th of September, 1906, though effective as of the first day of the preceding July; that in October, 1905, the Postmaster General, "on account of the . . . failures to observe the schedule on routes, or parts of routes," issued an order that deductions should be made, in sums stated, after December 31, 1905, when trains arrived at termini or junction points fifteen or more minutes late, a designated number of times in a quarter; and that the Act of Congress, approved June 26, 1906, referred to, declared it to be the duty of the Postmaster General to impose and collect reasonable fines for failure of railroads to comply with the terms of their contracts with respect to the time of arrival and departure of mails. This act was repealed in the following year, but the substance of it was immediately reënacted in a more adaptable form.

Thus, the appellant had notice before it made the con-

tracts under discussion that failure to maintain train schedules was regarded by Congress and the Department as a violation of mail-carrying contracts, justifying the imposition of fines or deductions, and that both believed there was authority under the customary contracts and the law to impose such deductions. The Act of June 26, 1906, was not a grant of new power to the Postmaster General to impose such fines or deductions, but was an imperative direction to him to exercise the power which, it assumes, he already had for that purpose.

This action of Congress and of the Department is sufficient answer to the claim, if it were otherwise sound, that failure to exercise the power to impose fines for such a cause amounted to a departmental declaration that no such power existed.

But the contention is not sound. Failure, within moderate limits, to maintain train schedules may well have been regarded by the Postmaster General as a necessary evil to be tolerated and not to call for the exercise of his power to impose fines under the statute, when more flagrant neglect to maintain such schedules might very justly require him to exercise such authority in order to prevent intolerable public inconvenience. We cannot doubt that the contracts of the appellant, and the law which was a part of them, furnished ample authority for the action of the Department in this case and that omission to exercise such power did not make against the proper use of it when, in the judgment of the Postmaster General, adequate occasion for its use should arise.

We need not pursue the subject further. The principles involved are adequately and admirably discussed by the Court of Claims in its opinion, rendered in the case of *Louisville & Nashville R. R. Co.* v. *United States*, 53 Ct. Clms. 238, upon authority of which this case was decided.

The judgment of the Court of Claims is

Affirmed.

NEW YORK CENTRAL RAILROAD COMPANY *v.* MOHNEY.

CERTIORARI TO THE COURT OF APPEALS OF LUCAS COUNTY, STATE OF OHIO.

No. 196. Argued January 27, 1920.—Decided March 1, 1920.

A railroad employee was injured through a collision while traveling on his company's line between points in Ohio by means of a pass, good only between those points and within that State and containing a release from liability for negligence. His purpose was to continue the journey, partly over a line of another carrier in Ohio on which he would pay fare, and thence over one of his company into another State by means of another pass, the terms of which were not disclosed by the evidence. *Held*, that his travel, at time of injury, was intrastate, so that the validity of the release depended on the laws of Ohio. P. 155.

A stipulation on a free pass purporting to release the carrier from all liability for negligence is ineffective where injury to the passenger results from the wilful and wanton negligence of the carrier's servants. P. 157.

Affirmed.

THE case is stated in the opinion.

Mr. Howard Lewis, with whom *Mr. Frederick W. Gaines* was on the brief, for petitioner.

Mr. Albert H. Miller, with whom *Mr. A. Jay Miller* and *Mr. Charles H. Brady* were on the brief, for respondent.

MR. JUSTICE CLARKE delivered the opinion of the court.

The respondent, whom we shall refer to as the plaintiff, brought suit against the petitioner, defendant, to recover damages for severe injuries which he sustained in a rear-end collision on defendant's railroad, which he averred was caused by the gross negligence of the engineer of the

train following that on which he was a passenger, in failing to look for and heed danger signals, which indicated that the track ahead was occupied. The plaintiff was employed by the defendant as an engineer, with a run between Air Line Junction, at Toledo, and Collinwood, a suburb of Cleveland, wholly within the State of Ohio. As an incident to his employment he was given an annual pass, good between Air Line Junction and Collinwood, which contained the release following: "In consideration of receiving this free pass, each of the persons named thereon, using the same, voluntarily assumes all risk of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence of itself, its agents, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the company as a common carrier, and liable to him or her as such.

"And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass states that he or she is not prohibited by law from receiving free transportation, and that the pass will be lawfully used."

Having been informed that his mother had died at her home near Pittsburgh, Pennsylvania, the plaintiff, desiring to attend her funeral, applied to the defendant for, and obtained, a pass for himself and wife from Toledo to Youngstown, Ohio, via Ashtabula, and was promised that another pass for himself and wife would be left with the agent of the company at Youngstown, good for the remainder, the interstate part, of the journey to Pittsburgh. But the line of the defendant via Ashtabula to Youngstown was much longer and required a number of hours more for the journey than it did to go via Cleveland, using the Erie Railroad from that city to Youngstown, and for this reason, the record shows, the plaintiff Mohney,

before leaving home, decided that his wife should not accompany him and that he would make the journey by a train of the defendant, which used its own rails to Cleveland, and from Cleveland to Youngstown used the tracks of the Erie Railroad Company, and at Youngstown returned to the road of the defendant, over which it ran to Pittsburgh. The transportation which he had received via Ashtabula could not be used over the shorter route and therefore the plaintiff presented his annual pass for transportation from Toledo to Cleveland, intending to pay his fare from Cleveland to Youngstown over the Erie Railroad, leave the train at the Erie station at Youngstown, inquire by telephone as to the time and place of the burial of his mother, and then go to the New York Central station, a half mile away, obtain the pass which was to be left there for him, and go forward to Pittsburgh on the next convenient train.

The train on which Mohney was a passenger was wrecked between Toledo and Cleveland. It had come to a stop at a station and the second section of the train ran past two block signals, indicating danger ahead, and collided with the rear car of the first section, in which Mohney was riding, causing him serious injury.

The case was tried on stipulated facts and the testimony of the plaintiff. The trial court concluded that Mohney, at the time he was injured, was on an intrastate journey using an intrastate pass, and that by the law of Ohio the release upon it was void as against public policy. Thereupon, a jury being waived, the court entered judgment in plaintiff's favor.

The State Court of Appeals, differing with the trial court, concluded that Mohney was an interstate passenger when injured and that the release on the pass was valid, under the ruling in *Charleston & Western Carolina Ry. Co.* v. *Thompson*, 234 U. S. 576. But the court went further and affirmed the judgment on two grounds; by a divided

court, on the ground that the pass was issued to Mohney as part consideration of his employment, and, all judges concurring, for the reason that "we are clearly of the opinion that the negligence in this case, under the evidence, was willful and wanton." For these reasons it was held that the release on the pass did not constitute a defense to the action.

The Supreme Court of the State denied a motion for an order requiring the Court of Appeals to certify the record to it for review and the case is here on writ of certiorari.

The propriety of the use of the annual pass by Mohney for such a personal journey and that the release on it was not valid under Ohio law, were not questioned, and the sole defense urged by the Railroad Company was, and now is, that his purpose to continue his journey to a destination in Pennsylvania rendered him an interstate passenger, subject to federal law from the time he entered the train at Toledo and that the release on the pass was valid, under 234 U. S. 576, *supra*.

The three freight cases on which the defendant relies for its contention that the plaintiff was an interstate passenger when injured, all proceed upon the principle that the essential character of the transportation and not the purpose, or mental state, of the shipper determines whether state or national law applies to the transaction involved.

Thus, in *Coe* v. *Errol*, 116 U. S. 517, the owner's state of mind in relation to the logs, his intent to export them, and even his partial preparation to do so, did not exempt them from state taxation, because they did not pass within the domain of the federal law until they had "been shipped, or entered with a common carrier for transportation to another State, or [had] been started upon such transportation in a continuous route or journey."

In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission and Young*, 219 U. S. 498, 527, the cotton seed

cake and meal, although billed to Galveston, 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 case, therefore, comes under *Coe* v. *Errol*, 116 U. S. 517." The mental purpose of Young, and his attempted practice by intrastate billing, was to keep within the domain of the state law, but his contracts, express and implied, brought the discrimination complained of in the case within the scope of the Interstate Commerce Act.

In *Ohio Railroad Commission* v. *Worthington*, 225 U. S. 101, the Commission attempted to regulate the rate on "lake-cargo coal," because it was often billed from the mines to Huron, or other ports within the State, but this court found that the established "lake-cargo coal" rate was intended to apply, and in practice did apply, only "to such coal as [was] in fact placed upon vessels for carriage beyond the State" and obviously "by every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage." For this reason the enforcement of the order of the state commission was enjoined as an attempt to regulate and control interstate commerce. Here again it was the committing of a designated kind of coal to a carrier for transportation in interstate commerce that rendered the federal law applicable.

To what extent the analogy between the shipments of property and the transportation of passengers may profitably be pressed, we need not inquire, for in this case the only contract between the carrier defendant and the plaintiff was the annual pass issued to the latter. This written contract, with its release, is the sole reliance of the defendant. But that contract in terms was good only between Air Line Junction and Collinwood, over a line of track wholly within Ohio, and the company was charged

with notice when it issued the pass that the public policy of that State rendered the release upon it valueless. The purpose of the plaintiff to continue his journey into Pennsylvania would have been of no avail in securing him transportation over the Erie line to Youngstown, for that he must pay the published fare and very surely the release on the pass to Collinwood would not have attached to the ticket to Youngstown. Whether there was a similar release on the pass to Pittsburgh, which Mohney expected to get at Youngstown, the record does not disclose and it is of no consequence whether there was or not. The contract which the defendant had with its passenger was in writing and was for an intrastate journey, and it cannot be modified by the purpose of Mohney to continue his journey into another State, under a contract of carriage with another carrier, for which he would have been obliged to pay the published rate, or by an intended second contract with the defendant in terms which are not disclosed. The mental purpose of one of the parties to a written contract cannot change its terms. *Southern Pacific Co.* v. *Arizona*, 249 U. S. 472. For these reasons the judgment of the trial court was right and should have been affirmed.

But the Court of Appeals affirmed the judgment on two grounds, one of which was that all of the judges were "clearly of the opinion that the negligence in the case, under the evidence, was willful and wanton." This court does not weigh the evidence in such cases as we have here, but it has been looked into sufficiently to satisfy us that the argument that there is no evidence whatever in the record to support such a finding cannot be sustained.

A carrier by rail is liable to a trespasser or to a mere licensee wilfully or wantonly injured by its servants in charge of its train (Commentaries on the Law of Negligence, Thompson, §§ 3307, 3308, and 3309, and the same sections in White's Supplement thereto), and a sound public policy forbids that a less onerous rule should be applied to a

passenger injured by like negligence when lawfully upon one of its trains. This much of protection was due the plaintiff as a human being who had intrusted his safety to defendant's keeping. *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 603; *Chicago, Rock Island & Pacific Ry. Co.* v. *Maucher*, 248 U. S. 359, 363.

The evidence in the record as to the terms and conditions upon which the pass was issued to the plaintiff is so meager that, since it is not necessary to a decision of the case, we need not and do not consider the extent to which the case of *Charleston & Western Carolina Ry. Co.* v. *Thompson*, 234 U. S. 576, is applicable to an employee using a pass furnished to him seemingly as a necessary incident to his employment.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE DAY and MR. JUSTICE VAN DEVANTER concur in the result, being of opinion that Mohney was using the annual pass in an interstate journey and that to such a use of the pass the Ohio law was inapplicable, but that the releasing clause on the pass did not cover or embrace his injury because the latter resulted from wilful or wanton negligence, as to which such a clause is of no force or effect.

ASH SHEEP COMPANY v. UNITED STATES.

APPEAL FROM AND ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Nos. 212, 285. Argued January 30, 1920.—Decided March 1, 1920.

Whether or not by a cession of lands from an Indian tribe the United States becomes trustee for the Indians or acquires an unrestricted title depends in each case upon the terms of the agreement or treaty by which the cession is made. P. 164.

The Act of April 27, 1904, c. 1624, 33 Stat. 352, amending and ratifying an agreement with the Crow Indians, established the relation of trustee and beneficiary, the Indians ceding their possessory rights in certain lands of which the fee was in the United States and the United States undertaking to sell them (sections 16 and 36 excepted) to settlers and to apply the proceeds in specified ways for the benefit of the Indians. *Id.*

Such lands, therefore, are not "public lands" of the United States, but are Indian lands, within the meaning of Rev. Stats., § 2117, which imposes a penalty for driving stock to range and feed on any land belonging to any Indian or Indian tribe without the tribe's consent. P. 166.

Considered in the light of its purpose, early origin and long practical construction, Rev. Stats., § 2117, includes sheep under the term "cattle." *Id.*

The rule of strict construction is not violated by allowing the words of a penal statute to have full meaning or the more extended of two meanings, where such construction best harmonizes with the context and most fully promotes the objects of the legislation. P. 170.

An action by the United States to recover a statutory penalty for a trespass is not barred by an earlier decree in equity awarding it an injunction and nominal damages but denying a claim for the penalty as incompatible with the equity jurisdiction. *Id.*

250 Fed. Rep. 591; 254 *id.* 59, affirmed.

THE cases are stated in the opinion.

Mr. C. B. Nolan, with whom *Mr. Wm. Scallon*, was on the brief, for appellant and plaintiff in error:

When the Act of 1904 was passed, the title to the land was in the United States, and the only right of the Indians was a possessory right, *Johnson* v. *McIntosh*, 8 Wheat. 543; *Spaulding* v. *Chandler*, 160 U. S. 394; which could be terminated by act of Congress as well as by treaty or agreement with the Indians, *Beecher* v. *Wetherby*, 95 U. S. 517; *Buttz* v. *Northern Pacific Ry. Co.*, 119 U. S. 73; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553. When this right of occupancy terminated or was abandoned with the approval of the United States, all of the Indian rights were extinguished. *Buttz* v. *Northern Pacific Ry. Co.*, *supra*; *United States* v. *Cook*, 19 Wall. 591.

The cession to the United States is unqualified and unconditional. The manner of the disposal of the land, practically, under all of the land laws of the United States, rendering necessary its examination by the public, would preclude the idea that the Indian Department should exercise jurisdiction over it. It was the intention that every portion should at all times be accessible to the public, so that settlements might be made by those intending to do so under the homestead and other laws, and leasing by the Indian Department necessarily would interfere with this being done. If any trust arose at all, it attached to the money which was to be paid, and not to the land itself. *United States* v. *Choctaw Nation*, 179 U. S. 494; *Bean* v. *Morris*, 159 Fed. Rep. 651; *s. c.* 221 U. S. 485.

It is also needless to say that when lands are thrown open to exploration and settlement they are no longer reserved. So far as we know, no definition of the term "public lands" requires that the lands should be open to entry under all of the general laws relating to public lands. *Newall* v. *Sanger*, 92 U. S. 761; *Northern Lumber Co.* v. *O'Brien*, 139 Fed. Rep. 614; *United States* v. *Blendaur*, 128 Fed. Rep. 910; *Jackman* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 24 N. Mex. 278. If the land is reserved under the jurisdiction of the Indian Bureau, what is the position

of the homesteader or the purchaser from the State? The right of the State to the school sections or to sections acquired in lieu thereof attached and became fixed before the land was thrown open to settlement. The State could sell these. The land of the homesteader or of the purchaser from the State might be surrounded by lands not yet sold. Such person might find access to his land barred by a lessee of the Indian Department, who, under its regulations might fence up all of the leased lands. These lands are either reservation lands or public lands. They cannot be both. The statutes relating to public lands and those relating to reservation lands are so different that they cannot be applied at the same time and in the same district. Great confusion would result from such an attempt.

Even if held in trust the lands would be no longer "reserved" or "reservation" or "Indian" lands. *Quoad* the public, they are open to homesteaders; to exploration and location by prospectors; the title of the State to the school sections, or to lieu sections, has become fixed. These can be sold or leased by the State. It goes without saying, that the homesteader or locator or the purchaser from the State has a right of ingress and egress not resting on permission from an Indian agent or the Indian Department.

But no trust affects the land. Congress did not intend to limit or modify the title of the United States,—already the owner in fee absolute. The Indians ceded only the right of occupancy, which Congress might have ended without their agreement. How can it be maintained that Congress intended to give the Indians an equitable right in the lands themselves?

It is not the policy of the United States to give Indians any title except upon the breaking up of the tribal relations, and then only in severalty. The correct view is that the trust was simply an undertaking to treat the proceeds as trust funds and to act in the matter of the sale as a

trustee might act. Such a course cannot properly be held to affect the title of the sovereign or to affect the land at all. No trust is expressed to hold, care for, manage or lease for the Indians.

Section 2117, Rev. Stats., is penal, and the rule of strict construction applies. *United States* v. *Lacher*, 134 U. S. 624; *Sarlls* v. *United States*, 152 U. S. 570; *United States* v. *Harris*, 177 U. S. 305; *United States* v. *Gooding*, 12 Wheat. 460; *Grcely* v. *Thompson*, 10 How. 225; *Baldwin* v. *Franks*, 120 U. S. 678; *Tiffany* v. *National Bank of Missouri*, 18 Wall. 409.

The term "cattle" in ordinary usage never includes sheep. If the act intended otherwise, why mention horses and mules specifically? The term "cattle" as generally understood is confined to animals of the bovine species. *Esser* v. *District Court*, 42 Nevada, 218; *Rossbach* v. *United States*, 116 Fed. Rep. 781; *United Suates* v. *Schmoll*, 154 Fed. Rep. 734; *United States* v. *Ash Sheep Co.*, 229 Fed. Rep. 479; *Keys* v. *United States*, 2 Okla. Crim. Rep. 647. In the original act horses and cattle only were mentioned. The amendment of 1834 added mules, unnecessarily, if the Government's contention is correct.

In the equitable action the Government insisted that the statute fixed the amount of the damage, and that it was entitled to recover one dollar per head. The trial court decided against it, and that decision stands unappealed from and is final. *Forsyth* v. *Hammond*, 166 U. S. 506; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1; *Wabash Gas Light Co.* v. *District of Columbia*, 161 U. S. 316; *United States* v. *Ash Sheep Co.*, 229 Fed. Rep. 479; *Kendall* v. *Stokes*, 3 How. 87; *Union Central Life Ins. Co.* v. *Drake*, 214 Fed. Rep. 536.

Mr. Assistant Attorney General Nebeker, with whom *Mr. W. W. Dyar*, Special Assistant to the Attorney General, was on the brief, for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

These two cases were argued and will be decided together.

No. 212 is an appeal from a decree, entered in a suit in equity, in favor of the Government granting a permanent injunction restraining the appellant from trespassing upon described lands in Montana by grazing sheep thereon and for nominal damages for such trespass.

No. 285 is a proceeding in error, in which reversal is sought of a judgment rendered in an action at law against plaintiff in error, appellant in the equity suit, for a penalty for the same trespass.

The validity of the right asserted by the Government, in both cases, turns upon whether the lands involved were "Indian lands" or "Public lands." If they were the former, the decree in the equity case should be affirmed, but in the law case there would remain the question as to whether "sheep" were within the terms of the act under which the penalty was imposed.

In both cases the Government contends that the appellant violated § 2117 of the Revised Statutes of the United States, which reads as follows:

"Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock."

The company admits that it pastured 5,000 sheep on the described lands without the consent of the Crow tribe of Indians or of the United States, but denies that they were "Indian lands" and contends that they were "Public lands," upon which it was lawful for it to pasture its stock.

Whether the described lands were Indian or Public lands depends upon the construction to be given the Act of Congress, approved April 27, 1904, c. 1624, 33 Stat. 352, en-

titled "An Act To ratify and amend an agreement with the Indians of the Crow Reservation in Montana, and making appropriations to carry the same into effect."

The agreement embodied in this act of Congress provided for a division of the Crow Indian Reservation in Montana on boundary lines which were described, and the lands involved in this case were within the part of the Reservation as to which the Indians, in terms, "ceded, granted, and relinquished" to the United States all of their "right, title and interest."

The argument of the Sheep Company is that the United States being owner of the fee of the land before the agreement, the effect of this grant and release of their possessory right by the Indians, was to vest the complete and perfect title in the Government, and thereby make the territory a part of the public lands with the interest of the Indians transferred to the proceeds to be derived from them. For this conclusion the following cases are cited: *United States* v. *Choctaw Nation*, 179 U. S. 494; *Bean* v. *Morris*, 159 Fed. Rep. 651; *s. c.* 221 U. S. 485. But in the first of these cases the Indians parted with their possessory rights for a cash payment by the United States (p. 527), and in the second, the character of the agreement under which the Indian title was said, incidentally, to have terminated, does not appear.

Whether or not the Government became trustee for the Indians or acquired an unrestricted title by the cession of their lands, depends in each case upon the terms of the agreement or treaty by which the cession was made. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 394, 398; *United States* v. *Mille Lac Band of Chippewa Indians*, 229 U. S. 498, 509.

The agreement we have in this case is elaborate and, in consideration of the grant by the Indians of their possessory right, the Government assumed many obligations with respect to the lands and the proceeds of them,—not-

ably, that it would sell the land to settlers, except sections 16 and 36, for not less than four dollars per acre and would pay the proceeds to the Indians, under the direction of the Secretary of the Interior, in a manner prescribed. Thus, the Government contracted to expend; $90,000 of the proceeds of the land in the extension of the irrigation system on the reservation remaining; $295,000 in the purchase of stock to be placed on the reservation, with a further contingent purchase in contemplation of $200,000; $40,000 in fencing; $100,000 for schools, and $10,000 for a hospital for the Indians, for the maintenance of which $50,000 additional was to be held in trust. It was further provided, that to the extent that feasible irrigation prospects could be found, parts of the released lands should be withdrawn under the Reclamation Act and be disposed of within five years, but not for less than four dollars an acre.

There were many other like provisions, all intended to secure to the Indians the fullest possible value for what are referred to in the agreement as "their lands" and to make use of the proceeds for their benefit.

It was provided that semi-annual reports should be made by the Secretary of the Interior to the Indians, showing the amounts expended from time to time and the amounts remaining in each of the several funds.

It is obvious that the relation thus established by the act between the Government and the tribe of Indians was essentially that of trustee and beneficiary and that the agreement contained many features appropriate to a trust agreement to sell lands and devote the proceeds to the interests of the *cestui que trust*. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 394, 398. And that this was precisely the light in which the Congress regarded the whole transaction, is clear from the terms of the concluding section, the eighth:

"That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land

herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided." (33 Stat. 352, 361.)

Taking all of the provisions of the agreement together we cannot doubt that while the Indians by the agreement released their possessory right to the Government, the owner of the fee, so that, as their trustee, it could make perfect title to purchasers, nevertheless, until sales should be made any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee, and that they did not become "Public lands" in the sense of being subject to sale, or other disposition, under the general land laws. *Union Pacific R. R. Co.* v. *Harris*, 215 U. S. 386, 388. They were subject to sale by the Government, to be sure, but in the manner and for the purposes provided for in the special agreement with the Indians, which was embodied in the Act of April 27, 1904, 33 Stat. 352, and as to this point the case is ruled by the *Hitchcock* and *Chippewa Cases*, *supra*, Thus, we conclude, that the lands described in the bill were "Indian lands" when the company pastured its sheep upon them, in violation of § 2117 of Revised Statutes, and the decree in No. 212 must be affirmed.

There remains the question as to the construction of Rev. Stats., § 2117.

In the law case it is admitted in the bill of exceptions that the Sheep Company, without the permission of the Crow tribe of Indians or of the United States, drove, ranged and grazed 5,000 head of sheep on the land described in the complaint, and that at the time no settle-

ment or entries thereon had been authorized under acts of Congress. The judgment against the company was for $5,000,—one dollar for each sheep pastured on the land.

The company contends that the judgment should be reversed for the reason that Rev. Stats., § 2117, imposes the penalty prescribed, only, for ranging and feeding on the lands of an Indian tribe without permission "any stock of horses, mules, or cattle" and that "sheep" are not within its terms.

If this were a recent statute and if we were giving it a first interpretation we might hesitate to say that by the use of the word "cattle" Congress intended to include "sheep."

But the statute is an old one which has been interpreted in published reports of the courts for almost fifty years, and in an opinion by the Attorney General of the United States, rendered in 1884, as fairly comprehending "sheep" within the meaning of the word "cattle" as used in it.

The statute first appears as § 2 of an "Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers," enacted in 1796 and was then applicable only to "any stock of horses or cattle," etc. (1 Stat. 469, 470). The section was reënacted without change in 1802 (2 Stat. 139, 141). In 1834 [Act June 30, 1834, c. 161, § 9, 4 Stat. 729, 730] it was given its present form, which was carried into the Revised Statutes, without change in the wording we are considering (Rev. Stats., § 2117).

In 1871 suit was brought in the United States District Court for the District of Oregon, claiming that penalties under the section had been incurred by pasturing "sheep," as in this case, on Indian lands without the consent of the tribe. In a carefully prepared and clearly reasoned opinion Judge Deady overruled a demurrer to the complaint. and held that "sheep" were clearly within the mischief to be remedied and fairly within the language of the act.

This case has not been overruled or modified by any later decision. The court quotes definitions of the word "cattle" from several dictionaries, emphasizing especially, this from the 1837 edition of Webster:

"In its primary sense, the word includes camels, horses, asses, all the varieties of domesticated horned beasts of the bovine genus, sheep of all kinds and goats, and perhaps swine. . . . Cattle in the United States, in common usage, signifies only beasts of the bovine genus."

Upon this authority and applying the rule that in determining the legislative intent the mischief to be prevented should be looked to and saying that "it will not be denied that sheep are as much with the mischief to be remedied as horses or oxen," the court concludes:

"I have no hesitation in coming to the conclusion that the word cattle, as used in the Indian Intercourse act of 1834, includes, and was intended to include sheep, as well as cows and oxen." *United States* v. *Mattock*, 2 Sawy. 148.

Twelve years later, in 1884, the Attorney General of the United States, in an opinion to the Secretary of War, regarded the question as so little doubtful that he disposed of it in this single sentence:

"The standard lexicographers place sheep under the head of cattle, and it would seem to be in derogation of the manifest intention of Congress to take the word in a more confined sense." 18 Ops. Atty. Gen. 91.

In 1874, in *Decatur Bank* v. *St. Louis Bank*, 21 Wall. 294, this court held that the word "cattle" in a letter of credit guaranteeing "drafts on shipments of cattle" was comprehensive enough to justify the giving of credit on shipments of "hogs." This pertinent paragraph is from the opinion:

"That stock of some kind formed part of the guarantee is quite plain, but is the word 'cattle' in this connection to be confined to neat cattle alone, that is, cattle of the bovine genus? It is often so applied, but it is [quoting

from Worcester's Dictionary] 'also a collective name for domestic quadrupeds generally, including not only the bovine tribe, but horses, asses, mules, sheep, goats, and swine.' In its limited sense it is used to designate the different varieties of horned animals, but it is also frequently used with a broader signification as embracing animals in general which serve as food for man. In England, even in a criminal case, where there is a greater strictness of construction than in a civil controversy, pigs were held to be included within the words 'any cattle.'"

The most recent definitions of the dictionaries are as follows:

Webster's New International Dictionary defines "cattle" thus: "Collectively, live animals held as property or raised for some use, now usually confined to quadrupeds of the bovine family, but sometimes including all domestic quadrupeds, as sheep, goats, horses, mules, asses, and swine, etc."

The Standard Dictionary defines the word as meaning: "Domesticated bovine animals, as oxen, cows, bulls, and calves; also, though seldom now as compared with former times, any live stock kept for use or profit, as horses, camels, sheep, goats, swine, etc."

Thus, although the word "sheep" is not in the section, and although in present day usage the word "cattle" would rarely be used with a signification sufficiently broad to include them, nevertheless: since the pasturing of sheep is plainly within the mischief at which this section aimed; since the word "cattle," which is used, may be given, say all the authorities, a meaning comprehensive enough to include them; and since the courts and the Department of Justice for almost fifty years have interpreted the section as applicable to "sheep," we accept this as the intended meaning of the section,—for had it been otherwise Congress, we must assume, would long since have corrected it.

It is argued that the rule that penal statutes must be strictly construed forbids such latitude of construction. But this is sufficiently and satisfactorily answered by repeated decisions of this court.

"The admitted rule that penal statutes are to be strictly construed is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the legislature." *United States* v. *Hartwell*, 6 Wall. 385; *United States* v. *Freeman*, 3 How. 556, 565; *United States* v. *Lacher*, 134 U. S. 624, 628.

It is also contended, far from confidently, that the recovery of nominal damages in the equity suit is a bar to the recovery of the penalty in the case at law. While the amount of the statutory penalty for the trespass was prayed for in the equity suit, yet the trial court, saying that equity never aids the collection of such penalties, *Marshall* v. *Vicksburg*, 15 Wall. 146, 149, and that no evidence of substantial damage had been introduced, limited the recovery to one dollar and costs. Rejection of a claim because pursued in an action in which it cannot be entertained does not constitute an estoppel against the pursuit of the same right in an appropriate proceeding. We agree with the Court of Appeals that "a judgment is not conclusive on any question which, from the nature of the case or the form of the action, could not have been adjudicated in the case in which it was rendered."

It results that the decree in No. 212 and the judgment in No. 285 must both be

Affirmed.

GAYON v. McCARTHY, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

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

No. 540. Argued January 6, 1920.—Decided March 1, 1920.

Engaging another to go to Mexico to join revolutionary forces, under promise of a commission and probable reimbursement for expenses, is a "retaining," within the meaning of § 10 of the Criminal Code. P. 177.

Evidence *held* sufficient to show probable cause, and sustain an order of removal.

Affirmed.

THE case is stated in the opinion.

Mr. William S. Bennet with whom *Mr. A. M. Wattenberg* was on the brief, for appellant and plaintiff in error.

Mr. Assistant Attorney General Stewart, with whom *Mr. W. C. Herron* was on the brief, for appellees and defendants in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

The appellant, Gayon, was indicted in the Southern District of Texas for conspiring (§ 37 of the Criminal Code) with one Naranjo, of San Antonio, Texas, and with one Mendoza, of Laredo, Texas, about January 1st, 1919, to hire and retain Foster Averitt, a citizen of the United States, to go to Mexico, there to enlist in military forces organized in the interest of Felix Diaz, then in revolt against the Government of Mexico, with which the United

States was at peace, in violation of § 10 of the Criminal Code, as amended May 7, 1917, (40 Stat. 39, c. 11).

Gayon was arrested in New York, and, after a full hearing before a Commissioner of the United States, was held subject to the order of the District Court for his removal to Texas.

Thereupon, by petition for writs of *habeas corpus* and certiorari, the case was removed to the District Court for the Southern District of New York, and, upon a hearing on a transcript of the evidence before the Commissioner, that court discharged the writ of *habeas corpus* and entered an order that a warrant issue for the removal of the appellant to Texas. An appeal brings this order here for review.

The principles and practice applicable to this case are abundantly settled: *Greene* v. *Henkel*, 183 U. S. 249, 261; *Beavers* v. *Haubert*, 198 U. S. 77; *Hyde* v. *Shine*, 199 U. S. 62, 84; *Tinsley* v. *Treat*, 205 U. S. 20; *Haas* v. *Henkel*, 216 U. S. 462, 475; *Price* v. *Henkel*, 216 U. S. 488, 490; *Hyde* v. *United States*, 225 U. S. 347; *Brown* v. *Elliott*, 225 U. S. 392; *Henry* v. *Henkel*, 235 U. S. 219.

Of many errors assigned only two are argued, viz: That the court erred in holding: (1) That the acts committed by the appellant "of which there was any evidence before the Commissioner" constituted a crime under § 10 of the Penal Code, and (2) that the evidence before the Commissioner showed probable cause for believing the defendant guilty of the crime charged in the indictment.

By these assignments of error the correct rule of decision is recognized, that if there was before the Commissioner or District Court evidence showing probable cause for believing the defendant guilty of having conspired with Naranjo or Mendoza, when either was in the Southern District of Texas, to hire or retain Averitt to go to Mexico to enlist in the insurgent forces operating under General Diaz against the Mexican Government, the order of the District Court must be affirmed.

The evidence before the Commissioner, carried to the District Court, may be summarized as follows:

The Government introduced the indictment and, with the admission by Gayon that he was the person named therein, rested. This established a *prima facie* case in the absence of other evidence. *Tinsley* v *Treat*, 205 U. S. 20, 31, and cases cited.

Thereupon the testimony of the accused and of one Del Villar was introduced by appellant, and that of Averitt by the Government, which we condense into narrative form:

For five years before the arrest, Del Villar, a political exile from Mexico, had maintained offices in New York, from which he had conducted a systematic propaganda in the interest of Felix Diaz and against the Mexican Government.

The accused, Gayon, is a Mexican citizen, and during several administrations prior to that of Carranza had served as consul for the Mexican Government at Roma, Texas, and at other places within and without the United States. For about two years he had been secretary to Del Villar and for some time prior to his arrest was in the joint service and pay of Del Villar and General Aurelio Blanquet, the latter then in Mexico serving with the forces of Diaz.

Naranjo was editor and publisher of a newspaper at San Antonio, Texas, called "Revista Mexicana" (Mexican Review), which was opposed to the established Mexican Government and favorable to the revolutionists operating in the interest of Diaz.

On December 12, 1918, Gayon wrote from New York to Naranjo at San Antonio to secure an advertisement in the Review for "my work 'El General Blanquet,'" saying: "There are some reasons that you may know in the next few days why I want a big circulation of the book," asking if he might send some copies to be sold at the newspaper

office, and concluding, "I will await your letters hoping to give you good news in my next letter."

On December 23, 1918, Gayon wrote Naranjo, addressing him as "My dear Friend," and saying that he had received his letter of the 18th instant. In this letter a discussion of the sale of his book "El General Blanquet" is followed by comment on the activities of other persons, in which he discourages new projects and urges joining "with the National Union Committees," which he states had already passed the embryonic state and now constitute a reality. He concludes: "God grant us, now that we are on the threshold of success, we may leave aside our obstinate custom of projecting, and go ahead to produce results exclusively."

On January 14, and again on January 21, 1919, he addressed Naranjo as "My dear Friend" and discussed further advertising and circulating of his book.

This correspondence makes it clear enough that Gayon, although in New York, in December, 1918, and January, 1919, was in close association with Naranjo, and that the two were actively engaged in promoting opposition to the established Mexican Government.

On January 5, 1919, Foster Averitt, an American citizen, whose home was in Texas, called at the office of Gayon, and what passed between them is derived from the testimony of the two, as follows:

Averitt had recently resigned from the United States Naval Academy at Annapolis and, being without employment, says that he called at the office of Gayon, for the purpose of securing, if possible, a position in Mexico or Central America as an engineer. He was wearing his uniform as midshipman of the United States Navy and he first showed Gayon some official papers, which the latter did not read, and then said that he was of the United States Navy, and that he must go at once to Mexico to see Generals Diaz and Blanquet personally. He did not give

any reason for desiring to see these men but asked for letters of introduction to them, which Gayon refused until he could confer with Del Villar. Averitt returned the next day and, after discussing with Gayon conditions in Mexico, the location of the several armed forces near the border, and whether he should go by sea to Vera Cruz or overland, he again left for the day. On returning the next day he received from Gayon two letters, one addressed to Naranjo, at San Antonio, and one to "General Aurelio Blanquet, General Headquarters, Mexico."

Gayon had no knowledge of or acquaintance with Averitt before his first call at his office and he did not present any letters of introduction, but in the letter to Naranjo, Gayon introduced him as "undertaking a trip to Mexico on special mission to Generals Felix Diaz and Aurelio Blanquet," and requested that he "supply him the necessary information to enable him to make his trip as quickly as possible."

The letter which he gave to Averitt addressed to General Blanquet opens with this paragraph:

"The bearer, Mr. Foster Averitt, Marine Guard of the United States, will inform you about the reasons for his trip and of the work we are undertaking here. I kindly request from you, after meeting Mr. Foster [sic], to be good enough to introduce him to General Felix Diaz, as he wants to take up some matters with both of you."

The remainder of the letter explains how he had given publicity to "the recent successful arrival" of the General in Mexico and the motives inspiring the movement of reorganization under the leadership of General Diaz. It predicts early recognition by our Government of the belligerency of the Diaz insurgents and urges the General to write as often as possible to enable "us to continue our campaign of propaganda."

Supplied with these letters, Averitt straightway went to San Antonio and presented his letter to Naranjo who,

after some conferences with him, gave him a letter to General Santiago Mendoza, at Laredo, on the border. This letter was presented to Mendoza and through him arrangements were made for Averitt's crossing into Mexico with two or three others, but they were arrested by customs guards and the proceedings we are considering followed.

In the interviews in New York there was suggestion of payment of expenses and a commission for Averitt, but Gayon, saying that the furnishing of either would violate the neutrality laws of the United States, told him there would be no difficulty in his getting a commission from General Blanquet on his arrival in Mexico and the last thing he said to him when leaving was "that he expected that he should be at least a Colonel when he saw him again down there." He told him it might be possible to have his expenses made up to him when he arrived in Mexico, and, as a matter of fact, he received $15 from General Mendoza at Laredo.

The statute which Gayon is charged with violating provides that "whoever, within the territory or jurisdiction of the United States . . . hires or retains another . . . to go beyond the limits or jurisdiction of the United States with intent to be enlisted . . . in the service of any foreign . . . people" shall be punished as provided. And the overt acts charged in the indictment are; that Gayon delivered to Averitt at New York a letter addressed to Naranjo, and at the same time gave him instructions with respect to presenting it and impliedly promised Averitt that upon his arrival in Mexico he would be given a commission in the army of General Blanquet; that at the same time he delivered to Averitt a letter addressed to General Blanquet, who was then in Mexico in command of revolutionary forces; that Averitt visited and held conferences with Naranjo who gave him a letter to Mendoza, at Laredo, in the Southern District of

Texas; and that Averitt, under instructions received from Naranjo, called upon and conferred with Mendoza at Laredo and with him arranged to enter Mexico with others, with intent to join the forces of Diaz under General Blanquet.

While the narration of what took place between Gayon and Averitt does not show a hiring of the latter in the ordinary sense of the word, yet, when taken with the conduct of Averitt in going immediately to Texas, and in attempting to cross into Mexico, plainly, it tends to show that Gayon retained Averitt in the sense of engaging him to go to Mexico, that he was induced to enter into that engagement by the promise that he would be given a commission in the forces of Diaz when he arrived there and that he would probably be reimbursed for his expenses.

There was also evidence tending to show that by communication and concerted action between Gayon, Naranjo and Mendoza, Averitt was induced to go from New York to the border and would have succeeded in reaching Mexico and joining the insurgent forces but for the vigilance of the United States officers who arrested him. The evidence also is that Mendoza conferred with Averitt and acted in promotion of the conspiracy when in the Southern District of Texas, thus establishing the jurisdiction of the court to which the indictment was returned, under *Hyde* v. *United States*, 225 U. S. 347, and *Brown* v. *Elliott*, 225 U. S. 392.

The word "retain" is used in the statute as an alternative to "hire" and means something different from the usual employment with payment in money. One may be retained, in the sense of engaged, to render a service as effectively by a verbal as by a written promise, by a prospect for advancement or payment in the future as by the immediate payment of cash. As stated long ago by a noted Attorney General, in an opinion dealing with this statute:

"A party may be retained by verbal promise, or by invitation, for a declared or known purpose. If such a statute could be evaded or set at naught by elaborate contrivances to engage without enlisting, to retain without hiring, to invite without recruiting, . . . it would be idle to pass acts of Congress for the punishment of this or any other offence." 7 Ops. Atty. Gen. 367, 378, 379.

This discussion of the record makes it sufficiently clear that there was substantial evidence before the Commissioner and the court tending to show that § 10 of the Criminal Code had been violated and that there was probable cause for believing the appellant guilty of conspiring with Naranjo and Mendoza to compass that violation, as charged in the indictment, and therefore the order of the District Court must be

Affirmed.

UNITED STATES AT THE RELATION OF KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

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

No. 413. Argued December 10, 1919.—Decided March 8, 1920.

The Valuation Act of March 1, 1913, requires the Interstate Commerce Commission to ascertain and report, *inter alia*, the present cost of condemnation and damages or of purchase of the lands, rights of way and terminals of carriers in excess of their original cost or present value, apart from improvements. *Held*, that a refusal of the Commission to receive and act upon evidence to this end was not justified by the supposed impossibility of performing the statutory duty

or the difficulties involved in so doing, and that a railroad company whose interests were affected was entitled to the writ of mandamus. P. 187.

Reversed.

THE case is stated in the opinion.

Mr. Louis Marshall and *Mr. Samuel W. Moore*, with whom *Mr. Samuel Untermyer* was on the brief, for plaintiff in error.

Mr. P. J. Farrell for defendant in error:

To estimate the present cost of condemnation and damages or of purchase of lands included in plaintiff in error's railroad is impossible, because it necessarily involves unwarrantable and unlawful assumptions.

In the *Minnesota Rate Cases*, 230 U. S. 352, this court entertained the opinion that an estimate of the present cost of acquisition of the lands included in the right of way, yards, and terminals of a carrier could be made only upon the theory that the railroad would be removed before the estimate would be made, and it is apparent that no other theory would be tenable. The court points out that upon the assumption of the nonexistence of the railroad it is impossible for anyone to describe either the conditions that would exist or the exigencies of the hypothetical owners of the property, and says in emphatic language that an attempt to estimate what would be the actual cost of acquiring the right of way under such circumstances would be to indulge in mere speculation. In other words, this court says that what plaintiff in error is asking the court to require the Commission to do cannot, as a matter of law, be done. The court, however, does not stop here. It proceeds to demonstrate why such an estimate cannot be made. It shows that the uses and values of lands in the vicinity of the railroad are largely the result of the construction and operation of the railroad; that it would be

impossible to determine the extent to which such uses and values have been so influenced, and that to assume that they would not be affected if the railroad were removed, and base upon that theory an estimate of reacquiring the lands, or its equivalent, an estimate of the present cost of condemnation and damages, or of purchase, would be improper and unjustifiable and produce a result which could not be accepted as evidence by a court. This court clearly states, in substance, that the estimate of present cost of condemnation and damages, or of purchase, which plaintiff in error is asking the court to compel the Commission to make is an estimate which is wholly beyond reach of any process of rational determination. In this connection it points out that the appraisers of the lands involved in the *Minnesota Rate Cases*, in an attempt to estimate the cost of acquiring the lands, were presented with an impossible hypothesis.

As shown in the answer herein, the evidence introduced before the Commission in connection with the valuation of the lands included in plaintiff in error's railroad establishes that at the time the railroad was constructed a portion of said lands was donated to, and another portion purchased by, plaintiff in error, and that plaintiff in error obtained title to still another portion through condemnation proceedings. It is evident that, upon the assumption of the removal of the railroad and its reproduction, it is impossible to ascertain the portion of said lands which would be so donated, or the portion thereof which would have to be purchased by plaintiff in error, or the portion thereof plaintiff in error would have to acquire title to through condemnation proceedings.

It is further apparent that the removal of the railroad and its immediate reproduction would not damage in any manner or to any extent any of the lands adjoining or adjacent to the railroad or the owners of such adjoining or adjacent lands.

It is also clear that to determine, upon the assumption of the removal of the railroad, that the title to the lands included therein would revert to or be vested in the owners of said adjoining lands, would be unjustifiable and improper.

The court will not, by issuing a writ of mandamus, require something to be done which it is impossible to do. *Silsby Mfg. Co.* v. *Allentown*, 153 Pa. St. 319.

The decision of this court in the *Minnesota Rate Cases* is directly in point and should be given controlling influence. *Chicago & Northwestern Ry. Co.* v. *Smith*, 210 Fed. Rep. 632; *Louisville & Nashville R. R. Co.* v. *Railroad Commission*, 208 Fed. Rep. 35; *Ann Arbor R. R. Co.* v. *Fellows*, 236 Fed. Rep. 387.

This court has approved the Commission's interpretation of the court's decision in the *Minnesota Rate Cases*. See *Denver* v. *Denver Union Water Co.*, 246 U. S. 178.

In finding the present market value of plaintiff in error's common-carrier lands, as measured by the "fair average of the normal market value of lands in the vicinity having a similar character," the Commission must of course consider conditions as they now are, including the existence of the railroad, but in estimating what it would cost to reacquire such lands, that is, the reproduction cost, or the present cost of condemnation and damages or of purchase, of the lands, the Commission would have to treat the railroad as nonexistent and speculate, enter into the realm of mere conjecture, as to what the market value of the lands would be under such circumstances.

Plaintiff in error's contention that it will lose something to which it is entitled, unless the remedy it asks for is applied, is based upon speculation, and is not justified by the facts. It is asking the court to assist it in obtaining for its common-carrier lands a special railway value, in excess of the amount invested in them and beyond the value of similar property owned by others.

Mr. W. G. Brantley, *Mr. Sanford Robinson* and *Mr. Leslie Craven*, by leave of court, filed a brief as *amici curiæ*.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The Act of Congress of March 1, 1913, c. 92, 37 Stat. 701, amending the "Act to regulate commerce," imposed the duty upon the Interstate Commerce Commission (§ 19a) to "investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act." Specifying the steps to be taken in the performance of the general duties thus imposed, the same section commanded as follows:

"First. In such investigation said commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier . . . the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. . . .

"Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

* * * * * * * *

"Fifth. . . [7th par.]. Whenever the commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the commission shall give notice by registered letter to the said carrier, . . . stating the valuation placed upon the sev-

eral classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the commission. . . .

"If notice of protest is filed the commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto. . . . All final valuations by the commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty seven, commonly known as 'the Act to regulate commerce" and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Pursuant to these requirements the Commission proceeded to investigate and report the value of the property of the Kansas City Southern Railway Company. Upon completing a tentative valuation, the Commission gave the notice required by the statute to the Railway Company, which thereupon filed a protest against such valuation on the ground that in making it the Commission had failed to consider and include the "present cost of condemnation and damages or of purchase in excess of such original cost or present value." Upon the subject of the protest, the Railway Company took a large amount of testimony and much was also taken by the Commission, both parties having incurred considerable expense in the matter.

Pending this situation, in order that the excessive expense of taking each individual parcel and showing what it would cost to acquire it or a right of way over it by purchase or condemnation might be avoided, an agreement

was entered into between the Director of the Bureau of Valuation of the Commission, C. A. Prouty, and the Railway Company, that in the event the Commission should decide that evidence upon the cost of acquiring land by purchase or condemnation would be received by it, the Bureau of Valuation would recommend to the Commission the percentage or multiplier of the naked value of the land, to be used for the purpose of reaching the railway cost of acquiring the same.

At that time there was also pending a protest concerning a tentative valuation made by the Commission as to the property of the Texas Midland Railroad Company, raising the same question as to error committed in failing to carry out the provisions of the statute concerning the present cost of condemnation, etc., in which case the Commission overruled the protest, holding that the provision of the statute in question was not susceptible of being enforced or acted upon for reasons stated by the Commission in part as follows (1 I. C. C. Val. Rep. 54 *et seq.*):

"However, the direction in paragraph 'Second' for the ascertainment of the present cost of condemnation and damages or of purchase in effect calls for a finding as to the cost of reproduction of these lands. Must this be done, and can this be done? It seems elementary that the cost of reproduction can be estimated only by assuming that the thing in question is to be produced again, and that if it is to be produced again, it is to be taken as not existent. It seems sophistry to contend that the lands of the railroad can be produced again at a cost to the railroad without first making the assumption that they are no longer lands of the railroad; and this necessary assumption carries with it the mental obliteration of the railroad itself.

"Considerable testimony was produced to the effect that in the acquisition of a railroad right of way it is necessary for the carrier to pay sums in excess of the value of

the land if measured by the present or market value of similar contiguous lands, and this because of the elements which have been enumerated and embraced in the protest, such as cost of acquisition, damages to the severed property, cost of buildings and other improvements, accrued taxes and various incidental rights.

* * * * * * * *

"We are unable to distinguish between what is suggested by the carrier in this record and nominally required by the act and what was condemned by the court [in the *Minnesota Rate Cases*] as beyond the possibility of rational determination; nor is there any essential difference in the actual methods there employed and those now urged upon us. Before we can report figures as ascertained, we must have a reasonable foundation for our estimate, and when, as here, if the estimate can be made only upon inadmissible assumptions, and upon impossible hypotheses, such as those pointed out by the Supreme Court in the opinion quoted, our duty to abstain from reporting as an ascertained fact that which is incapable of rational ascertainment, is clear.

* * * * * * * *

"Because of the impossibility of making the self-contradictory assumptions which the theory requires when applied to the carrier's lands, we are unable to report the reproduction cost of such lands or its equivalent, the present cost of acquisition and damages, or of purchase in excess of present value. The present value of lands as found by us appears in the final valuation, appended hereto."

Applying the ruling thus made to the protest which was pending in this case, the Commission gave notice to the Railway that the agreement made with the Director of the Bureau of Valuation concerning the method of proof would be treated as not further operative; and thereafter when an offer was made by the Railway before an exam-

iner of the Commission of further testimony concerning the subject in hand, it was excluded because in conflict with the ruling announced in the *Midland Case*. The Commission sustained this action of the examiner on the ground that that officer had rightly held that the ruling in the *Midland Case* was controlling; and the Commission therefore decided that no further testimony on the particular subject would be heard in this case, and that it would make no report concerning that subject.

This suit was then brought to obtain a mandamus to compel the Commission to hear the proof and act upon it under the statute. The amended petition, after reciting the facts as we have outlined them and making the appropriate formal averments to justify resort to mandamus, alleged:

"That the refusal of respondent to investigate and find such present cost of condemnation and damages or of purchase in excess of original cost or present value of relator's lands will result in great wrong and injury to relator; by way of illustration, such refusal will result in a finding by respondent of a value of but $60,000 with respect to parcels of land acquired by relator by judicial award in condemnation proceedings during four years immediately preceding such valuation at an actual cost to relator of $180,000; and in the aggregate will result in a finding with respect to said lands at least $5,000,000 less than the value so directed by the Act of Congress above mentioned to be found."

It was further averred, with considerable elaboration, that the petitioner stood ready to produce proof to meet the requirements of the statute which was neither speculative nor impossible to be acted upon, since it would conform to the character of proof usually received in judicial proceedings involving the exercise of eminent domain.

The Commission in its answer, either stating or con-

ceding the history of the case as we have recited it, and summarily reiterating the grounds for the refusal by the Commission to receive the proof or report concerning it, challenged the right to the relief sought. A demurrer to the answer as stating no defense was overruled by the trial court, which denied relief without opinion. In the Court of Appeals, two judges sitting, the judgment of the trial court was affirmed by a divided court, also without opinion, and the case is here on writ of error to review that judgment.

It is obvious from the statement we have made, as well as from the character of the remedy invoked, mandamus, that we are required to decide, not a controversy growing out of duty performed under the statute, but one solely involving an alleged refusal to discharge duties which the statute exacts. Admonishing, as this does, that the issue before us is confined to a consideration of the face of the statute and the non-action of the Commission in a matter purely ministerial, it serves also to furnish a ready solution of the question to be decided, since it brings out in bold contrast the direct and express command of the statute to the Commission, to act concerning the subject in hand, and the Commission's unequivocal refusal to obey such command.

It is true that the Commission held that its non-action was caused by the fact that the command of the statute involved a consideration by it of matters "beyond the possibility of rational determination," and called for "inadmissible assumptions," and the indulging in "impossible hypotheses" as to subjects "incapable of rational ascertainment," and that such conclusions were the necessary consequence of the *Minnesota Rate Cases*, 230 U. S. 352.

We are of opinion, however, that, considering the face of the statute and the reasoning of the Commission, it results that the conclusion of the Commission was erroneous, an error which was exclusively caused by a mistaken

conception by the Commission of its relation to the subject, resulting in an unconscious disregard on its part of the power of Congress and an unwitting assumption by the Commission of authority which it did not possess. And the significance which the Commission attributed to the ruling in the *Minnesota Rate Cases*, even upon the assumption that its view of the ruling in those cases was not a mistaken one, but illustrates in a different form the disregard of the power of Congress which we have just pointed out, since, as Congress indisputably had the authority to impose upon the Commission the duty in question, it is impossible to conceive how the *Minnesota Rate* ruling could furnish ground for refusing to carry out the commands of Congress, the cogency of which consideration is none the less manifest though it be borne in mind that the *Minnesota Rate Cases* were decided after the passage of the act in question.

Finally, even if it be further conceded that the subject-matter of the valuations in question which the act of Congress expressly directed to be made necessarily opened a wide range of proof and called for the exercise of close scrutiny and of scrupulous analysis in its consideration and application, such assumption, we are of opinion, affords no basis for refusing to enforce the act of Congress, or what is equivalent thereto, of exerting the general power which the act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise.

The judgment of the Court of Appeals is therefore reversed with directions to reverse that of the Supreme Court and direct the Supreme Court to grant a writ of mandamus in conformity with this opinion.

EISNER, AS COLLECTOR OF UNITED STATES INTERNAL REVENUE FOR THE THIRD DISTRICT OF THE STATE OF NEW YORK, *v.* MACOMBER.

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

No. 318. Argued April 16, 1919; restored to docket for reargument May 19, 1919; reargued October 17, 20, 1919.—Decided March 8, 1920.

Congress was not empowered by the Sixteenth Amendment to tax, as income of the stockholder, without apportionment, a stock dividend made lawfully and in good faith against profits accumulated by the corporation since March 1, 1913. P. 201. *Towne* v. *Eisner*, 245 U. S. 418.

The Revenue Act of September 8, 1916, c. 463, 39 Stat. 756, plainly evinces the purpose of Congress to impose such taxes and is to that extent in conflict with Art. I, § 2, cl. 3, and Art. 1, § 9, cl. 4, of the Constitution. Pp. 199, 217.

These provisions of the Constitution necessarily limit the extension, by construction, of the Sixteenth Amendment. P. 205.

What is or is not "income" within the meaning of the Amendment must be determined in each case according to truth and substance, without regard to form. P. 206.

Income may be defined as the gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital. P. 207.

Mere growth or increment of value in a capital investment is not income; income is essentially a gain or profit in itself of exchangeable value, proceeding from capital, severed from it, and derived or received by the taxpayer for his separate use, benefit and disposal. *Id.*

A stock dividend—evincing merely a transfer of an accumulated surplus to the capital account of the corporation—takes nothing from the property of the corporation and adds nothing to that of the shareholder; a tax on such dividends is a tax on capital increase and not on income, and to be valid under the Constitution such taxes must be apportioned according to population in the several States. P. 208.

Affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Frierson for plaintiff in error:

Stockholders have such an interest in the earnings and profits of a corporation that the same are within the power of Congress to tax as income even before they are divided. *Collector* v. *Hubbard*, 12 Wall. 1; *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330, 336; *Lynch* v. *Turrish*, 247 U. S. 221, 228; *Bailey* v. *Railroad Co.*, 22 Wall. 604, 635, 636; *Lynch* v. *Hornby*, 247 U. S. 339, 343.

The right of Congress to tax undivided profits cannot be destroyed by the issuance of stock certificates to represent them; and, since the certificates of stock in this case represent earnings of the corporation accrued subsequently to March 1, 1913, they are clearly made taxable as income by the Act of 1916, c. 463, 39 Stat. 756. *Peabody* v. *Eisner*, 247 U. S. 347; *Bailey* v. *Railroad Co.*, 22 Wall. 604, 635; *Swan Brewery Co., Ltd.*, v. *Rex*, [1914] A. C. 231, 234–236.

Towne v. *Eisner*, 245 U. S. 418, does not control this case. (1) It merely decides that the stock dividends then before the court, paid out of earnings accrued prior to March 1, 1913, were not income within the meaning of the Act of 1913. Nothing said in the opinion can be construed as challenging the power of Congress to tax, as the income of stockholders, the profits of a corporation even before they are divided, and much less to tax a certificate of stock issued to represent such profits. (2) The most that can be said of the opinion is that it holds that the term "dividend" in its ordinary acceptation does not include stock dividends, and that since the Act of 1913 used the term "dividend" without qualification stock dividends were not taxable under it. *Gibbons* v. *Mahon*, 136 U. S. 549, 559, 560. (3) The Act of 1916, however, expressly taxes stock dividends, and hence *Towne* v. *Eisner* is not controlling.

The case of *Lynch* v. *Hornby*, 247 U. S. 339, holding that cash dividends are to be treated as income for the year in which received, whether paid out of earnings accruing before or after March 1, 1913, in view of the reasons stated for the holding, would not have been inconsistent with a holding that stock dividends were taxable when representing earnings accruing after March 1, 1913, but not taxable when representing earnings accruing before that date.

But whether such holdings would have been inconsistent or not, the holding in *Lynch* v. *Hornby* is not controlling in this case, since the Act of 1916 makes it plain that dividends, whether paid in cash or stock, are to be taxed only when they represent earnings accruing after March 1, 1913.

While *Gibbons* v. *Mahon*, *supra*, holds that as between a life tenant and a remainderman stock dividends are not income, that case arose in the District of Columbia, involves no federal question, and is not controlling in similar cases arising in the state courts. As a matter of fact, most of the state courts have adopted a different ruling and hold that stock dividends are income. In the Act of 1916, therefore, Congress was clearly within its power when it declared that by "dividends" it meant either cash or stock dividends in accordance with the meaning of the term as understood and construed by the courts of most of the States. *Pritchitt* v. *Nashville Trust Co.*, 96 Tennessee, 472; *Thomas* v. *Gregg*, 78 Maryland, 545; *McLouth* v. *Hunt*, 154 N. Y. 179; *Will of Pabst*, 146 Wisconsin, 330; *Lord* v. *Brooks*, 52 N. H. 72; *Hite* v. *Hite*, 93 Kentucky, 257; *Moss's Appeal*, 83 Pa. St. 264; *Paris* v. *Paris*, 10 Ves. Jr. 184; *Tax Commissioner* v. *Putnam*, 227 Massachusetts, 522; *Matter of Osborne*, 209 N. Y. 450; *Goodwin* v. *McGaughey*, 108 Minnesota, 248.

The ultimate object of corporate business is gain to the stockholders. This gain always and necessarily first ap-

pears in the shape of undivided profits which are held in trust for them. When, later, dividends are declared, the cash or stock received by a stockholder is the same gain converted into a concrete form for the convenient payment, transfer, or definite assignment to him of his share of the previously undivided profits.

The Government is under no delusions as to the nature of a stock dividend, or as to what it accomplishes. It serves to readjust the evidence of ownership by which the stockholder previously held his share of both capital and undivided profits. His share of profits is invested for him in the stock of the company. The profits are segregated from his former capital and he has a separate certificate representing his invested profits or gains. It is, of course, conceded that this transaction does not, of itself, make the stockholder richer than he was before. The Government readily agrees that there has been a mere change in form of that which already belonged to the stockholder and that what was not income before is not income after a stock dividend. But this contention of defendant in error proves too much and destroys her case. Her share of undivided profits which has, by undergoing a mere change of form, become 198 shares of stock, was itself *income* within the power of Congress to tax. Unless its *change of form* destroyed its previous character it was still income. It is defendant in error and not the Government who must rely upon the change of form for success in this case. The Government claims the right to tax gains when wearing a new dress only when they were taxable in their old dress. The defendant in error's contention cannot succeed unless the new dress destroys the power to tax which existed before it was put on.

So far as what they serve to transfer or assign to stockholders is concerned, there are but two points of difference between cash dividends and stock dividends. By a cash dividend, a corporation transfers to a stockholder his

share of corporate earnings in money, while, in the case of a stock dividend, it first invests the earnings in its business and then issues to each stockholder new shares of stock of the same par value as his share of the earnings or, to use other words, invests each stockholder's share of the earnings in its own stock at par and delivers to him the stock so purchased. In either case, he simply gets, in a concrete form, the actual gains he has derived from his invested capital.

The other point of difference is that a cash dividend may serve either to distribute profits or return capital. A stock dividend, on the other hand, never contemplates a reduction in capital but, on the contrary, necessarily implies an increase in capital to be represented by the new shares. It can never, therefore, serve to return capital, but that which, in the form of new stock, it assigns to each stockholder, is always a share of corporate earnings or gains. In other words, a cash dividend may or may not distribute gains, but a stock dividend cannot, under any circumstances, distribute, assign, or transfer anything else.

If the constitutional power exists to tax corporate earnings when they are passed to the stockholder by means of a cash dividend, no reason is perceived why the same power does not exist to tax the same earnings when they are passed to him, in an equally concrete form, by means of a stock dividend.

Stock issued as a dividend is property in every sense that any other thing of value is property.

The Act of 1916 taxes gains derived from capital invested in corporate stocks, that is, shares of corporate gains or profits. It does not tax dividends *per se* but merely uses them to indicate the form in which such gains shall be taxed and to mark the time when the tax shall be collected. And, in the case of stock dividends, it uses the stock issued to measure the amount of the gains.

The substance of the Act of 1916 is that no corporate earnings are taxed as distributed gains which might not have been taxed as undivided profits when they accrued, and all such earnings which might have been taxed as undivided profits are taxed when distributed.

Before a dividend, one certificate is the evidence of a stockholder's ownership of a share of capital and also a share of profits. When he receives a cash dividend the value of his certificate is reduced and the money received measures the gain which his investment has yielded. When he receives a stock dividend, the par value of his new certificate measures his gains. As the fruit or result of his investment, something of value, which is distinct from his original capital and distinct from the corporation's ownership of its assets, has come to him.

The fact that a stockholder is no richer immediately after than immediately before a stock dividend is wholly unimportant. Neither is he made richer by a cash dividend.

The important fact is that, assuming the profits have been earned since March 1, 1913, he has, in either case, become richer since that date through the earnings of his invested capital. Congress has seen fit to say that these earnings may accumulate free from tax until they are delivered to him either as cash or in stock. His gain comes, not from the declaration of a dividend of any kind, but from what his capital has earned. The only effect of the dividend is to fix the date upon which, under the law, his share of corporate earnings, previously accrued, becomes taxable.

Mr. Charles E. Hughes, with whom *Mr. George Welwood Murray* was on the briefs, for defendant in error:

The tax in question is not laid with respect to the taxpayer's interest in undivided corporate profits as constituting income to the taxpayer, or upon the "stock dividend"

as the form or dress in which a previous gain or income to the taxpayer appears. The tax is laid upon the "stock dividend" as constituting income in itself.

Undivided corporate profits are not income to the stockholder. It is of the essence of income that it should be realized. Potentiality is not enough. Book entries or opinions of increase are not income. Income necessarily implies separation and realization. The increase of the forest is not income until it is cut. The increase in the value of lands due to the growth and prosperity of the community is not income until it is realized. Where investments are concerned, there is no income until there has been a separate, realized gain. When a corporation earns profits, it receives money over the amount of its expenditures. The money belongs to the corporation; the profits are the property of the corporation. If the corporation distributes its earnings in dividends, properly so-called, that is, in money, or in property *in specie*, the stockholder has realized a gain and that gain is income. The shareholder has simply his share, his interest, in the corporate enterprise. The corporation must, of course, pay its income tax upon its profits, but there is no income to the shareholder unless he receives it. His share interest is a "capital" interest.

This distinction is not a form or technicality. It is a vital distinction inherent in corporate organization. The interest of the shareholder is a distinct interest. The profits of the corporation are not his profits. This distinction between the title of a corporation and the interest of its shareholders in the property of the corporation, including its earnings, has been authoritatively established by two lines of decisions of this court in cases involving the power of taxation:

(1) *Van Allen* v. *The Assessors*, 3 Wall. 573, 584; *People* v. *Commissioners*, 4 Wall. 244; *Bradley* v. *People*, 4 Wall. 459; *National Bank* v. *Commonwealth*, 9 Wall. 353, 358,

359; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 680; *Evansville Bank* v. *Britton*, 105 U. S. 322; *Cleveland Trust Co.* v. *Lander*, 184 U. S. 111; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503; *Rogers* v. *Hennepin County*, 240 U. S. 184.

(2) *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146; *Shelby County* v. *Union & Planters' Bank*, 161 U. S. 149, 153–154; *Wright* v. *Georgia R. R. & Banking Co.*, 216 U. S. 420, 425; *Farrington* v. *Tennessee*, 95 U. S. 679; *Sturges* v. *Carter*, 114 U. S. 511; *Tennessee* v. *Whitworth*, 117 U. S. 129; *New Orleans* v. *Houston*, 119 U. S. 265; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371; *Powers* v. *Detroit, Grand Haven &c. Ry. Co.*, 201 U. S. 543.

When the question of the nature of the shareholder's interest in undivided profits came before this court in *Gibbons* v. *Mahon*, 136 U. S. 549, the question was carefully considered and explicitly determined. The court pointed out the distinction between the money earned by the corporation and the shareholder's income, and ruled expressly that the interest of the shareholder in the accumulated earnings of the corporation, as a part of his share interest, was capital and not income, so long as the earnings were held and invested by the corporation as a part of its corporate property. See *Towne* v. *Eisner*, 245 U. S. 418.

The case of *Collector* v. *Hubbard*, 12 Wall. 1, arose under a provision that gains and profits of certain companies should be included in estimating the annual gains, profits or income of any person entitled to the same, whether divided or otherwise. The object was to insure the payment of the tax upon the earnings of the corporation (see *Gibbons* v. *Mahon*, 136 U. S. 549, 560). It was a crude method of reaching the corporate earnings and was the only tax imposed with respect to those earnings. A shareholder was to be taxed upon the increment supposed to have been added to the value of his share by his pro-

portionate interest in the undivided profits. This, as a matter of statutory construction, is clear enough. But it by no means follows that this increment was income to the shareholder, when it becomes necessary to distinguish between a tax on income and a direct tax on the capital investment.

The *Hubbard Case* was dealing with the mere fact of the increment and did not deal with its nature, as the court in the *Gibbons Case* was called upon to deal. The reason why the court in the *Hubbard Case* was not called upon to define the nature of the increment, beyond the fact that it was *property*, is apparent from the absence of any controversy over a constitutional question, and from the opinion entertained at the time with respect to what was a direct and what was an indirect tax under the Federal Constitution; accepting the view then entertained of direct and indirect taxes, the decision was unassailable.

It was not necessary for Mr. Justice Clifford, in the absence of the debate which about twenty-five years later took place in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601, to go further. When, however, the court had occasion to deal with the precise question, in *Gibbons* v. *Mahon*, it stated its conclusion emphatically, and without the slightest reservation, that whatever increment there was, through undivided profits held and invested by the corporation, to the share of the stockholder, was capital and not income. But the increment in the *Hubbard Case* was nothing but an accretion to capital. It was not a separated, realized gain. It was not income. Hence, under the doctrine of the *Pollock Case* and the doctrine now applicable to all cases where a capital interest is taxed, the tax could not validly be laid except as an apportioned direct tax. [*Bailey* v. *Railroad Co.*, 22 Wall. 604, and recent cases cited by the Government, distinguished.]

Income is the gain, come to fruition, from capital, from labor, or from both combined. This is sound doctrine both in law and in economics. Income of a corporation is not income of a shareholder until distributed. A "stock dividend" is not income. It does not constitute a distribution of anything; it is a mere readjustment of capital. *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 415; *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, 185; *Lynch* v. *Hornby*, 247 U. S. 339, 343; *Lynch* v. *Turrish*, 247 U. S. 221, 231; *Commissioners of Inland Revenue* v. *Blott* [reported in the London Times of July 25, 1919]; Seligman, Income Tax, p. 19; "The Economic Nature of the Stock Dividend," by Fairchild, Bulletin of National Tax Assn., vol. III, No. 7, April, 1918, p. 163; Seligman, "Are Stock Dividends Income," American Economic Review, vol. IX, No. 3, p. 517; *Peabody* v. *Eisner*, 247 U. S. 347; *Towne* v. *Eisner*, 245 U. S. 418, 426; *Union Trust Co.* v. *Coleman*, 126 N. Y. 433, 438.

The tax in question is an income tax and cannot be sustained as anything else.

Mr. George W. Wickersham and *Mr. Charles Robinson Smith*, by leave of court, filed a brief as *amici curiæ:*

The principle laid down by this court in two well-considered cases (*Gibbons* v. *Mahon*, 136 U. S. 549, and *Towne* v. *Eisner*, 245 U. S. 418), that stock dividends represent capital and do not constitute income is based on sound economic reasoning.

Although *Collector* v. *Hubbard*, 12 Wall. 1, is plainly distinguishable from the case at bar, it is inconsistent both with other and later rulings of this court and with sound economics. It tends to block the way to a consistent, harmonious and logical system of income taxation and it should be expressly overruled. As upholding a tax on property except by apportionment under Art. I, § 2, of the Constitution, it has been overruled by *Pollock* v. *Farmers'*

Loan & Trust Co., 157 U. S. 429; 158 U. S. 601. In so far as it assumes an equivalency between the property and the income of the corporation and the shares of stock in the names of the stockholders for taxation purposes, it has been implicitly overruled by a long series of authorities in this court. The suggestion that this court has in other cases cited *Collector* v. *Hubbard* or its principle with approval except upon altogether minor points is erroneous.

The stock dividend is in reality not a dividend at all. It is a mere certified expression of an undivided surplus and its capitalization. Whatsoever gain there may be in either case to the stockholder is a capital gain. Capital gains (being mere increases in valuation) are not income until realized. The gains that come with stock dividends when stock is sold are realized capital gains—the same in nature and similarly taxable as those gains that are made with any stock that is sold at an advance. Inasmuch as undivided corporate earnings cannot be taxed as income against the stockholder—so the stock certificates issued merely to represent these may not be so taxed, until the gain be realized in some form by sale.

MR. JUSTICE PITNEY delivered the opinion of the court.

This case presents the question whether, by virtue of the Sixteenth Amendment, Congress has the power to tax, as income of the stockholder and without apportionment, a stock dividend made lawfully and in good faith against profits accumulated by the corporation since March 1, 1913.

It arises under the Revenue Act of September 8, 1916, c. 463, 39 Stat. 756, *et seq.*, which, in our opinion (notwithstanding a contention of the Government that will be

noticed), plainly evinces the purpose of Congress to tax stock dividends as income.[1]

The facts, in outline, are as follows:

On January 1, 1916, the Standard Oil Company of California, a corporation of that State, out of an authorized capital stock of $100,000,000, had shares of stock outstanding, par value $100 each, amounting in round figures to $50,000,000. In addition, it had surplus and undivided profits invested in plant, property, and business and required for the purposes of the corporation, amounting to about $45,000,000, of which about $20,000,000 had been earned prior to March 1, 1913, the balance thereafter. In January, 1916, in order to readjust the capitalization, the board of directors decided to issue additional shares sufficient to constitute a stock dividend of 50 per cent. of the outstanding stock, and to transfer from surplus account to capital stock account an amount equivalent to such issue. Appropriate resolutions were adopted, an amount equivalent to the par value of the proposed new stock was transferred accordingly, and the new stock duly issued against it and divided among the stockholders.

Defendant in error, being the owner of 2,200 shares of the old stock, received certificates for 1,100 additional

[1] TITLE I.—INCOME TAX.

PART I.—ON INDIVIDUALS.

Sec. 2 (a) That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived . . . , also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever: *Provided*, That the term "dividends" as used in this title 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, . . which stock dividend shall be considered income, to the amount of its cash value.

shares, of which 18.07 per cent., or 198.77 shares, par value $19,877, were treated as representing surplus earned between March 1, 1913, and January 1, 1916. She was called upon to pay, and did pay under protest, a tax imposed under the Revenue Act of 1916, based upon a supposed income of $19,877 because of the new shares; and an appeal to the Commissioner of Internal Revenue having been disallowed, she brought action against the Collector to recover the tax. In her complaint she alleged the above facts, and contended that in imposing such a tax the Revenue Act of 1916 violated Art. I, § 2, cl. 3, and Art. I, § 9, cl. 4, of the Constitution of the United States, requiring direct taxes to be apportioned according to population, and that the stock dividend was not income within the meaning of the Sixteenth Amendment. A general demurrer to the complaint was overruled upon the authority of *Towne* v. *Eisner*, 245 U. S. 418; and, defendant having failed to plead further, final judgment went against him. To review it, the present writ of error is prosecuted.

The case was argued at the last term, and reargued at the present term, both orally and by additional briefs.

We are constrained to hold that the judgment of the District Court must be affirmed: First, because the question at issue is controlled by *Towne* v. *Eisner*, *supra;* secondly, because a reëxamination of the question, with the additional light thrown upon it by elaborate arguments, has confirmed the view that the underlying ground of that decision is sound, that it disposes of the question here presented, and that other fundamental considerations lead to the same result.

In *Towne* v. *Eisner;* the question was whether a stock dividend made in 1914 against surplus earned prior to January 1, 1913, was taxable against the stockholder under the Act of October 3, 1913, c. 16, 38 Stat. 114, 166, which provided (§ B, p. 167) that net income should include "dividends," and also "gains or profits and income de-

rived from any source whatever." Suit having been brought by a stockholder to recover the tax assessed against him by reason of the dividend, the District Court sustained a demurrer to the complaint. 242 Fed. Rep. 702. The court treated the construction of the act as inseparable from the interpretation of the Sixteenth Amendment; and, having referred to *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, and quoted the Amendment, proceeded very properly to say (p. 704): "It is manifest that the stock dividend in question cannot be reached by the Income Tax Act, and could not, even though Congress expressly declared it to be taxable as income, unless it is in fact income." It declined, however, to accede to the contention that in *Gibbons* v. *Mahon*, 136 U. S. 549, "stock dividends" had received a definition sufficiently clear to be controlling, treated the language of this court in that case as *obiter dictum* in respect of the matter then before it (p. 706), and examined the question as *res nova*, with the result stated. When the case came here, after overruling a motion to dismiss made by the Government upon the ground that the only question involved was the construction of the statute and not its constitutionality, we dealt upon the merits with the question of construction only, but disposed of it upon consideration of the essential nature of a stock dividend, disregarding the fact that the one in question was based upon surplus earnings that accrued before the Sixteenth Amendment took effect. Not only so, but we rejected the reasoning of the District Court, saying (245 U. S. 426): "Notwithstanding the thoughtful discussion that the case received below we cannot doubt that the dividend was capital as well for the purposes of the Income Tax Law as for distribution between tenant for life and remainderman. What was said by this court upon the latter question is equally true for the former. 'A stock dividend really takes nothing from the property of the corporation, and adds nothing to the

interests of the shareholders. Its property is not diminished, and their interests are not increased. . . . The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones.' *Gibbons* v. *Mahon*, 136 U. S. 549, 559, 560. In short, the corporation is no poorer and the stockholder is no richer than they were before. *Logan County* v. *United States*, 169 U. S. 255, 261. If the plaintiff gained any small advantage by the change, it certainly was not an advantage of $417,450, the sum upon which he was taxed. . . . What has happened is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new."

This language aptly answered not only the reasoning of the District Court but the argument of the Solicitor General in this court, which discussed the essential nature of a stock dividend. And if, for the reasons thus expressed, such a dividend is not to be regarded as "income" or "dividends" within the meaning of the Act of 1913, we are unable to see how it can be brought within the meaning of "incomes" in the Sixteenth Amendment; it being very clear that Congress intended in that act to exert its power to the extent permitted by the Amendment. In *Towne* v. *Eisner* it was not contended that any construction of the statute could make it narrower than the constitutional grant; rather the contrary.

The fact that the dividend was charged against profits earned before the Act of 1913 took effect, even before the Amendment was adopted, was neither relied upon nor alluded to in our consideration of the merits in that case. Not only so, but had we considered that a stock dividend constituted income in any true sense, it would have been held taxable under the Act of 1913 notwithstanding it was

based upon profits earned before the Amendment. We ruled at the same term, in *Lynch* v. *Hornby*, 247 U. S. 339, that a cash dividend extraordinary in amount, and in *Peabody* v. *Eisner*, 247 U. S. 347, that a dividend paid in stock of another company, were taxable as income although based upon earnings that accrued before adoption of the Amendment. In the former case, concerning "corporate profits that accumulated before the Act took effect," we declared (pp. 343–344): "Just as we deem the legislative intent manifest to tax the stockholder with respect to such accumulations only if and when, and to the extent that, his interest in them comes to fruition as income, that is, in dividends declared, so we can perceive no constitutional obstacle that stands in the way of carrying out this intent when dividends are declared out of a pre-existing surplus. . . . Congress was at liberty under the Amendment to tax as income, without apportionment, everything that became income, in the ordinary sense of the word, after the adoption of the Amendment, including dividends received in the ordinary course by a stockholder from a corporation, even though they were extraordinary in amount and might appear upon analysis to be a mere realization in possession of an inchoate and contingent interest that the stockholder had in a surplus of corporate assets previously existing." In *Peabody* v. *Eisner* (pp. 349–350), we observed that the decision of the District Court in *Towne* v. *Eisner* had been reversed "only upon the ground that it related to a stock dividend which in fact took nothing from the property of the corporation and added nothing to the interest of the shareholder, but merely changed the evidence which represented that interest;" and we distinguished the *Peabody Case* from the *Towne Case* upon the ground that "the dividend of Baltimore & Ohio shares was not a stock dividend but a distribution *in specie* of a portion of the assets of the Union Pacific."

Therefore, *Towne* v. *Eisner* cannot be regarded as turn-

ing upon the point that the surplus accrued to the company before the act took effect and before adoption of the Amendment. And what we have quoted from the opinion in that case cannot be regarded as *obiter dictum*, it having furnished the entire basis for the conclusion reached. We adhere to the view then expressed, and might rest the present case there; not because that case in terms decided the constitutional question, for it did not; but because the conclusion there reached as to the essential nature of a stock dividend necessarily prevents its being regarded as income in any true sense.

Nevertheless, in view of the importance of the matter, and the fact that Congress in the Revenue Act of 1916 declared (39 Stat. 757) that a "stock dividend shall be considered income, to the amount of its cash value," we will deal at length with the constitutional question, incidentally testing the soundness of our previous conclusion.

The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the Amendment was adopted. In *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, under the Act of August 27, 1894, c. 349, § 27, 28 Stat. 509, 553, it was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arose, imposed by reason of ownership; and that Congress could not impose such taxes without apportioning them among the States according to population, as required by Art. I, § 2, cl. 3, and § 9, cl. 4, of the original Constitution.

Afterwards, and evidently in recognition of the limitation upon the taxing power of Congress thus determined, the Sixteenth Amendment was adopted, in words lucidly expressing the object to be accomplished: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among

the several States, and without regard to any census or enumeration." As repeatedly held, this did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income. *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 17–19; *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103, 112 *et seq.*; *Peck & Co.* v. *Lowe*, 247 U. S. 165, 172–173.

A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.

In order, therefore, that the clauses cited from Article I of the Constitution may have proper force and effect, save only as modified by the Amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not "income," as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised.

The fundamental relation of "capital" to "income" has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter as the outlet stream, to be measured by its flow during a period of time. For the present purpose we require only a clear definition of the term "in-

come," as used in common speech, in order to determine its meaning in the Amendment; and, having formed also a correct judgment as to the nature of a stock dividend, we shall find it easy to decide the matter at issue.

After examining dictionaries in common use (Bouv. L. D.; Standard Dict.; Webster's Internat. Dict.; Century Dict.), we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 (*Stratton's Independence* v. *Howbert*, 231 U. S. 399, 415; *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, 185)—"Income may be defined as the gain derived from capital, from labor, or from both combined," provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the *Doyle Case* (pp. 183, 185).

Brief as it is, it indicates the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy. The Government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word "gain," which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. "*Derived—from—capital*";—"the *gain—derived—from—capital*," etc. Here we have the essential matter: *not* a gain *accruing to* capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being "*derived*," that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. Nothing else answers the description.

The same fundamental conception is clearly set forth in the Sixteenth Amendment—"incomes, *from* whatever *source derived*"—the essential thought being expressed

with a conciseness and lucidity entirely in harmony with the form and style of the Constitution.

Can a stock dividend, considering its essential character, be brought within the definition? To answer this, regard must be had to the nature of a corporation and the stockholder's relation to it. We refer, of course, to a corporation such as the one in the case at bar, organized for profit, and having a capital stock divided into shares to which a nominal or par value is attributed.

Certainly the interest of the stockholder is a capital interest, and his certificates of stock are but the evidence of it. They state the number of shares to which he is entitled and indicate their par value and how the stock may be transferred. They show that he or his assignors, immediate or remote, have contributed capital to the enterprise, that he is entitled to a corresponding interest proportionate to the whole, entitled to have the property and business of the company devoted during the corporate existence to attainment of the common objects, entitled to vote at stockholders' meetings, to receive dividends out of the corporation's profits if and when declared, and, in the event of liquidation, to receive a proportionate share of the net assets, if any, remaining after paying creditors. Short of liquidation, or until dividend declared, he has no right to withdraw any part of either capital or profits from the common enterprise; on the contrary, his interest pertains not to any part, divisible or indivisible, but to the entire assets, business, and affairs of the company. Nor is it the interest of an owner in the assets themselves, since the corporation has full title, legal and equitable, to the whole. The stockholder has the right to have the assets employed in the enterprise, with the incidental rights mentioned; but, as stockholder, he has no right to withdraw, only the right to persist, subject to the risks of the enterprise, and looking only to dividends for his return. If he desires to dissociate himself

from the company he can do so only by disposing of his stock.

For bookkeeping purposes, the company acknowledges a liability in form to the stockholders equivalent to the aggregate par value of their stock, evidenced by a "capital stock account." If profits have been made and not divided they create additional bookkeeping liabilities under the head of "profit and loss," "undivided profits," "surplus account," or the like. None of these, however, gives to the stockholders as a body, much less to any one of them, either a claim against the going concern for any particular sum of money, or a right to any particular portion of the assets or any share in them unless or until the directors conclude that dividends shall be made and a part of the company's assets segregated from the common fund for the purpose. The dividend normally is payable in money, under exceptional circumstances in some other divisible property; and when so paid, then only (excluding, of course, a possible advantageous sale of his stock or winding-up of the company) does the stockholder realize a profit or gain which becomes his separate property, and thus derive income from the capital that he or his predecessor has invested.

In the present case, the corporation had surplus and undivided profits invested in plant, property, and business, and required for the purposes of the corporation, amounting to about $45,000,000, in addition to outstanding capital stock of $50,000,000. In this the case is not extraordinary. The profits of a corporation, as they appear upon the balance sheet at the end of the year, need not be in the form of money on hand in excess of what is required to meet current liabilities and finance current operations of the company. Often, especially in a growing business, only a part, sometimes a small part, of the year's profits is in property capable of division; the remainder having been absorbed in the acquisition of increased plant,

equipment, stock in trade, or accounts receivable, or in decrease of outstanding liabilities. When only a part is available for dividends, the balance of the year's profits is carried to the credit of undivided profits, or surplus, or some other account having like significance. If thereafter the company finds itself in funds beyond current needs it may declare dividends out of such surplus or undivided profits; otherwise it may go on for years conducting a successful business, but requiring more and more working capital because of the extension of its operations, and therefore unable to declare dividends approximating the amount of its profits. Thus the surplus may increase until it equals or even exceeds the par value of the outstanding capital stock. This may be adjusted upon the books in the mode adopted in the case at bar—by declaring a "stock dividend." This, however, is no more than a book adjustment, in essence not a dividend but rather the opposite; no part of the assets of the company is separated from the common fund, nothing distributed except paper certificates that evidence an antecedent increase in the value of the stockholder's capital interest resulting from an accumulation of profits by the company, but profits so far absorbed in the business as to render it impracticable to separate them for withdrawal and distribution. In order to make the adjustment, a charge is made against surplus account with corresponding credit to capital stock account, equal to the proposed "dividend"; the new stock is issued against this and the certificates delivered to the existing stockholders in proportion to their previous holdings. This, however, is merely bookkeeping that does not affect the aggregate assets of the corporation or its outstanding liabilities; it affects only the form, not the essence, of the "liability" acknowledged by the corporation to its own shareholders, and this through a readjustment of accounts on one side of the balance sheet only, increasing "capital stock" at the expense of

"surplus"; it does not alter the preëxisting proportionate interest of any stockholder or increase the intrinsic value of his holding or of the aggregate holdings of the other stockholders as they stood before. The new certificates simply increase the number of the shares, with consequent dilution of the value of each share.

A "stock dividend" shows that the company's accumulated profits have been capitalized, instead of distributed to the stockholders or retained as surplus available for distribution in money or in kind should opportunity offer. Far from being a realization of profits of the stockholder, it tends rather to postpone such realization, in that the fund represented by the new stock has been transferred from surplus to capital, and no longer is available for actual distribution.

The essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit; on the contrary, every dollar of his original investment, together with whatever accretions and accumulations have resulted from employment of his money and that of the other stockholders in the business of the company, still remains the property of the company, and subject to business risks which may result in wiping out the entire investment. Having regard to the very truth of the matter, to substance and not to form, he has received nothing that answers the definition of income within the meaning of the Sixteenth Amendment.

Being concerned only with the true character and effect of such a dividend when lawfully made, we lay aside the question whether in a particular case a stock dividend may be authorized by the local law governing the corporation, or whether the capitalization of profits may be the result of correct judgment and proper business policy on the part of its management, and a due regard for the interests of the stockholders. And we are considering the taxability of *bona fide* stock dividends only.

We are clear that not only does a stock dividend really take nothing from the property of the corporation and add nothing to that of the shareholder, but that the antecedent accumulation of profits evidenced thereby, while indicating that the shareholder is the richer because of an increase of his capital, at the same time shows he has not realized or received any income in the transaction.

It is said that a stockholder may sell the new shares acquired in the stock dividend; and so he may, if he can find a buyer. It is equally true that if he does sell, and in doing so realizes a profit, such profit, like any other, is income, and so far as it may have arisen since the Sixteenth Amendment is taxable by Congress without apportionment. The same would be true were he to sell some of his original shares at a profit. But if a shareholder sells dividend stock he necessarily disposes of a part of his capital interest, just as if he should sell a part of his old stock, either before or after the dividend. What he retains no longer entitles him to the same proportion of future dividends as before the sale. His part in the control of the company likewise is diminished. Thus, if one holding $60,000 out of a total $100,000 of the capital stock of a corporation should receive in common with other stockholders a 50 per cent. stock dividend, and should sell his part, he thereby would be reduced from a majority to a minority stockholder, having six-fifteenths instead of six-tenths of the total stock outstanding. A corresponding and proportionate decrease in capital interest and in voting power would befall a minority holder should he sell dividend stock; it being in the nature of things impossible for one to dispose of any part of such an issue without a proportionate disturbance of the distribution of the entire capital stock, and a like diminution of the seller's comparative voting power—that "right preservative of rights" in the control of a corporation.

Yet, without selling, the shareholder, unless possessed of other resources, has not the wherewithal to pay an income tax upon the dividend stock. Nothing could more clearly show that to tax a stock dividend is to tax a capital increase, and not income, than this demonstration that in the nature of things it requires conversion of capital in order to pay the tax.

Throughout the argument of the Government, in a variety of forms, runs the fundamental error already mentioned—a failure to appraise correctly the force of the term "income" as used in the Sixteenth Amendment, or at least to give practical effect to it. Thus, the Government contends that the tax "is levied on income derived from corporate earnings," when in truth the stockholder has "derived" nothing except paper certificates which, so far as they have any effect, deny him present participation in such earnings. It contends that the tax may be laid when earnings "are received by the stockholder," whereas he has received none; that the profits are "distributed by means of a stock dividend," although a stock dividend distributes no profits; that under the Act of 1916 "the tax is on the stockholder's share in corporate earnings," when in truth a stockholder has no such share, and receives none in a stock dividend; that "the profits are segregated from his former capital, and he has a separate certificate representing his invested profits or gains," whereas there has been no segregation of profits, nor has he any separate certificate representing a personal gain, since the certificates, new and old, are alike in what they represent—a capital interest in the entire concerns of the corporation.

We have no doubt of the power or duty of a court to look through the form of the corporation and determine the question of the stockholder's right, in order to ascertain whether he has received income taxable by Congress without apportionment. But, looking through the form,

we cannot disregard the essential truth disclosed; ignore the substantial difference between corporation and stockholder; treat the entire organization as unreal; look upon stockholders as partners, when they are not such; treat them as having in equity a right to a partition of the corporate assets, when they have none; and indulge the fiction that they have received and realized a share of the profits of the company which in truth they have neither received nor realized. We must treat the corporation as a substantial entity separate from the stockholder, not only because such is the practical fact but because it is only by recognizing such separateness that any dividend—even one paid in money or property—can be regarded as income of the stockholder. Did we regard corporation and stockholders as altogether identical, there would be no income except as the corporation acquired it; and while this would be taxable against the corporation as income under appropriate provisions of law, the individual stockholders could not be separately and additionally taxed with respect to their several shares even when divided, since if there were entire identity between them and the company they could not be regarded as receiving anything from it, any more than if one's money were to be removed from one pocket to another.

Conceding that the mere issue of a stock dividend makes the recipient no richer than before, the Government nevertheless contends that the new certificates measure the extent to which the gains accumulated by the corporation have made him the richer. There are two insuperable difficulties with this: In the first place, it would depend upon how long he had held the stock whether the stock dividend indicated the extent to which he had been enriched by the operations of the company; unless he had held it throughout such operations the measure would not hold true. Secondly, and more important for present purposes, enrichment through increase in value

of capital investment is not income in any proper meaning of the term.

The complaint contains averments respecting the market prices of stock such as plaintiff held, based upon sales before and after the stock dividend, tending to show that the receipt of the additional shares did not substantially change the market value of her entire holdings. This tends to show that in this instance market quotations reflected intrinsic values—a thing they do not always do. But we regard the market prices of the securities as an unsafe criterion in an inquiry such as the present, when the question must be, not what will the thing sell for, but what is it in truth and in essence.

It is said there is no difference in principle between a simple stock dividend and a case where stockholders use money received as cash dividends to purchase additional stock contemporaneously issued by the corporation. But an actual cash dividend, with a real option to the stockholder either to keep the money for his own or to reinvest it in new shares, would be as far removed as possible from a true stock dividend, such as the one we have under consideration, where nothing of value is taken from the company's assets and transferred to the individual ownership of the several stockholders and thereby subjected to their disposal.

The Government's reliance upon the supposed analogy between a dividend of the corporation's own shares and one made by distributing shares owned by it in the stock of another company, calls for no comment beyond the statement that the latter distributes assets of the company among the shareholders while the former does not; and for no citation of authority except *Peabody* v. *Eisner*, 247 U. S. 347, 349–350.

Two recent decisions, proceeding from courts of high jurisdiction, are cited in support of the position of the Government.

Swan Brewery Co., Ltd., v. *Rex*, [1914] A. C. 231, arose under the Dividend Duties Act of Western Australia, which provided that "dividend" should include "every dividend, profit, advantage, or gain intended to be paid or credited to or distributed among any members or directors of any company," except, etc. There was a stock dividend, the new shares being allotted among the shareholders *pro rata;* and the question was whether this was a distribution of a dividend within the meaning of the act. The Judicial Committee of the Privy Council sustained the dividend duty upon the ground that, although "in ordinary language the new shares would not be called a dividend, nor would the allotment of them be a distribution of a dividend," yet, within the meaning of the act, such new shares were an "advantage" to the recipients. There being no constitutional restriction upon the action of the lawmaking body, the case presented merely a question of statutory construction, and manifestly the decision is not a precedent for the guidance of this court when acting under a duty to test an act of Congress by the limitations of a written Constitution having superior force.

In *Tax Commissioner* v. *Putnam* (1917), 227 Massachusetts, 522, it was held that the 44th Amendment to the constitution of Massachusetts, which conferred upon the legislature full power to tax incomes, "must be interpreted as including every item which by any reasonable understanding can fairly be regarded as income" (pp. 526, 531); and that under it a stock dividend was taxable as income, the court saying (p. 535): "In essence the thing which has been done is to distribute a symbol representing an accumulation of profits, which instead of being paid out in cash is invested in the business, thus augmenting its durable assets. In this aspect of the case the substance of the transaction is no different from what it would be if a cash dividend had been declared with the privilege of subscription to an equivalent amount of new shares."

We cannot accept this reasoning. Evidently, in order to give a sufficiently broad sweep to the new taxing provision, it was deemed necessary to take the symbol for the substance, accumulation for distribution, capital accretion for its opposite; while a case where money is paid into the hand of the stockholder with an option to buy new shares with it, followed by acceptance of the option, was regarded as identical in substance with a case where the stockholder receives no money and has no option. The Massachusetts court was not under an obligation, like the one which binds us, of applying a constitutional amendment in the light of other constitutional provisions that stand in the way of extending it by construction.

Upon the second argument, the Government, recognizing the force of the decision in *Towne* v. *Eisner*, *supra*, and virtually abandoning the contention that a stock dividend increases the interest of the stockholder or otherwise enriches him, insisted as an alternative that by the true construction of the Act of 1916 the tax is imposed not upon the stock dividend but rather upon the stockholder's share of the undivided profits previously accumulated by the corporation; the tax being levied as a matter of convenience at the time such profits become manifest through the stock dividend. If so construed, would the act be constitutional?

That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question; and that such interests might be valued in view of the condition of the company, including its accumulated and undivided profits, is equally clear. But that this would be taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution, is settled beyond peradventure by previous decisions of this court.

The Government relies upon *Collector* v. *Hubbard* (1870),

12 Wall. 1, 17, which arose under § 117 of the Act of June 30, 1864, c. 173, 13 Stat. 223, 282, providing that "the gains and profits of all companies, whether incorporated or partnership, other than the companies specified in this section, shall be included in estimating the annual gains, profits, or income of any person entitled to the same, whether divided or otherwise." The court held an individual taxable upon his proportion of the earnings of a corporation although not declared as dividends and although invested in assets not in their nature divisible. Conceding that the stockholder for certain purposes had no title prior to dividend declared, the court nevertheless said (p. 18): "Grant all that, still it is true that the owner of a share of stock in a corporation holds the share with all its incidents, and that among those incidents is the right to receive all future dividends, that is, his proportional share of all profits not then divided. Profits are incident to the share to which the owner at once becomes entitled provided he remains a member of the corporation until a dividend is made. Regarded as an incident to the shares, undivided profits are property of the shareholder, and as such are the proper subject of sale, gift, or devise. Undivided profits invested in real estate, machinery, or raw material for the purpose of being manufactured are investments in which the stockholders are interested, and when such profits are actually appropriated to the payment of the debts of the corporation they serve to increase the market value of the shares, whether held by the original subscribers or by assignees." In so far as this seems to uphold the right of Congress to tax without apportionment a stockholder's interest in accumulated earnings prior to dividend declared, it must be regarded as overruled by *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 627, 628, 637. Conceding *Collector* v. *Hubbard* was inconsistent with the doctrine of that case, because it sustained a direct tax upon property not apportioned

among the States, the Government nevertheless insists that the Sixteenth Amendment removed this obstacle, so that now the *Hubbard Case* is authority for the power of Congress to levy a tax on the stockholder's share in the accumulated profits of the corporation even before division by the declaration of a dividend of any kind. Manifestly this argument must be rejected, since the Amendment applies to income only, and what is called the stockholder's share in the accumulated profits of the company is capital, not income. As we have pointed out, a stockholder has no individual share in accumulated profits, nor in any particular part of the assets of the corporation, prior to dividend declared.

Thus, from every point of view, we are brought irresistibly to the conclusion that neither under the Sixteenth Amendment nor otherwise has Congress power to tax without apportionment a true stock dividend made lawfully and in good faith, or the accumulated profits behind it, as income of the stockholder. The Revenue Act of 1916, in so far as it imposes a tax upon the stockholder because of such dividend, contravenes the provisions of Article I, § 2, cl. 3, and Article I, § 9, cl. 4, of the Constitution, and to this extent is invalid notwithstanding the Sixteenth Amendment.

Judgment affirmed.

MR. JUSTICE HOLMES, dissenting.

I think that *Towne* v. *Eisner*, 245 U. S. 418, was right in its reasoning and result and that on sound principles the stock dividend was not income. But it was clearly intimated in that case that the construction of the statute then before the Court might be different from that of the Constitution. 245 U. S. 425. I think that the word "incomes" in the Sixteenth Amendment should be read in

"a sense most obvious to the common understanding at the time of its adoption." *Bishop* v. *State*, 149 Indiana, 223, 230; *State* v. *Butler*, 70 Florida, 102, 133. For it was for public adoption that it was proposed. *McCulloch* v. *Maryland*, 4 Wheat. 316, 407. The known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest. I am of opinion that the Amendment justifies the tax. See *Tax Commissioner* v. *Putnam*, 227 Massachusetts, 522, 532, 533.

MR. JUSTICE DAY concurs in this opinion.

MR. JUSTICE BRANDEIS, dissenting, delivered the following opinion, in which MR. JUSTICE CLARKE concurred.

Financiers, with the aid of lawyers, devised long ago two different methods by which a corporation can, without increasing its indebtedness, keep for corporate purposes accumulated profits, and yet, in effect, distribute these profits among its stockholders. One method is a simple one. The capital stock is increased; the new stock is paid up with the accumulated profits; and the new shares of paid-up stock are then distributed among the stockholders *pro rata* as a dividend. If the stockholder prefers ready money to increasing his holding of the stock in the company, he sells the new stock received as a dividend. The other method is slightly more complicated. Arrangements are made for an increase of stock to be offered to stockholders *pro rata* at par and, at the same time, for the payment of a cash dividend equal to the amount which the stockholder will be required to pay to

the company, if he avails himself of the right to subscribe for his *pro rata* of the new stock. If the stockholder takes the new stock, as is expected, he may endorse the dividend check received to the corporation and thus pay for the new stock. In order to ensure that all the new stock so offered will be taken, the price at which it is offered is fixed far below what it is believed will be its market value. If the stockholder prefers ready money to an increase of his holdings of stock, he may sell his right to take new stock *pro rata*, which is evidenced by an assignable instrument. In that event the purchaser of the rights repays to the corporation, as the subscription price of the new stock, an amount equal to that which it had paid as a cash dividend to the stockholder.

Both of these methods of retaining accumulated profits while in effect distributing them as a dividend had been in common use in the United States for many years prior to the adoption of the Sixteenth Amendment. They were recognized equivalents. Whether a particular corporation employed one or the other method was determined sometimes by requirements of the law under which the corporation was organized; sometimes it was determined by preferences of the individual officials of the corporation; and sometimes by stock market conditions. Whichever method was employed the resultant distribution of the new stock was commonly referred to as a stock dividend. How these two methods have been employed may be illustrated by the action in this respect (as reported in Moodys Manual, 1918 Industrial, and the Commercial and Financial Chronicle), of some of the Standard Oil companies, since the disintegration pursuant to the decision of this court in 1911. *Standard Oil Co.* v. *United States*, 221 U. S. 1.

(a) Standard Oil Co. (of Indiana), an Indiana corporation. It had on December 31, 1911, $1,000,000 capital stock (all common), and a large surplus. On May 15,

1912, it increased its capital stock to $30,000,000, and paid a simple stock dividend of 2900 per cent. in stock.[1]

(b) Standard Oil Co. (of Nebraska), a Nebraska corporation. If had on December 31, 1911, $600,000 capital stock (all common), and a substantial surplus. On April 15, 1912, it paid a simple stock dividend of 33 1/3 per cent., increasing the outstanding capital to $800,000. During the calendar year 1912 it paid cash dividends aggregating 20 per cent.; but it earned considerably more, and had at the close of the year again a substantial surplus. On June 20, 1913, it declared a further stock dividend of 25 per cent., thus increasing the capital to $1,000,000.[2]

(c) The Standard Oil Co. (of Kentucky), a Kentucky corporation. It had on December 31, 1913, $1,000,000 capital stock (all common), and $3,701,710 surplus. Of this surplus $902,457 had been earned during the calendar year 1913, the net profits of that year having been $1,002,457 and the dividends paid only $100,000 (10 per cent.). On December 22, 1913, a cash dividend of $200 per share was declared payable on February 14, 1914, to stockholders of record January 31, 1914; and these stockholders were offered the right to subscribe for an equal amount of new stock at par and to apply the cash dividend in payment therefor. The outstanding stock was thus increased to $3,000,000. During the calendar years 1914, 1915 and 1916, quarterly dividends were paid on this stock at an annual rate of between 15 per cent. and 20 per cent., but the company's surplus increased by $2,347,614, so that on December 31, 1916, it had a large surplus over its $3,000,000 capital stock. On December 15, 1916, the company issued a circular to the stockholders, saying:

"The company's business for this year has shown a

[1] Moodys, p. 1544; Commercial and Financial Chronicle, Vol. 94, p. 831; Vol. 98, pp. 1005, 1076.

[2] Moodys, p. 1548; Commercial and Financial Chronicle, Vol. 94, p. 771; Vol. 96, p. 1428; Vol. 97, p. 1434; Vol. 98, p. 1541.

very good increase in volume and a proportionate increase in profits, and it is estimated that by Jan. 1, 1917, the company will have a surplus of over $4,000,000. The board feels justified in stating that if the proposition to increase the capital stock is acted on favorably, it will be proper in the near future to declare a cash dividend of 100%; and to allow the stockholders the privilege *pro rata* according to their holdings, to purchase the new stock at par, the plan being to allow the stockholders, if they desire, to use their cash dividend to pay for the new stock."

The increase of stock was voted. The company then paid a cash dividend of 100 per cent., payable May 1, 1917, again offering to such stockholders the right to subscribe for an equal amount of new stock at par and to apply the cash dividend in payment therefor.

Moodys Manual, describing the transaction with exactness, says first that the stock was increased from $3,000,000 to $6,000,000, "a cash dividend of 100%, payable May 1, 1917, being exchanged for one share of new stock, the equivalent of a 100% stock dividend." But later in the report giving, as customary in the Manual, the dividend record of the company, the Manual says: "A stock dividend of 200% was paid Feb. 14, 1914, and one of 100% on May 1, 1917." And in reporting specifically the income account of the company for a series of years ending December 31, covering net profits, dividends paid and surplus for the year, it gives, as the aggregate of dividends for the year 1917, $660,000; (which was the aggregate paid on the quarterly cash dividend—5 per cent. January and April; 6 per cent. July and October); and adds in a note: "In addition a stock dividend of 100% was paid during the year." [1] The Wall Street Journal of

[1] Moodys, p. 1547; Commercial and Financial Chronicle, Vol. 97, pp. 1589, 1827, 1903; Vol. 98, pp. 76, 457; Vol. 103, p. 2348. Poor's Manual of Industrials (1918), p. 2240, in giving the "Comparative

May 2, 1917, p. 2, quotes the 1917 "High" price for Standard Oil of Kentucky as "375 Ex. Stock Dividend."

It thus appears that among financiers and investors the distribution of the stock by whichever method effected is called a stock dividend; that the two methods by which accumulated profits are legally retained for corporate purposes and at the same time distributed as dividends are recognized by them to be equivalents; and that the financial results to the corporation and to the stockholders of the two methods are substantially the same—unless a difference results from the application of the federal income tax law.

Mrs. Macomber, a citizen and resident of New York, was, in the year 1916, a stockholder in the Standard Oil Company (of California), a corporation organized under the laws of California and having its principal place of business in that State. During that year she received from the company a stock dividend representing profits earned since March 1, 1913. The dividend was paid by direct issue of the stock to her according to the simple method described above, pursued also by the Indiana and Nebraska companies. In 1917 she was taxed under the federal law on the stock dividend so received at its par value of $100 a share, as income received during the year 1916. Such a stock dividend is income as distinguished from capital both under the law of New York and under the law of California; because in both States every dividend representing profits is deemed to be income whether paid in cash or in stock. It had been so held in New York, where the question arose as between life-tenant and remainderman, *Lowry* v. *Farmers' Loan & Trust Co.*, 172 N. Y. 137; *Matter of Osborne*, 209 N. Y. 450; and also, where the question arose in matters of taxation. *People* v. *Glynn*,

Income Account" of the company describes the 1914 dividend as "Stock Dividend paid (200%)—$2,000,000"; and describes the 1917 dividend as "$3,000,000 special cash dividend."

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130 App. Div. 332; 198 N. Y. 605. It has been so held in California, where the question appears to have arisen only in controversies between life-tenant and remainderman. *Estate of Duffill*, 58 Cal. Dec. 97; 180 California, 748.

It is conceded that if the stock dividend paid to Mrs. Macomber had been made by the more complicated method pursued by the Standard Oil Company of Kentucky, that is, issuing rights to take new stock *pro rata* and paying to each stockholder simultaneously a dividend in cash sufficient in amount to enable him to pay for this *pro rata* of new stock to be purchased—the dividend so paid to him would have been taxable as income, whether he retained the cash or whether he returned it to the corporation in payment for his *pro rata* of new stock. But it is contended that, because the simple method was adopted of having the new stock issued direct to the stockholders as paid-up stock, the new stock is not to be deemed income, whether she retained it or converted it into cash by sale. If such a different result can flow merely from the difference in the method pursued, it must be because Congress is without power to tax as income of the stockholder either the stock received under the latter method or the proceeds of its sale; for Congress has, by the provisions in the Revenue Act of 1916, expressly declared its purpose to make stock dividends, by whichever method paid, taxable as income.

The Sixteenth Amendment proclaimed February 25, 1913, declares:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

The Revenue Act of September 8, 1916, c. 463, 39 Stat. 756, 757, provided:

"That the term 'dividends' as used in this title 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 . . . which stock dividend shall be considered income, to the amount of its cash value."

Hitherto powers conferred upon Congress by the Constitution have been liberally construed, and have been held to extend to every means appropriate to attain the end sought. In determining the scope of the power the substance of the transaction, not its form has been regarded. *Martin* v. *Hunter*, 1 Wheat. 304, 326; *McCulloch* v. *Maryland*, 4 Wheat. 316, 407, 415; *Brown* v. *Maryland*, 12 Wheat. 419, 446; *Craig* v. *Missouri*, 4 Pet. 410, 433; *Jarrolt* v. *Moberly*, 103 U. S. 580, 585, 587; *Legal Tender Case*, 110 U. S. 421, 444; *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53, 58; *United States* v. *Realty Co.*, 163 U. S. 427, 440, 441, 442; *South Carolina* v. *United States*, 199 U. S. 437, 448–9. Is there anything in the phraseology of the Sixteenth Amendment or in the nature of corporate dividends which should lead to a departure from these rules of construction and compel this court to hold, that Congress is powerless to prevent a result so extraordinary as that here contended for by the stockholder?

First: The term "income" when applied to the investment of the stockholder in a corporation, had, before the adoption of the Sixteenth Amendment, been commonly understood to mean the returns from time to time received by the stockholder from gains or earnings of the corporation. A dividend received by a stockholder from a corporation may be either in distribution of capital assets or in distribution of profits. Whether it is the one or the other is in no way affected by the medium in which it is paid, nor by the method or means through which the particular thing distributed as a dividend was procured. If the

dividend is declared payable in cash, the money with which to pay it is ordinarily taken from surplus cash in the treasury. But (if there are profits legally available for distribution and the law under which the company was incorporated so permits) the company may raise the money by discounting negotiable paper; or by selling bonds, scrip or stock of another corporation then in the treasury; or by selling its own bonds, scrip or stock then in the treasury; or by selling its own bonds, scrip or stock issued expressly for that purpose. How the money shall be raised is wholly a matter of financial management. The manner in which it is raised in no way affects the question whether the dividend received by the stockholder is income or capital; nor can it conceivably affect the question whether it is taxable as income.

Likewise whether a dividend declared payable from profits shall be paid in cash or in some other medium is also wholly a matter of financial management. If some other medium is decided upon, it is also wholly a question of financial management whether the distribution shall be, for instance, in bonds, scrip or stock of another corporation or in issues of its own. And if the dividend is paid in its own issues, why should there be a difference in result dependent upon whether the distribution was made from such securities then in the treasury or from others to be created and issued by the company expressly for that purpose? So far as the distribution may be made from its own issues of bonds, or preferred stock created expressly for the purpose, it clearly would make no difference in the decision of the question whether the dividend was a distribution of profits, that the securities had to be created expressly for the purpose of distribution. If a dividend paid in securities of that nature represents a distribution of profits Congress may, of course, tax it as income of the stockholder. Is the result different where the security distributed is common stock?

Suppose that a corporation having power to buy and sell its own stock, purchases, in the interval between its regular dividend dates, with monies derived from current profits, some of its own common stock as a temporary investment, intending at the time of purchase to sell it before the next dividend date and to use the proceeds in paying dividends, but later, deeming it inadvisable either to sell this stock or to raise by borrowing the money necessary to pay the regular dividend in cash, declares a dividend payable in this stock:—Can anyone doubt that in such a case the dividend in common stock would be income of the stockholder and constitutionally taxable as such? See *Green* v. *Bissell*, 79 Connecticut, 547; *Leland* v. *Hayden*, 102 Massachusetts, 542. And would it not likewise be income of the stockholder subject to taxation if the purpose of the company in buying the stock so distributed had been from the beginning to take it off the market and distribute it among the stockholders as a dividend, and the company actually did so? And proceeding a short step further: Suppose that a corporation decided to capitalize some of its accumulated profits by creating additional common stock and selling the same to raise working capital, but after the stock has been issued and certificates therefor are delivered to the bankers for sale, general financial conditions make it undesirable to market the stock and the company concludes that it is wiser to husband, for working capital, the cash which it had intended to use in paying stockholders a dividend, and, instead, to pay the dividend in the common stock which it had planned to sell: Would not the stock so distributed be a distribution of profits—and, hence, when received, be income of the stockholder and taxable as such? If this be conceded, why should it not be equally income of the stockholder, and taxable as such, if the common stock created by capitalizing profits, had been originally created for the express purpose of being dis-

tributed as a dividend to the stockholder who afterwards received it?

Second: It has been said that a dividend payable in bonds or preferred stock created for the purpose of distributing profits may be income and taxable as such, but that the case is different where the distribution is in common stock created for that purpose. Various reasons are assigned for making this distinction. One is that the proportion of the stockholder's ownership to the aggregate number of the shares of the company is not changed by the distribution. But that is equally true where the dividend is paid in its bonds or in its preferred stock. Furthermore, neither maintenance nor change in the proportionate ownership of a stockholder in a corporation has any bearing upon the question here involved. Another reason assigned is that the value of the old stock held is reduced approximately by the value of the new stock received, so that the stockholder after receipt of the stock dividend has no more than he had before it was paid. That is equally true whether the dividend be paid in cash or in other property, for instance, bonds, scrip or preferred stock of the company. The payment from profits of a large cash dividend, and even a small one, customarily lowers the then market value of stock because the undivided property represented by each share has been correspondingly reduced. The argument which appears to be most strongly urged for the stockholders is, that when a stock dividend is made, no portion of the assets of the company is thereby segregated for the stockholder. But does the issue of new bonds or of preferred stock created for use as a dividend result in any segregation of assets for the stockholder? In each case he receives a piece of paper which entitles him to certain rights in the undivided property. Clearly segregation of assets in a physical sense is not an essential of income. The year's gains of a partner are taxable as income, although there, likewise, no

segregation of his share in the gains from that of his partners is had.

The objection that there has been no segregation is presented also in another form. It is argued that until there is a segregation, the stockholder cannot know whether he has really received gains; since the gains may be invested in plant or merchandise or other property and perhaps be later lost. But is not this equally true of the share of a partner in the year's profits of the firm or, indeed, of the profits of the individual who is engaged in business alone? And is it not true, also, when dividends are paid in cash? The gains of a business, whether conducted by an individual, by a firm or by a corporation, are ordinarily reinvested in large part. Many a cash dividend honestly declared as a distribution of profits, proves later to have been paid out of capital, because errors in forecast prevent correct ascertainment of values. Until a business adventure has been completely liquidated, it can never be determined with certainty whether there have been profits unless the returns have at least exceeded the capital originally invested. Business men, dealing with the problem practically, fix necessarily periods and rules for determining whether there have been net profits—that is income or gains. They protect themselves from being seriously misled by adopting a system of depreciation charges and reserves. Then, they act upon their own determination, whether profits have been made. Congress in legislating has wisely adopted their practices as its own rules of action.

Third: The Government urges that it would have been within the power of Congress to have taxed as income of the stockholder his *pro rata* share of undistributed profits earned, even if no stock dividend representing it had been paid. Strong reasons may be assigned for such a view. See *Collector* v. *Hubbard*, 12 Wall. 1. The undivided share of a partner in the year's undistributed profits of his firm

is taxable as income of the partner, although the share in the gain is not evidenced by any action taken by the firm. Why may not the stockholder's interest in the gains of the company? The law finds no difficulty in disregarding the corporate fiction whenever that is deemed necessary to attain a just result. *Linn & Lane Timber Co.* v. *United States*, 236 U. S. 574; see Morawetz on Corporations, 2d ed., §§ 227–231; Cook on Corporations, 7th ed., §§ 663, 664. The stockholder's interest in the property of the corporation differs, not fundamentally but in form only, from the interest of a partner in the property of the firm. There is much authority for the proposition that, under our law, a partnership or joint stock company is just as distinct and palpable an entity in the idea of the law, as distinguished from the individuals composing it, as is a corporation.[1] No reason appears, why Congress, in legislating under a grant of power so comprehensive as that authorizing the levy of an income tax, should be limited by the particular view of the relation of the stockholder to the corporation and its property which may, in the absence of legislation, have been taken by this court. But we have no occasion to decide the question whether Congress might have taxed to the stockholder his undivided share of the corporation's earnings. For Congress has in this act limited the income tax to that share of the stockholder in the earnings which is, in effect, distributed by means of the stock dividend paid. In other words, to render the stockholder taxable there must be both earnings made *and* a dividend paid. Neither earnings without dividend—nor a dividend without earnings—subjects the

[1] See "Some Judicial Myths," by Francis M. Burdick, 22 Harvard Law Review, 393, 394–396; The Firm as a Legal Person, by William Hamilton Cowles, 57 Cent. L. J., 343, 348; The Separate Estates of Non-Bankrupt Partners, by J. D. Brannan, 20 Harvard Law Review, 589–592; compare Harvard Law Review, Vol. 7, p. 426; Vol. 14, p. 222; Vol. 17, p. 194.

stockholder to taxation under the Revenue Act of 1916.

Fourth: The equivalency of all dividends representing profits, whether paid in cash or in stock, is so complete that serious question of the taxability of stock dividends would probably never have been made, if Congress had undertaken to tax only those dividends which represented profits earned during the year in which the dividend was paid or in the year preceding. But this court, construing liberally not only the constitutional grant of power but also the Revenue Act of 1913, held that Congress might tax, and had taxed, to the stockholder dividends received during the year, although earned by the company long before; and even prior to the adoption of the Sixteenth Amendment. *Lynch* v. *Hornby*, 247 U. S. 339.[1] That rule, if indiscriminatingly applied to all stock dividends representing profits earned, might, in view of corporate practice, have worked considerable hardship, and have raised serious questions. Many corporations, without legally capitalising any part of their profits, had assigned definitely some part or all of the annual balances remaining after paying the usual cash dividends, to the uses to which permanent capital is ordinarily applied. Some of the corporations doing this, transferred such balances on their books to "Surplus" account,—distinguishing between such permanent "Surplus" and the "Undivided Profits" account. Other corporations, without this formality, had assumed that the annual accumulating balances carried as undistributed profits were to be treated as capital permanently invested in the business. And still others, without definite assumption of any kind, had

[1] The hardship supposed to have resulted from such a decision has been removed in the Revenue Act of 1916, as amended, by providing in § 31 (b) that such cash dividends shall thereafter be exempt from taxation, if before they are made, all earnings made since February 28, 1913, shall have been distributed. Act of October 3, 1917, c. 63, § 1211, 40 Stat. 338; Act of February 24, 1919, c. 18, § 201 (b), 40 Stat. 1059.

so used undivided profits for capital purposes. To have made the revenue law apply retroactively so as to reach such accumulated profits, if and whenever it should be deemed desirable to capitalize them legally by the issue of additional stock distributed as a dividend to stockholders, would have worked great injustice. Congress endeavored in the Revenue Act of 1916 to guard against any serious hardship which might otherwise have arisen from making taxable stock dividends representing accumulated profits. It did not limit the taxability to stock dividends representing profits earned within the tax year or in the year preceding; but it did limit taxability to such dividends representing profits earned since March 1, 1913. Thereby stockholders were given notice that their share also in undistributed profits accumulating thereafter was at some time to be taxed as income. And Congress sought by § 3 to discourage the postponement of distribution for the illegitimate purpose of evading liability to surtaxes.

Fifth: The decision of this court, that earnings made before the adoption of the Sixteenth Amendment but paid out in cash dividend after its adoption were taxable as income of the stockholder, involved a very liberal construction of the Amendment. To hold now that earnings both made and paid out after the adoption of the Sixteenth Amendment cannot be taxed as income of the stockholder, if paid in the form of a stock dividend, involves an exceeding narrow construction of it. As said by Mr. Chief Justice Marshall in *Brown* v. *Maryland*, 12 Wheat. 419, 446: "To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity."

No decision heretofore rendered by this court requires us to hold that Congress, in providing for the taxation of

stock dividends, exceeded the power conferred upon it by the Sixteenth Amendment. The two cases mainly relied upon to show that this was beyond the power of Congress are *Towne* v. *Eisner*, 245 U. S. 418, which involved a question not of constitutional power but of statutory construction, and *Gibbons* v. *Mahon*, 136 U. S. 549, which involved a question arising between life-tenant and remainderman. So far as concerns *Towne* v. *Eisner*, we have only to bear in mind what was there said (p. 425): "But it is not necessarily true that income means the same thing in the Constitution and the [an] act." [1] *Gibbons* v. *Mahon* is even less an authority for a narrow construction of the power to tax incomes conferred by the Sixteenth Amendment. In that case the court was required to determine how, in the administration of an estate in the District of Columbia, a stock dividend, representing profits, received after the decedent's death, should be disposed of as between life-tenant and remainderman. The question was in essence: What shall the intention of the testator be presumed to have been? On this question there was great diversity of opinion and practice in the courts of English-speaking countries. Three well-defined rules were then competing for acceptance; two of these involve an arbitrary rule of distribution, the third equitable apportionment. See Cook on Corportions, 7th ed., §§ 552–558.

1. The so-called English rule, declared in 1799, by *Brander* v. *Brander*, 4 Ves. Jr. 800, that a dividend rep-

[1] Compare Rugg, C. J., in *Tax Commissioner* v. *Putnam*, 227 Massachusetts, 522, 533: "However strong such an argument might be when urged as to the interpretation of a statute, it is not of prevailing force as to the broad considerations involved in the interpretation of an amendment to the Constitution adopted under the conditions preceding and attendant upon the ratification of the Forty-fourth Amendment."

resenting profits, whether in cash, stock or other property, belongs to the life-tenant if it was a regular or ordinary dividend, and belongs to the remainderman if it was an extraordinary dividend.

2. The so-called Massachusetts rule, declared in 1868 by *Minot* v. *Paine*, 99 Massachusetts, 101, that a dividend representing profits, whether regular, ordinary or extraordinary, if in cash belongs to the life-tenant, and if in stock belongs to the remainderman.

3. The so-called Pennsylvania rule declared in 1857 by *Earp's Appeal*, 28 Pa. St. 368, that where a stock dividend is paid, the court shall inquire into the circumstances under which the fund had been earned and accumulated out of which the dividend, whether a regular, an ordinary or an extraordinary one, was paid. If it finds that the stock dividend was paid out of profits earned since the decedent's death, the stock dividend belongs to the life-tenant; if the court finds that the stock dividend was paid from capital or from profits earned before the decedent's death, the stock dividend belongs to the remainderman.

This court adopted in *Gibbons* v. *Mahon* as the rule of administration for the District of Columbia the so-called Massachusetts rule, the opinion being delivered in 1890 by Mr. Justice Gray. Since then the same question has come up for decision in many of the States. The so-called Massachusetts rule, although approved by this court, has found favor in only a few States. The so-called Pennsylvania rule, on the other hand, has been adopted since by so many of the States (including New York and California), that it has come to be known as the "American Rule." Whether, in view of these facts and the practical results of the operation of the two rules as shown by the experience of the thirty years which have elapsed since the decision in *Gibbons* v. *Mahon*, it might be desirable for this court to reconsider the question there decided, as

some other courts have done (see 29 Harvard Law Review, 551), we have no occasion to consider in this case. For, as this court there pointed out (p. 560), the question involved was one "between the owners of successive interests in particular shares," and not, as in *Bailey* v. *Railroad Co.*, 22 Wall. 604, a question "between the corporation and the government, and [which] depended upon the terms of a statute carefully framed to prevent corporations from evading payment of the tax upon their earnings."

We have, however, not merely argument, we have examples which should convince us that "there is no inherent, necessary and immutable reason why stock dividends should always be treated as capital." *Tax Commissioner* v. *Putnam*, 227 Massachusetts, 522, 533. The Supreme Judicial Court of Massachusetts has steadfastly adhered, despite ever-renewed protest, to the rule that every stock dividend is, as between life-tenant and remainderman, capital and not income. But in construing the Massachusetts Income Tax Amendment, which is substantially identical with the Federal Amendment, that court held that the legislature was thereby empowered to levy an income tax upon stock dividends representing profits. The courts of England have, with some relaxation, adhered to their rule that every extraordinary dividend is, as between life-tenant and remainderman, to be deemed capital. But in 1913 the Judicial Committee of the Privy Council held that a stock dividend representing accumulated profits was taxable like an ordinary cash dividend, *Swan Brewery Co., Ltd.*, v. *Rex*, [1914] A. C. 231. In dismissing the appeal these words of the Chief Justice of the Supreme Court of Western Australia were quoted (p. 236), which show that the facts involved were identical with those in the case at bar: "Had the company distributed the 101,450£ among the shareholders and had the shareholders repaid such sums to the company as the price of the 81,160 new shares, the duty on the 101,450£

would clearly have been payable. Is not this virtually the effect of what was actually done? I think it is."

Sixth: If stock dividends representing profits are held exempt from taxation under the Sixteenth Amendment, the owners of the most successful businesses in America will, as the facts in this case illustrate, be able to escape taxation on a large part of what is actually their income. So far as their profits are represented by stock received as dividends they will pay these taxes not upon their income but only upon the income of their income. That such a result was intended by the people of the United States when adopting the Sixteenth Amendment is inconceivable. Our sole duty is to ascertain their intent as therein expressed.[1] In terse, comprehensive language befitting the Constitution, they empowered Congress "to lay and collect taxes on incomes, from whatever source derived." They intended to include thereby everything which by reasonable understanding can fairly be regarded as income. That stock dividends representing profits are so regarded, not only by the plain people but by investors and financiers, and by most of the courts of the country, is shown, beyond peradventure, by their acts and by their utterances. It seems to me clear, therefore, that Congress possesses the power which it exercised to make dividends representing profits, taxable as income, whether the medium in which the dividend is paid be cash or stock, and that it may define, as it has done, what dividends repre-

[1] Compare Rugg, C. J., *Tax Commissioner* v. *Putnam*, 227 Massachusetts, 522, 524: "It is a grant from the sovereign people and not the exercise of a delegated power. It is a statement of general principles and not a specification of details. Amendments to such a charter of government ought to be construed in the same spirit and according to the same rules as the original. It is to be interpreted as the Constitution of a State and not as a statute or an ordinary piece of legislation. Its words must be given a construction adapted to carry into effect its purpose."

senting profits shall be deemed income. It surely is not clear that the enactment exceeds the power granted by the Sixteenth Amendment. And, as this court has so often said, the high prerogative of declaring an act of Congress invalid, should never be exercised except in a clear case.[1] "It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt." *Ogden* v. *Saunders*, 12 Wheat. 213, 270.

MR. JUSTICE CLARKE concurs in this opinion.

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[1] "It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Sinking-Fund Cases*, 99 U. S. 700, 718 (1878). See also *Legal Tender Cases*, 12 Wall. 457, 531 (1870); *Trade-Mark Cases*, 100 U. S. 82, 96 (1879). See American Doctrine of Constitutional Law, by James B. Thayer, 7 Harvard Law Review, 129, 142.

"With the exception of the extraordinary decree rendered in the Dred Scott Case, . . . all of the acts or the portions of the acts of Congress invalidated by the courts before 1868 related to the organization of courts. Denying the power of Congress to make notes legal tender seems to be the first departure from this rule." Haines, American Doctrine of Judicial Supremacy, p. 288. The first legal tender decision was overruled in part two years later (1870), *Legal Tender Cases*, 12 Wall. 457; and again in 1883, *Legal Tender Case*, 110 U. S. 421.

PIERCE ET AL. v. UNITED STATES.

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

No. 234. Argued November 18, 19, 1919.—Decided March 8, 1920.

The decision in another case of a constitutional question which formed the jurisdictional basis for a direct writ of error previously sued out under Jud. Code, § 238, does not divest this court of its jurisdiction to determine the other questions raised in the record. P. 242.

In order to constitute a conspiracy, within § 4 of the Espionage Act, to commit a substantive offense defined in § 3, it is not essential that the conspirators shall have agreed in advance upon the precise method of violating the law; and, while the averment of the conspiracy cannot be aided by the allegations of overt acts and the conspiracy is not punishable unless such acts were committed, they need not be in themselves criminal, still less constitute the very crime which is the object of the conspiracy. P. 243.

Averments in such an indictment that defendants unlawfully, wilfully or feloniously committed the forbidden acts import an unlawful motive. P. 244.

Whether statements contained in a pamphlet circulated by defendants tended to produce the consequences forbidden by the Espionage Act, (§ 3), as alleged, *held* a matter to be determined by the jury, and not by the court on demurrer to the indictment. *Id.*

Evidence in the case examined and *held* sufficient to warrant the jury's finding that defendants, in violation of the Espionage Act, conspired to commit, and committed, the offense of attempting to cause insubordination and disloyalty and refusal of duty in the military and naval forces, and made and conveyed false statements with intent to interfere with the operation and success of those forces, in the war with Germany, by circulating pamphlets and other printed matter tending in the circumstances to produce those results. P. 245.

The fact that defendants distributed such pamphlets with a full understanding of their contents furnished of itself a ground for attributing to them an intent, and for finding that they attempted, to bring about any and all such consequences as reasonably might be anticipated from their distribution. P. 249.

In a prosecution for circulating false statements with intent to interfere with the operation and success of the military and naval forces, in violation of the Espionage Act, § 3, where the falsity of the statements in question appears plainly, as a matter of common knowledge and public fact, other evidence on that subject is not needed in order to sustain a verdict of guilty. P. 250.

In such cases it is for the jury to determine whether the statements circulated should be taken literally or in an innocent, figurative sense, in view of the class and character of the people among whom the statements were circulated. P. 251.

To circulate such false statements recklessly, without effort to ascertain the truth, is equivalent to circulating them with knowledge of their falsity. *Id.*

The fact that the statements in question do not, to the common understanding, purport to convey anything new but only to interpret or comment on matters pretended to be facts of public knowledge, does not remove them from the purview of § 3 of the Espionage Act. P. 252.

The insufficiency of one of several counts of an indictment upon which concurrent sentences have been imposed does not necessitate reversal where the other counts sustain the total punishment inflicted. *Id.*

Affirmed.

THE case is stated in the opinion.

Mr. Frederick A. Mohr for plaintiffs in error.

Mr. Assistant Attorney General Stewart, with whom *Mr. W. C. Herron* was on the brief, for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

Plaintiffs in error were jointly indicted October 2, 1917, in the United States District Court for the Northern District of New York, upon six counts, of which the 4th and 5th were struck out by agreement at the trial and the 1st is now abandoned by the Government.

The 2d count charged that throughout the period from

April 6, 1917, to the date of the presentation of the indictment, the United States being at war with the Imperial German Government, defendants at the City of Albany, in the Northern District of New York and within the jurisdiction, etc., unlawfully and feloniously conspired together and with other persons to the grand jurors unknown to commit an offense against the United States, to wit, "The offense of unlawfully, feloniously and willfully attempting to cause insubordination, disloyalty and refusal of duty in the military and naval forces of the United States when the United States was at war and to the injury of the United States in, through, and by personal solicitations, public speeches and distributing and publicly circulating throughout the United States certain articles printed in pamphlets called 'The Price We Pay,' which said pamphlets were to be distributed publicly throughout the Northern District of New York, and which said solicitations, speeches, articles and pamphlets would and should persistently urge insubordination, disloyalty and refusal of duty in the said military and naval forces of the United States to the injury of the United States and its military and naval service and failure and refusal on the part of available persons to enlist therein and should and would through and by means above mentioned obstruct the recruiting and enlistment service of the United States when the United States was at war to the injury of that service and of the United States." For overt acts it was alleged that certain of the defendants, in the City of Albany at times specified, made personal solicitations and public speeches, and especially that they published and distributed to certain persons named and other persons to the grand jurors unknown certain pamphlets headed "The Price We Pay," a copy of which was annexed to the indictment and made a part of it.

The 3d count charged that during the same period and on August 26, 1917, the United States being at war, etc.,

defendants at the City of Albany, etc., wilfully and feloniously made, distributed, and conveyed to certain persons named and others to the grand jurors unknown certain false reports and false statements in certain pamphlets attached to and made a part of the indictment and headed "The Price We Pay," which false statements were in part as shown by certain extracts quoted from the pamphlet, with intent to interfere with the operation and success of the military and naval forces of the United States.

The 6th count charged that at the same place, during the same period and on August 27, 1917, while the United States was at war, etc., defendants willfully and feloniously attempted to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval service of the United States by means of the publication, circulation, and distribution of "The Price We Pay" to certain persons named and others to the grand jurors unknown.

A general demurrer was overruled, whereupon defendants pleaded not guilty and were put on trial together, with the result that Pierce, Creo, and Zeilman were found guilty upon the 1st, 2d, 3d and 6th counts, and Nelson upon the 3d count only. Each defendant was separately sentenced to a term of imprisonment upon each count on which he had been found guilty; the several sentences of Pierce, Creo, and Zeilman, however, to run concurrently.

The present direct writ of error was sued out under § 238, Judicial Code, because of contentions that the Selective Draft Act and the Espionage Act were unconstitutional. These have since been set at rest. *Selective Draft Law Cases*, 245 U. S. 366; *Schenck* v. *United States*, 249 U. S. 47, 51; *Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211, 215. But our jurisdiction continues for the purpose of disposing of other questions raised in the record. *Brolan* v. *United States*, 236 U. S. 216.

It is insisted that there was error in refusing to sustain the demurrer, and this on the ground that (1) the facts and circumstances upon which the allegation of conspiracy rested were not stated; (2) there was a failure to set forth facts or circumstances showing unlawful motive or intent; (3) there was a failure to show a clear and present danger that the distribution of the pamphlet would bring about the evils that Congress sought to prevent by the enactment of the Espionage Act; and (4) that the statements contained in the pamphlet were not such as would naturally produce the forbidden consequences.

What we have recited of the 2d count shows a sufficiently definite averment of a conspiracy and overt acts under the provisions of Title I of the Espionage Act.[1] The 4th section makes criminal a conspiracy "to violate the provisions of sections two or three of this title," provided one or more of the conspirators do any act to

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[1] Extract from Act of June 15, 1917, c. 30, 40 Stat. 217, 219.

Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

Sec. 4. If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine.

effect the object of the conspiracy. Such a conspiracy, thus attempted to be carried into effect, is none the less punishable because the conspirators fail to agree in advance upon the precise method in which the law shall be violated. It is true the averment of the conspiracy cannot be aided by the allegations respecting the overt acts. *United States* v. *Britton*, 108 U. S. 199, 205; *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 536. On the other hand, while under § 4 of the Espionage Act, as under § 37 of the Criminal Code, a mere conspiracy, without overt act done in pursuance of it, is not punishable criminally, yet the overt act need not be in and of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy. *United States* v. *Rabinowich*, 238 U. S. 78, 86; *Goldman* v. *United States*, 245 U. S. 474, 477.

As to the second point: Averments that defendants unlawfully, willfully, or feloniously committed the forbidden acts fairly import an unlawful motive; the 3rd count specifically avers such a motive; the conspiracy charged in the 2d and the willful attempt charged in the 6th necessarily involve unlawful motives.

The third and fourth objections point to no infirmity in the averments of the indictment. Whether the statements contained in the pamphlet had a natural tendency to produce the forbidden consequences, as alleged, was a question to be determined not upon demurrer but by the jury at the trial. There was no error in overruling the demurrer.

Upon the trial, defendants' counsel moved that the jury be directed to acquit the defendants, upon the ground that the evidence was not sufficient to sustain a conviction. Under the exceptions taken to the refusal of this motion it is urged that there was no proof (a) of conspiracy, (b) of criminal purpose or intent, (c) of the falsity of the statements contained in the pamphlet cir-

culated, (d) of knowledge on defendants' part of such falsity, or (e) of circumstances creating a danger that its circulation would produce the evils which Congress sought to prevent; and further (f) that the pamphlet itself could not legitimately be construed as tending to produce the prohibited consequences.

The pamphlet—"The Price We Pay"—was a highly colored and sensational document, issued by the national office of the Socialist Party at Chicago, Illinois, and fairly to be construed as a protest against the further prosecution of the war by the United States. It contained much in the way of denunciation of war in general, the pending war in particular; something in the way of assertion that under Socialism things would be better; little or nothing in the way of fact or argument to support the assertion. It is too long to be quoted in full. The following extracts will suffice; those indicated by italics being the same that were set forth in the body of the 3d count:

"Conscription is upon us; the draft law is a fact!

"*Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the army;*

"Stand them up in long rows, break them into squads and platoons, teach them to deploy and wheel;

"Guns will be put into their hands; they will be taught not to think, only to obey without questioning.

"Then they will be shipped thru the submarine zone by the hundreds of thousands to the bloody quagmire of Europe.

"Into that seething, heaving swamp of torn flesh and floating entrails they will be plunged, in regiments, divisions and armies, screaming as they go.

"Agonies of torture will rend their flesh from their sinews, will crack their bones and dissolve their lungs; every pang will be multiplied in its passage to you.

"Black death will be a guest at every American fireside. Mothers and fathers and sisters, wives and sweethearts will know the weight of that awful vacancy left by the bullet which finds its mark.

"*And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size;*

"And still the toll of death will grow.

* * * * * * * *

"The manhood of America gazes at that seething, heaving swamp of bloody carrion in Europe, and say 'Must we—be that!'

"You cannot avoid it; you are being dragged, whipped, lashed, hurled into it; Your flesh and brains and entrails must be crushed out of you and poured into that mass of festering decay;

"It is the price you pay for your stupidity—you who have rejected Socialism.

* * * * * * * * *

"Food prices go up like skyrockets; and show no sign of bursting and coming down.

* * * * * * * *

"*The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has no time to protect the food supply from gamblers.*

* * * * * * * *

"This war began over commercial routes and ports and rights; and underneath all the talk about democracy versus autocracy, you hear a continual note, and undercurrent, a subdued refrain;

"'Get ready for the commercial war that will follow this war.'

"Commercial war preceded this war; it gave rise to this war; it now gives point and meaning to this war;

* * * * * * * *

"This, you say, is a war for the rights of small nations and the first land sighted when you sail across the Atlantic is the nation of Ireland, which has suffered from England for three centuries more than what Germany has inflicted upon Belgium for three years.

"But go to it! Believe everything you are told—you always have, and doubtless always will, believe them.

* * * * * * * *

"For this war — as every one who thinks or knows anything will say, whenever truth-telling becomes safe and possible again,—This war is to determine the question, whether the chambers of commerce of the allied nations or of the Central Empires have the superior right to exploit undeveloped countries.

"It is to determine whether interest, dividends and profits shall be paid to investors speaking German or those speaking English and French.

"*Our entry into it was determined by the certainty that if the allies do not win, J. P. Morgan's loans to the allies will be repudiated, and those American investors who bit on his promises would be hooked.*"

These expressions were interspersed with suggestions that the war was the result of the rejection of Socialism, and that Socialism was the "salvation of the human race."

It was in evidence that defendants were members of the Socialist Party—a party "organized in locals throughout the country"—and affiliated with a local branch in the City of Albany. There was evidence that at a meeting of that branch, held July 11, 1917, at which Pierce was present, the question of distributing "The Price We Pay" was brought up, sample copies obtained from the national organization at Chicago having been produced for examination and consideration; that the pamphlet was discussed, as well as the question of ordering a large number of copies from the national organization for distribution; it was stated that criminal proceed-

ings were pending in the United States District Court for the District of Maryland against parties indicted for distributing the same pamphlet; some of the members present, one of them an attorney, advised against its distribution, and a motion was adopted not to distribute it until it was known to be legal. However, some action appears to have been taken towards procuring copies for distribution, for on July 17th a large bundle of them, said to have been 5,000 copies, was delivered at Pierce's house by the literature agent of the Albany local. At a meeting held July 25 the subject was again brought up, it having become known that in the criminal proceedings before mentioned the court had directed a verdict of acquittal; thereupon the resolution of July 11 was rescinded and distributors were called for. On July 29, defendants Pierce, Creo, and Zeilman met at Pierce's house about half past 5 o'clock in the morning, and immediately began distributing the pamphlets in large numbers throughout the City of Albany. Each of them took about 500 copies, and having agreed among themselves about the division of the territory, they went from house to house, leaving a copy upon each doorstep. They repeated this on successive Sundays until August 26, when they were arrested. Nelson acted with them as a distributor on the latter date, and perhaps on one previous occasion.

There was evidence that in some instances a leaflet entitled "Protect Your Rights," and bearing the Chicago address of the national office of the Socialist Party, was folded between the pages of the pamphlet. The leaflet was a fervid appeal to the reader to join the Socialist Party, upon the ground that it was the only organization that was opposing the war. It declared among other things: "This organization has opposed war and conscription. It is still opposed to war and conscription. . . . Do you want to help in this struggle? . . . The party needs you now as it never needed you before. You

need the party now as you never needed it before. Men are going to give up their lives for a cause which you are convinced is neither great or noble, will you then begrudge your best efforts to the cause that you feel certain is both great and noble and in which lives the only hope and promise of the future?" And there was evidence of declarations made by Pierce on the 16th and 17th of August, amounting to an acknowledgment of a treasonable purpose in opposing the draft, which he sought to excuse on the ground that he had "no use for England."

It was shown without dispute that defendants distributed the pamphlet—"The Price We Pay"—with full understanding of its contents; and this of itself furnished a ground for attributing to them an intent to bring about, and for finding that they attempted to bring about, any and all such consequences as reasonably might be anticipated from its distribution. If its probable effect was at all disputable, at least the jury fairly might believe that, under the circumstances existing, it would have a tendency to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States; that it amounted to an obstruction of the recruiting and enlistment service; and that it was intended to interfere with the success of our military and naval forces in the war in which the United States was then engaged. Evidently it was intended, as the jury found, to interfere with the conscription and recruitment services; to cause men eligible for the service to evade the draft; to bring home to them, and especially to their parents, sisters, wives, and sweethearts, a sense of impending personal loss, calculated to discourage the young men from entering the service; to arouse suspicion as to whether the chief law officer of the Government was not more concerned in enforcing the strictness of military discipline than in protecting the people against improper speculation in their food supply; and to produce a belief that our

participation in the war was the product of sordid and sinister motives, rather than a design to protect the interests and maintain the honor of the United States.

What interpretation ought to be placed upon the pamphlet, what would be the probable effect of distributing it in the mode adopted, and what were defendants' motives in doing this, were questions for the jury, not the court, to decide. Defendants took the witness-stand and severally testified, in effect, that their sole purpose was to gain converts for Socialism, not to interfere with the operation or success of the naval or military forces of the United States. But their evidence was far from conclusive, and the jury very reasonably might find—as evidently they did—that the protestations of innocence were insincere, and that the real purpose of defendants—indeed, the real object of the pamphlet—was to hamper the Government in the prosecution of the war.

Whether the printed words would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide in view of all the circumstances of the time and considering the place and manner of distribution. *Schenck* v. *United States*, 249 U. S. 47, 52; *Frohwerk* v. *United States*, 249 U. S. 204, 208; *Debs* v. *United States*, 249 U. S. 211, 215.

Concert of action on the part of Pierce, Creo, and Zeilman clearly appeared, and, taken in connection with the nature of the pamphlet and their knowledge of its contents, furnished abundant evidence of a conspiracy and overt acts to sustain their conviction upon the second count.

The validity of the conviction upon the third count (the only one that includes Nelson), depends upon whether there was lawful evidence of the falsity of the statements contained in the pamphlet and tending to show that,

knowing they were false, or disregarding their probable falsity, defendants willfully circulated it, with intent to interfere with the operation or success of the military or naval forces of the United States. The criticism of the evidence admitted to show the untruth of the statements about the Attorney General and about J. P. Morgan's loans to the Allies is not well founded; the evidence was admissible; but we hardly see that it was needed to convince a reasonable jury of the falsity of these and other statements contained in the pamphlet. Common knowledge (not to mention the President's Address to Congress of April 2, 1917, and the Joint Resolution of April 6 declaring war, which were introduced in evidence) would have sufficed to show at least that the statements as to the causes that led to the entry of the United States into the war against Germany were grossly false; and such common knowledge went to prove also that defendants knew they were untrue. That they were false if taken in a literal sense hardly is disputed. It is argued that they ought not to be taken literally. But when it is remembered that the pamphlet was intended to be circulated, and so far as defendants acted in the matter was circulated, among readers of all classes and conditions, it cannot be said as matter of law that no considerable number of them would understand the statements in a literal sense and take them seriously. The jury was warranted in finding the statements false in fact, and known to be so by the defendants, or else distributed recklessly, without effort to ascertain the truth (see *Cooper* v. *Schlesinger*, 111 U. S. 148, 155), and circulated willfully in order to interfere with the success of the forces of the United States. This is sufficient to sustain the conviction of all of the defendants upon the third count.

There being substantial evidence in support of the charges, the court would have erred if it had peremptorily directed an acquittal upon any of the counts. The

question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt was for the jury, not the court, to decide.

It is suggested that the clause of § 3—"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies"—cannot be construed to cover statements that on their face, to the common understanding, do not purport to convey anything new, but only to interpret or comment on matters pretended to be facts of public knowledge; and that however false the statements and with whatever evil purpose circulated, they are not punishable if accompanied with a pretense of commenting upon them as matters of public concern. We cannot accept such a construction; it unduly restricts the natural meaning of the clause, leaves little for it to operate upon, and disregards the context and the circumstances under which the statute was passed. In effect, it would allow the professed advocate of disloyalty to escape responsibility for statements however audaciously false, so long as he did but reiterate what had been said before; while his ignorant dupes, believing his statements and thereby persuaded to obstruct the recruiting or enlistment service, would be punishable by fine or imprisonment under the same section.

Other assignments of error pointing to rulings upon evidence and instructions given or refused to be given to the jury are sufficiently disposed of by what we have said.

The conceded insufficiency of the first count of the indictment does not warrant a reversal, since the sentences imposed upon Pierce, Creo, and Zeilman did not exceed that which lawfully might have been imposed under the second, third, or sixth counts, so that the concurrent sentence under the first count adds nothing to their punish-

ment. *Claassen* v. *United States*, 142 U. S. 140, 146; *Evans* v. *United States*, (2 cases) 153 U. S. 584, 595, 608; *Putnam* v. *United States*, 162 U. S. 687, 714; *Abrams* v. *United States*, 250 U. S. 616, 619.

Judgments affirmed.

MR. JUSTICE BRANDEIS, dissenting, delivered the following opinion in which MR. JUSTICE HOLMES concurred.

What is called "distributing literature" is a means commonly used by the Socialist Party to increase its membership and otherwise to advance the cause it advocates. To this end the national organization with headquarters at Chicago publishes such "literature" from time to time and sends sample copies to the local organizations. These, when they approve, purchase copies and call upon members to volunteer for service in making the distribution locally. Sometime before July 11, 1917, a local of the Socialist Party at Albany, New York, received from the national organization sample copies of a four-page leaflet entitled "The Price We Pay," written by Irwin St. John Tucker, an Episcopal clergyman and a man of sufficient prominence to have been included in the 1916–1917 edition of "Who's Who in America." The proposal to distribute this leaflet came up for action at a meeting of the Albany local held on July 11, 1917. A member who was a lawyer called attention to the fact that the question whether it was legal to distribute this leaflet was involved in a case pending in Baltimore in the District Court of the United States; and it was voted "not to distribute 'The Price We Pay' until we know if it is legal." The case referred to was an indictment under the Selective Draft Act for conspiracy to obstruct recruiting by means of distributing the leaflet. Shortly after the July 11th meeting it became known that District Judge Rose had directed an acquittal in that case; and at the next meet-

ing of the local, held July 25th, it was voted to rescind the motion "against distributing 'The Price We Pay' and call for distributors." Four members of the local, two of them native Americans, one a naturalized citizen, and the fourth a foreigner who had filed his first naturalization papers, volunteered as distributors. They distributed about five thousand copies by hand in Albany.

District Judge Rose in directing an acquittal had said of the leaflet in the Baltimore case:

"I do not think there is anything to go to the jury in this case.

"You may have your own opinions about that circular; I have very strong individual opinions about it, and as to the wisdom and fairness of what is said there; but so far as I can see it is principally a circular intended to induce people to subscribe to Socialist newspapers and to get recruits for the Socialist Party. I do not think that we ought to attempt to prosecute people for that kind of thing. It may be very unwise in its effect, and it may be unpatriotic at that particular time and place, but it would be going very far indeed, further, I think than any law that I know of would justify, to hold that there has been made out any case here even tending to show that there was an attempt to persuade men not to obey the law."

In New York a different view was taken; and an indictment in six counts was found against the four distributors. Two of the counts were eliminated at the trial. On the other four there were convictions, and on each a sentence of fine and imprisonment. But one of the four counts was abandoned by the Government in this court. There remain for consideration count three, which charges a violation of § 3 of the Espionage Act by making false reports and false statements, with the intent "to interfere with the operation and success of the military and naval forces"; and counts two and six, also involving § 3 of the Espionage Act, the one for conspiring, the other for at-

tempting, "to cause insubordination, disloyalty and refusal of duty in the military and naval forces." Demurrers to the several counts and motions that a verdict be directed for the several defendants were overruled.

In considering the several counts it is important to note that three classes of offences are included in § 3 of the Espionage Act, and that the essentials of liability under them differ materially. The first class, under which count three is drawn, is the offence of making or conveying false statements or reports with intent to interfere with the operations or success of the military and naval forces. The second, involved in counts two and six is that of attempting to cause insubordination, disloyalty, mutiny, or refusal of duty. With the third, that of obstructing the recruiting and enlistment service, we have, since the abandonment of the first count, no concern here. Although the uttering or publishing of the words charged be admitted, there necessarily arises in every case—whether the offence charged be of the first class or of the second—the question whether the words were used "in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent," *Schenck* v. *United States*, 249 U. S. 47, 52; and also the question whether the act of uttering or publishing was done willfully, that is, with the intent to produce the result which the Congress sought to prevent. But in cases of the first class three additional elements of the crime must be established, namely:

(1) The statement or report must be of something capable of being proved false in fact. The expression of an opinion, for instance, whether sound or unsound, might conceivably afford a sufficient basis for the charge of attempting to cause insubordination, disloyalty or refusal of duty, or for the charge of obstructing recruiting; but, because an opinion is not capable of being proved

false in fact, a statement of it cannot be made the basis of a prosecution of the first class.

(2) The statement or report must be proved to be false.

(3) The statement or report must be known by the defendant to be false when made or conveyed.

In the case at bar the alleged offence consists wholly in distributing leaflets which had been written and published by others. The fact of distribution is admitted. But every other element of the two classes of crime charged must be established in order to justify conviction. With unimportant exceptions to be discussed later, the only evidence introduced to establish the several elements of both of the crimes charged is the leaflet itself; and the leaflet is unaffected by extraneous evidence which might give to words used therein special meaning or effect. In order to determine whether the leaflet furnishes any evidence to establish any of the above enumerated elements of the offences charged, the whole leaflet must necessarily be read. It is as follows:

"THE PRICE WE PAY.

By Irwin St. John Tucker.

I.

"Conscription is upon us: the draft law is a fact!

Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the army;

Stand them up in long rows, break them into squads and platoons, teach them to deploy and wheel;

Guns will be put into their hands; they will be taught not to think, only to obey without questioning.

Then they will be shipped thru the submarine zone by the hundreds of thousands to the bloody quagmire of Europe.

Into that seething, heaving swamp of torn flesh and

floating entrails they will be plunged, in regiments, divisions and armies, screaming as they go.

Agonies of torture will rend their flesh from their sinews, will crack their bones and dissolve their lungs; every pang will be multiplied in its passage to you.

Black death will be a guest at every American fireside. Mothers and fathers and sisters, wives and sweethearts will know the weight of that awful vacancy left by the bullet which finds its mark.

And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size;

And still the toll of death will grow,

Let them come! Let death and desolation make barren every Home! Let the agony of war crack every parent's heart! Let the horrors and miseries of the world-downfall swamp the happiness of every hearthstone!

Then perhaps you will believe what we have been telling you! For war is the price of your stupidity, you who have rejected Socialism!

II.

"Yesterday I saw moving pictures of the Battle of the Somme. A company of Highlanders was shown, young and handsome in their kilts and brass helmets and bright plaids.

They laughed and joked as they stood on the screen in their ranks at ease, waiting the command to advance.

The camera shows rank after rank, standing strong and erect, smoking and chaffing with one another;

Then it shows a sign: 'Less than 20 per cent. of these soldiers were alive at the close of the day.'

Only one in five remained of all those laddies, when sunset came, the rest were crumpled masses of carrion under their torn plaids.

Many a highland home will wail and croon for many a

year, because of these crumpled masses of carrion, wrapped in their plaids, upon a far French hillside.

I saw a regiment of Germans charging downhill against machine gunfire. They melted away like snowflakes falling into hot water.

The hospital camps were shown, with hundreds and thousands of wounded men in all stages of pain and suffering, herded like animals, milling around like cattle in the slaughter pens.

All the horror and agony of war were exhibited; and at the end a flag was thrown on the screen and a proclamation said: 'Enlist for your Country!' The applause was very thin and scattering; and as we went out, most of the men shook their heads and said:

'That's a hell of a poor recruiting scheme!'

For the men of this land have been fed full with horror during the past three years; and tho the call for volunteers has become wild, frantic, desperate; tho the posters scream from every billboard, and tho parades and red fire inflame the atmosphere in every town;

The manhood of America gazes at that seething, heaving swamp of bloody carrion in Europe, and say 'Must we—be that!'

You cannot avoid it; you are being dragged, whipped, lashed, hurled into it; Your flesh and brains and entrails must be crushed out of you and poured into that mass of festering decay;

It is the price you pay for your stupidity—you who have rejected Socialism.

III.

"Food prices go up like skyrockets; and show no sign of bursting and coming down.

Wheat, corn, potatoes, are far above the Civil War mark; eggs, butter, meat—all these things are almost beyond a poor family's reach.

The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has no time to protect the food supply from gamblers.

Starvation begins to stare us in the face—and we, people of the richest and most productive land on earth are told to starve ourselves yet further because our allies must be fed.

Submarines are steadily sending to the fishes millions of tons of food stuffs; and still we build more ships, and send more food, and more and more is sunk;

Frantically we grub in the earth and sow and tend and reap; and then as frantically load the food in ships, and then as frantically sink with them—

We, the 'civilized nations' of the world!

While the children of the poor clamor for their bread and the well to do shake their heads and wonder what on earth the poor folks are doing;

The poor folks are growling and muttering with savage side-long glances, and are rolling up their sleeves.

For the price they pay for their stupidity is getting beyond their power to pay!

IV.

"Frightful reports are being made of the ravages of venereal diseases in the army training camps, and in the barracks where the girl munition workers live.

One of the great nations lost more men thru loathsome immoral diseases than on the firing line, during the first 18 months of the war.

Back from the Mexican border our boys come, spreading the curse of the great Black Plague among hundreds of thousands of homes; blasting the lives of innocent women and unborn babes,

Over in Europe ten millions of women are deprived of their husbands, and fifty millions of babies can never be;

Of those women who will have their mates given back to them, there are twenty millions who will have ruined wrecks of men; mentally deranged, physically broken, morally rotten;

Future generations of families are made impossible; blackness and desolation instead of happiness and love will reign where the homes of the future should be;

And all because you believed the silly lie, that 'Socialism would destroy the home!'

Pound on, guns of the embattled host; wreck yet more homes, kill yet more husbands and fathers, rob yet more maidens of their sweethearts, yet more babies of their fathers;

That is the price the world pays for believing the monstrous, damnable, outrageous lie that Socialism would destroy the home!

Now the homes of the world are being destroyed; every one of them would have been saved by Socialism. But you would not believe. Now pay the price!

V.

"This war, you say, is all caused by the Kaiser; and we are fighting for democracy against autocracy. Once dethrone the Kaiser and there will be permanent peace.

That is what they said about Napoleon. And in the century since Napoleon was overthrown there has been more and greater wars than the world ever saw before.

There were wars before Germany ever existed; before Rome ruled; before Egypt dominated the ages.

War has been universal; and the cause of war is always the same. Somebody wanted something somebody else possessed and they fought over the ownership of it.

This war began over commercial routes and ports and rights; and underneath all the talk about democracy versus autocracy, you hear a continual note, and undercurrent, a subdued refrain;

'Get ready for the commercial war that will follow this war.'

Commercial war preceded this war; it gave rise to this war; it now gives point and meaning to this war;

And as soon as the guns are stilled and the dead are buried, commercial forces will prepare for the next bloody struggle over routes and ports and rights, coal mines and railroads;

For these are the essence of this, as of all other wars!

This, you say, is a war for the rights of small nations and the first land sighted when you sail across the Atlantic is the nation of Ireland, which has suffered from England for three centuries more than what Germany has inflicted upon Belgium for three years.

But go to it! Believe everything you are told—you always have and doubtless always will, believe them.

Only do retain this much reason; when you have paid the price, the last and uttermost price; and have not received what you were told you were fighting for—namely Democracy—

Then remember that the price you paid was not the purchase price for justice, but the penalty price for your stupidity!

VI.

"We are beholding the spectacle of whole nations working as one person for the accomplishment of a single end—namely killing.

Every man, every woman, every child, must 'do his bit' in the service of destruction.

We have been telling you for, lo, these many years that the whole nation could be mobilized and every man, woman and child induced to do his bit for the service of humanity but you have laughed at us.

Now you call every person traitor, slacker, pro-enemy who will not go crazy on the subject of killing; and you

have turned the whole energy of the nations of the world into the service of their kings for the purpose of killing—killing—killing.

Why would you not believe us when we told you that it was possible to coöperate for the saving of life?

Why were you not interested when we begged you to work all together to build, instead to destroy? To preserve, instead of to murder?

Why did you ridicule us and call us impractical dreamers when we prophesied a world-state of fellowworkers, each man creating for the benefit of all the world, and the whole world creating for the benefit of each man?

Those idle taunts, those thoughtless jeers, that refusal to listen, to be fair-minded—you are paying for them now.

— Lo, the price you pay! Lo, the price your children will pay. Lo, the agony, the death, the blood, the unforgettable sorrow,—

The price of your stupidity!

For this war—as every one who thinks or knows anything will say, whenever truth-telling becomes safe and possible again,—This war is to determine the question, whether the chambers of commerce of the allied nations or of the Central Empires have the superior right to exploit undeveloped countries.

It is to determine whether interest, dividends and profits shall be paid to investors speaking German or those speaking English and French.

Our entry into it was determined by the certainty that if the allies do not win, J. P. Morgan's loans to the allies will be repudiated, and those American investors who bit on his promises would be hooked.

Socialism would have settled that question; it would determine that to every producer shall be given all the value of what he produces; so that nothing would be left over for exploiters or investors.

With that great question settled there would be no cause for war.

Until the question of surplus profits is settled that way, wars will continue; each war being the prelude to a still vaster and greater outburst of hell;

Until the world becomes weary of paying the stupendous price for its own folly;

Until those who are sent out to maim and murder one another for the profit of bankers and investors determine to have and to hold what they have fought for;

Until money is no more sacred than human blood;

Until human life refuses to sacrifice itself for private gain;

Until by the explosion of millions of tons of dynamite the stupidity of the human race is blown away, and Socialism is known for what it is, the salvation of the human race;

Until then—you will keep on paying the price!

IF THIS INTERESTS YOU, PASS IT ON.

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Subscribe to The American Socialist, published weekly by the National Office, Socialist Party, 803 West Madison Street, Chicago, Ill., 50 cents per year, 25 cents for 6 months. It is a paper without a muzzle.

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Cut this out or copy it and send it to us. We will see that you promptly receive the desired information.

* * * * * * * *

To the National Office, Socialist Party, 803 W. Madison St., Chicago, Ill.

I am interested in the Socialist Party and its principles. Please send me samples of its literature.

Name.....

Address.....

City.....State....."

First: From this leaflet, which is divided into six

chapters, there are set forth in count three, five sentences as constituting the false statements or reports wilfully conveyed by defendants with the intent to interfere with the operation and success of the military and naval forces of the United States.

(*a*) Two sentences are culled from the first chapter. They follow immediately after the words: "Conscription is upon us; the draft law is a fact"—and a third sentence culled follows a little later. They are:

"Into your homes the recruiting officers are coming. They will take your sons of military age and impress them into the army. . . . And still the recruiting officers will come; seizing age after age, mounting up to the elder ones and taking the younger ones as they grow to soldier size."

To prove the alleged falsity of these statements the Government gravely called as a witness a major in the regular army with 28 years' experience, who has been assigned since July 5, 1917, to recruiting work. He testified that "recruiting" has to do with the volunteer service and has nothing to do with the drafting system and that the word impress has no place in the recruiting service. The subject of his testimony was a matter not of fact but of law; and as a statement of law it was erroneous. That "recruiting is gaining fresh supplies for the forces, as well by draft as otherwise" had been assumed by the Circuit Court of Appeals for that circuit in *Masses Publishing Co.* v. *Patten*, 246 Fed. Rep. 24 (decided eleven days before this testimony was given), and was later expressly held by this court in *Schenck* v. *United States*, 249 U. S. 47, 53. The third of the sentences charged as false was obviously neither a statement nor a report, but a prediction; and it was later verified.[1] That the prediction

[1] On May 20, 1918, c. 79, 40 Stat. 557, Congress, by joint resolution, extended the draft to males who had since June 5, 1917, attained the age of twenty-one and authorized the President to extend it to those

made in the leaflet was later verified is, of course, immaterial; but the fact shows the danger of extending beyond its appropriate sphere the scope of a charge of falsity.

(*b*) The fourth sentence set forth in the third count as a false statement was culled from the third chapter of the leaflet and is this:

"The Attorney General of the United States is so busy sending to prison men who do not stand up when the Star Spangled Banner is played, that he has not time to protect the food supply from gamblers."

To prove the falsity of this statement the Government called the United States Attorney for that district who testified that no federal law makes it a crime not to stand up when the "Star Spangled Banner" is played and that he has no knowledge of any one being prosecuted for failure to do so. The presiding judge supplemented this testimony by a ruling that the Attorney General, like every officer of the Government, is presumed to do his duty and not to violate his duty and that this presumption should obtain unless evidence to the contrary was adduced. The Regulations of the Army (No. 378, Edition of 1913, p. 88) provide that if the National Anthem is played in any place those present, whether in uniform or in civilian clothes, shall stand until the last note of the anthem. The regulation is expressly limited in its operation to those belonging to the military service, although the practice was commonly observed by civilians throughout the war.

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thereafter attaining that age. Under this act, June, 5, 1918, was fixed as the date for the Second Registration. Subsequently, August 24, 1918, was fixed for the supplemental registration of all coming of age between June 5, 1918, and August 24, 1918. 40 Stat. 1834; 40 Stat. 1781. By Act of August 31, 1918, c. 166, 40 Stat. 955, the provisions of the draft law were extended to persons between the ages of eighteen and forty-five. Under this act, September 12, 1918, was fixed as the date for the Third Registration. 40 Stat. 1840.

There was no federal law imposing such action upon them. The Attorney General, who does not enforce Army Regulations, was, therefore, not engaged in sending men to prison for that offence. But when the passage in question is read in connection with the rest of the chapter, it seems clear that it was intended, not as a statement of fact, but as a criticism of the Department of Justice for devoting its efforts to prosecutions for acts or omissions indicating lack of sympathy with the war, rather than to protecting the community from profiteering by prosecuting violators of the Food Control Act. (August 10, 1917, c. 53, 40 Stat. 276.) Such criticisms of governmental operations, though grossly unfair as an interpretation of facts or even wholly unfounded in fact, are not "false reports or false statements with intent to interfere with the operation or success of the military or naval forces."

(c) The remaining sentence, set forth in count three as a false statement, was culled from the sixth chapter of the leaflet and is this:

"Our entry into it was determined by the certainty that if the allies do not win, J. P. Morgan's loans to the allies will be repudiated, and those American investors who bit on his promises would be hooked."

To prove the falsity of this statement the Government introduced the address made by the President to Congress on April 2, 1917, which preceded the adoption of the Joint Resolution of April 6, 1917, declaring that a state of war exists between the United States and the Imperial German Government (c. 1, 40 Stat. 1). This so-called statement of fact—which is alleged to be false—is merely a conclusion or a deduction from facts. True it is the kind of conclusion which courts call a conclusion of fact, as distinguished from a conclusion of law; and which is sometimes spoken of as a finding of ultimate fact as distinguished from an evidentiary fact. But, in its essence it is the expression of a judgment—like the

statements of many so-called historical facts. To such conclusions and deductions the declaration of this court in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 104, is applicable:

"There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity."

The cause of a war—as of most human action—is not single. War is ordinarily the result of many coöperating causes, many different conditions, acts and motives. Historians rarely agree in their judgment as to what was the determining factor in a particular war, even when they write under circumstances where detachment and the availability of evidence from all sources minimize both prejudice and other sources of error. For individuals, and classes of individuals, attach significance to those things which are significant to them. And, as the contributing causes cannot be subjected, like a chemical combination in a test tube, to qualitative and quantitative analysis so as to weigh and value the various elements, the historians differ necessarily in their judgments. One finds the determining cause of war in a great man, another in an idea, a belief, an economic necessity, a trade advantage, a sinister machination, or an accident. It is for this reason largely that men seek to interpret anew in each age, and often with each new generation, the important events in the world's history.

That all who voted for the Joint Resolution of April 6,

1917, did not do so for the reasons assigned by the President in his address to Congress on April 2, is demonstrated by the discussions in the House and in the Senate.[1] That debate discloses also that both in the Senate and in the House the loans to the Allies and the desire to ensure their repayment in full were declared to have been instrumental in bringing about in our country the sentiment in favor of the war.[2] However strongly we may believe

[1] See 55 Cong. Rec. 253, 254, 344, 354, 357, 407.

[2] Discussion in the Senate April 4, 1917:

" . . . there is no doubt in any mind but the enormous amount of money loaned to the allies in this country has been instrumental in bringing about a public sentiment in favor of our country taking a course that would make every bond worth a hundred cents on the dollar and making the payment of every debt certain and sure." (55 Cong. Rec. p. 213.)

Discussion in the House April 5, 1917.

"Since the loan of $500,000,000 was made by Morgan to the allies their efforts have been persistent to land our soldiers in the French trenches." (55 Cong. Rec. p. 342.)

"Already we have loaned the allies, through our banking system, up to December 31, 1916, the enormous sum of $2,325,900,000 in formal loans. Other huge sums have been loaned and millions have been added since that date. 'Where your treasures are, there will be your heart also.' That is one of the reasons why we are about to enter this war. No wonder the Morgans and the munition makers desire war. . . . Our financiers desire that Uncle Sam underwrite these and other huge loans and fight to defend their financial interests, that there may be no final loss." (55 Cong. Rec. p. 362.)

"I believe that all Americans, except that limited although influential class which is willing to go on shedding other men's blood to protect its investments and add to its accursed profits, have abhorred the thought of war." (55 Cong. Rec. p. 386).

"Likewise, Mr. Chairman, the J. Pierpont Morgans and their associates, who have floated war loans running into millions which they now want the United States to guarantee by entering the European war. . . ." (55 Cong. Rec. p. 372.)

"These war germs are both epidemic and contagious. They are in the air, but somehow or other they multiply fastest in the fumes around the munition factories. You will not find many in our climate.

that these loans were not the slightest makeweight, much less a determining factor, in the country's decision, the fact that some of our representatives in the Senate and the House declared otherwise on one of the most solemn occasions in the history of the Nation, should help us to understand that statements like that here charged to be false are in essence matters of opinion and judgment, not matters of fact to be determined by a jury upon or without evidence; and that even the President's address, which set forth high moral grounds justifying our entry into the war, may not be accepted as establishing beyond a reasonable doubt that a statement ascribing a base motive was criminally false. All the alleged false statements were an interpretation and discussion of public facts of public interest. If the proceeding had been for libel, the defence of privilege might have been interposed. *Gandia* v. *Pettingill*, 222 U. S. 452. There is no reason to believe that Congress, in prohibiting a special class of false statements, intended to interfere with what was obviously comment as distinguished from a statement.

The presiding judge ruled that expressions of opinion were not punishable as false statements under the act; but he left it to the jury to determine whether the five sentences in question were statements of facts or expressions of opinion. As this determination was to be made from the reading of the leaflet unaffected by any extrinsic evidence the question was one for the court. To hold that a jury may make punishable statements of conclusions or of opinion, like those here involved, by declaring them to be statements of facts and to be false would practically deny members of small political parties freedom of criticism and of discussion in times when feelings run high and the questions involved are deemed fundamental.

They also multiply pretty fast in Wall Street and other money centers. I am opposed to declaring war to save the speculators." (55 Cong. Rec. p. 376.)

There is nothing in the act compelling or indeed justifying such a construction of it; and I cannot believe that Congress in passing, and the President in approving, it conceived that such a construction was possible.

Second: But, even if the passages from the leaflet set forth in the third count could be deemed false statements within the meaning of the act, the convictions thereon were unjustified because evidence was wholly lacking to prove any one of the other essential elements of the crime charged. Thus there was not a particle of evidence that the defendants knew that the statements were false. They were mere distributors of the leaflet. It had been prepared by a man of some prominence. It had been published by the national organization. Not one of the defendants was an officer even of the local organization. One of them, at least, was absent from the meetings at which the proposal to distribute the leaflet was discussed. There is no evidence that the truthfulness of the statements contained in the leaflet had ever been questioned before this indictment was found. The statement mainly relied upon to sustain the conviction—that concerning the effect of our large loans to the Allies—was merely a repetition of what had been declared with great solemnity and earnestness in the Senate and in the House while the Joint Resolution was under discussion. The fact that the President had set forth in his noble address worthy grounds for our entry into the war, was not evidence that these defendants knew to be false the charge that base motives had also been operative. The assertion that the great financial interests exercise a potent, subtle and sinister influence in the important decisions of our Government had often been made by men high in authority. Mr. Wilson, himself a historian, said before he was President and repeated in the New Freedom that: "The masters of the Government of the United States are the combined capitalists and manufacturers of the United

States." [1] We may be convinced that the decision to enter the great war was wholly free from such base influences but we may not, because such is our belief, permit a jury to find, in the absence of evidence, that it was proved beyond a reasonable doubt that these defendants *knew* that a statement in this leaflet to the contrary was false.

Nor was there a particle of evidence that these statements were made with intent to interfere with the operation or success of the military and naval forces. So far as there is any evidence bearing on the matter of intent, it is directly to the contrary. The fact that the local refused to distribute the pamphlet until Judge Rose had directed a verdict of acquittal in the Baltimore case shows that its members desired to do only that which the law permitted. The tenor of the leaflet itself shows that the intent of the writer and of the publishers was to advance the cause of Socialism; and each defendant testified that this was his only purpose in distributing the pamphlet. Furthermore, the nature of the words used and the circumstances under which they were used showed affirmatively that they did not "create a clear and present danger," that thereby the operations or success of our military and naval forces would be interfered with.

The gravamen of the third count is the charge of wilfully conveying in time of war false statements with the intent to interfere with the operation and success of our military or naval forces. One who did that would be called a traitor to his country. The defendants, humble members of the Socialist Party, performed as distributors of the leaflet what would ordinarily be deemed merely a menial service. To hold them guilty under the third

[1] Page 57. Then follows: "It is written over every intimate page of the records of Congress, it is written all through the history of conferences at the White House, that the suggestions of economic policy in this country have come from one source, not many sources."

count is to convict not them alone, but, in effect, their party, or at least its responsible leaders, of treason, as that word is commonly understood. I cannot believe that there is any basis in our law for such a condemnation on this record.

Third: To sustain a conviction on the second or on the sixth count it is necessary to prove that by coöperating to distribute the leaflet the defendants conspired or attempted wilfully to "cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces." No evidence of intent so to do was introduced unless it be found in the leaflet itself. What has been said in respect to the third count as to the total lack of evidence of evil intent is equally applicable here.

A verdict should have been directed for the defendants on these counts also because the leaflet was not distributed under such circumstances, nor was it of such a nature, as to create a clear and present danger of causing either insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces. The leaflet contains lurid and perhaps exaggerated pictures of the horrors of war. Its arguments as to the causes of this war may appear to us shallow and grossly unfair. The remedy proposed may seem to us worse than the evil which, it is argued, will be thereby removed. But the leaflet, far from counselling disobedience to law, points to the hopelessness of protest, under the existing system, pictures the irresistible power of the military arm of the Government, and indicates that acquiescence is a necessity. Insubordination, disloyalty, mutiny and refusal of duty in the military or naval forces are very serious crimes. It is not conceivable that any man of ordinary intelligence and normal judgment would be induced by anything in the leaflet to commit them and thereby risk the severe punishment prescribed for such offences. Certainly there was no clear and present danger that such would be the result.

239. Syllabus.

The leaflet was not even distributed among those in the military or the naval service. It was distributed among civilians; and since the conviction on the first count has been abandoned here by the Government, we have no occasion to consider whether the leaflet might have discouraged voluntary enlistment or obedience to the provisions of the Selective Draft Act.

The fundamental right of free men to strive for better conditions through new legislation and new institutions will not be preserved, if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law—merely, because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning or intemperate in language. No objections more serious than these can, in my opinion, reasonably be made to the arguments presented in "The Price We Pay."

STATE OF MINNESOTA v. STATE OF WISCONSIN.

IN EQUITY.

No. 16, Original. Argued October 16, 17, 1919.—Decided March 8, 1920.

Part of the boundary between Wisconsin and Minnesota is described in the Wisconsin Enabling Act of August 6, 1846, as running westwardly, through Lake Superior "to the mouth of the St. Louis River; thence up the main channel of said river to the first rapids in the same, above the Indian village, . . . ; thence due south," etc. As given in the Minnesota Enabling Act of February 26, 1857, from the opposite direction, the line follows the boundary of Wisconsin

until the same intersects the St. Louis River, "thence down said river to and through Lake Superior," etc. The St. Louis River loses its well-defined banks, deep, narrow channel, and obvious current, characteristic of a river, before reaching Lake Superior proper, emptying or merging into Upper St. Louis Bay, which joins with Lower St. Louis Bay and this with Allouez and Superior Bays, all of the same level as Lake Superior and connected with it by a narrow "entry." *Held*, upon historical and other facts and circumstances, that the mouth of the river, as intended by the Wisconsin Enabling Act, is this "entry" or opening and not where the river, in a stricter sense of the term, debouches into Upper St. Louis Bay. P. 279.

At the date of the Wisconsin Enabling Act, Upper and Lower St. Louis Bays, parts of St. Louis River as herein defined, were broad sheets with irregular, indented shores, with no definite, uninterrupted channel extending throughout their entire length, and with no steady current controlling navigation. Such vessels as plied there then and long thereafter, until dredging improvements intervened, moved freely in different directions, and drew less than 8 feet, the depths of the entry from Lake Superior and of the waters of the Lower Bay being too slight for vessels drawing more. The Lower Bay was shallow, with a ruling depth of eight feet, and had no well-defined channel. In the Upper Bay there was a narrow, winding channel near the Minnesota shore with a ruling depth of ten, possibly eight, feet; but a more direct, median course could be and customarily was pursued by vessels for approximately one mile until a deeper channel was encountered, and this was long regarded by officers and representatives of the two States as approximately the boundary. *Held*, that the boundary runs through the middle of the Lower Bay to a deep channel leading into the Upper Bay, to a point, thence westward along the aforesaid more direct median course through waters not less than eight feet deep, approximately one mile to the deep channel to which it leads, and thence, following this, up-stream. P. 280.

In applying the rule of the *Thalweg* (*Arkansas* v. *Tennessee*, 246 U. S. 158), the deepest water and the principal navigable channel are not necessarily the same. It refers to actual or probable use in the ordinary course; and to adopt in this case a narrow, crooked channel close to shore in preference to a safer and more direct one with sufficient water would defeat its purpose. P. 281.

THE case is stated in the opinion.

Mr. W. D. Bailey and *Mr. H. B. Fryberger*, with whom *Mr. Clifford L. Hilton*, Attorney General of the State of Minnesota, *Mr. Oscar Mitchell* and *Mr. Louis Hanitch* were on the briefs, for complainant.

Mr. M. B. Olbrich, Deputy Attorney General of the State of Wisconsin, with whom *Mr. John J. Blaine*, Attorney General of the State of Wisconsin, was on the brief, for defendant.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

We are asked to ascertain and establish the boundary line between the parties in Upper and Lower St. Louis Bays. Complainant claims to the middle of each bay—halfway between the shores. The defendant does not seriously question this claim as to the lower bay, but earnestly maintains that in the upper one the line follows a sinuous course near complainant's shore. Since 1893 a deep channel has been dredged through these waters and harbor lines have been established. According to Wisconsin's insistence, its border crosses and recrosses this channel and intersects certain docks extending from the Minnesota shore, leaving portions of them in each State. See *Wisconsin* v. *Duluth*, 96 U. S. 379; *Norton* v. *Whiteside*, 239 U. S. 144.

"An Act to enable the People of Wisconsin Territory to form a Constitution and State Government, and for the Admission of such State into the Union," approved August 6, 1846, c. 89, 9 Stat. 56, described the boundary in part as follows: "Thence [with the northwesterly boundary of Michigan] down the main channel of the Montreal River to the middle of Lake Superior; thence [westwardly] through the centre of Lake Superior to the mouth of the St. Louis River; thence up the main channel

of said river to the first rapids in the same, above the Indian village, according to Nicollet's map; thence due south to the main branch of the River St. Croix," etc., etc. With the boundaries described by the Enabling Act, Wisconsin entered the Union May 29, 1848 (c. 50, 9 Stat. 233).

"An Act to authorize the people of the Territory of Minnesota to form a Constitution and State Government, preparatory to their Admission in the Union," approved February 26, 1857, c. 60, 11 Stat. 166, specifies a portion of the boundary thus: "Thence by a due south line to the north line of the State of Iowa; thence east along the northern boundary of said State to the main channel of the Mississippi River; thence up the main channel of said river, and following the boundary line of the State of Wisconsin, until the same intersects the Saint Louis River; *thence down said river to and through Lake Superior, on the boundary line of Wisconsin* and Michigan, until it intersects the dividing line between the United States and the British possessions." With boundaries as therein described, Minnesota became a State May 11, 1858 (c. 31, 11 Stat. 285).

The present controversy arises from conflicting interpretations of the words—"thence [westwardly] through the centre of Lake Superior *to the mouth of the St. Louis River;* thence up *the main channel of said river* to the first rapids in the same, above the Indian village, according to Nicollet's map." The situation disclosed by an accurate survey gives much room for differences concerning the location of the "mouth of the St. Louis River" and "the main channel of said river." Nicollet's Map of the "Hydrographical Basin of the Upper Mississippi River," published in 1843, and drawn upon a scale of 1:1,200,000—approximately twenty miles to the inch—is too small either to reveal or to give material aid in solving the difficulties. A sketch from it—approximately on original scale—is printed on the next page.

During 1823–1825 Lieutenant Bayfield of the British Navy surveyed and sounded the westerly end of Lake

SKETCH FROM SECTION OF NICOLLET'S MAP.

On original scale: 20 miles to 1 inch.

Superior and the lower waters of St. Louis River. A chart compiled from data so obtained (1:49,300,—4108 feet to the inch) and published in 1828, shows the general configuration and lays the proper sailing course southward of

Big Island. Prior to 1865 this was the only available chart and navigators often used it.

The first accurate map of these waters was drawn from surveys and soundings made under direction of Captain George W. Meade in 1861 and is now on file in the Lake Survey Office at Detroit. After being reduced one-half—to a scale of 1:32,000 or approximately two inches to a mile—it was engraved and published in 1865 or 1866. Known as the Meade Chart, this reproduction is accepted by both parties as adequately disclosing conditions existing in 1846. A rough sketch based upon the chart—about one-third of its size—and also a photographic reproduction of a portion of the original map, are printed on succeeding pages [284, 285.]

Minnesota and Wisconsin Points are low narrow strips of sand—the former six miles in length, the latter approximately three. Between them there is a narrow opening known as "The Entry," and inside lies a bay (Allouez and Superior) nine miles long and a mile and a half wide. A narrow channel between Rice's Point and Connor's Point leads into Lower St. Louis Bay, approximately a mile and a half wide and three miles long. Passing south of Grassy Point another channel leads into irregular shaped Upper St. Louis Bay with Big Island at its southwesterly end. Southeast of this Island begin the well defined banks, deep narrow channel and obvious current characteristic of a true river; these continue through many windings to the falls above the Indian village noted on Nicollet's Map.

Meade's Chart indicates: A depth of not over eight feet across the bar at "The Entry." A deep channel through Superior Bay; rather shallow water with a ruling depth of eight feet in Lower St. Louis Bay; eight feet of water on a fairly direct course, about a mile in length, from the deep channel south of Grassy Point and east of Fisherman's Island to the deep water immediately westward of the

bar, about seven-eighths of a mile northeast of Big Island. It further discloses a curving channel along the west side of Grassy Point and thence close to the Minnesota shore and around Big Island, with a depth of fifteen or more feet except at the bar, where there are only ten, possibly eight, feet. To the south of Big Island lies the well-known and formerly much used course indicated on Lieutenant Bayfield's Map.

The level of the water within all the bays is substantially the same as in Lake Superior; such current as exists flows in opposite directions according to the wind and movement within the Lake. The shores are irregular and much indented.

Since 1893 the United States have dredged a twenty-two foot channel through Upper St. Louis Bay and around Grassy Point; thence through Lower St. Louis Bay (where there are two branches) and between Rice's and Connor's Points; thence through Superior Bay to "The Entry" and into the Lake. Extensive docks have been constructed from the Minnesota shore in both the upper and lower bays; those extending southwest from Grassy Point cross the boundary claimed by Wisconsin. The general situation of 1846 continued until long after 1861, but during the last thirty years extensive improvements required for a large and busy harbor have produced great changes.

The complainant maintains that within the true intendment of the statute the "mouth of the St. Louis River" is southeast of Big Island, where end the banks, channel and current characteristic of a river and lake features begin. On the other hand the defendant insists, and we think correctly, that such mouth is at the junction of Lake Superior and the deep channel between Minnesota and Wisconsin Points—"The Entry."

It is unnecessary to specify the many facts and circumstances, historical and otherwise, which lead to the conclusion stated. They seem adequate notwithstanding

some troublesome objections based upon the peculiar hydrographic conditions.

Treating "The Entry" as the mouth of the St. Louis River, where is the line "thence up the main channel of said river to the first rapids," etc.? This must be determined upon consideration of the situation existing in 1846, which the parties admit remained substantially unchanged until after the Meade survey. No alterations now material have come about through accretion or erosion.

The line through Superior Bay is not here called in question. But let it be noted that no vessel drawing more than eight feet could have passed into that bay from Lake Superior; that within "The Entry" there were only small boats of light draft; and that navigation long remained rather primitive.

Lower St. Louis Bay was shallow, with a ruling depth of eight feet, and had no well-defined channel. From the deep water at the southern tip of Grassy Point a vessel drawing less than eight feet bound north of Big Island and beyond could have turned northwest and followed the narrow winding channel near the Minnesota shore with a ruling depth of ten, possibly eight, feet. Or it could have proceeded westward, approximately one mile, over a more direct course with a depth of eight feet or more, until it came to the deeper channel about seven-eighths of a mile northeast of Big Island. This latter course is indicated by the red trace "A, B, C" on Minnesota's Exhibit No. 1—Meade's Chart. For many years officers and representatives of both States regarded the boundary as on or near this line. And, considering all the circumstances, we think it must be accepted as the main channel within intendment of the statute. No current controlled navigation and vessels proceeding in opposite directions followed the same general course.

Both parties say that in 1846 "practically all of Upper and Lower St. Louis Bays between the shores were navi-

gable for such vessels as were accustomed to use said bays at said time for the purpose of navigation, and there was no defined course, or channel, in said bays, which said vessels followed, but, owing to the depth of the water, they were permitted and accustomed to travel across said bays in any direction." For very many years subsequent to 1846 there were no vessels with eight foot draft upon these waters; and probably none of such size regularly plied there until 1890 or later.

The course south of Big Island shown on the Bayfield map was never accepted as the boundary and need not be further considered. Wisconsin's claim to that island is not denied.

Manifestly, from the description heretofore given, the waters between Big Island and Lake Superior were broad sheets without any definite uninterrupted deep channel extending throughout their entire length. Also, there was no steady, controlling current. Such vessels as plied there in 1846 and long thereafter moved with freedom in different directions. The evidence convinces us that as navigation gradually increased prior to 1890, the northerly course in Upper St. Louis Bay commonly followed by vessels going to or coming from points above Big Island was not along the narrow curving channel skirting Grassy Point but over the shorter one near the middle of the bay.

This court approved the doctrine of *Thalweg* as opposed to the physical middle line, in *Iowa* v. *Illinois*, 147 U. S. 1, and has adhered thereto. *Louisiana* v. *Mississippi*, 202 U. S. 1; *Washington* v. *Oregon*, 211 U. S. 127; 214 U. S. 205; *Arkansas* v. *Tennessee*, 246 U. S. 158. "When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits

of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. . . . Thus the jurisdiction of each State extends to the thread of the stream, that is, to the 'mid-channel,' and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed." (*Iowa* v. *Illinois*, *supra*, pp. 7, 13.) "As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different States." (*Louisiana* v. *Mississippi*, *supra*, p. 50.)

The doctrine of *Thalweg*, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each State equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. The rule has direct reference to actual or probable use in the ordinary course, and common experience shows that vessels do not follow a narrow crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water.

As we view the whole record, the claim of Wisconsin cannot prevail unless the doctrine of *Thalweg* requires us to say that the main channel is the deepest one. So to apply it here would defeat its fundamental purpose. The ruling depth in the waters below Upper Bay was eight feet, and practically this limited navigation to vessels of no greater draft. For these there was abundant water near the middle line. Under such circumstances

Minnesota would be deprived of equality of right both in navigation and to the surface if the boundary line were drawn near its shore.

A decree will be entered declaring and adjudging as follows: That the boundary line between the two States must be ascertained upon a consideration of the situation existing in 1846 and accurately disclosed by the Meade Chart. That when traced on this chart the boundary runs midway between Rice's Point and Connor's Point and through the middle of Lower St. Louis Bay to and with the deep channel leading into Upper St. Louis Bay and to a point therein immediately south of the southern extremity of Grassy Point; thence westward along the most direct course, through water not less than eight feet deep, eastward of Fisherman's Island and as indicated by the red trace "A, B, C," on Minnesota's Exhibit No. 1, approximately one mile, to the deep channel and immediately west of the bar therein; thence with such channel north and west of Big Island up stream to the falls.

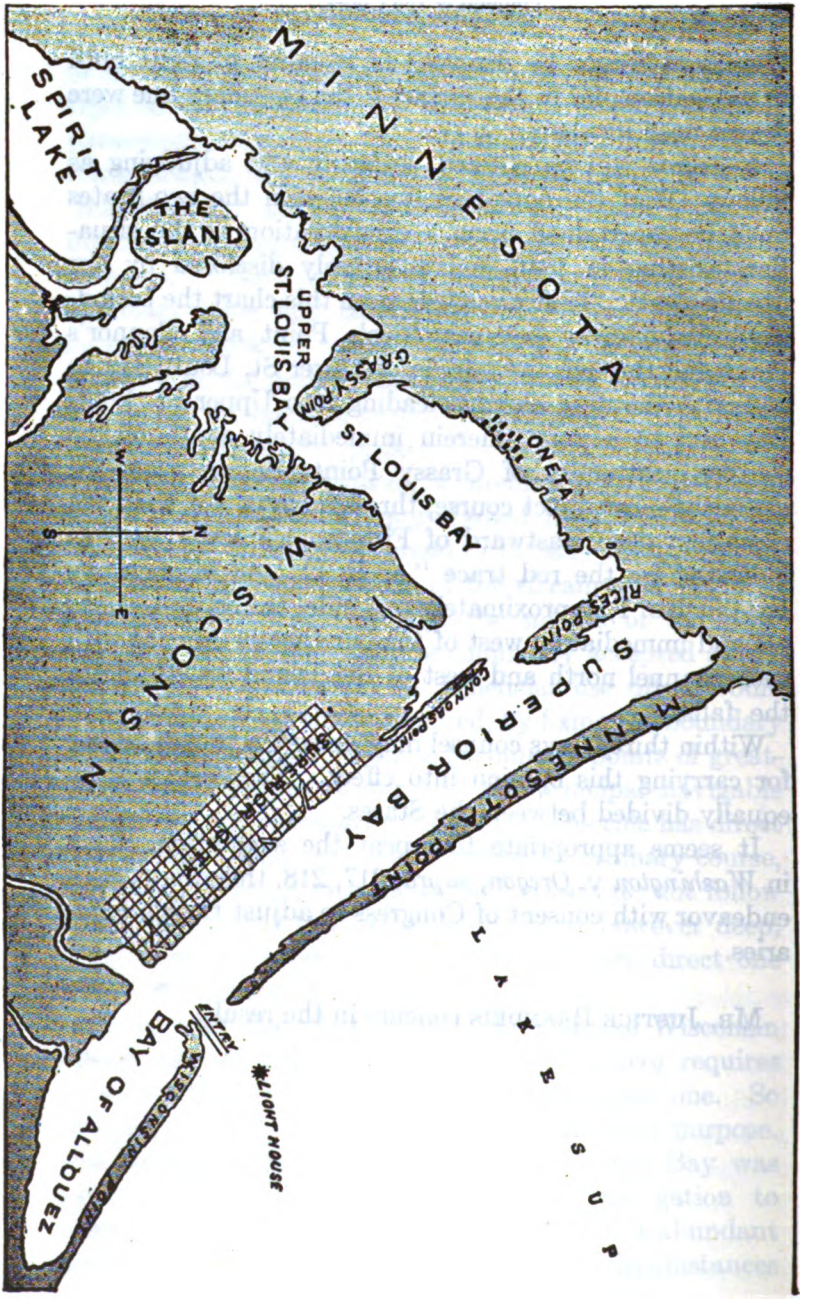
Within thirty days counsel may present a proper decree for carrying this opinion into effect. The costs will be equally divided between the States.

It seems appropriate to repeat the suggestion, made in *Washington* v. *Oregon*, *supra*, 217, 218, that the parties endeavor with consent of Congress to adjust their boundaries.

MR. JUSTICE BRANDEIS concurs in the result.

SHORE LINE—SKETCHED FROM MEADE'S CHART.

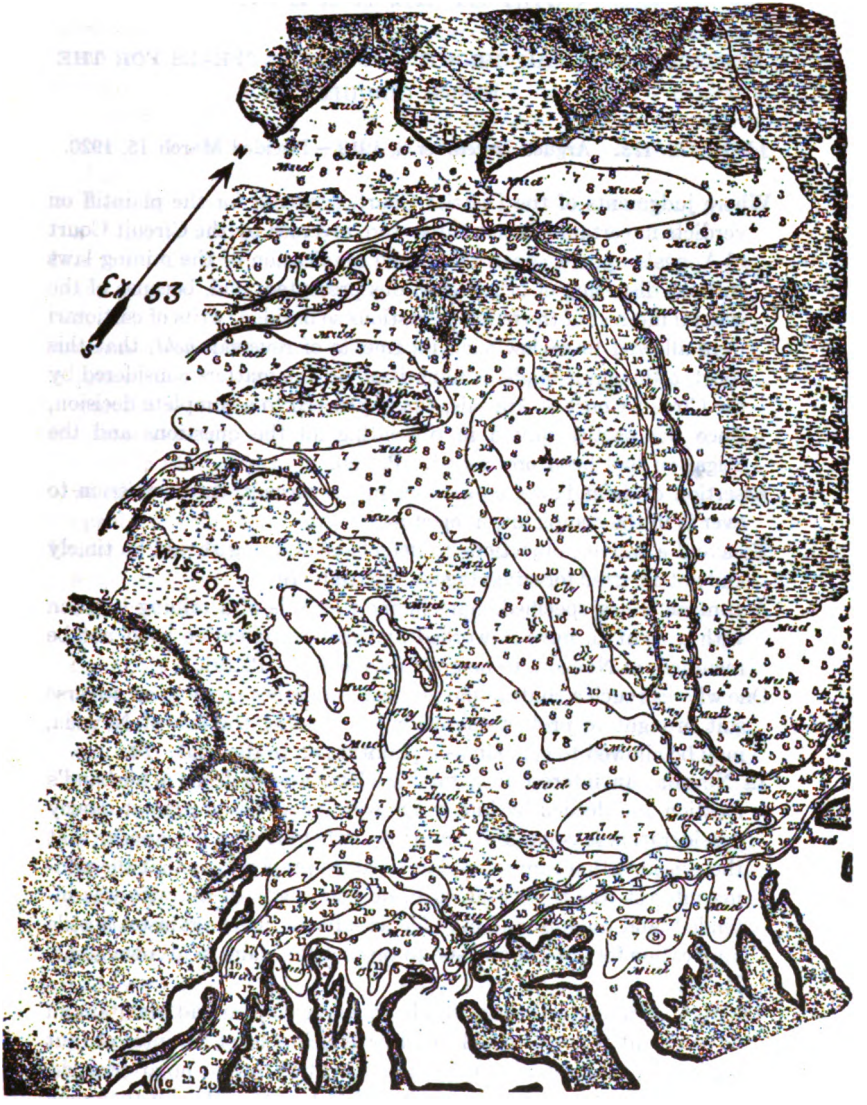
Scale: About two-thirds of an inch to 1 mile.



FROM A PHOTOGRAPH—PORTION OF ORIGINAL MEADE MAP WEST OF GRASSY POINT, ON FILE IN OFFICE U. S. ENGINEERS.

Scale: About 1 mile to 3 inches.

(The words "Fishermans Island" have been added.)



←——————*To The Falls* *To Lake Superior*——————→

COLE ET AL. *v.* RALPH.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 172, 173. Argued December 8, 1919.—Decided March 15, 1920.

Where judgments of the District Court, rendered for the plaintiff on verdicts in certain adverse suits, were reversed by the Circuit Court of Appeals upon a construction and application of the mining laws without disposing of other questions presented; and, because of the general interest of the federal questions so decided, writs of certiorari were allowed to review such judgments of reversal, *held*, that this court, although it might confine itself to the matters considered by the Circuit Court of Appeals, would proceed to a complete decision, since the parties united in presenting all the questions and the litigation had been protracted. P. 290.

Assertion of defendant's possession, in the answer, cures omission to aver it in the complaint, in ejectment. *Id.*

To avoid a waiver, objections to defects of pleading should be timely and not deferred for advantage at the trial. *Id.*

A contract for a specified share in the proceeds of a mining location with a right to have it worked and made productive need not be recorded, in Nevada, to be good *inter partes*. P. 291.

One who has such a contractual interest is a proper party to an adverse suit brought to protect the claim, and, under the law of Nevada, may be allowed to come in as a plaintiff before the trial. *Id.*

In Nevada, an interest in a mining claim arising from a husband's location and deeded by him to his wife for a recited present money consideration is community property, where it does not appear that the consideration came from her separate property, or that the mining interest was treated as such, or that a gift to the wife was intended; and the husband may file an adverse claim against a hostile application for patent, and sue to protect the claim in his own name. P. 292.

The right of a mining locator to file an adverse claim and maintain an adverse suit is not divested by prior attachment of his interest, but his acts in that regard inure to the benefit of those who afterwards, through the attachment case, succeed to his interest; and they may be substituted as plaintiffs when such interest has fully passed to them. *Id.*

An adverse claim is not invalidated by a misnomer of a claimant due to an inadvertence, by which no one is misled or harmed. P. 293.

Absence of revenue stamps does not make a deed invalid or inadmissible in evidence under the Act of October 22, 1914. *Id.*

Rules of the mining law re-stated, respecting the rights of explorers, those of lode locators and of placer locators, significance and distinction of discovery and assessment work, and the nature and effect of adverse proceedings. Pp. 294, *et seq.*

A placer discovery will not sustain a lode location, nor a lode discovery a placer location. P. 295.

Location—the act or series of acts whereby the boundaries of the claim are marked, etc.,—confers no rights in the absence of discovery. P. 296.

Assessment work does not take the place of discovery. *Id.*

A junior placer location with earlier placer discovery prevails over a senior lode location with later lode discovery. P. 297.

Evidence reviewed and *held* sufficient to go to the jury on the question of prior discovery as between lode and placer claims, and as to whether the latter were initiated by trespass or peaceably and openly or even with acquiescence of the lode claimant. P. 299.

Evidence that placer claimants entered openly upon lode claims, where some prospecting had recently been done and where there were buildings, in charge of a watchman, which had been used by the lode claimant in operations on other claims and which the placer claimants did not appropriate or disturb; and that they made their discoveries and locations and remained several months, working and mining,—*held* enough, in the absence of any proof that they met with resistance or resorted to hostile, fraudulent acts, to warrant a jury in finding no trespass upon the actual possession of the lode claimant and acquiescence by him. *Id.*

The presence of buildings owned by a mining claimant, on his claim but not used in connection with it, *held* evidence of his actual possession of the place where they stood and, in less degree, of the remainder of the claim; but ineffectual to prevent others from entering peaceably and in good faith under the mining laws. P. 300.

An adverse placer claimant does not admit the validity of a pre-existing lode location by posting a lode location notice through a mistake, promptly corrected and not misleading. P. 303.

Generally, and specifically in Nevada, recitals of discovery, in location notices, are self-serving declarations, not evidence against adverse claimants. *Id.*

Revised Statutes, § 2332, provides that where a mining claim has been held and worked for a period equal to the time prescribed by the

local state or territorial statute of limitations for mining claims, evidence of such possession and working for such period shall be sufficient to establish a right to a patent in the absence of any adverse claim. *Held*, that it does not dispense with, or cure the absence of, discovery. P. 305.

To "work" a mining claim is to do something toward making it productive, such as developing or extracting an ore body after it has been discovered. P. 307.

249 Fed. Rep. 81, reversed.

THE case is stated in the opinion.

Mr. George B. Thatcher, with whom *Mr. William C. Prentiss* was on the briefs, for petitioners.

Mr. Samuel Herrick and *Mr. P. G. Ellis*, with whom *Mr. Edwin W. Senior* was on the briefs, for respondent:

Among the authorities relied on in support of their claim under Rev. Stats., § 2332, and Nev. Rev. Laws, 1912, § 4951, were the following: *Belk* v. *Meagher*, 104 U. S. 279, 287; *Glacier Mountain Min. Co.* v. *Willis*, 127 U. S. 471; *Reavis* v. *Fianza*, 215 U. S. 16, 25; Costigan, Mining Law, § 153, note 52; *Buffalo Zinc Co.* v. *Crump*, 70 Arkansas, 525; *Harris* v. *Equator Min. Co.*, 8 Fed. Rep. 863; *Four Hundred Twenty Min. Co.* v. *Bullion Min. Co.*, 3 Sawy. 634; Lindley on Mines, § 865, note 3; *id.*, § 688; *Golden* v. *Murphy*, 31 Nevada, 395; *Anthony* v. *Jillson*, 83 California, 296; *Altoona Min. Co.* v. *Integral Min. Co.*, 114 California, 100; *Upton* v. *Santa Rita Min. Co.*, 14 N. Mex. 96; *Vogel* v. *Warsing*, 146 Fed. Rep. 949; *Risch* v. *Wiseman*, 36 Oregon, 484; Snyder on Mines, §§ 353, 672; *Thomas* v. *South Butte Min. Co.*, 211 Fed. Rep. 105, 107, 108.

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

These suits relate to conflicting mining locations in Nevada and are what are commonly called adverse suits.

The locations set up on one side are lode and those on the other placer, the former being designated as Salt Lake No. 3, Midas, and Evening Star and the latter as Guy Davis and Homestake. Joseph Ralph is the lode claimant and the other parties are the placer claimants.

Ralph made application at the local land office for the issue to him of a patent for the three lode claims, along with thirteen others not here in question, and in due time two adverse claims were filed in that proceeding, one based upon the Guy Davis and covering most of the ground within the Salt Lake No. 3, and the other based upon the Homestake and covering a considerable portion of the ground within the Midas and Evening Star. These suits were brought in a state court in support of the adverse claims, and Ralph, the sole defendant, caused them to be removed into the federal court, the parties being citizens of different States. Afterwards some of the original plaintiffs were eliminated and others brought in, but the citizenship remained diverse as before.

The cases were tried together to the court and a jury, the latter returning general verdicts for the plaintiffs and special verdicts finding that when the placer locations were made no lode had been discovered within the limits of any of the lode locations. Judgments for the plaintiffs were entered upon the verdicts and motions by the defendant for a new trial were overruled. Upon writs of error the Circuit Court of Appeals reversed the judgments and ordered a new trial, one judge dissenting. 249 Fed. Rep. 81. The cases are here upon writs of certiorari which were granted because the ground upon which the Circuit Court of Appeals put its decision—the construction and application of some of the mineral land laws—was deemed of general interest in the regions where those laws are operative.

The defendant does not rely entirely upon the ground of decision advanced by the Circuit Court of Appeals,

but urges at length that, if it be not well taken, the record discloses other grounds, not considered by that court, for reversing the judgments and ordering a new trial. And he further urges that, if the decision of the Circuit Court of Appeals be right, it is not sufficiently comprehensive to serve as a guide to the court and the parties upon another trial. The plaintiffs insist that the judgments in the District Court were right and should be affirmed.

In the circumstances it is open to us to deal only with the matter considered by the Circuit Court of Appeals and to remand the cases to it for any needed action upon other questions, or to proceed ourselves to a complete decision. The latter course seems the better inasmuch as counsel have united in presenting to us all questions thought to arise upon the record and the litigation already has covered a considerable period.

Criticism is made of the complaints. As presented in the state court they fully met the requirements of the local code, Rev. Laws 1912, § 5526, and there was no request after the removal into the federal court that they be recast to meet any further requirements prevailing there. Apart from the local code, each sufficiently stated a cause of action in the nature of ejectment, save as some allegations were wanting in precision and it was left uncertain whether the defendant was in possession. The latter defect was cured by an affirmative statement in the answer that the defendant was in possession. *Texas & New Orleans R. R. Co.* v. *Miller*, 221 U. S. 408, 416. If the other defects embarrassed the defendant he should have interposed a timely objection, which doubtless would have resulted in appropriate amendments. Instead, he permitted the matter to pass until the trial was in progress and then sought to obtain some advantage from it This he could not do; by his failure to make timely objection the defects had been waived. We here dispose of a related question by saying that, in our opinion, the

complaints, with the answers, put in issue the validity of the lode locations, including the requisite mineral discovery.

The defendant insists that necessary parties did not join in filing the adverse claims in the land office, that in the suits there was a misjoinder of plaintiffs and a failure to join essential plaintiffs, and that deeds showing title in some of the plaintiffs were erroneously admitted in evidence in that they were without the requisite revenue stamps. We think this insistence is untenable in all its phases.

As respects the Guy Davis placer, Davis and Faubert were the original locators and Faubert soon conveyed a fraction of his interest to Thatcher. These three filed the adverse claim and brought the suit, the title being in them at the time. Thereafter Faubert transferred his remaining interest to Cole, Malley and Ross, and Thatcher conveyed a fraction of his interest to Healey. Because of these transfers, and with the court's approval, Faubert was eliminated as a party and Cole, Malley, Ross and Healey came in as plaintiffs. Thus the changes in title pending the suit were followed by corresponding changes in the parties plaintiff.

At all the times mentioned the title was in a sense affected by an outstanding contract, executed by the original locators, which invested Thatcher and Forman with a right to a specified share in the output or proceeds of the claim, and possibly with a right to have it worked and thereby made productive. The contract was not recorded, but this is not material, for the contract was good between the parties and no subsequent purchaser is calling it in question. See Rev. Laws. 1912, §§ 1038–1040. Unlike Thatcher, Forman had no interest in the claim other than under this contract. He did not join in filing the adverse claim or in bringing the suit, but with the court's approval came in as a plaintiff before the trial. We think his in-

terest was not such as to make him an essential party to the adverse claim or to the suit, and yet was such as to make him an admissible party to either. Of course the acts of those having the title in filing the adverse claim and bringing the suit inured to his benefit. And had they proceeded in his absence to a judgment in their favor the same would have been true of it. But this does not prove that he could not be admitted as a plaintiff. He had an interest—a real interest—in the maintenance and protection of the claim which was the subject of the suit, and in view of the liberal provisions of the local statute, Rev. Laws 1912, §§ 4998, 5000, we think the court did not err in allowing him to come in as a plaintiff. It is not asserted that his presence was prejudicial to the defendant and we perceive no ground for thinking it could have been.

As respects the Homestake placer, Murray Scott and John J. Healey were the original locators and the title was still in them when the adverse claim was filed and when the suit was begun, unless there be merit in the defendant's contention that Scott's interest had then passed to others under attachment proceedings and that Healey's interest had then passed to his wife. Neither branch of the contention is, in our opinion, well grounded. The attachment proceedings, although commenced before the adverse claim was filed, did not result in a transfer of Scott's title until after the present suit was begun. The purported conveyance of Healey's interest to his wife, to which the defendant directs attention, recites that it was made upon a consideration paid in money at the time, and this is in no wise explained. There is no evidence that the consideration was paid out of any separate property of the wife, or that the conveyance was intended as a gift to her, or that she ever listed the subject of the conveyance as her separate property. In these circumstances, according to the laws of the State, the Healey interest was community property, of which the husband had the "entire

management and control" and the "absolute power of disposition." He could lease or convey it without the wife's concurrence and could sue in respect of it in his name alone. Rev. Laws 1912, §§ 2155–2160; *Crow* v. *Van Sickle*, 6 Nevada, 146; *Lake* v. *Bender*, 18 Nevada, 361, 384–385; *Adams* v. *Baker*, 24 Nevada, 375; *Malstrom* v. *People's Ditch Co.*, 32 Nevada, 246, 260.

There was here a contract with Thatcher and Forman like that relating to the Guy Davis, and this gave them a real interest in the claim, as already explained.

The adverse claim was filed and the suit was brought by Scott, Healey, Thatcher and Forman. Afterwards, and following the consummation of the attachment proceedings, the entire interest of Scott was transferred to Cole, Malley, Ross and Davis, and by reason of this, and with the court's approval, Scott was eliminated as a party and Cole, Malley, Ross and Davis came in as plaintiffs. Thus there was no misjoinder of plaintiffs, nor any failure to join an essential party. Of course, those who succeeded to Scott's interest pending the suit were entitled to the benefit of what he had done while he held the title.

In one of the adverse claims Healey's name was given as Frank J. instead of John J., but this was a mere inadvertence, did not mislead or prejudice anyone, and rightly was disregarded by the District Court.

As to the absence of revenue stamps, it is true that the deeds showing title in some of the plaintiffs—they were produced in evidence over the defendant's objection—were without the stamps required by the Act of October 22, 1914, c. 331, § 22, Schedule A, 38 Stat. 762. But this neither invalidated the deeds nor made them inadmissible as evidence. The relevant provisions of that act, while otherwise following the language of earlier acts, do not contain the words of those acts which made such an instrument invalid and inadmissible as evidence while not

properly stamped. Those words were carefully omitted, as will be seen by contrasting §§ 6, 11, 12 and 13 of the Act of 1914 with §§ 7, 13, 14 and 15 of the Act of 1898, c. 448, 30 Stat. 454. From this and a comparison of the acts in other particulars it is apparent that Congress in the later act departed from its prior practice of making such instruments invalid or inadmissible as evidence while remaining unstamped and elected to rely upon other means of enforcing this stamp provision, such as the imposition of money penalties, fines and imprisonment. The decisions upon which the defendant relies arose under the earlier acts and were based upon the presence in them of what studiously was omitted from the later one.

As a preliminary to considering other contentions it will be helpful to refer to some features of the mineral land laws, Rev. Stats., § 2318, *et seq.*, about which there can be no controversy, and also to what actually was in dispute at the trial and what not in dispute.

By those laws public lands containing valuable mineral deposits are opened to exploration, occupation and acquisition for mining purposes; and as an inducement to effective exploration the discoverer is given the right to locate a substantial area embracing his discovery, to hold the same and extract the mineral without payment of rent or royalty, so long as he puts one hundred dollars' worth of labor or improvements—called assessment work—upon the claim each year, and to demand and receive a patent at a small sum per acre after he has put five hundred dollars' worth of labor or improvements upon the claim.

In advance of discovery an explorer in actual occupation and diligently searching for mineral [1] is treated as a licensee or tenant at will, and no right can be initiated or

[1] As to the status of an explorer or locator on oil-bearing land in advance of discovery, see the special provisions in Acts of June 25, 1910, c. 421, § 2, 36 Stat. 847, and March 2, 1911, c. 201, 36 Stat. 1015.

acquired through a forcible, fraudulent or clandestine intrusion upon his possession. But if his occupancy be relaxed, or be merely incidental to something other than a diligent search for mineral, and another enters peaceably, and not fraudulently or clandestinely, and makes a mineral discovery and location, the location so made is valid and must be respected accordingly. *Belk* v. *Meagher*, 104 U. S. 279, 287; *Union Oil Co.* v. *Smith*, 249 U. S. 337, 346–348, and cases cited.

A location based upon discovery gives an exclusive right of possession and enjoyment, is property in the fullest sense, is subject to sale and other forms of disposal, and so long as it is kept alive by performance of the required annual assessment work prevents any adverse location of the land. *Gwillim* v. *Donnellan*, 115 U. S. 45, 49; *Swanson* v. *Sears*, 224 U. S. 180.

While the two kinds of location—lode and placer—differ in some respects,[1] a discovery within the limits of the claim is equally essential to both. But to sustain a lode location the discovery must be of a vein or lode of rock in place bearing valuable mineral (§ 2320), and to sustain a placer location it must be of some other form of valuable mineral deposit (§ 2329), one such being scattered particles of gold found in the softer covering of the earth. A placer discovery will not sustain a lode location, nor a lode discovery a placer location. As is said by Mr. Lindley,[2] § 323, "Gold occurs in veins of rock in place, and when so found the land containing it must be appropriated under the laws applicable to lodes. It is also found in placers, and when so found the land containing it must be appropriated under the laws applicable to

[1] *Clipper Mining Co.* v. *Eli Mining Co.*, 194 U. S. 220, 229; *Webb* v. *American Asphaltum Co.*, 157 Fed. Rep. 203; *San Francisco Chemical Co.* v. *Duffield*, 201 Fed. Rep. 830; *Harry Lode Mining Claim*, 41 L. D. 403.

[2] Lindley on Mines, 3d ed.

placers"; and again, § 419, "It is the mode of occurrence, whether in place or not in place [meaning in rock in place], which determines the manner in which it should be located."

Location is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim. *Waskey* v. *Hammer*, 223 U. S. 85, 90–91; *Beals* v. *Cone*, 27 Colorado, 473, 484, 495; *Round Mountain Mining Co.* v. *Round Mountain Sphinx Mining Co.*, 36 Nevada, 543, 560; *New England &c. Oil Co.* v. *Congdon*, 152 California, 211, 213. Nor does assessment work take the place of discovery, for the requirement relating to such work is in the nature of a condition subsequent to a perfected and valid claim and has "nothing to do with locating or holding a claim before discovery." *Union Oil Co.* v. *Smith*, *supra*, p. 350. In practice discovery usually precedes location, and the statute treats it as the initial act. But in the absence of an intervening right it is no objection that the usual and statutory order is reversed. In such a case the location becomes effective from the date of discovery; but in the presence of an intervening right it must remain of no effect. *Creede & Cripple Creek Mining Co.* v. *Uinta Tunnel Mining Co.*, 196 U. S. 337, 348–351, and cases cited; *Union Oil Co.* v. *Smith*, *supra*, p. 347.

When an application for a patent to mineral land is presented at the local land office and an adverse claim is filed in response to the notice required by the statute (§ 2325) further proceedings upon the application must be suspended to await the determination by a court of competent jurisdiction of the question whether either party, and, if so, which, has the exclusive right to the possession arising from a valid and subsisting location. A suit appropriate to the occasion must be brought by the adverse claimant, and in that suit each party is deemed an

actor and must show his own title, for the suit is "in aid of the land department." If neither establishes the requisite title the judgment must so declare. Rev. Stats., § 2326; Act March 3, 1881, c. 140, 21 Stat. 505; *Jackson* v. *Roby*, 109 U. S. 440; *Perego* v. *Dodge*, 163 U. S. 160, 167; *Brown* v. *Gurney*, 201 U. S. 184, 190; *Healey* v. *Rupp*, 37 Colorado, 25, 28; *Tonopah Fraction Mining Co.* v. *Douglass*, 123 Fed. Rep. 936, 941. If final judgment be given in favor of either party—whether the applicant for patent or the adverse claimant—he may file in the land office a certified copy of the judgment and then will be entitled, as respects the area awarded to him, to go forward with the patent proceedings and to have the judgment recognized and respected as a binding adjudication of his exclusive right to the possession. Rev. Stats., § 2326; *Richmond Mining Co.* v. *Rose*, 114 U. S. 576, 585; *Wolverton* v. *Nichols*, 119 U. S. 485, 489; *Iron Silver Mining Co.* v. *Campbell*, 135 U. S. 286, 299; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 694; *Perego* v. *Dodge, supra; Clipper Mining Co.* v. *Eli Mining Co.*, 194 U. S. 220, 232.

The situation developed by the evidence presented and admissions made in the course of the trial was as follows: At the outset the land was public and unappropriated, and it remained such save as the locations in question or some of them may have changed its status. The lode locations were made, one in 1897 and the other two in 1907, and the placer locations in September, 1913. The title under the latter already has been sufficiently traced. That under the lode locations passed to the Glasgow & Western Exploration Company soon after they were made, and the defendant, Ralph, claims under a deed executed by that company's liquidator in 1914. The principal controversy was over the presence or absence of essential discoveries within the lode locations, it being denied on one hand and affirmed on the other that a vein or lode of rock in place bearing valuable mineral was dis-

covered in each location before the placer locations were made. It was not controverted, but, on the contrary, conceded, that that point of time was the important one in the inquiry. Thus when the presiding judge indicated his view by saying, "My idea is that you can't take advantage of any discoveries made since the placer locations; and I don't believe there can be any dispute about that," counsel for the defendant responded, "No, your Honor, there is none," and on another occasion counsel said, "We are undoubtedly limited to proving that there was a discovery of mineral in place on each of our lode claims prior to the location of the placer claims." In all particulars other than discovery the regularity and perfection of the lode locations were conceded. Closely connected with the controversy over lode discoveries was another over the applicability and effect of § 2332 of the Revised Statutes, but it will be passed for the moment and separately considered later. As to the placer claims, it was shown that they were based upon adequate discoveries of placer gold within their limits, and counsel for the defendant announced, "We don't deny this ground is of placer character." Their boundaries were properly marked and the requisite notices were posted and certificates recorded. The only questions respecting their validity that were presented and need present mention were, first, whether at the time the placer locations were made the lode locations had become valid and effective claims, thereby precluding any adverse location of the same ground, and next, if the lode locations had not then become valid and effective, whether the placer locations were initiated and made through wrongful intrusions or trespasses upon any actual possession of the lode claimant. The defendant, as is admitted in his brief in this court, did not claim that any lode or vein was or should be excepted from the placer claims, but only that they were of no effect for the reasons just indicated.

The evidence bearing upon the presence or absence of lode discoveries [1] was conflicting. That for the plaintiffs tended persuasively to show the absence of any such discovery before the placer claims were located, while that for the defendant tended the other way. Separately considered, some portions of the latter were persuasive, but it was not without noticeable infirmities, among them the following: The defendant testified that no ore was ever mined upon any of the lode claims, and that "there was no mineral exposed to the best of my [his] knowledge which would stand the cost of mining, transportation and reduction at a commercial profit." In the circumstances this tended to discredit the asserted discoveries; and of like tendency was his unexplained statement, referring to the claims grouped in this patent application, that "some of them have not a smell of ore, but they can be located and held on the principle of being contiguous to adjacent claims,"—an obviously mistaken view of the law,—and his further statement, referring to vein material particularly relied upon as a discovery, that he "would hate to try to mine it and ship it."

As respects the initiation and working of the placer

[1] The following extracts from *Chrisman* v. *Miller*, 197 U. S. 313, 322, show what constitutes an adequate discovery:

"The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral."

"Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

"The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would *justify* a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property."

claims, the plaintiffs' evidence indicated that the locators entered openly, made placer discoveries, performed the requisite acts of location, excavated several shafts in the "wash" from 35 to 57 feet in depth, ran drifts from the bottom along the bed-rock, and mined a considerable amount of placer gold; and that these acts covered a period of between two and three months. None of this was contradicted; and there was no evidence that the locators met with any resistance or resorted to any hostile, fraudulent or deceptive acts. But there was evidence of such ownership of buildings, comparatively recent prospecting, and maintenance of a watchman, on the part of the lode claimant [1] as made it a fair question whether he was in actual possession when the placer locators entered. That he was in possession of the buildings and the ground where they stood was made certain, but that he had any actual possession beyond that was reasonably debatable under the evidence.

The buildings were all on the same claim and covered only a part of it. One was a mill formerly in use but then dismantled and stripped of its machinery. All had been used in connection with mining operations upon other claims, but the operations had then been suspended. The buildings were not disturbed by the placer locators, nor was there any attempt to appropriate them. A watchman was in charge, but so far as appears he made no objection to what was done. Although a witness for the defendant and in his employ, he was not interrogated upon this point. Of course, ownership of the buildings did not in itself give the lode claimant any right in the land or prevent others from entering peaceably and in good faith to avail themselves of privileges accorded by the mineral land laws; but the presence of the buildings

[1] The lode claimant at that time was either the liquidator of the Glasgow & Western Exploration Company or the company itself.

and his relation to them did have a bearing upon the question of actual possession—a pronounced bearing as respects the place where the buildings stood and a lesser bearing as respects the other ground.

Even if the lode claimant was in actual possession of all, it still was a disputable question under the evidence whether there had not been such acquiescence in the acts of the placer locators in going upon the ground, making placer discoveries and marking their locations as gave them the status of lawful discoverers and locators rather than wrongful intruders or trespassers, that is to say, the status of explorers entering by permission and then making discoveries. See *Crossman* v. *Pendery*, 8 Fed. Rep. 693.

The questions of fact to which we have adverted were all submitted to the jury under a charge which was comprehensive, couched in plain terms, and in substantial accord with the legal principles hereinbefore stated. And, while the defendant criticises some portions of the charge, we think they neither included nor omitted anything of which he rightly can complain. As has been said, the jury returned general verdicts for the plaintiffs, and also special verdicts finding that no lode had been discovered within any of the lode locations before the placer ones were made.

But it is objected that the court, instead of requiring the plaintiffs to take the burden of proving the absence of essential lode discoveries, subjected the defendant to the burden of proving that there were such discoveries. This is not in accord with the record. It there appears that the plaintiffs undertook at the outset to establish the absence of any lode discovery and persisted in that course, a large, if not the larger, part of their case in chief being directed to that point. When they rested the defendant moved that the evidence produced by them "as to the absence of lodes, or the failure or inability of the witnesses to find or discover lodes, or mineral-bearing

rock in place" within the lode locations be stricken out because not within the issues tendered by the plaintiffs' complaints. The motion was denied and in that connection the court observed that the burden "undoubtedly" was on the plaintiffs not only to show their own placer discoveries, acts of location, etc., but also "that the ground in dispute was open to location"; and the court added, "Plaintiffs have, so far as the record discloses, always insisted that there was no lode discovery, and that the only discovery was of placer." There was also an admission in the defendant's requested instructions that the plaintiffs "in their case in chief" introduced evidence tending to show that "the ground comprised in the lode mining claims . . . contained no lodes, veins or mineral-bearing rock in place, and . . . that said lode locations were therefore invalid." And the court in charging the jury said, "The burden is on the plaintiffs in the first instance to show that when they went on these claims to locate the placers the ground was open to location, and that there were at the time no valid, subsisting locations where their discoveries were made." It therefore is plain that the burden of proof was dealt with and carried in a manner which does not admit of criticism by the defendant.

It is objected also that the court refused to direct verdicts for the defendant. But what has been said sufficiently shows that, in our opinion, the evidence presented several disputable questions of fact which it was the province of the jury to determine. This was the view not only of the judge who presided at the trial but of another judge who in overruling the motion for a new trial said, "I think that not only is there substantial evidence to support the verdict, but the preponderance is upon that side." Were we less satisfied than we are upon the point we should hesitate to disturb the concurring conclusions of those judges.

It is urged that the court erred in not holding that the placer claimants had admitted the validity of one of the lode locations by relocating the ground as a lode claim. A short statement of what was done will show, as we think, that it did not involve any such admission. After the placer claimants made their placer discovery a representative of theirs posted on the ground a notice stating that they had relocated it as a lode claim. The next day he substituted another notice stating that they had located it as a placer claim. The first notice did not accord with their discovery and the other did. Nothing was done or claimed under the first and all the subsequent steps were in accord with the other. Evidently the first was posted by mistake and the other as the true notice. No one was misled by the mistake and it was promptly corrected. In these circumstances, the first notice was of no effect and no admission could be predicated of it. *Zeiger* v. *Dowdy*, 13 Arizona, 331.

The further objection is made that no probative force was given to recitals of discovery in the recorded notices of location of the lode claims. The notices were admitted in evidence and no instruction was asked or given respecting the recitals. In one nothing is said about discovery, and what is said in the other two is meager. But, passing this, the objection is not tenable. The general rule is that such recitals are mere *ex parte*, self-serving declarations on the part of the locators, and not evidence of discovery. *Creede & Cripple Creek Mining Co.* v. *Uinta Tunnel Mining Co.*, 196 U. S. 337, 352; Lindley on Mines, 3d ed., § 392; *Mutchmor* v. *McCarty*, 149 California, 603, 607; *Strepey* v. *Stark*, 7 Colorado, 614, 619; *Magruder* v. *Oregon & California R. R. Co.*, 28 L. D. 174. This rule is recognized and applied in Nevada. *Fox* v. *Myers*, 29 Nevada, 169, 186; *Round Mountain Mining Co.* v. *Round Mountain Sphinx Mining Co.*, 36 Nevada, 543, 560.

Complaint is made because the defendant was not per-

mitted on the cross-examination of a witness for the plaintiffs to show the contents of certain assay reports. In his examination in chief the witness told of taking twelve samples from openings made by the lode claimant in the lode locations and of having the samples assayed. Seven of the assay reports were produced at the plaintiffs' request and put in evidence. They attributed to one sample a mineral value of sixty-three cents per ton and to the other six only a trace of mineral. In cross-examining the witness the defendant called for the remaining reports or their contents, but the plaintiffs objected and the objection was sustained. In other respects the cross-examination proceeded without restriction and included a full interrogation of the witness about the points from which each of the twelve samples was taken. This interrogation disclosed that one of the reports put in evidence covered a sample taken from an opening made after the location of the placer claims; and because of this that report was stricken out at the defendant's request and with the plaintiffs' consent. Near the close of the trial the court recalled its prior ruling and announced another more favorable to the defendant. The witness was then recalled and, after some further examination, three of the remaining reports were put in evidence. They attributed to one sample a mineral value of one dollar and thirty-four cents per ton and to the other two only a trace of mineral. Thus of the twelve reports all but two were produced. These two, like the one stricken out, covered samples taken from openings made after the placer claims were located. The defendant did not call for them when the witness was recalled or reserve any exception to the new ruling, and it is more than inferable from the record that he acquiesced in it. Of course, there is no merit in the present complaint.

What we have said sufficiently disposes of all questions other than that before mentioned respecting the applica-

bility and effect of § 2332 of the Revised Statutes, which provides:

"Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining-claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

The defendant, conceiving that the section could be invoked in the absence of a mineral discovery, requested the court to instruct the jury that if the lode claimant held and worked the lode claims for a period of two years—the local prescriptive period for adverse possession, Rev. Laws, 1912, § 4951,—before the placer claims were initiated, such holding and working were the full equivalent of all that was essential to the validity of the lode claims, including discovery. That request was refused and others were then presented which differed from it only in that they treated discovery as essential by coupling it with holding and working. These were also refused, but no complaint is made of this,—obviously because the jury were told that under the evidence the lode claims should be regarded as valid, if only the requisite discoveries were made at any time before the placer claims were initiated. The jury, as we have seen, found as matter of fact that there was no such discovery.

The effect which must be given to § 2332 in circumstances such as are here disclosed—whether it substitutes something else in the place of discovery or cures its absence—is the matter we have to consider. That the section is a remedial provision and designed to make proof of holding and working for the prescribed period the legal equivalent of proof of acts of location, recording and transfer, and thereby to relieve against possible loss or

destruction of the usual means of establishing such acts, is attested by repeated rulings in the land department and the courts. But those rulings give no warrant for thinking that it disturbs or qualifies important provisions of the mineral land laws, such as deal with the character of the land that may be taken, the discovery upon which a claim must be founded, the area that may be included in a single claim, the citizenship of claimants, the amount that must be expended in labor or improvements to entitle the claimant to a patent, and the purchase price to be paid before the patent can be issued. Indeed, the rulings have been to the contrary.

The view entertained and applied in the land department is shown in the following excerpt from a decision by the Secretary of the Interior:

"One purpose of section 2332, . . . clearly shown in the history of the proceedings in Congress attending its consideration and passage there, was to lessen the burden of proving the location and transfers of old claims concerning which the possessory right was not controverted but the record title to which had in many instances been destroyed by fire or otherwise lost because of the insecurity and difficulty necessarily attending its preservation during the early days of mining operations. . . .

"The section was not intended as enacted, nor as now found in the Revised Statutes, to be a wholly separate and independent provision for the patenting of a mining claim. As carried forward into the Revised Statutes it relates to both lode and placer claims, and being *in pari materia* with the other sections of the Revision concerning such claims is to be construed together with them, and so, if possible, that they may all stand together, forming a harmonious body of mining law." *Barklage* v. *Russell*, 29 L. D. 401, 405–406.

The views entertained by the courts in the mining regions are shown in *Harris* v. *Equator Mining Co.*, 8

Fed. Rep. 863, 866, where the court ruled that holding and working a claim for a long period were the equivalent of necessary acts of location, but added that "this, of course, was subject to proof of a lode in the Ocean Wave ground, of which there was evidence"; in *Humphreys* v. *Idaho Gold Mines Co.*, 21 Idaho, 126, 140, where the section was held to obviate the necessity for proving the posting, etc., of a location notice, but not to dispense with proof of discovery; in *Upton* v. *Santa Rita Mining Co.*, 14 N. Mex. 96, where the court held that the section should be construed in connection with other provisions of the mineral land laws, and that it did not relieve a claimant coming within its terms from continuing to do the assessment work required by another section; and in *Anthony* v. *Jillson*, 83 California, 296, where the section was held not to change the class who may acquire mineral lands or to dispense with proof of citizenship.

As repects discovery, the section itself indicates that no change was intended. Its words, "have held and worked their claims," presuppose a discovery; for to "work" a mining claim is to do something toward making it productive, such as developing or extracting an ore body after it has been discovered. Certainly it was not intended that a right to a patent could be founded upon nothing more than holding and prospecting, for that would subject non-mineral land to acquisition as a mining claim. Here, as the verdicts show, there was no discovery, so the working relied upon could not have been of the character contemplated by Congress.

The defendant places some reliance upon the decisions of this court in *Belk* v. *Meagher*, 104 U. S. 279, and *Reavis* v. *Fianza*, 215 U. S. 16, but neither contains any statement or suggestion that the section dispenses with a mineral discovery or cures its absence. The opinion in the first shows affirmatively that there was a discovery and that in the other shows that the controversy, although of

recent origin, related to "gold mines" which had been worked for many years.

The only real divergence of opinion respecting the section has been as to whether it is available in an adverse suit, such as these are, or is addressed merely to the land department. Some of the courts have held it available only in proceedings in the department, *McGowan* v. *Maclay*, 16 Montana, 234, and others in greater number have held it available in adverse suits. *Upton* v. *Santa Rita Mining Co.*, *supra*, and cases cited. The latter view has received the approval of this court. *Reavis* v. *Fianza*, *supra*; *Belk* v. *Meagher*, *supra*.

We conclude that the defendant was not entitled to any instruction whereby he could receive the benefit of § 2332 in the absence of a discovery, and therefore that the District Court rightly refused to give the one in question. The Circuit Court of Appeals held that the instruction should have been given, and in this we think it erred.

Judgments of Circuit Court of Appeals reversed.
Judgments of District Court affirmed.

PANAMA RAILROAD COMPANY *v.* TOPPIN.

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

No. 147. Argued January 16, 1920.—Decided March 15, 1920.

By the laws of Panama, a railroad company is liable for personal injuries resulting from the criminal negligence of its servant in running an engine at a rate prohibited by the Panama Police Code. P. 310.

The rule of *respondeat superior* applies in Panama, in such cases, and due care in selecting the servant is not a defense for the railroad company. P. 311.

In Panama, under Civil Code, Art. 2341, as well as in the Canal Zone, damages for physical pain are allowable in a personal injury case. P. 313. *Panama R. R. Co.* v. *Bosse*, 249 U. S. 41.
250 Fed. Rep. 989, affirmed.

THE case is stated in the opinion.

Mr. Frank Feuille and *Mr. Walter F. Van Dame*, for plaintiff in error, submitted.

Mr. Wm. C. MacIntyre, with whom *Mr. W. C. Todd* and *Mr. T. C. Hinckley* were on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Toppin was struck by a locomotive of the Panama Railroad Company while riding a horse in the City of Colon. He sued the company for damages in the District Court of the Canal Zone, alleging negligence, and recovered a verdict. The judgment entered thereon was affirmed by the Circuit Court of Appeals for the Fifth Circuit (250 Fed. Rep. 989), and the case is here on writ of error.

The main contentions of the company are here, as in *Panama R. R. Co.* v. *Bosse*, 249 U. S. 41, that the trial court erred in holding applicable the rule of *respondeat superior* and the rule permitting recovery for physical pain suffered. The important difference in the two cases is this: There the accident occurred in the Canal Zone; here, in the Republic of Panama. The company insists that the *Bosse Case* is not controlling, because the questions affecting liability must here be determined by the law of that Republic,—the place where the accident occurred. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120; *Cuba R. R. Co.* v. *Crosby*, 222 U. S. 473. The law

of Panama is pleaded by both parties and evidence thereon was introduced by both; but we are not limited to this evidence, as they agree that we may take judicial notice of the law of Panama existing February 26, 1904, when the Canal Treaty was proclaimed, and that, in the absence of evidence to the contrary, the law then prevailing there will be presumed to have continued in force.

First: The company contends that the jury should have been instructed that under the law of Panama the company was not liable if the accident resulted from a criminal act of its employees, there being evidence that it was due to running the locomotive at a rate of speed prohibited under penalty by the Police Code of Panama. That code, known as Ordinance No. 87 of the year 1896, provides (Articles 488, 489):

"When a tramway crosses a town, as well as when it passes by a gate or viaduct, it shall not travel at a greater speed than that of a wagon drawn by horses at a moderate trot; in case of an infraction the conductor or the administrator of the company subsidiarily shall pay a fine of 10 to 100 pesos, without prejudice to the responsibility, civil or penal, to which he may be subjected by reason of the damage, fault or tort. . . ."

"This article . . . shall be applied to railroads when they enter cities or towns."

The Panama Law, No. 62, of 1887, had provided in Article 5:

"Railroad companies are responsible for the wrongs and injuries which are caused to persons and properties by reason of the service of said railroads and which are imputable to want of care, neglect, or violation of the respective police regulations which shall be issued by the government as soon as the law is promulgated."

And Article 2341 of the Civil Code provides:

"He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it,

without prejudice to the principal penalty which the law imposes for the fault or offense committed."

It would seem clear from a reading of these provisions that the company would not be relieved from liability in damages for injuries resulting from the negligence of its employee, merely because the negligent act was also punishable as a crime. And the Colombian authorities to which our attention has been called tend to confirm this construction.[1] There seems to have been a rule of practice under the Colombian Judicial Code (Article 1501 [2]) by which, if the civil action and the criminal action arising out of the same acts are not brought at the same time, the civil action cannot be prosecuted until the conclusion of the criminal action with the condemnation of the delinquent. But such rule obviously can have no application here; among other reasons because it refers to the case where the same person is liable both civilly and criminally. Here it is the engineer who is liable criminally under the Police Code and the company against whom civil liability is being enforced.

Second: The company contends that by the law of Panama it cannot be held liable for the injury caused by the negligence of its engineer if it was careful in selecting him, because the law of Panama does not recognize liability without fault. This contention was made and rejected by the Supreme Court of Colombia in a case similar to the case at bar.[3] There suit was brought against the empresario of a railway to recover for the loss of a house by fire due to the negligent operation of a locomotive.

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[1] *Cecilia Jaramillo de Cancino* v. *Railroad of the North.* Supreme Court of Justice of the Republic of Colombia, XIII Judicial Gazette, Nos. 652–653. Decided December 16, 1897.

[2] *Ruperto Restrepo* v. *Sabana Railway Company.* Supreme Court of Justice of the Republic of Colombia, III Judicial Gazette, No. 353, pp. 332–334. Decided July 19, 1892.

[3] *Cancino* v. *Railroad of the North, supra,* note 1.

The court rested the liability upon Article 2347 of the Civil Code,[1] declaring that all doubt as to the existence of the necessary dependency was removed by Article 5 of Law 62 of 1887, which "without in any way mentioning the dependents, employees, or workmen of railway enterprises, makes their empresarios responsible for the damages and injuries which they may cause to persons or to property by reason of the service of the said roads." The court continues: "and there is not in the record any proof whatever that any care or precaution, either on the part of the empresario or the engineer, had been taken to prevent the fire, the proof that the empresario on his part had exercised much care in the selection of his employees not being sufficient in the opinion of the court, because the diligence and care here treated of, is that which ought to have been exercised in order to prevent an injury that could have been easily foreseen." [2] This case seems to overrule in effect the principal authority to which the plaintiff in error has referred us [3]—in fact, it is not unlikely that such was the object of Article 5 of Law 62 of 1887.

[1] Article 2347. "Every person is responsible not only for his own actions, for the purpose of making good the damage, but for the act of those who may be under his care.

"Thus, the father, and failing him the mother, is responsible for the act of the minor children who live in the same house.

"Thus, the tutor or guardian is responsible for the conduct of the pupil who lives under his protection and care.

"Thus, the husband is responsible for the conduct of his wife.

"Thus, the directors of colleges and schools respond for the acts of students while they are under their care, and artisans and empresarios for the acts of their apprentices and dependents in like cases.

"But this responsibility will cease if with the exercise of the authority and care which their respective characters prescribe for and confer on them they could not prevent the act."

[2] See also *Panama R. R. Co.* v. *Bosse*, 249 U. S. 41, 49.

[3] *Ramirez* v. *Panama Railroad Company*. Supreme Court of Justice of Colombia, 1 Gaceta Judicial, No. 22, p. 170 (June 10, 1887).

Third: The contention that the lower courts erred in allowing recovery for physical pain was made and overruled in *Panama R. R. Co.* v. *Bosse, supra*, p. 47. As the decision there rested upon Article 2341 of the Civil Code of Panama it is applicable whether the *lex loci* or the *lex fori* should be held controlling as to such damages. Exception was also taken to the ruling that "if the plaintiff has developed tuberculosis of the spine as a result of the injuries received" the tuberculosis may be considered as an element of damages. The instruction was given with such explanations as to have been clearly unobjectionable.

Affirmed.

THE ATLANTEN.[1]

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

No. 171. Argued March 10, 1920.—Decided March 22, 1920.

A charter party provided that, should any dispute arise, it should be settled by referees, to be appointed by the captain and the charterers respectively, whose decision, or that of an umpire, should be final, and that any party attempting to revoke such submission to arbitration without permission of court should be liable to pay the estimated freight as liquidated damages. *Held*, that this could not be construed to apply where there was not merely a dispute in carrying out the contract but a substantial repudiation of it, by the shipowner's declining to go on with the voyage unless the freight rate were increased. P. 315.

A clause in a charter party: "Penalty for non-performance of this agreement to be proved damages, not exceeding estimated amount of freight," *held* inapplicable where the shipowner substantially

[1] The docket title of this case is *Rederiaktiebolaget Atlanten* v. *Aktieselskabet Korn-Og Foderstof Kompagniet.*

repudiated the contract by refusing to go on with the voyage. P. 316.

Such a clause provides a penalty and leaves the ordinary liability upon the undertakings of the contract unchanged. *Id.*

Presumption that in such a matter the rule on the continent of Europe is the same as in England and the United States. *Id.*

250 Fed. Rep. 935, affirmed.

THE case is stated in the opinion.

Mr. Clarence Bishop Smith for petitioner.

Mr. Roscoe H. Hupper, with whom *Mr. George H. Terriberry* was on the brief, for respondent.

Mr. Julius Henry Cohen, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a libel in admiralty by a Danish corporation, the respondent here, against a Swedish corporation, owner of the steamship Atlanten, for breach of a charter party made in Denmark, on September 30, 1914. The voyage was to be from a southern port in the United States to Danish ports to be named. On January 8, 1915, the owner (the petitioner) wrote to the charterers that owing to the increased war risk and other difficulties "we are compelled to cancel the Atlanten's charter party Pensacola to Scandinavia, and are ready to take all the consequences the Court after Clause No. 24 in the charter party will compel us to pay, not exceeding the estimated amount of freight." It offered to proceed, however, if the charterers would pay a higher rate. This libel was brought five months later. The owner in its answer admitted the breach, but set up the clause 24 of the char-

ter "Penalty for non-performance of this agreement to be proved damages, not exceeding estimated amount of freight" and clause 21 "If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision . . . shall be final, and any party attempting to revoke this submission to arbitration without leave of a court, shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight." It is alleged that by the laws of both Denmark and Sweden such a provision is binding and that arbitration is a condition precedent to the right to sue by reason of any dispute arising under the charter. The case was heard on exceptions to the answer. The District Court made a decree for the libellant for full damages, 232 Fed. Rep. 403, and this decision was affirmed by the Circuit Court of Appeals. 250 Fed. Rep. 935. 163 C. C. A. 185.

With regard to the arbitration clause we shall not consider the general question whether a greater effect should not be given to such clauses than formerly was done, since it is not necessary to do so in order to decide the case before us. For this case it is enough that we agree substantially with the views of Judge Learned Hand in the District Court and Judge Hough in the Circuit Court of Appeals. Their opinion was that the owner repudiated the contract and that the arbitration clause did not apply. It is true that it would be inaccurate to say that the owner repudiated the contract *in toto*, for the letter that we have quoted assumed that the contract was binding and referred to it as fixing the liability incurred. It meant simply that the owner would not proceed with the voyage. *United States* v. *McMullen*, 222 U. S. 460, 471. But we agree that such a refusal was not a "dispute" of the kind referred to in the arbitration clause.

As Judge Hand remarked, the withdrawal was before

the voyage began and it is absurd to suppose that the captain, who might be anywhere in the world, was to be looked up and to pick an arbitrator in such a case. The clause obviously referred to disputes that might arise while the parties were trying to go on with the execution of the contract—not to a repudiation of the substance of the contract, as it is put by Lord Haldane in *Jureidini* v. *National British & Irish Millers Ins. Co., Ltd.*, [1915] A. C. 499, 505. The allegation in the answer as to the law of Denmark and Sweden we do not understand to mean more than that arbitration agreements will be enforced according to their intent. It does not extend the scope or affect the construction of an agreement which, as we should construe it apart from that allegation, does not apply to the present case.

Paragraph 24 of the charter, supposed to limit liability, may be met in similar and other ways. If it were a limitation of liability it hardly could be taken to apply to a case of wilful unexcused refusal to go on with the voyage. It obviously was not intended to give the owner an option to go on or stop at that price. But furthermore, as was fully pointed out below, the clause is a familiar modification of a very old one, and in the courts of England that have had frequent occasion to deal with it, is held to be only a penalty, even in the present form, and to leave the ordinary liability upon the undertakings of the contract unchanged. *Wall* v. *Rederiaktiebolaget Luggude*, [1915] 3 K. B. 66. *Watts, Watts & Co., Ltd.*, v. *Mitsui & Co., Ltd.*, [1917] A. C. 227. [1916] 2 K. B. 826, 844. *Watts* v. *Camors*, 115 U. S. 353. Presumably this is also the continental point of view. We are of opinion that the decree was clearly right.

Decree affirmed.

MANNERS v. MOROSCO.

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

No. 370. Argued March 2, 1920.—Decided March 22, 1920.

Plaintiff, a dramatic author, granted defendant the "sole and exclusive license and liberty to produce, perform and represent" his copyrighted play in the United States and Canada, defendant agreeing to produce it "not later than January first, 1913, and to continue . . . for at least seventy-five performances during the season of 1913–1914 and for each theatrical season thereafter for a period of five years;" in default of 75 performances in any one theatrical year, all of defendant's rights were to revert to plaintiff; the play was to be presented in first-class theaters with competent companies and with a designated actress in the title rôle, a percentage of the gross receipts going to plaintiff as royalties; if it failed, it was to be let to stock companies, and the royalties thus accruing were to be divided equally between the parties; rehearsal and production were to be under the plaintiff's direction; no changes in the play were to be made without his approval, and he was to have the right to print and publish it, but not within six months of its first production without defendant's consent.

Held: (1) That the grant was not limited to five years' duration. P. 325.

(2) It did not convey the right to represent the play in motion pictures. *Id.*

(3) There was an implied covenant by the grantor not to use the reserved motion picture rights to the destruction of the rights granted. P. 326.

(4) Plaintiff is entitled to an injunction against representation in motion pictures, but upon condition that he also shall abstain from representing or authorizing representation in that form in Canada or the United States. *Id.*

258 Fed. Rep. 557, reversed.

THE case is stated in the opinion.

Mr. David Gerber, with whom *Mr. William J. Hughes* was on the briefs for petitioner:

The situation of the parties at the time the contract was entered into, and their acts in performance thereunder, are at war with the belated claim of respondent that he had the right to use the drama as the basis for a photoplay.

The contract is not a grant or assignment—but a license to produce the play in the United States and Canada, subject to "the terms, conditions and limitations" therein expressed, and every "term," "condition" or "limitation" is applicable only to a production of the play as a spoken drama, and inappropriate to the use of petitioner's literary work as the basis for a scenario for a photoplay or screen performance. *Heap* v. *Hartley*, 42 L. R. Ch. Div. 461; *London Printing & Publishing Alliance* v. *Cox*, 7 Times L. R. 738; *Neilson* v. *Horniman*, 26 Times L. R. 188; *Stevens* v. *Benning*, 1 Kay & J. 168; *Tuck* v. *Canton*, 51 L. J. (N. S.) pt. 2, pp. 363–365; *Lucas* v. *Cooke*, 13 L. R. Ch. Div. 872; *McIntosh* v. *Miner*, 37 App. Div. 483; *Harper Bros.* v. *Klaw*, 232 Fed. Rep. 609, 612; *Universal Film Mfg. Co.* v. *Copperman*, 218 Fed. Rep. 577–578; *Photo Drama Motion Picture Co.* v. *Social Uplift Film Corp.*, 213 Fed. Rep. 374–377; *New Fiction Publishing Co.* v. *Star Co.*, 220 Fed. Rep. 994–995; *London* v. *Biograph Co.*, 231 Fed. Rep. 696–697; *Klein* v. *Beach*, 239 Fed. Rep. 108, 110.

The modification of the contract, made July 20, 1914, somewhat reflects what was in the minds of the parties in January, 1912.

The word "represent" used in the contract, cannot be construed as referring to a motion picture, as distinct from the play. *Routledge* v. *Low*, L. R. 3; H. L. 100; *Black* v. *Imperial Book Co.*, 8 Ont. L. R. 9; *Smiles* v. *Belford*, 1 Ont. App. 436; *Murray* v. *Elliston*, 5 Barn. & Ald. 657; *Duck* v. *Bates*, 13 L. R. Q. B. 843; *Chappell* v. *Boosey*, 21 L. R. Ch. Div. 232.

The provision that the author would not exercise his

right to print the play until six months after its production in New York City, is not a limitation of the reserved rights possessed by the author. Its purpose is to delay the exercise by the author of his undoubted right to publish the play until six months after the stage representation in New York City, not otherwise to limit or grant to respondent his reserved rights.

The fact that petitioner retained the motion picture rights is not inconsistent with a license limited to a representation of the play as a spoken drama.

It would be an act of folly for the author to destroy the value of his play as a spoken drama by giving motion picture performances. He might also have published his play without copyright protection six months after its first representation in New York City, and thus have made it common property. With the loss of his common-law rights would have fallen the rights claimed by respondent. *Société Des Films Menchen* v. *Vitagraph Co.*, 251 Fed. Rep. 258.

By the amendment to § 5 of the Copyright Act of 1912, 37 Stat. 488, motion picture photoplays are classified apart from dramatic or musical compositions (subdivisions *l* and *m*). These rights are separable; "there might be a copyright for a dramatization of the old sort (acted on a stage) and also a copyright for a dramatization of the new sort (arranged in motion pictures)." *Photo Drama Motion Picture Co.* v. *Social Uplift Film Corp.*, 220 Fed. Rep. 448, 449.

In *Klein* v. *Beach*, 239 Fed. Rep. 108, the exclusive right to dramatize a book for presentation "on the stage" was held to exclude the presentation by means of motion pictures (see contract set forth at length in 232 Fed. Rep. 242).

In England, a contract covering the "acting rights" is held not to include cinema rights, nor do the words "English performances," embrace them. *Ganthony* v.

G. R. J. Syndicate, Ltd.; and *Wyndham* v. *A. E. Huebsch & Co., Ltd.* ("The Author," Vol. XXVI, No. 1, of Oct. 1, 1915, pp. 16, 17.) *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55, distinguished.

The license was not the grant of a right in perpetuity. *Grant* v. *Maddox*, 15 M. & W. 737; *Broadway Photoplay Co.* v. *World Film Corp.*, 225 N. Y. 104.

Mr. Charles H. Tuttle, with whom *Mr. William Klein* was on the brief, for respondent:

The agreement, as modified, did not terminate by self-limitation at the end of the six theatrical seasons. It was not an agreement for personal services or for a naked license, but a contract of bargain and sale, whereby property was granted and conveyed. *Frohman* v. *Fitch*, 164 App. Div. 231, 233.

It goes without saying that where property is conveyed, the conveyance is presumed to be absolute and not revocable at will or for a temporary period, in the absence of clear words of limitation. *Western Union Telegraph Co.* v. *Pennsylvania Co.*, 129 Fed. Rep. 849, 867, 862.

The provision for at least 75 performances each theatrical season for a specified time was not a grant by the plaintiff but a covenant by the defendant—a statement of the least he was to do. Furthermore, the contract of modification constituted a plain recognition by both parties that the original contract was not limited to the period mentioned and that the only question which was to be considered open, was whether that contract carried the motion picture rights.

The modified contract also shows that the defendant received not a mere personal privilege, but property rights which the parties did not intend should expire by self-limitation at the end of the period referred to in the original contract.

Any construction of the contract as modified, whereby

it would be limited to the period of seasons mentioned in the original agreement, would be harsh and oppressive to the defendant.

Quite apart from the special features and circumstances, the absolute character of this grant as not limited to any fixed period of years would follow as a matter of law. 6 Ruling Case Law, § 281; *Western Union Tel. Co.* v. *Pennsylvania Co., supra*, 861; *McKell* v. *Chesapeake & Ohio Ry. Co.*, 175 Fed. Rep. 321, 329; *White* v. *Hoyt*, 73 N. Y. 505, 511; *Duryea* v. *Mayor*, 62 N. Y. 592, 597.

Even if the contract as modified is to be limited to the period of seasons mentioned in the original contract, the action must fail because premature. That period does not expire until the season of 1918–1919.

The contracts between the parties conferred upon the defendant as part of the production rights, the right to produce the play in motion picture form. The granting clause of the original contract conveyed all the production rights.

The comprehensive force of the word "exclusive" when used in a conveyance of dramatic rights, and its clear purpose to prevent competitive production, have been well stated in *Photo Drama Motion Picture Co.* v. *Social Uplift Film Corp.*, 213 Fed. Rep. 374, 376; affd. 220 Fed. Rep. 448.

The word "represent" is peculiarly appropriate to a motion picture representation of a play.

Section 4952, Rev. Stats., gave the author of a dramatic composition not only the sole right of printing it but also the sole right "of publicly performing or *representing* it or causing it to be performed or *represented* by others."

In *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55, this court held that a motion picture representation of "Ben Hur" was an infringement of the author's copyright, since it was a representation of the story dramatically. See

Daly v. *Palmer*, 6 Blatchf. 256, 6 Fed. Cas. 1132, Case No. 3552.

Furthermore, unquestionably the grant of an exclusive right to produce, perform and represent a play purports a grant of the exclusive dramatic rights, and the "dramatic rights include motion picture rights," unless that meaning is narrowed by the addition of other words. Before the present contract was made, dramatic rights had acquired that definite and judicially determined meaning by virtue of *Kalem Co.* v. *Harper Bros.*, *supra*. If the parties to the present contract intended this form of grant to have any less meaning, language was available to reveal that intent. *Tully* v. *Triangle Film Corp.*, 229 Fed. Rep. 297.

In addition to the breadth of the granting clause itself, there are other provisions in the agreement which prove incontestably the mutual intent to convey the entire right to place the play before the American public in any form.

The expression of certain reservations in favor of the plaintiff was an exclusion of all others.

The courts will not easily accept a construction which would permit the plaintiff to produce motion pictures in competition with the defendant's production on the stage. The courts have frequently discerned the destructive consequences of a motion picture production of the play, synchronously with its production on the stage. *Harper Bros.* v. *Klaw*, 232 Fed. Rep. 609, 613; *Frohman* v. *Fitch*, 164 App. Div. 231, 233–234; *Photo Drama Motion Picture Co.* v. *Social Uplift Film Corp.*, 213 Fed. Rep. 374, 377.

The supplemental contract illustrates the intent of the parties to transfer to the defendant the ownership of the play for all production purposes.

The unbroken tenor of judicial decisions interpreting similar agreements establishes incontestably that the

motion picture rights were included. *Frohman* v. *Fitch*, *supra*; *Klein* v. *Beach*, 239 Fed. Rep. 108, 109; 232 Fed. Rep. 240, 246; *Harper Bros.* v. *Klaw*, 232 Fed. Rep. 609, 613; *Lipzin* v. *Gordin*, 166 N. Y. S. 792; *Hart* v. *Fox*, 166 N. Y. S. 793; *Photo Drama Motion Picture Co.* v. *Social Uplift Film Corp.*, 220 Fed. Rep. 448; *Kalem Co.* v. *Harper Bros.*, 222 U. S. 55; *s. c.* 169 Fed. Rep. 61, 63; *Klaw* v. *General Film Co.*, 154 N. Y. S. 988; *Universal Film Mfg. Co.* v. *Copperman*, 212 Fed. Rep. 301; affd. 218 Fed. Rep. 577; *Liebler* v. *Bobbs-Merrill Co.*, 162 App. Div. 900; Drone, Copyright, p. 588; Brackett's Theatrical Law, p. 61; *Lee* v. *Simpson*, 3 C. B. 871.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by the author of a play called Peg O' My Heart to restrain the defendant, Morosco, from representing the play in motion pictures, in violation of the plaintiff's copyright; and also, although this is a subsidiary question, from producing the play at all. The defendant justifies under an agreement of January 19, 1912, and a supplemental agreement of July 20, 1914, both set forth in the bill. The ground upon which the right to produce the play in any way was denied was that the agreement gave rights only for five years. This construction was rejected by the District Court and the Circuit Court of Appeals. Both Courts held also that the agreement conveyed the right to represent the play in moving pictures and on that ground dismissed the bill. 254 Fed. Rep. 737. 258 Fed. Rep. 557.

By the first agreement the plaintiff, party of the first part "does grant" to Morosco, the party of the second part, "the sole and exclusive license and liberty to produce, perform and represent the said play in the United States of America and the Dominion of Canada," subject to the terms and conditions of the contract. Morosco

agrees "to produce the play not later than January first, 1913, and to continue the said play for at least seventy-five performances during the season of 1913–1914 and for each theatrical season thereafter for a period of five years." He agrees further to pay specified percentages on the gross weekly receipts as royalties, and that "if during any one theatrical year . . . said play has not been produced or presented for seventy-five performances, then all rights of the said party of the second part shall cease and determine and shall immediately revert to the said party of the first part." Morosco further agrees to present the play in first-class theatres with competent companies and with Miss Laurette Taylor (the stage name of the author's wife), in the title rôle; the play to have a production in New York and to be continued on the road for at least one season or longer if considered advisable by both parties. No alterations, eliminations or additions are to be made without the approval of the author and the rehearsals and production of the play are to be under his direction. The author to have the right to print and publish the play but not within six months after the production of the play in New York City without consent. Morosco is not to let or transfer his rights without the author's consent. "Should the play fail in New York City and on the road . . . it shall be released for stock;" i. e., let to stock companies, with an equal division of royalties between plaintiff and defendant. By an addendum, after Miss Taylor should have finished her season her successor in the rôle of "Peg" for any subsequent tours shall be mutually agreeable to both parties. The contract is declared binding upon the parties, "their heirs, executors, assigns, administrators and successors."

The second agreement, in order to adjust controversies and to modify the first, authorized Morosco "as long as this contract is in force" to "produce, perform and represent" the play with or in as many companies as he saw fit,

without engaging Laurette Taylor and without consulting the plaintiff as to the cast, rehearsals or production of the play. Morosco also was authorized to let or sell any of his rights under the contracts, but he was not to be released from his personal liability to pay the royalties as specified in the contracts. The play might be released for stock whenever the net profits realized from all the companies producing the play should be less than $2,000, and then the royalties received from the stock theatres were to be divided equally. For four years from date neither party without consent of the other was to produce or give leave to produce the play by moving pictures and after that the rights of the parties were to be determined by and under the original agreement as if the supplemental agreement had not been made.

As to the duration of the defendant's rights we agree with the Courts below. We perceive no ground for converting the defendant's undertaking to continue the play for seventy-five performances during the season of 1913–1914, and for each season thereafter for five years, into a limit of the plaintiff's grant of rights. As was said in the District Court, it is a statement of the least that defendant was to do, not of the most that he was to have. The plaintiff was secured sufficiently by the forfeiture in case the play should not have been produced for seventy-five performances. The provisions in both contracts as to the release for stock are somewhat of an additional indication that it was expected that the arrangement was to last as long as the public liked the play well enough to make it pay, provided the defendant kept his half of the bargain performed.

On the question principally argued we are of opinion that the majority below was wrong. The thing granted was "the sole and exclusive license and liberty to produce, perform and represent" the play within the territorial limits stated, subject to the other terms of the contract.

It may be assumed that those words might carry the right to represent the play in moving pictures if the other terms pointed that way, but to our mind they are inconsistent with any such intent. We need not discuss the abstract question whether, in view of the fact that such a mode of representation was familiar, it was to be expected that it should be mentioned if it was to be granted or should be excluded if it was to be denied. Every detail shows that a representation by spoken drama alone is provided for. The play is to be continued for seventy-five performances for the theatrical seasons named. This applies only to the regular stage. The royalties are adapted only to that mode of presentation. *Harper Bros.* v. *Klaw*, 232 Fed. Rep. 609, 612. The play is to be presented in first-class theatres with a competent company and with Miss Laurette Taylor in the title rôle, which, of course, does not mean in moving pictures. The stipulations against alterations, eliminations or additions, and that the rehearsals and production of the play shall be under the direction of the author, denote the same thing, and clearly indicate that no other form of production is contemplated. The residuary clause, so to speak, by which the play is to drop to stock companies shows the lowest point to which the author was willing to let it go.

The Courts below based their reasoning upon the impossibility of supposing that the author reserved the right to destroy the value of the right granted, however that right may be characterized, by retaining power to set up the same play in motion pictures a few doors off with a much smaller admission fee. We agree with the premise but not with the conclusion. The implied assumption of the contract seems to us to be that the play was to be produced only as a spoken drama, with respect for the author's natural susceptibility concerning a strict adhesion to the text. We need not amplify the argument presented below against the reservation of the right in

question. As was said by Judge Hough in a similar case, "there is implied a negative covenant on the part of the [grantor] not to use the ungranted portion of the copyright estate to the detriment, if not destruction, of the licensees' estate. Admittedly if Harper Bros. (or Klaw & Erlanger, for the matter of that) permitted photo-plays of Ben Hur to infest the country, the market for the spoken play would be greatly impaired, if not destroyed." *Harper Bros.* v. *Klaw*, 232 Fed. Rep. 609, 613. The result is that the plaintiff is entitled to an injunction against the representation of the play in moving pictures, but upon the terms that the plaintiff also shall abstain from presenting or authorizing the presentation of the play in that form in Canada or the United States.

Decree reversed. Injunction to issue upon the condition that the plaintiff shall neither represent nor authorize the representation of the play Peg O' My Heart in moving pictures while the contract with the defendant remains in force.

MR. JUSTICE CLARKE, with whom concurred MR. JUSTICE PITNEY, dissenting.

The decision of this case involves the construction of the written contract of January 19, 1912, as modified by that of July 20, 1914, and, centering its attention upon the claim of the defendant to moving picture rights, the court dismisses in a single paragraph provisions in these contracts which seem to me to so clearly limit the rights of the defendant to a term expiring possibly in May, 1918, but certainly not later than May, 1919, that I cannot concur in the conclusion arrived at by my associates.

The court says:

"As to the duration of the defendant's rights we agree with the Courts below. We see no ground for converting the defendant's undertaking to continue the play for seventy-five performances during the season of 1913–1914,

and for each season thereafter for five years, into a limit of the plaintiff's grant of rights. As was said in the District Court, it is a statement of the least that defendant was to do, not of the most that he was to have."

This expression that the third paragraph of the contract of January 19, 1912, "is a statement of the least that defendant was to do, not of the most that he was to have," is repeated in the opinion of each of the three courts as the sufficient reason for concluding, as the District Court said, that the contract gave to the defendant "all the rights mentioned *for all time*." It is not the first time that a catchy phrase has diverted attention from less picturesque realities.

My reasons for concluding that the rights of the defendant were limited, as the court says his obligations were limited, to a term expiring not later than the close of the theatrical season of 1918–1919 may be briefly stated.

The grant which it is concluded gave the defendant the "exclusive license and liberty to produce, perform and represent" the play involved "for all time" is in these words:

"First: The party of the first part hereby grants . . . . to the party of the second part *subject to the terms, conditions and limitations hereinafter expressed*, the sole and exclusive license and liberty to produce, perform and represent the said play in the United States" and Canada.

In terms this is a "license" and in terms also it is subject to "conditions and limitations" to follow in the contract,—which are found in the third and fifth paragraphs.

The third paragraph reads:

"The party of the second part [defendant] agrees to produce the play not later than January first, 1913, and to continue the said play for at least seventy-five per-

317. CLARKE and PITNEY, JJ., dissenting.

formances during the season 1913–1914 and for each theatrical season thereafter for a period of five years."

The fifth paragraph provides that if the defendant shall fail to produce the play seventy-five times in any one theatrical year "then all rights of the said party of the second part [the defendant] shall cease and determine and shall immediately revert to the said party of the first part."

This third paragraph expresses the agreement of the parties as to what the defendant was to do in consideration of the grant by the plaintiff in the first paragraph, and reading it and the fifth paragraph together, as one, we have the extreme extent and time limit of the defendant's obligation and the penalty, forfeiture, is provided for the failure to perform at any time within that limit. The court says that the third paragraph expresses "the least [all] that defendant was to do," so that his obligation under the contract ended with the five-year period, which obviously would be not later than the close of the theatrical season of 1918–1919. This being true, when did the reciprocal obligation of the plaintiff expire?

That the obligation of the plaintiff continued "for all time" is apparently derived wholly from the inference, as stated by the District Court, that the parties, if they had intended otherwise, "could readily have fixed a time limit in paragraph 'First' by the addition of words such as 'for . . . years from' or 'until' a stated date."

It is very true that the parties could have written their contract in a different form, and certainly with much more precision of statement, than that in which they did write it, but it is also true that in making it in their own way and terms they granted a general license in the first paragraph, but made it subject to the "terms, conditions and limitations" thereinafter to be expressed, and that they then went forward and expressed in the third paragraph the five-year limitation as we have seen it. The

court holds that this five-year limitation applies to the defendant's obligation to perform but that it does not apply to the plaintiff's license to produce. I think it applies to both. Plainly the parties were undertaking to set down in their contract the mutual obligations which each intended to assume—those of the one in consideration of those of the other. The author granted the privilege of producing the play and the defendant agreed to produce it for at least seventy-five performances during each of five years. After that, the court concludes, the defendant was no longer bound by the contract to do anything which could advantage the plaintiff and therefore, clearly, the plaintiff should not continue thereafter under obligation to the defendant, unless the intention to be so bound is unmistakably expressed in his contract. The "natural and normal" inference is that when the obligation of one party to such a contract as we have here is ended it was the intention that the obligation of the other party should end also.

The inference that the license to produce continued after the obligation to produce expired, in my judgment, can be sustained only by neglecting the specific provision of the first paragraph, that the license granted is subject to the limitations which should follow, and which did follow in the third paragraph. It involves imposing, by judicial construction, heavy and unusual burdens upon the author of a successful dramatic composition in the interest of a commercial producer—a result which courts should not strain themselves to accomplish.

A penalty of forfeiture being provided for failure of the defendant to perform at any time, I cannot see any substantial reason for inserting the five-year limitation except to fix a limit for the expiration of all rights of both parties and this, it seems to me, was its only function.

The provision in the first contract that if the play should fail "in New York City and on the road," and in the

second that if the net profits for "one theatrical season" should be less than two thousand dollars, the play should be "released for stock" and the royalties divided equally between the parties, would have ample scope for application within the five-year period and therefore cannot properly be made the basis for the implied continuance of the license beyond that term.

For the reasons thus briefly stated, I think that the parties expressed with sufficient clearness their intention that their mutual relations should all terminate with the expiration of the five-year period, and therefore I dissent from the opinion of the court.

MR. JUSTICE PITNEY concurs in this opinion.

OKLAHOMA OPERATING COMPANY v. LOVE ET AL., COMPOSING THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA.

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

No. 129. Argued January 23, 24, 1919; restored to docket for reargument April 21, 1919; submitted October 9, 1919; order for oral argument entered October 20, 1919; reargued December 17, 1919.—Decided March 22, 1920.

Under the constitution and laws of Oklahoma, an order of the state Corporation Commission declaring a laundry to be a monopoly and its business public, and limiting its rates, was not reviewable directly, by appeal, mandamus, prohibition or otherwise, in any court of the State, and the only recourse for securing a judicial test of the adequacy of the rates fixed was to disobey the order and to appeal to the state Supreme Court from further action of the Commission,

when taken, imposing a penalty for contempt; a penalty as high as $500 might be imposed, and, *semble*, a new one for each violation of the order; and each day's refusal was declared to be a separate offense. *Held*, applying *Ex parte Young*, 209 U. S. 123, 147, and other cases, that the provisions relating to the enforcement of the rates by penalties were violative of the Fourteenth Amendment, without regard to the question of the insufficiency of the rates. P. 336.

Jurisdiction of the District Court having attached in a suit to enjoin the enforcement of such a rate-fixing order and infliction of penalties, it is not divested by a change in the state law permitting direct review of the order in the state court. P. 337.

Enforcement of the penalties should be enjoined until the District Court can determine whether the rates are confiscatory, and if they be found so their enforcement, by penalties or otherwise, should be enjoined permanently; and, if found not confiscatory, there should be a permanent injunction of penalties accrued *pendente lite*, if the plaintiff had reasonable ground for contesting the rates as confiscatory. *Id.*

The State Commission need not be enjoined from investigating plaintiff's rates and practices, but its findings and conclusions must be subjected to the review of the District Court in the injunction case; and may be made part of the final proofs therein. P. 338.

Reversed.

THE case is stated in the opinion.

Mr. C. B. Ames for appellant.

Mr. S. P. Freeling, Attorney General of the State of Oklahoma, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

This suit was brought in the District Court of the United States for the Western District of Oklahoma by the Oklahoma Operating Company against the Corporation Commission of that State to enjoin it from entertaining complaints against the company for the violation of orders limiting the rates for laundry work in Oklahoma City

theretofore entered by the Commission, under § 8235 [1] of the Revised Laws of Oklahoma (1910); and from doing any other acts or things to enforce said orders. The case comes here under § 266 of the Judicial Code by direct appeal from an order denying a motion for a preliminary injunction heard before three judges. The appellant presents to this court the question whether § 8235 is void under the Fourteenth Amendment, contending that under the laws of the State there was no opportunity of reviewing judicially a legislative rate fixed pursuant to that section except by way of defense to proceedings for contempt which might be instituted for violating the order, and that the possible penalties for such violation were so heavy as to prohibit resort to that remedy.

The bill as amended makes the following allegations: In 1913 the Commission entered an order declaring the Oklahoma Operating Company a monopoly and its business a public one, and directed it not to increase the rates then being charged except upon application to and permission of the Commission. Since that time operating costs have risen greatly and rates for laundry work pre-

[1] 8235. *Public business defined.* Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence or to affect the community at large as to supply, demand or price or rate thereof, or said business is conducted in violation of the first section of this article, said business is a public business, and subject to be controlled by the State, by the corporation commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business.

vailing in 1913 have become noncompensatory. Accordingly in January, 1918, the company moved the Commission to set aside its order of 1913 on the ground that the laundry business was not within the purview of § 8235, that the company was not a monopoly within the meaning of that section, and that the section was void. The Commission denied this motion and thereafter the company established rates higher than those prevailing in 1913. On account of this it is now threatened with proceedings for contempt. Since the establishment of these higher rates the company has been summoned before the Commission to give information as to the cost of performing laundry service in Oklahoma City and information in general to determine what may be reasonable rates for laundry service in that city. Upon these allegations a preliminary injunction was sought below to restrain the Commission from entertaining complaints for violation of its order fixing rates and to enjoin it from proceeding with the investigation regarding the cost of the service.

The scope of § 8235 and the prescribed course of proceedings thereunder, as construed by the Supreme Court of the State (*Harriss-Irby Cotton Co.* v. *State*, 31 Oklahoma, 603; *Shawnee Gas & Electric Co.* v. *State*, 31 Oklahoma, 505; *Oklahoma Gin Co.* v. *State*, 63 Oklahoma, 10) in connection with other legislation (§§ 1192 to 1207 of the Revised Laws of 1910) and provisions of the state constitution (Article IX, §§ 18 to 23), are so far as here material, these: Whenever any business by reason of its nature, extent or the exercise of a virtual monopoly therein is such that the public must use the same or its services, it is deemed a public business and as such is subject to the duty to render its services upon reasonable terms without discrimination. If any public business violates such duty the Corporation Commission has power to regulate its rates and practices. Disobedience to an order establishing rates may be punished as a contempt and the Commission has power,

sitting as a court, to impose a penalty therefor not exceeding $500 a day. Each day's continuance of failure or refusal to obey the order constitutes a separate offence. The original order may not be made nor any penalty imposed except upon due notice and hearing. No court of the State, except the Supreme Court by way of appeal, may review, correct or annul any action of the Commission within the scope of its authority or suspend the execution thereof; and the Supreme Court may not review an order fixing rates by direct appeal from such order. But in the proceedings for contempt the validity of the original order may be assailed; and for that purpose, among others, new evidence may be introduced. When a penalty for failure to obey an order has been imposed an appeal lies to the Supreme Court. On this appeal the validity of the original order may be reviewed; the appeal is allowed as of right upon filing a bond with sureties in double the amount of the fine imposed; the filing of the bond suspends the fine; and the period of suspension may not be computed against a concern in fixing the amount of liability for fines.

The order of the Commission prohibiting the company from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribed maximum rates for the service. It was, therefore, a legislative order; and under the Fourteenth Amendment plaintiff was entitled to an opportunity for a review in the courts of its contention that the rates were not compensatory. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 418, 456–458; *Ex parte Young*, 209 U. S. 123, 165, 166. The constitution of the State prohibited any of its courts from reviewing any action of the Commission within its authority except by way of appeal to the Supreme Court (Article IX, § 20); and the Supreme Court had construed the constitution and applicable provisions of the statutes as not permitting a direct appeal from

orders fixing rates. *Harriss-Irby Cotton Co.* v. *State, supra.* On behalf of the Commission it was urged at the oral argument that a judicial review of the order fixing rates might have been had also by writ of mandamus or of prohibition issuing out of the Supreme Court of the State. But, in view of the provision of the state constitution just referred to, it must be assumed, in the absence of a decision of a state court to the contrary, that neither remedy, even if otherwise available, could be used to review an order alleged to be void because confiscatory. The proviso "that the writs of mandamus and prohibition shall lie from the Supreme Court to the Commission in all cases where such writs, respectively, would lie to any inferior court or officer," appears to have no application here. The challenge of a prescribed rate as being confiscatory raises a question not as to the scope of the Commission's authority but of the correctness of the exercise of its judgment. Compare *Hirsh* v. *Twyford*, 40 Oklahoma, 220, 230.

So it appears that the only judicial review of an order fixing rates possible under the laws of the State was that arising in proceedings to punish for contempt. The constitution endows the Commission with the powers of a court to enforce its orders by such proceedings. (Article IX, §§ 18, 19.) By boldly violating an order a party against whom it was directed may provoke a complaint; and if the complaint results in a citation to show cause why he should not be punished for contempt, he may justify before the Commission by showing that the order violated was invalid, unjust or unreasonable. If he fails to satisfy the Commission that it erred in this respect, a judicial review is opened to him by way of appeal on the whole record to the Supreme Court. But the penalties, which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident. The penalty for refusal to

obey an order may be $500; and each day's continuance of the refusal after service of the order it is declared "shall be a separate offense." The penalty may apparently be imposed for each instance of violation of the order. In *Oklahoma Gin Co.* v. *Oklahoma*, decided this day; *post*, 339, it appears that the full penalty of $500 with the provision for the like penalty for each subsequent day's violation of the order was imposed in each of three complaints there involved, although they were merely different instances of charges in excess of a single prescribed rate. Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates. *Ex parte Young*, 209 U. S. 123, 147; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 349; *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 662.

The plaintiff is entitled to a temporary injunction restraining the Corporation Commission from enforcing the penalties. Since this suit was commenced, the legislature has provided by c. 52, § 3, of the Laws of 1919 (Sess. Laws Oklahoma 1919, p. 87) that in actions arising before the Commission under § 8235 there shall be the same right of direct appeal to the Supreme Court of the State as had theretofore existed in the case of transportation and transmission companies under Art. IX, § 20, of the constitution. But as plaintiff was obliged to resort to a federal court of equity for relief it ought to retain jurisdiction of the cause in order to make that relief as full and complete as the circumstances of the case and the nature of the proofs may require. The suit should, therefore, proceed for the purpose of determining whether the maximum rates fixed by the Commission are, under present conditions, confiscatory. If they are found to be so, a permanent injunction should issue to restrain their

enforcement either by means of penalties or otherwise, as through an assertion by customers of alleged rights arising out of the Commission's orders. *Missouri* v. *Chicago, Burlington & Quincy R. R. Co.*, 241 U. S. 533, 538. If upon final hearing the maximum rates fixed should be found not to be confiscatory, a permanent injunction should, nevertheless, issue to restrain enforcement of penalties accrued *pendente lite*, provided that it also be found that the plaintiff had reasonable ground to contest them as being confiscatory.

It does not follow that the Commission need be restrained from proceeding with an investigation of plaintiff's rates and practices, so long as its findings and conclusions are subjected to the review of the District Court herein. Indeed, such investigation and the results of it might with appropriateness be made a part of the final proofs in the cause.[1]

These conclusions require that the decree of the District Court be reversed and that the case be remanded for further proceedings in conformity with this opinion.

Reversed.

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[1] In *Ex parte Young*, 209 U. S. 123, 133, the District Court appears to have considered whether the rates were reasonable although the penal features of the act were declared void. *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, was an action for the penalty; and the question here raised was not involved. That it is the penalty provision and not the rate provision which is void appears from the cases in which the validity of statutes was sustained because the objectionable penalty provisions were severable and there was no attempt to enforce the penalties. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 417; *Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433, 443; *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor*, 223 U. S. 280, 286; *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 662.

OKLAHOMA GIN COMPANY v. STATE OF OKLAHOMA.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 32. Argued January 23, 24, 1919; restored to docket for reargument April 21, 1919; submitted October 9, 1919; order for oral argument entered October 20, 1919; reargued December 17, 1919.—Decided March 22, 1920.

The provision of the Oklahoma law concerning penalties for disobedience of an order of the Corporation Commission fixing rates, *held* void, following *Oklahoma Operating Co.* v. *Love*, *ante*, 331, as depriving a cotton ginning company of opportunity for judicial review. P. 340.

63 Oklahoma, 10, reversed.

THE case is stated in the opinion.

Mr. C. B. Ames for plaintiff in error.

Mr. S. P. Freeling, Attorney General of the State of Oklahoma, with whom *Mr. Paul A. Walker* was on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Corporation Commission of Oklahoma having found under § 8235 of the Revised Laws of 1910 that the Oklahoma Gin Company and four other concerns in the town of Chandler had combined and raised the charges for ginning cotton, on October 17, 1913, fixed a schedule of rates lower than those then in force. The company thereafter charged rates in excess of those so fixed; and three separate complaints against it alleging violation of the order were filed with the Commission. Being summoned

to show cause why it should not be punished for contempt the company admitted violation of the order, but alleged that it was void, among other reasons, because § 8235 was in conflict with the Fourteenth Amendment. After a full hearing at which new evidence was introduced, the Commission affirmed, on October 10, 1914, the rates fixed; made a finding that the violation of the order was wilful; imposed on the company a fine of $500 and costs under each of the three separate complaints; directed refund of all amounts collected in excess of prescribed rates; and declared also: "A fine will be imposed for each day the order has been violated, and the matter as to the number of days and the amounts of fines to be imposed upon the defendant, other than those mentioned in the information, will be left open for adjustment upon taking of evidence as to the number of days violated." An appeal was taken by the company to the Supreme Court of the State, which affirmed the order and, thereafter, denied two petitions for rehearing. The case comes here on writ of error under § 237 of the Judicial Code as amended.

This case was argued and submitted with *Oklahoma Operating Co.* v. *Love*, decided this day, *ante*, 331. For the reasons set forth in the opinion in that case the provision concerning penalties for disobedience to an order of the Commission was void because it deprived the company of the opportunity of a judicial review. The judgment must, therefore, be reversed. It is unnecessary to consider other contentions of plaintiff in error.

Reversed.

Counsel for Parties.

HIAWASSEE RIVER POWER COMPANY v. CAROLINA-TENNESSEE POWER COMPANY.

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

No. 208. Argued January 30, 1920.—Decided March 22, 1920.

The question whether a special act of a state legislature chartering a power company contravenes the equal protection and privileges and immunities clauses of the Fourteenth Amendment because it grants powers of eminent domain not conferred on a rival company organized under a general law, is not necessarily decided by a ruling of a state trial court, in a suit by the former company against the latter to quiet title, admitting the special charter in evidence over defendant's objection that it is void under the state bill of rights and constitution and violates the Fourteenth Amendment; nor is such question raised in the state Supreme Court by an assignment alleging merely that the trial court erred in admitting such evidence, and not mentioning the Amendment. P. 342.

A constitutional question not presented by assignment of errors or otherwise, or passed upon, in the state Supreme Court, does not afford jurisdiction under Jud. Code, § 237; an attempt to raise it by the petition for a writ of error from this court and the assignment filed here, is too late, and allowance of the writ by the chief justice of the state court does not cure the omission. P. 343.

Writ of error to review 175 N. Car. 668, dismissed.

THE case is stated in the opinion.

Mr. Eugene R. Black, with whom *Mr. Sanders McDaniel*, *Mr. J. N. Moody*, *Mr. Felix Alley* and *Mr. Zebulon Weaver* were on the briefs, for plaintiff in error.

Mr. Julius C. Martin, with whom *Mr. Thos. S. Rollins* and *Mr. Geo. H. Wright* were on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Carolina-Tennessee Power Company, a public utility, was incorporated by a private law of North Carolina with broad powers, including that of taking by eminent domain riparian lands of and water rights in any non-navigable stream of the State. It filed locations for two hydro-electric plants on the Hiawassee River and proceeded to acquire by purchase and by condemnation the lands and water rights necessary for that development. Thereafter the Hiawassee River Power Company was organized under the general laws of the State and threatened to locate and develop on that river hydro-electric plants which would necessarily interfere with the development undertaken by the Carolina-Tennessee Company. The latter brought in the Superior Court of Cherokee County a suit in the nature of a bill to quiet title. The case was tried in that court with the aid of a jury. Many issues of fact were raised and many questions of state law presented. A decree entered for the plaintiff below was reversed by the Supreme Court of the State and a new trial was ordered (171 N. Car. 248). The second trial resulted also in a decree for plaintiff below which was affirmed by the state Supreme Court (175 N. Car. 668). The case comes here on writ of error.

The federal question relied upon as giving jurisdiction to this court is denial of the claim that the private law incorporating the Carolina-Tennessee Company is invalid, because it conferred upon that company broad powers of eminent domain, whereas the general law, under which the Hiawassee Company was later organized, conferred no such right; the contention being that thereby the guaranty of the Fourteenth Amendment of privileges and immunities and equal protection of the laws had been violated. But this claim was not presented to nor passed upon by the

Supreme Court of the State. The only basis for the contention that it was so presented is the fact, that, when the Carolina-Tennessee Company offered in evidence at the trial in the Superior Court the private law as its charter, objection was made to its admission "on the ground that the same was in terms and effect a monopoly and a void exercise of power by the State Legislature which undertook to provide it, it being opposed and obnoxious to the bill of rights and the Constitution and in violation of the Fourteenth Amendment;" and that the admission of this evidence is among the many errors assigned in the Supreme Court of the State. The law, whether valid or invalid, was clearly admissible in evidence, as it was the foundation of the equity asserted in the bill. No right under the Federal Constitution was necessarily involved in that ruling. The reference to the "bill of rights and the Constitution" made when objecting to the admissibility of the evidence was to the state constitution and the point was not again called to the attention of that court. Compare *Hulbert* v. *Chicago*, 202 U. S. 275, 279, 280. The claim of invalidity under the state constitution was specifically urged in that court as a reason why the Carolina-Tennessee Company should be denied relief and the claim was passed upon adversely to the plaintiff in error; but no reference was made in that connection to the Fourteenth Amendment.

If a general statement that the ruling of the state court was against the Fourteenth Amendment were a sufficient specification of the claim of a right under the Constitution to give this court jurisdiction (see *Clarke* v. *McDade*, 165 U. S. 168, 172; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 248; *Marvin* v. *Trout*, 199 U. S. 212, 217, 224), still the basis for a review by this court is wholly lacking here. For the Fourteenth Amendment was mentioned only in the trial court. In the Supreme Court of the State no mention was made of it in the assignment of errors; nor was it, so far as appears by the record, otherwise presented to or

passed upon by that court. The denial of the claim was specifically set forth in the petition for the writ of error to this court and in the assignment of errors filed here. But obviously that was too late. *Chicago, Indianapolis & Louisville Ry. Co.* v. *McGuire*, 196 U. S. 128, 132. The omission to set it up properly in the Supreme Court of the State was not cured by the allowance of the writ of error by its Chief Justice. *Appleby* v. *Buffalo*, 221 U. S. 524, 529; *Hulbert* v. *Chicago*, 202 U. S. 275, 280; *Marvin* v. *Trout*, 199 U. S. 212, 223.

We have no occasion, therefore, to consider whether the claim of denial of rights under the Fourteenth Amendment was of the substantial character which is required to support a writ of error. *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311. Compare *Henderson Light & Power Co.* v. *Blue Ridge Interurban Ry. Co.*, 243 U. S. 563.

Dismissed for want of jurisdiction.

STATE OF ARKANSAS *v.* STATE OF MISSISSIPPI.

INTERLOCUTORY DECREE. IN EQUITY.

No. 7, Original. Entered March 22, 1920, upon motion submitted March 8, 1920.

Decree appointing, empowering and instructing commissioners to locate, etc., part of the boundary between the two States.

THIS CAUSE came on to be heard by this court on the motions and suggestions of counsel for the respective parties for the appointment of a commission to run, locate, and designate the boundary line between the States of Arkansas and Mississippi as indicated in the opinion of this court delivered on the 19th day of May, 1919, and

344. Interlocutory Decree.

thereupon and on consideration thereof, It is ordered, adjudged and decreed as follows, viz:

1. The true boundary line between the States of Arkansas and Mississippi, at the places in controversy in this cause, aside from the question of the avulsion of 1848, hereinafter mentioned, is the middle of the main channel of navigation of the Mississippi River as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.

2. By the avulsion which occurred about 1848, and which resulted in the formation of a new main channel of navigation, the boundary line between said States was unaffected, and remained in the middle of the former main channel of navigation as above defined.

3. The boundary line between the said States should now be located along that portion of said river, or the bed of said river, which ceased to be the main channel of navigation as the result of said avulsion, according to the middle of the main navigable channel as it existed immediately prior to the time of said avulsion.

4. A commission consisting of Samuel S. Gannett, Washington, D. C., Charles H. Miller, Little Rock, Arkansas, and Stevenson Archer, Jr., Greenville, Mississippi, competent persons, is here and now appointed by the court, to run, locate and designate the boundary line between said States along that portion of said river which ceased to be a part of the main navigable channel of said river as the result of said avulsion, in accordance with the above principles: Commencing at a point in said Mississippi River about one mile southwest from Friars Point, Coahoma County, Mississippi, where the main navigable channel of said river, prior to said avulsion, turned and flowed in a southerly direction, and thence following along the middle of the former main

channel of navigation by its several courses and windings to the end of said portion of said Mississippi River which ceased to be a part of the main channel of navigation of said river as the result of said avulsion of 1848.

5. In the event the said Commission cannot now locate with reasonable certainty the line of the river as it ran immediately before the avulsion of 1848, it shall report the nature and extent of the erosions, accretions and changes that occurred in the old channel of navigation as the result of said avulsion, and in said report, if necessary to be made in obedience to this paragraph of the decree, said Commission shall give its findings of fact and the evidence on which same are based.

6. Before entering upon the discharge of their duties, each of said Commissioners shall be duly sworn to perform faithfully, impartially and without prejudice or bias the duties hereinafter imposed; said oaths to be taken before the Clerk of this court, or before the clerk of any District Court of the United States, or before an officer authorized by law to administer an oath in the State of Arkansas or Mississippi, and returned with their report. Said Commission is authorized and empowered to make examination of the territory in question, and to adopt all ordinary and legitimate methods in the ascertainment of the true location of the said boundary line; to examine and consider carefully the printed record in this cause and the opinion of this court delivered on May 19, 1919, and to take such additional evidence under oath as may be necessary and authorized to enable said Commission to determine said boundary line, but such evidence shall be taken only upon notice to the parties with permission to attend by counsel and cross-examine the witnesses; to compel the attendance of witnesses and require them to testify; and all evidence taken and all exceptions thereto and rulings thereon shall be preserved, certified and returned with the report of said Commissioners; and

said Commission shall do all other matters necessary to enable it to discharge its duties and to obtain the end to be accomplished conformably to this decree.

7. It is further ordered that should any vacancy or vacancies occur in said Board of Commissioners by reason of death, refusal to act, or inability to perform the duties required by this decree, the Chief Justice of this court is hereby authorized and empowered to appoint another commissioner or commissioners to supply such vacancy or vacancies, the Chief Justice acting upon such information in the premises as may be satisfactory to him.

8. It is further ordered that said Commissioners do proceed with all convenient dispatch to discharge their duties conformably to this decree, and they are authorized, if they deem it necessary, to request the co-operation and assistance of the state authorities of Arkansas and Mississippi, or either of those States, in the performance of the duties hereby imposed.

9. It is further ordered that the Clerk of this court shall forward at once to the Governor of each of said States of Arkansas and Mississippi and to each of the Commissioners hereby appointed a copy of this decree and of the opinion of this court delivered herein May 19, 1919, duly authenticated.

10. Said Commissioners shall make a report of their proceedings under this decree as soon as practicable on or before the first day of October, 1920, and shall return with their report an itemized statement of services performed and expenses incurred by them in the performance of their duties.

11. All other matters are reserved until the coming in of said report, or until such time as matters pertaining to this cause shall be properly presented to this court for its consideration.

Per MR. CHIEF JUSTICE WHITE.

March 22, 1920.

STRATHEARN STEAMSHIP COMPANY, LIMITED, *v.* DILLON.

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

No. 373. Argued December 9, 1919.—Decided March 29, 1920.

Section 4 of the Seamen's Act of March 4, 1915, c. 153, 38 Stat. 1164, amending Rev. Stats., § 4530, provides that every seaman on a vessel of the United States shall be entitled to receive on demand from the master one-half of the wages which he shall then have earned, at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended; that all stipulations in the contract to the contrary shall be void; that such demand shall not be made before the expiration of or oftener than 5 days; that the master's failure to comply shall release the seaman from his contract and entitle him to full payment of wages earned, and (by a proviso) that the section shall apply to seamen on foreign vessels while in harbors of the United States, and that the courts of the United States shall be open to such seamen for its enforcement.

Held: (1) The proviso makes it clear that the benefits of the section are for foreign seamen on foreign vessels as well as American seamen on such vessels, since, otherwise, the grant of access to federal courts —a right already enjoyed by American seamen—would have been superfluous. P. 353. *Sandberg* v. *McDonald*, 248 U. S. 185, distinguished.

(2) The title of the act does not justify a different construction. P. 354.

(3) The section is constitutional as applied to the case of a foreign seaman who shipped abroad on a foreign vessel under a contract withholding payment of wages until the end of the voyage, and where demand was made before that time, it being within the authority of Congress thus to condition the right of foreign vessels to enter and use the ports of the United States. P. 355. *Patterson* v. *Bark Eudora*, 190 U. S. 169.

(4) The wages in respect of which demand may be made are not limited to those earned in a port of the United States, nor does the section intend that demand made in such a port shall be deferred five days from the arrival of the vessel there. P. 356.

256 Fed. Rep. 631, affirmed.

348. Argument for Petitioner.

THE case is stated in the opinion.

Mr. Ralph James M. Bullova, for petitioner, submitted:

The statute was not intended to apply to a foreign seaman entering into a valid contract in a foreign port for service on a foreign vessel.

If the scope of the act is so broadened, it is necessary to impute to Congress an intention to enact legislation having force beyond the territory of the United States; to interfere with friendly foreigners by destroying the contracts which they have made between themselves at home merely because their ships visit our ports; and to interfere with and attempt to control the relations between the subjects of a foreign friendly power aboard their own ships while they are temporarily in American waters. The language of the proviso does not require such a construction. It may readily be so construed as to avoid such results by excluding from its operation foreign seamen under agreements made in foreign countries, thus making it conform to the purpose of the act as expressed in its title.

The libellant contends that the object was to make the seaman a "free man"—in simple words, to encourage desertion from foreign vessels, not to promote the welfare of American seamen. This is much too short-sighted to be accepted as American. Under British law the breach of a seaman's contract is desertion, and the punishment for desertion is imprisonment. Of what avail is it for a British seaman to desert and to ship on an American vessel with higher wages and, when he arrives in a British port, to be imprisoned? The argument further implies that it was the will of Congress to impose its standards not only on behalf of American seamen but of all seamen American or foreign. Fundamentally and radically the argument is at variance with the first principles of our Republic and is an attempt to violate the sovereignty of

each nation and the comity of nations. Moore, International Law Dig., vol. II, p. 335; *Wildenhus's Case*, 120 U. S. 1; *Sandberg* v. *McDonald*, 248 U. S. 185.

If construed as libellant contends, this statute violates the due process of law clause of the Constitution. It would give him wages to which he is not entitled under his contract; these same wages it would take from the ship; it would deprive the ship of libellant's services to which, under their contract, it is entitled; and it would take from the ship a right to defend an action brought by the seaman for wages which under his contract he has not yet earned. The argument that the effect of the statute is "merely remedial," in opening the courts of this country to foreign seamen, is contrary to the statements by which it has been explained, and to the statute itself. Properly, Congress has refused our fora to the enforcement of remedies which are contrary to its public policy (such as imprisonment for desertion), and has made it illegal to enter into a contract contrary to its law within its jurisdiction (*Patterson* v. *Bark Eudora*, 190 U. S. 169); but it is radically different to open our fora, not for the enforcement of its law, but for the avowed purpose of interfering with and rendering void the contracts, laws and regulations of a friendly power.

It cannot be held that the law of the place of performance is the law of the United States, for the place of performance was a British ship; and although she was not immune from process while in the ports of the United States, still she did not cease to be British. While amenable to the police power of the United States, and of its several States, "her discipline and all things done on board which affected only the vessel or those belonging to her" must be dealt with according to British law. The agreement to pay the seamen's wages was not to be performed in the United States—the wages were to be paid only upon the return of the vessel to a port in the United

Kingdom, except as the master might voluntarily make prior payments.

The temporary stay in a port of the United States cannot be held to take away the right of the owner to the security, which he held for the performance of the seaman's contract.

Even if the act applies to foreign seamen upon foreign vessels who ship at a foreign port, the libellant's demand for half wages was premature, five days not having elapsed from the time of the arrival of the vessel at an American port. *The Italier*, 257 Fed. Rep. 712.

Mr. George Sutherland and *Mr. W. J. Waguespack*, with whom *Mr. Silas B. Axtell* was on the brief, for respondent.

Mr. Frederic R. Coudert and *Mr. Howard Thayer Kingsbury* for the British Embassy, by special leave of court.

The Solicitor General, with whom *Mr. A. F. Myers*, was on the brief, for the United States, by special leave of court.

MR. JUSTICE DAY delivered the opinion of the court.

This case presents questions arising under the Seamen's Act of March 4, 1915, c. 153, 38 Stat. 1164. It appears that Dillon, the respondent, was a British subject, and shipped at Liverpool on the eighth of May, 1916, on a British vessel. The shipping articles provided for a voyage of not exceeding three years, commencing at Liverpool and ending at such port in the United Kingdom as might be required by the master, the voyage including ports of the United States. The wages which were fixed by the articles were made payable at the end of the voyage. At

the time of the demand for one-half wages, and at the time of the beginning of the action, the period of the voyage had not been reached. The articles provided that no cash should be advanced abroad or liberty granted other than at the pleasure of the master. This, it is admitted, was a valid contract for the payment of wages under the laws of Great Britain. The ship arrived at the Port of Pensacola, Florida, on July 31, 1916, and while she was in that port, Dillon, still in the employ of the ship, demanded from her master one-half part of the wages theretofore earned, and payment was refused. Dillon had received nothing for about two months, and after the refusal of the master to comply with his demand for one-half wages, he filed in the District Court of the United States a libel against the ship, claiming $125.00, the amount of wages earned at the time of demand and refusal.

The District Court found against Dillon upon the ground that his demand was premature. The Circuit Court of Appeals reversed this decision, and held that Dillon was entitled to recover. 256 Fed. Rep. 631. A writ of certiorari brings before us for review the decree of the Circuit Court of Appeals.

In *Sandberg* v. *McDonald*, 248 U. S. 185, and *Neilson* v. *Rhine Shipping Co.*, 248 U. S. 205, we had occasion to deal with § 11 of the Seamen's Act, and held that it did not invalidate advancement of seamen's wages in foreign countries when legal where made. The instant case requires us to consider now § 4 of the same act. That section amends § 4530, Rev. Stats., and so far as pertinent provides: "Sec. 4530. Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary

shall be void: *Provided*, Such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. . . . *And provided further*, That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

This section has to do with the recovery of wages by seamen, and by its terms gives to every seaman on a vessel of the United States the right to demand one-half the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the end of the voyage, and stipulations in the contract to the contrary are declared to be void. A failure of the master to comply with the demand releases the seaman from his contract and entitles him to recover full payment of the wages, and the section is made applicable to seamen on foreign vessels while in harbors of the United States, and the courts of the United States are open to such seamen for enforcement of the act.

This section is an amendment of § 4530 of the Revised Statutes. It was intended to supplant that section, as amended by the Act of December 21, 1898, c. 28, 30 Stat. 756, which provided, "Every seaman on a vessel of the United States shall be entitled to receive from the master of the vessel to which he belongs one-half part of the wages which shall be due him at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended unless the contrary be expressly stipulated in the contract," etc.

The section, of which the statute now under consideration is an amendment, expressly excepted from the right to recover one-half of the wages those cases in which the

contract otherwise provided. In the amended section all such contract provisions are expressly rendered void, and the right to recover is given the seamen notwithstanding contractual obligations to the contrary. The language applies to all seamen on vessels of the United States, and the second proviso of the section as it now reads makes it applicable to seamen on foreign vessels while in harbors of the United States. The proviso does not stop there, for it contains the express provision that the courts of the United States shall be open to seamen on foreign vessels for its enforcement. The latter provision is of the utmost importance in determining the proper construction of this section of the act. It manifests the purpose of Congress to give the benefit of the act to seamen on foreign vessels, and to open the doors of the federal courts to foreign seamen. No such provision was necessary as to American seamen, for they had the right independently of this statute to seek redress in the courts of the United States, and, if it were the intention of Congress to limit the provision of the act to American seamen, this feature would have been wholly superfluous.

It is said that it is the purpose to limit the benefit of the act to American seamen, notwithstanding this provision giving access to seamen on foreign vessels to the courts of the United States, because of the title of the act in which its purpose is expressed "to promote the welfare of American seamen in the merchant marine of the United States." But the title is more than this, and not only declares the purposes to promote the welfare of American seamen but further to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea. But the title of an act cannot limit the plain meaning of its text, although it may be looked to to aid in construction in cases of doubt. *Cornell* v. *Coyne*, 192 U. S. 418, 530, and cases cited. Apart from the text, which we think plain, it is by

no means clear that, if the act were given a construction to limit its application to American seamen only, the purposes of Congress would be subserved, for such limited construction would have a tendency to prevent the employment of American seamen, and to promote the engagement of those who were not entitled to sue for one-half wages under the provisions of the law. But, taking the provisions of the act as the same are written, we think it plain that it manifests the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned, with equal opportunity to resort to the courts of the United States for the enforcement of the act. Before the amendment, as we have already pointed out, the right to recover one-half the wages could not be enforced in face of a contractual obligation to the contrary. Congress, for reasons which it deemed sufficient, amended the act so as to permit the recovery upon the conditions named in the statute. In the case of *Sandberg* v. *McDonald*, 248 U. S. *supra*, we found no purpose manifested by Congress in § 11 to interfere with wages advanced in foreign ports under contracts legal where made. That section dealt with advancements, and contained no provision such as we find in § 4. Under § 4 all contracts are avoided which run counter to the purposes of the statute. Whether consideration for contractual rights under engagements legally made in foreign countries would suggest a different course is not our province to inquire. It is sufficient to say that Congress has otherwise declared by the positive terms of this enactment, and if it had authority to do so, the law is enforcible in the courts.

We come then to consider the contention that this construction renders the statute unconstitutional as being destructive of contract rights. But we think this contention must be decided adversely to the petitioner upon the authority of previous cases in this court. The matter was

fully considered in *Patterson* v. *Bark Eudora*, 190 U. S. 169, in which the previous decisions of this court were reviewed, and the conclusion reached that the jurisdiction of this Government over foreign merchant vessels in our ports was such as to give authority to Congress to make provisions of the character now under consideration; that it was for this Government to determine upon what terms and conditions vessels of other countries might be permitted to enter our harbors, and to impose conditions upon the shipment of sailors in our own ports, and make them applicable to foreign as well as domestic vessels. Upon the authority of that case, and others cited in the opinion therein, we have no doubt as to the authority of Congress to pass a statute of this sort, applicable to foreign vessels in our ports and controlling the employment and payment of seamen as a condition of the right of such foreign vessels to enter and use the ports of the United States.

But, it is insisted, that Dillon's action was premature as he made a demand upon the master within less than five days after the vessel arrived in an American port. This contention was sustained in the District Court, but it was ruled otherwise in the Court of Appeals. Turning to the language of the act, it enacts in substance that the demand shall not be made before the expiration of five days, nor oftener than once in five days. Subject to such limitation, such demand may be made in the port where the vessel stops to load or deliver cargo. It is true that the act is made to apply to seamen on foreign vessels while in United States ports, but this is far from requiring that the wages shall be earned in such ports, or that the vessels shall be in such ports five days before demand for one-half the wages earned is made. It is the wages of the voyage for which provision is made, with the limitation of the right to demand one-half of the amount earned not oftener than once in five days. The section permits no

demand until five days after the voyage has begun, and then provides that it may be made at every port where the vessel stops to load or deliver cargo, subject to the five-day limitation. If the vessel must be five days in port before demand can be made, it would defeat the purpose of the law as to vessels not remaining that long in port, and would run counter to the manifest purpose of Congress to prevent a seaman from being without means while in a port of the United States.

We agree with the Circuit Court of Appeals of the Fifth Circuit, whose judgment we are now reviewing, that the demand was not premature. It is true that the Circuit Court of Appeals for the Second Circuit held in the case of *The Italier*, 257 Fed. Rep. 712, that demand, made before the vessel had been in port for five days, was premature; this was upon the theory that the law was not in force until the vessel had arrived in a port of the United States. But, the limitation upon demand has no reference to the length of stay in the domestic port. The right to recover wages is controlled by the provisions of the statute and includes wages earned from the beginning of the voyage. It is the right to demand and recover such wages, with the limitation of the intervals of demand as laid down in the statute, which is given to the seaman while the ship is in a harbor of the United States.

We find no error in the decree of the Circuit Court of Appeals and the same is

Affirmed.

THOMPSON, MASTER AND CLAIMANT OF THE STEAMSHIP "WESTMEATH," &c., *v.* LUCAS ET AL.

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

No. 391. Argued December 9, 1919.—Decided March 29, 1920.

Decided on the authority of *Strathearn S. S. Co.* v. *Dillon*, *ante*, 348. P. 363.
258 Fed. Rep. 446, affirmed.

THE case is stated in the opinion.

Mr. L. deGrove Potter, with whom *Mr. John M. Woolsey* was on the brief, for petitioner:

This section is ambiguous and is not expressly applicable to foreign seamen on a foreign vessel. Considering the purpose as disclosed by the act and its title, it is quite evident it was not the intention of Congress to legislate for the welfare of foreign seamen, but for the welfare of American seamen alone.

As the meaning is doubtful and as adherence to the strict letter would lead to injustice or contradiction, it is the duty of the court to give the statute a reasonable construction consistent with the general principles of law and comity, and, so far as practicable, to reconcile the different provisions to make them consistent and harmonious.

As this statute is penal, and in derogation of the common law, it should be construed strictly. *Sandberg* v. *McDonald*, 248 U. S. 185; *Neilson* v. *Rhine Shipping Co.*, *id.* 205.

If Congress had intended that this section should apply to foreign seamen on foreign vessels, temporarily within a

harbor of this country, in derogation of contracts made on foreign soil, and in contravention of the long established rules of comity and the law of nations it would expressly have provided in the act that it should be so applicable.

This section, and all the sections of the act, deal with American seamen and make provisions for their benefit and safety. *Sandberg* v. *McDonald*, 248 U. S. 195.

It is a general rule of law, well recognized in this country as well as in most other civilized countries, that a contract valid where made is valid everywhere, and should be enforced unless against public policy, natural justice or morality. Story, Conflict of Laws, 8th ed., § 242.

When once the rights and obligations of a particular transaction are fixed, in accordance with the principles of law and policy of the place where they become fixed, it cannot be admitted that these rights and obligations are subject to being varied according to the place or country or time of their enforcement. This fundamental principle is attributed to Cicero by Mr. Justice Swayne in the opinion of this court in the case of *Wilson* v. *McNamee*, 102 U. S. 572, 574. The enforcement by one sovereign of rights accrued under a valid contract made in the jurisdiction of another sovereign is part of the comity and law of nations.

The law of nations is a part of the law of the land and should be followed by the courts of the United States. *The Amelia*, 1 Cranch, 1; *The Charming Betsy*, 2 Cranch, 64, 118; *Holmes* v. *Jennison*, 14 Pet. 540, 569.

The contract involved herein, whereby it was provided that no wages were due the libellants until the completion of the voyage, is not contrary to public policy, good morals, or natural justice. Such a contract is valid under the laws of this country as well as those of Great Britain.

This contract is not contrary to public policy simply

because it is in conflict with the provisions of § 4530 of the Revised Statutes. *Northern Pacific R. R. Co.* v. *Babcock*, 154 U. S. 190. See *Sandberg* v. *McDonald*, 248 U. S. 185, 196.

That class of cases represented by *The Kensington*, 183 U. S. 263, and *Union Trust Co.* v. *Grosman*, 245 U. S. 412, on which the decision of the Circuit Court of Appeals in *The Strathearn*, 239 Fed. Rep. 583, was based, are not applicable here. They simply affirm the well recognized principle that the courts of this country will not enforce a foreign contract against public policy. See *Cuba R. R. Co.* v. *Crosby*, 222 U. S. 473, 478. The Seamen's Act, in so far as it is sought to be invoked in this case, does not place any limitation on the enforcement of an obligation but creates a pecuniary right and obligation in contravention of the terms of a valid foreign contract.

It has always been recognized by the courts as well as the executive branch of the government of this country that the laws and statutes of any State should not be given extra-territorial force and effect.

The English rule is laid down in *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115, 127; the French rule can be found in *The Dio Adelphi*, Nov., 1879, 91 Jour. du Palais, 1880, pp. 603, 609. In *The Apollon*, 9 Wheat. 362, Mr. Justice Story said, p. 370: "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens." *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 357; *United States* v. *Palmer*, 3 Wheat. 610, 631.

This court in the cases that have come before it has construed the act under consideration as not having any extra-territorial force. *Sandberg* v. *McDonald*, and *Neilson* v. *Rhine Shipping Co.*, *supra*. To the same effect are: *The Italier*, 257 Fed. Rep. 712; *The Nigretia*, 255 Fed. Rep. 56; *The Belgier*, 246 Fed. Rep. 966; *The State of Maine*, 22 Fed. Rep. 734; 30 Ops. Atty. Gen. 441. *Patter-*

son v. *Bark Eudora*, 190 U. S. 169, is not an authority to the contrary.

The provisions would have ample operation if confined to contracts of seamen on a foreign vessel when made while the vessel is in a harbor of the United States, and then only to contracts of American seamen. See *The Ixion*, 237 Fed. Rep. 142; *The Italier*, 257 Fed. Rep. 712.

Where a controversy concerns the rights and duties of the crew to the ship or among themselves and not involving a breach of the peace, on a foreign vessel on the high seas, or in the port of another country, the law of the flag of the vessel governs the rights and liabilities of the parties just as conclusively as though the controversy had arisen on land within the territorial jurisdiction of the country whose flag the vessel flies, for a ship has long been regarded by the courts and by writers on international law as a floating island of the country to which she belongs. Dicey, Conflict of Laws, 2d ed., § 663; Wharton, Conflict of Laws, § 473; Minor, Conflict of Laws, § 195; Bluntschli, § 317; 1 Calvo Droit International, 4th ed., 552; Book VI, § 3; Rutherford, II, c. 9. *Wildenhus's Case*, 120 U. S. 1, 12; *Wilson* v. *McNamee*, 102 U. S. 572, 574; *The Hamilton*, 207 U. S. 398; Moore, International Law Dig., vol. II, §§ 204, 207; Secretary Bayard to White, Charge d'Affairs at London, March 1, 1889, For. Rel. 1889, 447.

Where an act of Congress is passed over opposition of a minority, as in this case, it is to be considered that the words of the act represent all the majority deemed it safe to ask. *Lincoln* v. *United States*, 202 U. S. 484.

If the provisions of this section which do not specifically apply to foreign seamen of foreign vessels are construed by this court to apply to the case at bar, the effect of such a construction would be tantamount to holding that Congress may legislate as to contracts made on foreign soil and affecting only foreigners. Part of the section provides

"And all stipulations in the contract to the contrary shall be void." The contract was made at a port of Australia, and, if the words quoted are held to apply to the contract, this court will be sanctioning interference by Congress with the law of a foreign friendly power. That Congress possesses any such power has been denied by this court. *The Apollon*, 9 Wheat. 362.

The Federal Government possesses only those powers which are expressly or impliedly conferred on it by the Constitution. *South Carolina* v. *United States*, 199 U. S. 437. By no possible stretch of the power to regulate commerce can it be said that Congress possesses the power to regulate contracts of foreign shipowners and foreign seamen made in Australia. *Brown* v. *Duchesne*, 19 How. 183, 198.

Interference with the liberty to contract on such terms as may be advisable to the parties to the contract is a deprivation of liberty, without due process of law. *Allgeyer* v. *Louisiana*, 165 U. S. 578.

It is true that consistently with the Fifth Amendment Congress may legislate in such a manner as to deprive persons of the liberty of entering into certain contracts, but the justification for such legislation has always been motives of policy based on the exercise of police power. *Patterson* v. *Bark Eudora*, 190 U. S. 169.

In order to justify any legislation under the police power it must appear plainly that it has a tendency to rectify the conditions which the legislative body sought to remedy. The courts will look through the form to the substance. *Booth* v. *Illinois*, 184 U. S. 425, 429. The section does not even attempt to legislate to the benefit of the seaman. It goes directly contrary to the policy of the early Act of 1898, which was held constitutional in *Patterson* v. *Bark Eudora*, *supra*.

The only effect that the act has produced up to the present is that seamen on incoming vessels habitually

demand one-half wages under it immediately upon arrival, and leave the ship at once. Crews are constantly changing, discipline is impaired, and unnecessary expenses are incurred.

Although Congress is not prohibited from passing laws impairing the obligation of contracts, it cannot deprive a person of property without due process of law. *Hepburn* v. *Griswold*, 8 Wall. 603, 623; *McCracken* v. *Hayward*, 2 How. 608, 612; *Sinking-Fund Cases*, 99 U. S. 700, 718; Cooley, Const. Lim., 7th ed., 507. If this act be applicable to the case at bar, Congress did not merely pass a law impairing the obligation of a contract, by taking away the remedy for the enforcement of a contract, but created a liability on the shipowner in direct contravention of the terms of a legal, binding contract; and therefore violated the Constitution by taking property without due process of law.

Mr. W. J. Waguespack, with whom *Mr. Silas B. Axtell* was on the brief, for respondents.

Mr. Justice Day delivered the opinion of the court.

This case was argued at the same time as Number 373, just decided, *ante*, 348. In this case the libellants shipped as part of the crew of the British Steamer Westmeath for a voyage not to exceed one year, before the expiration of which time the vessel arrived in the harbor of New York, where she loaded and discharged cargo. A demand was made for one-half wages under § 4 of the Seamen's Act of 1915. The demand was refused, and an action was begun for full wages. A defense was set up that the libellants were deserters, and, therefore, not entitled to recover. The District Court and the Circuit Court of Appeals held that the libellants' case was made out under the statute. 258 Fed. Rep. 446.

The case is controlled by principles which governed the disposition of No. 373. The difference being that it appears in this case that demand was made more than five days after the vessel had arrived in the United States port. In all other respects as to the constitutionality and construction of the statute our judgment in the former case is controlling. It follows that the decree of the Circuit Court of Appeals must be affirmed.

Affirmed.

COLLINS *v.* MILLER, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF LOUISIANA.

CARLISLE, BRITISH CONSUL GENERAL *v.* COLLINS.

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

Nos. 350, 351. Argued December 9, 1919.—Decided March 29, 1920.

A judgment of the District Court, in a *habeas corpus* proceeding wherein the construction of a treaty is drawn in question, is not appealable directly to this court (Jud. Code, § 238) unless it is final. P. 365.

It is the duty of this court in every case in which its jurisdiction depends on the finality of the judgment under review, to examine and determine that question whether raised by the parties or not. *Id.*

A judgment in *habeas corpus* dealing with the detention of the relator for foreign extradition on three charges, and denying relief as to one but assuming to order a further hearing by the commissioner as to the others has not the finality and completeness requisite for an appeal to this court. Pp. 368, 370.

The proper party to appeal from a judgment in *habeas corpus* directing the marshal to release a person held for foreign extradition is the marshal, not the foreign consul upon whose complaint the extradition proceedings were begun. P. 371.

Appeals dismissed.

THE case is stated in the opinion.

Mr. J. Zach. Spearing and *Mr. Guion Miller*, with whom *Mr. J. Kemp Bartlett* was on the briefs, for appellant in No. 350 and appellee in No. 351.

Mr. Charles Fox, with whom *Mr. Robert H. Marr* and *Mr. Donaldson Caffery* were on the briefs, for appellee in No. 350 and appellant in No. 351.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

These are appeals from a single judgment entered by the District Court of the United States for the Eastern District of Louisiana on a petition for writs of *habeas corpus* and *certiorari*. The relator had been arrested on extradition proceedings. Each party asks to have reviewed the construction given below to provisions of our treaty with Great Britain, proclaimed August 9, 1842 (8 Stat. 572, 576), and of the supplementary treaty proclaimed April 22, 1901 (32 Stat. 1864). The questions presented are, therefore, of a character which may be reviewed upon direct appeal under § 238 of the Judicial Code. *Charlton* v. *Kelly*, 229 U. S. 447. But this court has jurisdiction on writ of error and appeal under that section, as under others, only from final judgments. *McLish* v. *Roff*, 141 U. S. 661; *Heike* v. *United States*, 217 U. S. 423. And the rule applies to *habeas corpus* proceedings. *Harkrader* v. *Wadley*, 172 U. S. 148, 162. The fundamental question whether the judgment appealed from

is a final one within the meaning of the rule has suggested itself to the court; and it must be answered although it was not raised by either party. *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 194. In order to answer the question it is necessary to describe the proceedings before the committing magistrate as well as those in the District Court on the petition for a writ of *habeas corpus*.

In October and November, 1918, the British Consul General at New Orleans filed with the Honorable Rufus E. Foster, District Judge of the United States for the Eastern District of Louisiana, three separate affidavits each charging that Charles Glen Collins, who was then within the jurisdiction of that court, had committed at Bombay, India, the crime therein described as obtaining property under false pretences, and that he stood charged therewith in the Chief Presidency Magistrate's Court at Bombay; and asking that he be committed as a fugitive from justice for the purpose of having him returned to India for trial. Warrants of arrest issued and Collins moved, as to each affidavit, to dismiss for want of jurisdiction, contending that the transactions in question were commercial dealings in which he had merely failed to pay debts incurred. Hearings, entitled "In the Matter of Extradition Proceedings of Charles Glen Collins," were had before Judge Foster, at which the Consul General and Collins appeared by counsel. Evidence in support of each of the three affidavits was introduced by the Consul General. Then Collins, who was sworn at his request, admitted his identity and that he had been present in India at the times the alleged crimes were committed. As to one of the charges, that of obtaining a pearl button from Mohamed Alli Zamiel ali Raza, he was allowed to testify further. But he was not permitted to testify as to matters concerning the other two which had been consolidated. And he was not permitted to introduce other witnesses in defense of any of the three

affidavits. After the hearings were concluded Judge Foster made two orders or judgments signed by him as Judge of said United States District Court and entitled in said court. In these orders he found, as to each of the affidavits, that he deemed the evidence sufficient to sustain the charge under the law and the treaty; and as to each he ordered Collins recommitted to the House of Detention in the custody of the United States marshal for that district to await the order of the President of the United States. The two proceedings (which included the three affidavits) were then consolidated. Under date of November 27, 1918, a certificate setting forth his findings together with a copy of the record in all the proceedings was transmitted to the Secretary of State.

This petition for writs of *habeas corpus* and *certiorari* was filed by Collins, in said District Court, on January 8, 1919. It set forth the proceedings before Judge Foster on the three affidavits, and alleged that his detention was illegal and in violation of rights secured to him by the treaty; among other reasons because he was refused permission to introduce evidence as above mentioned. District Judge Grubb ordered that the writs issue; and the marshal made return setting forth in substance the facts above recited. The case was heard before Judge Grubb on February 21, 1919, the record before Judge Foster being introduced. On the same day Judge Grubb, without delivering an opinion, entered an order which declared that "relator's application for *habeas corpus* is denied" so far as concerned the charge of obtaining the pearl button from Mohamed Alli Zaimel ali Raza, and that "the writs of *habeas corpus* are granted" so far as the detention was based on the other two charges, but that the relator be remanded to the House of Detention to await further proceedings in said last two named affidavits.

"And it is further ordered that, as to the said two affidavits last mentioned, this cause be and is hereby re-

manded to the Honorable Rufus E. Foster, Judge, to the end that relator be given the opportunity of introducing such evidence as he might offer at a preliminary examination under the law of Louisiana."

Neither party took any action in respect to such further proceedings before Judge Foster. On March 3, 1919, Collins petitioned for leave to appeal, contending that he should have been discharged on all three affidavits and his appeal was allowed. This is case No. 350 on the docket of this court. Later, the British Consul General petitioned for leave to appeal on the ground that Collins' application should have been definitely denied also as to the commitment on the other two affidavits. His appeal, being No. 351 on the docket of this court, was allowed March 28, 1919.

First: Was the judgment appealed from a final one? A single petition for a writ of *habeas corpus* thus sets forth detention of the relator on three separate affidavits. As to the commitment on one of these the judgment entered by Judge Grubb directed that the writ be "denied." Such denial, or more appropriately dismissal, of the writ would obviously have been a final judgment, if it had stood alone. *McNamara* v. *Henkel*, 226 U. S. 520, 523. But the judgment appealed from dealt also with the detention on the other two affidavits. It declared that "the writs of *habeas corpus* are granted " as to the commitments on the other two affidavits and ordered that the case be remanded for further hearing before Judge Foster.

What was thus called granting the writ was not a discharge of the prisoner, deferred as in *In re Medley*, 134 U. S. 160, and in *In re Bonner*, 151 U. S. 242; or made conditional as in *United States* v. *Petkos*, 214 Fed. Rep. 978; *Billings* v. *Sitner*, 228 Fed. Rep. 315, and *Ex parte Romano*, 251 Fed. Rep. 762; or coupled with other disposition of him as in *In re Gut Lun*, 84 Fed. Rep. 323, and

Ex parte Gytl, 210 Fed. Rep. 918, 924. It more nearly resembles the kind of an order which an appellate tribunal enters on reversing and remanding the judgment of a lower court upon finding error in its proceedings. But the proceeding before a committing magistrate in international extradition is not subject to correction by appeal. See *Fong Yue Ting* v. *United States*, 149 U. S. 698, 714; *Sternaman* v. *Peck*, 80 Fed. Rep. 883. Compare *United States* v. *Ferreira*, 13 How. 40, 48; *United States, Petitioner*, 194 U. S. 194. And it is ordinarily beyond the scope of the review afforded by a writ of *habeas corpus* to correct error in the proceedings. *In re Kaine*, 14 How. 103, 122; *Ex parte Harding*, 120 U. S. 782, 784; *Charlton* v. *Kelly*, 229 U. S. 447, 457; *Henry* v. *Henkel*, 235 U. S. 219, 228. The order resembles, also, that which might be entered by a district judge after having reviewed the proceedings taking place before a United States commissioner, under the court's authority to assume control in the preliminary stages of matters of which it has the final decision under the law. *United States* v. *Berry*, 4 Fed. Rep. 779, 781; *In re Chin K. Shue*, 199 Fed. Rep. 282, 284; *The Mary*, 233 Fed. Rep. 121, 124; compare *Todd* v. *United States*, 158 U. S. 278, 282; *United States* v. *Allred*, 155 U. S. 591, 594; *In re Perkins*, 100 Fed. Rep. 950, 954. For an extradition commissioner is an officer of the court which appoints him. See *Grin* v. *Shine*, 187 U. S. 181, 187; *In re Grin*, 112 Fed. Rep. 790, 794. But here the extradition commissioner had certified his findings to the Secretary of State before the petition for writ of *habeas corpus* was filed. Whether, for this reason, the time had not passed when the court could correct the action of its commissioner, except upon reopening of the proceeding before him with the consent of the Executive (see 6 Ops. Atty. Gen. 91),—or, in other words, whether in such a case the power of the court is not limited to ordering the discharge of the prisoner either absolutely

or conditionally except upon a rehearing before the commissioner with the consent of the President—this question, we are not required to consider at this time. For the proceeding ordered by Judge Grubb had not been taken; nor had the power sought to be exercised by him been challenged. Nor need we consider whether Judge Grubb, having found that a proper hearing had been denied by the committing magistrate on the two affidavits, might have heard the case *de novo*, and have determined thereon whether the prisoner should be discharged; compare *Chin Yow* v. *United States*, 208 U. S. 8, 13; *Whitfield* v. *Hanges*, 222 Fed. Rep. 745, 746; *United States* v. *Williams*, 193 Fed. Rep. 228; for Judge Grubb did not undertake to do so. The prisoner remained under the authority of the District Court (see Mr. Justice Nelson in *In re Kaine*, 14 How. 103, 133–4); and as the writ of *habeas corpus* had not been disposed of there so far as concerned the detention on two of the three affidavits, the decision below on that branch of the case was not final.

Second: A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete. *United States* v. *Girault*, 11 How. 22, 32; *Holcombe* v. *McKusick*, 20 How. 552, 554; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 4; *Grant* v. *Phœnix Ins. Co.*, 106 U. S. 429, 431; *Dainese* v. *Kendall*, 119 U. S. 53; *Covington* v. *Covington First National Bank*, 185 U. S. 270, 277; *Heike* v. *United States*, 217 U. S. 423, 429; *Rexford* v. *Brunswick-Balke-Collender Co.*, 228 U. S. 339, 346. And the rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved. *Louisiana Navigation Co.* v. *Oyster Commission*, 226 U. S. 99, 101; *Sheppy* v. *Stevens*, 200 Fed. Rep. 946. The seeming exception to this rule by which an adjudication final in its nature of

matters distinct from the general subject of the litigation, like a claim to property presented by intervening petition in a receivership proceeding, has been treated as final so as to authorize an appeal without awaiting the termination of the general litigation below, *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207, 224; *Williams* v. *Morgan*, 111 U. S. 684, 699; *Trustees* v. *Greenough*, 105 U. S. 527, has no application here. Nor have cases like *Forgay* v. *Conrad*, 6 How. 201, 204, and *Thomson* v. *Dean*, 7 Wall. 342, 345, where decrees finally disposing of property which the successful party was entitled to have carried into execution immediately, were held appealable, although certain accounts pursuant to the decree remained to be settled. Here a single judgment deals with the detention on three affidavits. Only one branch of the case has been finally disposed of below, therefore none of it is ripe for review by this court.

Third: In what has been said we must not be understood as recognizing the British Consul General as the party entitled to appeal from a decision in Collins' favor. For the writ of *habeas corpus* was directed to the United States marshal who held Collins in custody and the marshal was the party in whom rested the right to appeal, if Collins prevailed on final judgment. See *Charlton* v. *Kelly*, *supra*.

Both appeals are

Dismissed for want of jurisdiction.

STATE OF OKLAHOMA *v.* STATE OF TEXAS, UNITED STATES, INTERVENER.

IN EQUITY.

No. 27, Original. Motion for leave to intervene and to submit motion for injunction and receiver submitted March 29, 1920. Order entered April 1, 1920.

Order granting injunction and appointing receiver.

This cause coming on to be heard on the motion of the United States for leave to intervene herein for an injunction and for the appointment of a receiver, and on the responses made to such motion by the State of Oklahoma and the State of Texas, respectively, and the court being fully advised in the premises,

It is now considered, ordered and decreed as follows, until the further order of the court:

1. That said motion for leave to intervene herein be, and the same is hereby, granted.

2. The defendant, the State of Texas, her officers and agents, are hereby enjoined from selling any purported rights or making or issuing any grants, licenses or permits to any person, corporation or association covering or affecting any lands, or any part of the bed of Red River, lying north of the line of the south bank of such river as said south bank existed at the date of the ratification of the Treaty of 1819 between the United States and Spain, that is to say, on the twenty-second day of February, 1821, and between the One Hundredth degree of West Longitude and the southeastern corner of the State of Oklahoma.

3. Jacob M. Dickinson, Esquire, of Chicago, Illinois,

is hereby appointed receiver of all the lands described in paragraph two of the said intervener's motion, to wit:

Bounded on the north by the mid channel of the Red River, as the mid channel is hereinafter defined; on the east by extension south of the west boundary line of Range 10 West between Township 4 South, Range 10 West, and Township 4 South, Range 11 West, in Cotton County, Oklahoma, crossing the remaining portion of said Red River and to the foot of the Texas bluffs as the South bank,—Thence up said River along the foot of the Texas bluffs as the South bank, through Ranges 11, 12, 13, and through Range 14 as follows: Commencing at a point on the east boundary line of Range 14 extended which point is 116.50 chains from the original meander corner of fractional Section 31, Township 4 South, Range 13 West and Section 36, Township 4 South, Range 14 West; thence

N. 79° 00′ W. 26.75 chs.
N. 71° 15′ W. 33.00 "
N. 75° 15′ W. 28.25 "
N. 85° 30′ W. 22.60 "
S. 85° 15′ W. 52.20 "
S. 85° 30′ W. 8.90 "
N. 82° 00′ W. 21.40 "
S. 82° 15′ W. 11.50 "
S. 71° 30′ W. 66.70 "
S. 69° 00′ W. 59.25 "

to a point on the present south bank of the Red River which is at the foot of the Texas bluff; thence along the line of the south bank and the foot of the Texas bluff

S. 64° 30′ W. 36.00 chs.
S. 64° 00′ W. 20.40 "
S. 51° 30′ W. 44.60 "
S. 65° 45′ W. 24.20 "
S. 71° 15′ W. 54.70 "

to a point on the present south bank of Red River at the foot of the Texas bluff at the intersection of a direct south extension of the west boundary of Range 14 West between fractional Section 7, Township 5 South, Range 14 West, and Section 12, Township 5 South, Range 15, which point is 57.43 chains from the original meander corner of said fractional sections.—

Thence continuing up said River along the foot of the Texas bluffs as the south bank, through Ranges 15 and 16 to the intersection of the west boundary line of Range 16 extended to the foot of the Texas bluffs.—

Thence north along said boundary line of Range 16 to mid channel of said River as the same meanders through the broad stretch of sand which in some places extends to and is bounded by the bluffs on either side and in other places by the margin of the alluvial flood plain on either side, and which is covered with water at times of freshets and entirely devoid of flowing water during the annual dry seasons,—and of all machinery, fixtures, tools and other property of whatever kind or character now on said lands and used in connection with the extraction, storage, transportation, refining or disposal of the oil or gas products of said lands. And the said receiver is hereby authorized and empowered to take possession of said lands and property forthwith, to take all appropriate measures to conserve the oil and gas within such lands and to control all operations thereon for the production and disposal of such oil and gas.

4. Within thirty days after taking possession the receiver shall formulate and report to this court full and complete plans for prospecting such lands and developing and producing the oil and gas within the same; and until such report is made and acted upon by the court the receiver shall operate the existing oil and gas wells on said lands, or permit them to be operated by their respective claimants under his direction and supervision, or

close down said wells if he shall deem it advisable to do so; and he shall sell at market prices the oil and gas so produced and pay out of the proceeds the necessary expenses of operation and supervision. Full and accurate accounts shall be kept by the receiver of all oil and gas so produced and of the proceeds derived from their sale and the expenses paid therefrom; and these accounts shall be kept in such way that they will show separately the production, proceeds and expenses pertaining to each well so that the net proceeds may be ultimately awarded to the rightful claimant.

5. Before entering upon his duties the receiver shall execute a bond to be approved by the court in the sum of One Hundred Thousand Dollars for the faithful performance of his duties including the disbursement and payment according to the court's direction of all moneys which may come into his hands in the course of the receivership.

6. The receiver shall receive such compensation for his services as may be fixed hereafter by the court.

7. The defendant, the State of Texas, and the complainant, the State of Oklahoma, and their respective officers, agents and employees, and all persons now in possession of any of the said lands or claiming any right, title or interest therein, are directed to deliver possession thereof to the said receiver and are enjoined until the further order of this court from removing any of the property hereinbefore described from said lands and from conducting any oil or gas mining operations thereon save under the direction and supervision of the receiver and from interfering with the possession, control or operations of the receiver.

8. As to such of the land before described as is not claimed by the defendant, the State of Texas, in its proprietary capacity said State shall have fifteen days within which to file a response to the intervener's motion for an

injunction and receiver; and on the filing of such response the State of Texas or any claimant claiming under a patent lease or permit from that State shall be at liberty to request any modification of this order deemed essential or appropriate for the right or full protection of the interest of such State or claimant.

9. Either the plaintiff, the State of Oklahoma, or the intervener, the United States, may by an amendment of its pleading make any claimant claiming under the State of Texas or any other claimant a party to the cause and have the requisite process issued and served, so that all parties claiming an interest in the subject-matter may be before the court. And the like permission is granted to the State of Texas in respect of parties claiming under the State of Oklahoma or the United States.

CALDWELL *v.* PARKER, SHERIFF OF CALHOUN COUNTY, ALABAMA.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 636. Argued March 4, 5, 1920.—Decided April 19, 1920.

The jurisdiction to try and punish for the crime of murder, committed by a person in the federal military service upon a civilian while the nation is at war, but in a place within the jurisdiction of a State where hostilities are not present and where martial law has not been proclaimed, is not vested exclusively in a military court-martial by the Articles of War of 1916; and conviction and sentence of a soldier, in such circumstances, in the state court, are not void. So *held*, where no demand for the culprit had been made upon the State by the military authorities. P. 385.

Affirmed.

THE case is stated in the opinion.

Mr. Henry E. Davis and *Mr. Charles D. Kline*, with whom *Mr. James A. Cobb* was on the brief, for appellant:

Comparing former Article 58, Rev. Stats., § 1342, with present Article 92, it is first particularly to be noted that, whereas the former used the expression that the offenses therein mentioned "shall be punishable" (of which language as used in the Enrolment Act of March 3, 1863, this court in *Coleman* v. *Tennessee*, 97 U. S. 509, remarked: "It simply declares that the offences shall be 'punishable,' not that they shall be punished by the military courts; and this is merely saying that they may be thus punished") the present Article 92 distinctly provides that "any *person* subject to military law who commits" either crime in the Article mentioned, of which murder is one, "*shall suffer* death or imprisonment for life, *as a court-martial may direct.*" The difference in language between the two sections, old and new, cannot be regarded as accidental and must be regarded as industrious. As Congress is to be presumed to have had in mind the language of this court in the *Coleman Case*, this conclusion is inevitable. Congress, instead of providing that the offenses mentioned should be "punishable," intended that the offender should suffer the prescribed penalty, to be inflicted by the designated tribunal, namely, a court-martial.

By existing Article 74 it is required of the commanding officer, and of him only, upon application of the civil authorities, and upon such application only, to deliver to the latter, or to aid in apprehending or securing for the latter, for trial, a soldier accused of crime, except one who is at the time held by the military authorities as prescribed, and also, "*except in time of war;*" and the penalty incurrable by the commanding officer who upon such application refuses or wilfully neglects to do as required is

to be visited upon him only *in time of peace*. Again, whereas present Article 92 provides that a soldier committing murder shall suffer the prescribed penalty by sentence of a court-martial, it further provides that no soldier accused of such offense shall be tried by that tribunal if the offense be committed "*in time of peace*." If, therefore, these Articles are so to be read as to give effect to each and all of their provisions, they mean this: that in time of peace a soldier charged with murder must be tried by the civil authorities and cannot be tried by the military, but that in time of war the military authority over the soldier is primary, paramount and exclusive.

From another viewpoint this conclusion seems equally unavoidable. The citizen—by which is meant *every* citizen—is under obligation to national military service, and the right of the nation to require such service is paramount; the army of which the citizen becomes a member is a body of men whose business is war, and what is more, the body which the nation has formed and is using as its instrumentality to carry on war; and so impossible is it to say that the services of *every* citizen capable of bearing arms may not become indispensable for the defense of the country, that it follows as a corollary that *every* citizen must be kept in a situation and condition to render those services at any and every moment of his time.

When, therefore, the citizen becomes a member of the army in time of war, he is, for the time being and for the purposes of the services due by and required of him, withdrawn from civil life and transferred to a separate and distinct realm, namely, the realm of military life. He ceases for the time being to be of the civil citizenry and becomes a member of the military citizenry, and is subject accordingly to the laws and regulations governing the latter and not to those governing the former: all this, of course, during a state of war. And if this be so, no civil authority may for the time being lay hand upon him

because of any act for which, except for his temporary condition, he would have been amenable to the civil law and its authorities.

The language of this court in the *Coleman Case* respecting the exclusiveness, or the contrary, of the jurisdiction of the military tribunal under the section of the Enrollment Act under consideration is plainly *obiter dictum*, and should therefore not be, and is not, controlling.

The cases of *Ex parte Mason*, 105 U. S. 696; *Grafton* v. *United States*, 206 U. S. 333, and *Franklin* v. *United States*, 216 U. S. 559, arose in time of peace, and under the former, and not the present, Articles of War; and the language of the court in each of those cases is to be restricted in application accordingly. [Counsel also cited *Tennessee* v. *Hibdom*, 23 Fed. Rep. 795; *Ex parte King*, 246 Fed. Rep. 868; and *Kepner* v. *United States*, 195 U. S. 100, 128.]

In the judgment now under review it is recited that there is no averment in the petition that the military authorities at any time demanded the surrender of the petitioner. Of this it ought to suffice to say that the failure of those authorities to put their jurisdiction in play cannot be said to cancel or abrogate it.

Nor would the case be affected if the fact were that any one in military authority had delivered the petitioner to the civil authorities for trial: as respects this, it suffices to say that no one in military authority has any right so to do; that no one but the commanding officer is charged with the duty of delivering an accused soldier to the civil authorities, and that in time of war that obligation is not even on him.

Mr. J. Q. Smith, Attorney General of the State of Alabama, and *Mr. Niel P. Sterne*, with whom *Mr. Benjamin Micou* was on the brief, for appellee.

The Solicitor General and *Mr. H. S. Ridgely*, by leave of court, filed a brief as *amici curiæ*, in behalf of the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Pending the existence of a state of war with Germany the appellant, a soldier in the Army of the United States serving in a camp in Alabama, was tried and convicted for the murder of a civilian at a place within the jurisdiction of the State and not within the confines of any camp or place subject to the control of the civil or military authorities of the United States. The conviction was reviewed and affirmed by the Supreme Court of Alabama and was reëxamined and reaffirmed on rehearing.

The case is here to reverse the action of the court below in refusing on writ of habeas corpus a discharge which was prayed on the ground that, under the circumstances stated, the sentence was void because the state court had no jurisdiction whatever over the subject of the commission of the crime, since under the Constitution and laws of the United States that power was exclusively vested in a court-martial.

As there was no demand by the military authorities for the surrender of the accused, what would have been the effect of such a demand, if made, is not before us. The contention of a total absence of jurisdiction in the state court is supported in argument, not only by the appellant, but also by the United States in a brief which it has filed as *amicus curiæ*. These arguments, while differing in forms of expression, rest upon the broad assumption that Congress in reënacting the Articles of War in 1916, by an exercise of constitutional authority, vested in the military courts during a state of war exclusive jurisdiction to try and punish persons in the military service for offenses

committed by them which were violative of the law of the several States. In other words, the proposition is that under the Act of 1916, by mere operation of a declaration of war, the States were completely stripped of authority to try and punish for virtually all offenses against their laws committed by persons in the military service. As in both arguments differences between the provisions of the Act of 1916 and the previous Articles are relied upon to sustain the accomplishment of the result contended for, we must briefly consider the prior Articles before we come to test the correctness of the conclusion sought to be drawn from the Articles of 1916.

The first Articles of War were adopted in 1775. By them the generic power of courts-martial was established as follows:

"L. All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion."

It cannot be disputed that the effect of this grant was to confer upon courts-martial as to offenses inherently military an exclusive authority to try and punish. In so far, however, as acts which were criminal under the state law but which became subject to military authority because they could also appropriately be treated as prejudical to good order and military discipline, a concurrent power necessarily arose, although no provision was made in the Articles regulating its exercise. But this omission was provided for in Article 1 of § X of the revised Articles adopted in 1776, as follows:

"Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offence against the persons or property of the good people

of any of the United American States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made by or in behalf of the party or parties injured, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring them to a trial. If any commanding officer or officers shall wilfully neglect or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered."

In view of the terms of this Article and the fact that it was drawn from the British Articles, where the supremacy of the civil law had long prevailed, it results that its provisions gave the civil courts, if not a supremacy of jurisdiction, at least a primary power to proceed against military offenders violating the civil law, although the same acts were concurrently within the jurisdiction of the military courts because of their tendency to be prejudicial to good order and military discipline.

And in harmony with this view, the Articles in question were applied up to 1806, in which year they were reënacted without change as Articles 99 and 33 of that revision, and were in force in 1863, in the Enrollment Act of which year, it was provided (Act of March 3, 1863, c. 75, § 30, 12 Stat. 736):

"That in time of war, insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit

rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and the punishments for such offences shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed."

It is to be observed that by this section there was given to courts-martial, under the conditions mentioned, power to punish for capital crimes, from which their authority had been from 1775 expressly excluded; and power was also given to deal, under the conditions stated and in the manner specified, with other enumerated offenses over which they had not prior to the passage of the act had jurisdiction, presumably because such acts had not in practice been treated as within the grant of authority to deal with them as prejudicial to good order and military discipline.

In 1874, when the Articles of War were revised and reenacted (Rev. Stats., § 1342), the generic grant of power to punish acts prejudicial to good order and military discipline was reëxpressed in Article 62, substantially as it existed from 1775. The provisions of § 30 of the Act of 1863, *supra*, were in so many words made to constitute Article 58; and the duty put upon military officials, to surrender to state officers on demand persons in the military service charged with offenses against the State, was reënacted in Article 59, qualified, however, with the words, "except in time of war." Thus the Articles stood until they were reënacted in the Revision of 1916, as follows:

The general grant of authority as to acts prejudicial to good order and military discipline was reënacted in Article 96, substantially as it had obtained from the beginning. The capital offenses of murder and rape, as enumerated in § 30 of the Act of 1863, were placed in a distinct Article

and power was given to military courts to prosecute and punish them, as follows:

"Art. 92. Murder—Rape.—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may (be) direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace." (39 Stat. 664.)

The remaining offenses enumerated in the Act of 1863 were placed in a separate Article, as follows:

"Art. 93. Various Crimes.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct." (39 Stat. 664.)

And finally, the duty to respond to the demand of the state authorities for the surrender of military offenders against the state criminal laws was reënacted as it had prevailed from the beginning, subject however to express regulations to govern in case of conflict between state and federal authority, and again subject to the qualification, "except in time of war," as first expressed in the Revision of 1874, the Article being as follows:

"Art. 74. Delivery of Offenders to Civil Authorities.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil

authorities, or to aid the officers of justice in apprehending or securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct." (39 Stat. 662.)

Comprehensively considering these provisions, it is apparent that they contain no direct and clear expression of a purpose on the part of Congress, conceding for the sake of the argument that authority existed under the Constitution to do so, to bring about, as the mere result of a declaration of war, the complete destruction of state authority and the extraordinary extension of military power upon which the argument rests. This alone might be sufficient to dispose of the subject for, as said in *Coleman* v. *Tennessee*, 97 U. S. 509, 514, "With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect." Certainly, it cannot be assumed that the mere existence of a state of war begot of necessity the military power asserted, since the Articles of War, originally adopted in 1775, were, as we have seen, in the very midst of the War for Independence, modified in 1776 to make certain the preservation of the civil power.

But the contention relied upon is directly based upon the words, "except in time of war," as qualifying the duty of the military officers to respond to the demand by state authority for the surrender of military offenders against the state criminal laws, imposed by Article 74, and the grant in Article 92, expressed in the form of a negative pregnant, of authority to courts-martial to try capital

crimes when committed by an officer or soldier within the geographical limits of the United States and the District of Columbia in time of war. Both these provisions took their origin in the Act of 1863 and were drawn from the terms of that act as reëxpressed in the Revision of 1874. By its very terms, however, the Act of 1863 was wholly foreign to the destruction of state and the enlargement of military power here relied upon. It is true, indeed, that by that act authority was for the first time given, as pointed out in the *Coleman Case*, 97 U. S. 509, 514, to courts-martial or military commissions to deal with capital and other serious crimes punishable under the state law. But the act did not purport to increase the general powers of courts-martial by defining new crimes, or by bringing enumerated offenses within the category of military crimes as defined from the beginning, as we have already pointed out, but, simply contemplated endowing the military authorities with power, not to supplant, but to enforce, the state law. As observed by Winthrop, in his work on Military Law, 2d ed., p. 1033, it was intended to provide, through the military authorities, means of enforcing and punishing crimes against the state law committed by persons in the military service where, as the result of the existence of martial law or of military operations, the courts of the State were not open and military power was therefore needed to enforce the state law. And it was doubtless this purpose indicated by the text, to which we have already called attention, which caused the court in the *Coleman Case* to say that that statute had no application to territory where "the civil courts were open and in the undisturbed exercise of their jurisdiction." (P. 515.)

As in 1866 it was settled in *Ex parte Milligan*, 4 Wall. 2, that a state of war, in the absence of some occasion for the declaration of martial law or conditions consequent on military operations, gave no power to the military authorities where the civil courts were open and capable of per-

forming their duties, to disregard their authority or frustrate the exercise by them of their normal and legitimate jurisdiction, it is indeed open to grave doubt whether it was the purpose of Congress, by the words "except in time of war," or the cognate words which were used with reference to the jurisdiction conferred in capital cases, to do more than to recognize the right of the military authorities, in time of war, within the areas affected by military operations or where martial law was controlling, or where civil authority was either totally suspended or obstructed, to deal with the crimes specified,—a doubt which if solved against the assumption of general military power, would demonstrate, not only the jurisdiction of the state courts in this case, but the entire absence of jurisdiction in the military tribunals. And this doubt becomes additionally serious when the Revision of 1874 is considered, since in that revision the Act of 1863 was in terms reënacted and the words "except in time of war," appearing for the first time in Article 59 of that revision, could have been alone intended to qualify the time of war with which the act dealt, that is, a condition resulting from a state of war which prevented or interfered with the discharge of their duties by the civil courts.

Into the investigation of the subject of whether it was intended by the provision "except in time of war," contained in the Articles of 1916, to do more than meet the conditions exacted by the actual exigencies of war like those contemplated by the Act of 1863, and which were within the purview of military authority, as pointed out in *Ex parte Milligan*, we do not feel called upon to enter. We say this because even though it be conceded that the purpose of Congress by the Article of 1916, departing from everything which had gone before, was to give to military courts, as the mere result of a state of war, the power to punish as military offenses the crimes specified when committed by those in the military service, such admission is

here negligible because, in that view, the regulations relied upon would do no more than extend the military authority, because of a state of war, to the punishment, as military crimes, of acts criminal under the state law, without the slightest indication of purpose to exclude the jurisdiction of state courts to deal with such acts as offenses against the state law.

And this conclusion harmonizes with the principles of interpretation applied to the Articles of War previous to 1916; *Drury* v. *Lewis*, 200 U. S. 1; *Grafton* v. *United States*, 206 U. S. 333; *Franklin* v. *United States*, 216 U. S. 559; 6 Ops. Atty. Gen. 413; and is, moreover, in accord with the decided cases which have considered the contention of exclusive power in the military courts as resulting from the Articles of 1916 which we have here considered. *People* v. *Denman*, 179 California, 497; *Funk* v. *State*, 208 S. W. Rep. 509; *United States* v. *Hirsch*, 254 Fed. Rep. 109.

It follows, therefore, that the contention as to the enlargement of military power, as the mere result of a state of war, and the consequent complete destruction of state authority, are without merit and that the court was right in so deciding and hence its judgment must be and it is

Affirmed.

CUYAHOGA RIVER POWER COMPANY *v.* NORTHERN OHIO TRACTION & LIGHT COMPANY ET AL.

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

No. 102. Argued March 17, 1920.—Decided April 19, 1920.

Plaintiff, a hydro-electric company organized under a general law of Ohio, averred in its bill to quiet title, that its incorporation constituted a contract whereby the State granted it a right of way for

388. Statement of the Case.

its plant, along a certain river, between the termini designated in its articles, with the power of eminent domain to acquire title from private owners; that these rights were crystallized by a resolution of its board of directors adopting a detailed plan of power development and definitely and irrevocably fixing the location of its proposed works on specific lands, surveyed by its engineers and essential to the enterprise; that all this, supplemented by condemnation proceedings initiated but not as yet consummated, gave exclusive rights to acquire the lands for plaintiff's corporate objects, through its power of eminent domain; and that the purchase of such lands from their owner by one of two defendant public service corporations, also organized under general laws of Ohio, their transfer to the other with the consent of the state Public Utilities Commission, and their occupation and use by the other for generating electric power, with assertion of immunity from plaintiff's power of condemnation, worked an impairment of plaintiff's contract, and a taking of its property, by state action or agency. *Held*, that the asserted federal questions were too plainly without merit to afford jurisdiction to the District Court. P. 395. *Sears* v. *City of Akron*, 246 U. S. 242.

Affirmed.

THE appeal is direct to this court, the laws and Constitution of the United States being asserted to be involved. Upon motion of defendants (appellees) the bill was dismissed for want of jurisdiction and equity. Its allegations, therefore, become necessary to consider.

Plaintiff (appellant) was incorporated as a hydro-electric power company on May 29, 1908, for the purposes specified in the act of the legislature of Ohio, passed in 1904, and contained in §§ 10,128 and 10,134 of the Ohio General Code of 1910.

The Articles of Incorporation filed May 29, 1908, with the Secretary of State specified the streams across which the dams were to be built and maintained, that is, the streams in controversy, the Big Cuyahoga River and certain of its tributaries.

By said incorporation a contract was duly made and entered into between the State and plaintiff whereby the State granted to plaintiff a right of way over and along the

Cuyahoga River between the designated termini and a vested right and franchise to construct, maintain and operate, within the limits of the right of way, a hydro-electric plant for the development of electric current and energy from the waters of the river, together with a right or franchise to exercise the State's power of eminent domain in order to appropriate and acquire property necessary to carry out and perform the grant and make it effective. The grant has not been repealed.

The grants were accepted and are of great value and upon the faith of that, the capital stock of plaintiff was subscribed for, and large expenditures and investments made and obligations incurred, including bonds of the par value of $150,000, and stock to the value of $210,000, all in a large part prior to December, 1910.

On June 4, 1908, plaintiff by its board of directors adopted a specific and detailed plan for the development of the power and sale of the same to the public, and definitely located its proposed improvements for that purpose upon specifically described lands, which had previously been entered upon and surveyed by its engineers, and then and there declared and resolved that the parcels of land were necessary to carry out the purpose of the plaintiff's organization and that it thereby appropriated and demanded them for its corporate purposes. The parcels of land described in the resolution include all that were necessary for the purpose of the corporation, and the location of the improvement so fixed by the resolution was permanent and irrevocable and conclusive upon plaintiff and all other persons except as the same might be altered by further act of the State.

June 5, 1908, the plaintiff instituted a suit in the court of proper jurisdiction, to condemn or appropriate in accordance with the statutes of Ohio, the parcels of land mentioned in the resolution, and the persons owning the same were made parties. The suit was continuously pend-

ing until a date subsequent to July 18, 1911, but at the instance and request of one of the owners of the parcels, and of the Northern Ohio Traction and Light Company, called the Traction Company, the suit was not pressed for trial against them until January, 1911, up to which date certain negotiations in regard to the improvement of the Company were proposed, but finally terminated in the refusal of the owner of the land and the Traction Company to sell the land to plaintiff.

December 20, 1910, pending the suit and negotiations, the landowner executed a deed of the lands to The Northern Realty Company, conveying to it a fee simple title.

January 20, 1911, after unsuccessful negotiations with the Realty Company, plaintiff instituted another suit for the condemnation of the land, which suit was prosecuted in the Probate Court (the court of jurisdiction) and is now pending in the Supreme Court of the United States, undetermined, to which court it was carried by a writ of error from the Court of Appeals of Ohio.

January 31, 1911, and while the suit above mentioned was pending, the Realty Company conveyed the land that had been conveyed to it, to the Northern Ohio Power Company, and the latter company conveyed that and other land which it had acquired, and all of its properties, rights and franchises to the Traction Company and the latter company entered upon the lands and now holds possession of them and of the improvements erected thereon.

Prior to January 20, 1911, no location or improvement upon the lands above designated was made for the purpose of utilizing them in the development of power and they were actually employed for no use whatsoever, except a small wooden structure intended and occasionally used for dances and roller skating, a small portion of which structure was within all of the parcels.

Between January 31, 1911, and February 24, 1914, there

was erected upon the lands designated, a power-house and other appliances for the generation of electric current and energy by means of steam power, also a dam, a power-house and other appliances for the generation of electric current and energy by the flow and fall of the waters of the river.

(There is an allegation of the capacity of the plants which may be omitted. Other allegations in regard to the various companies and the powers they possess and do not possess also may be omitted. It is only necessary to say that it is alleged that the Power Company had not, and the Traction Company has not, power to use the designated lands or the waters of the river to operate the steam power plant and the hydro-electric plant, or for the development of such powers and, therefore, neither company had power to exercise eminent domain for such purposes, though asserting its right and intention to do so, and if it should do so, it would invade and injure rights of plaintiff, inflicting "upon the plaintiff and the persons interested therein a continuing, permanent and irreparable injury, for which there is no adequate remedy at law.")

From and after the time of the adoption of the resolution of June 4, 1908, the designated parcels of land were subjected to plaintiff's public use and its rights and franchises, exclusive of all other persons and corporations; that such rights and franchises were granted to plaintiff by the State of Ohio under and by authority of plaintiff's contract with the State, and for the protection of which plaintiff is entitled to and claims the protection of the Constitution of the United States and of the Amendments thereof, as well as § 5 of Article XIII of the constitution of the State of Ohio.

The effect and result of the Traction Company's use of the designated parcels of land and of the waters of the river is an appropriation by it of the rights and franchises of plaintiff and the deprivation of its property for private

use without compensation and without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, and an impairment of the contract of plaintiff with the State of Ohio within the meaning of Article I of the Constitution of the United States.

Plaintiff has at all times and since its incorporation, actively and diligently and in good faith proceeded to carry out and accomplish its corporate purpose.

In April, 1909, the plaintiff amended its resolution of June 4, 1908, and enlarged its proposed plant and the output and product thereof and obtained a grant from the State over the additional portion or section of the Cuyahoga River so as to carry out the amended plan, and it provides for the utilization of the designated parcels of land necessary to the plaintiff's rights and franchises. (The additional capacity is alleged.)

The prayer is that plaintiff's rights and franchises be established and adjudged; that the proceedings complained of be decreed a violation of the plaintiff's rights, and of the constitution of Ohio and the Constitution of the United States, and a taking its property without due process of law. And that an injunction be granted against their further exercise; that defendants be required to remove the structures and devices already erected upon the lands, or to convey them to the plaintiff, and that a receiver be appointed to take possession of the lands and structures. An accounting is also prayed, and general relief.

Mr. Carroll G. Walter, with whom *Mr. William Z. Davis* and *Mr. John L. Wells* were on the briefs, for appellant.

Mr. John E. Morley and *Mr. J. S. Clark*, with whom *Mr. S. H. Tolles* and *Mr. T. H. Hogsett* were on the briefs, for appellees.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

As we have said, a motion was made to dismiss the bill. The grounds of the motion were that there was no jurisdiction in the court, the controversy not arising under the Constitution and laws of the United States, and that the bill did not state facts sufficient to constitute a cause of action against defendants or either of them.

There is an assertion, in words, of rights under the Constitution of the United States, and the only question now presented is whether the assertion is justified by the allegations of the bill. Putting the question concretely, or rather the contention which constitutes its foundation, the District Court said, "The contention of the plaintiff is that by virtue of its charter, it has appropriated the potentialities of the river and its tributaries within the boundaries by it designated in its resolution of improvement, and that it is entitled, because of its incorporation under the general laws of the State, to exclude any use of the water power of these streams of the nature of the use which it anticipates enjoying in the future while it proceeds, however dilatorily, to make its improvements in detail and to complete its ambitious scheme. In brief, its proposition is that its charter is equivalent to a contract with the State of Ohio giving it the exclusive right to the employment of the benefits which nature has conferred upon the public through the forces of these streams to the end that, until it finds itself able to completely occupy all the territory which it has privately designated to be necessary for its use, the public shall not have the advantage of any portion not immediately occupied by it through the employment of the resources thereof by another public utility company."

The court rejected the contention holding that it was not tenable under the law and constitution of Ohio. To

sustain this view the court cited prior Ohio cases, and certain cases on the docket of the court, and, as an inference from them, declared that it was "not true in Ohio that the character of complainant gave to it 'a vested right seemingly unlimited in time to exclude the rest of the world from the water sheds it chose' simply by declaring by resolution just what territory it hoped in the future to occupy to carry out its purposes" and further, "the terms of Section 19, Art. I of the Ohio constitution militate against plaintiff's claim. Until appropriation is completed as provided by the condemnation laws of the State, the Traction Company's right to dominion over its holdings is inviolate. *Wagner* v. *Railway Co.*, 38 O. S. 32." The court also cited *Sears* v. *City of Akron*, 246 U. S. 242 (then just delivered) expressing the view that if the case had been brought to the court's attention sooner, a less extended discussion of the motion to dismiss could have been made.

We concur with the District Court both in its reasoning and its deductions from the cited cases. The contention of plaintiff is certainly a bold one and seemingly erects into a legal principle, that unexecuted intention, or partly executed intention, has the same effect as executed intention, and that the declaration of an enterprise gives the same right as its consummation. Of course, there must be a first step in every project as well as a last step, and in enterprises like those we are considering there may be attainment under the local law of a right invulnerable to opposing assertion. And this plaintiff contends. To be explicit it contends that as against the Power Company and the Traction Company, they being its competitors in the same field of enterprise, its resolution of June 4, 1908, constituted an appropriation of the waters of the river, and a definite location of "its proposed improvement for that purpose upon specifically described parcels of land previously entered upon and surveyed by its engineers." Whether the

resolution had that effect under the Ohio laws we are not called upon to say. Indeed, we are not so much concerned with the contention as the ground of it. Plaintiff alleges as a ground of it, a contract with the State of Ohio, by its incorporation, "wherein and whereby said State duly granted to the plaintiff a right of way over and along said Cuyahoga River" between the designated termini, with the rights and franchises which we have mentioned, together "with the right or franchise of exercising the State's power of eminent domain in order to appropriate and acquire all property necessary to carry out and perform said grant and make the same effective" and that the acts of defendants, having legislative sanction of the State, impair plaintiff's contract.

It is manifest, therefore, that the determining and effective element of the contention is the charter of the State, and plaintiff has proceeded in confidence in it against adverse adjudications. One of the adjudications is *Sears* v. *City of Akron, supra.* The elemental principle urged here was urged there, that is, there was urged there as here, that the charter of the company constituted a contract with the State, and that the contract was to a conclusive effect executed by the resolution of the board of directors of plaintiff on June 4, 1908, such resolution constituting an appropriation of the lands described therein, they being necessary to be acquired in order to construct and maintain the improvement specified in the plaintiff's charter and resolution. The principle was rejected and it was decided that the incorporation of plaintiff was not a contract by the State with reference to the riparian rights, and that if plaintiff acquired riparian rights or specific rights in the use and flow of the water, that "would be property acquired *under* the charter, not contract rights expressed or implied in the grant of the charter."

The case is determinative of the plaintiff's contention here, and it is manifest if plaintiff has any rights, they

are against defendants as rival companies or against them as land owners, rights under the charter, not by the charter, considered as a contract express or implied. The District Court recognized the distinction and confined its decree accordingly. The court refused to speculate as to what plaintiff might be able to do hereafter in the assertion of rights against the Traction Company, but declared that it was against public policy to accede to the contention of plaintiff that, in the absence of specific acquirement, plaintiff could prevent an owner of property within its territory from occupying or using the same, without condemnation proceedings being had and compensation paid or secured for such property.

The court, therefore, was considerate of the elements of the case and of plaintiff's rights both against defendants as rival companies or as land owners, and necessarily, as we have said, if either or both of them be regarded as involved in the case, its or their assertion cannot be made in a federal court unless there be involved a federal question. And a federal question not in mere form but in substance, and not in mere assertion, but in essence and effect. The federal questions urged in this case do not satisfy the requirement. The charter as a contract is the plaintiff's reliance primarily and ultimately. Independent of that it has no rights or property to be taken, that is, independently of the resolution of June 4, 1908, there was no appropriation or condemnation of the land. *Wagner* v. *Railway Co.*, 38 Ohio St. 32.

Having nothing independently of its charter and the resolution of June 4, 1908, it could be divested of nothing and it must rely upon the assertion of a contract and the impairment of it by the State or some agency of the State exercising the State's legislative power. That there is such agency is the contention, but what it is exactly it is not easy to say. We, however, pick out of the confusion of the bill, with the assistance of plaintiff's brief, that the rights

it acquired, and by what they are impaired, are as follows: By the resolution of June 4, 1908, the lands described in the bill (Exhibit A) became, and ever since have been, subjected to plaintiff's public use and subject to its rights of way and franchises exclusive of all other persons or corporations, that the Traction Company asserts and claims that by reason of purchases of the rights and franchises of The Northern Ohio Power Company sanctioned by the orders of the Public Utilities Commission as set forth in the bill, and the construction by the Traction Company of power plants upon the designated tracts of land, they, the tracts of land, have become subject to a public use and cannot be appropriated by plaintiff. And it is said (in the brief) that the Traction Company bases its claim upon the state laws, that is, the incorporation of the defendant Power Company and the Public Utilities Commission's orders.

It is manifest that there was no state legislative or other action against any charter rights which plaintiff possessed. What the Traction Company may, or does claim, cannot be attributed to the State (its incorporation antedated that of plaintiff), and it would be a waste of words to do more than say that the incorporation of plaintiff under the general laws of the State did not preclude the incorporation of the Power Company under the same general laws. What rights, if any, the Power Company thereby acquired against plaintiff is another question. There remains then, only the order of the Public Utilities Commission, authorizing the conveyance by the Power Company of the latter's rights and franchises to the Traction Company, to complain of as an impairment of plaintiff's asserted contract. But here again we are not disposed to engage in much discussion. The Commission's order may or may not have been the necessary condition to a conveyance by the Power Company of whatever rights it had to the Traction Company. (§ 614–60, Page and Adams Ohio General

Code.) The order conferred no new rights upon the Power Company which that company could or did convey to the Traction Company, nor give them a sanction that they did not have, nor did it affect any rights of the plaintiff.

From every federal constitutional standpoint, therefore, the contentions of plaintiff are so obviously without merit as to be colorless and whatever controversies or causes of action it had were against the defendant companies as rivals in eminent domain, or as owners of the lands, and, diversity of citizenship not existing, the District Court of the United States had no jurisdiction.

Decree affirmed.

MR. JUSTICE DAY and MR. JUSTICE CLARKE took no part in the consideration or decision of this case.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY *v.* COMMONWEALTH OF KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 252. Argued March 18, 19, 1920.—Decided April 19, 1920.

A state law requiring interurban railroad companies to supply separate cars or compartments for white and colored passengers, and punishing failure to do so, is not an unconstitutional burden on interstate commerce as applied to such a railroad, owned by a local corporation and lying wholly within such State, while in control of an allied street car company and in practice operated as part of a street-car system over which the cars are run to and from a city in another State (where such separation of races is illegal) and passengers are

carried through to destination without change for a single fare, those traveling interstate greatly exceeding in number those traveling wholly within the State making the requirement. P. 403.

181 Kentucky, 449, affirmed.

THE case is stated in the opinion.

Mr. Alfred C. Cassatt, with whom *Mr. J. C. W. Beckham*, *Mr. Richard P. Ernst* and *Mr. Frank W. Cottle* were on the briefs, for plaintiff in error.

Mr. Stephens L. Blakely, with whom *Mr. Chas. I. Dawson*, Attorney General of the Commonwealth of Kentucky, was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The Railway Company was indicted for a violation of a statute of Kentucky which required companies or persons running or operating railroads in the State, to furnish separate coaches or cars for white and colored passengers.

The statute, as far as we are concerned with it, is as follows: all corporations, companies or persons "engaged in running or operating any of the railroads of this State, either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart." [Ky. Stats., § 795.]

It is also provided that there shall be no difference or discrimination in the quality of the coaches or cars. A violation of the act is made a misdemeanor.

Interurban electric railroads are subject to the above provisions. We may say in passing that the railway company denies that it is interurban, but admits that the fact has been decided against it and accepts the ruling. It will be considered, therefore, as interurban and being so it was within the law and the charge of the indictment. The charge is that the company at the time designated "then and there had authority and was authorized to operate a line of railroad ten miles in length between Covington and Erlanger, and beyond, through and by means of its control, ownership and lease of and from the Cincinnati, Covington and Erlanger Railway Company, a corporation organized under the laws of the Commonwealth of Kentucky, an interurban railroad company authorized to construct and operate an electric railroad ten miles in length in this County between Covington and Erlanger and beyond, and incorporated under the general railroad laws of this Commonwealth, said defendant then and there operating said line of railroad, the construction of which by the Cincinnati, Covington and Erlanger Railway Company had theretofore been authorized." And having such authority and control of the line of railroad, the company violated the law of the State by not observing its requirement as to separate coaches.

The defense to the action was, and the contention here is, not that the facts charged are not true, but that the statute so far as it is attempted to be made applicable to the company is an interference with interstate commerce, and that the defense was made in the trial court in a motion to dismiss and for a new trial and also in the Court of Appeals.

In support of the contention it is stated that the company's principal business was interstate commerce—the

carriage of passengers between Cincinnati and the Kentucky cities across the Ohio River,—that the car in question was an ordinary single truck street car solely engaged in interstate trips from Cincinnati, Ohio, through Covington, Kentucky, and a suburb about five miles distant, and that eighty per cent. of the passengers carried were interstate.

The reply made by the State, and expressed by the Court of Appeals, to the contention is that the railway company is a Kentucky corporation and by its charter was given authority "to construct, operate and manage street railways in the City of Covington and vicinity"; "and along such streets and public highways in the city as the council shall grant the right of way to"; "and along such roads or streets out of the city as the companies or corporations owning the same may cede the right to the use of." And further "it may at any time, by agreement, purchase, lease, consolidate with, acquire, hold or operate any other street railway, or intersect therein, in Covington, Cincinnati, Newport or vicinity," etc.

The Court of Appeals further declared that the railway company became in some way the owner of all of the stocks of the Cincinnati, Covington and Erlanger Railway Company, and that the corporations are operated under the same general management, and "that the elder corporation operating in the name of the junior, actually constructed its road, and has been operating it from the beginning, being the owner of the cars, which are operated upon the road. The motive power is electricity and is the property of the elder corporation. The cars operated upon the road are such as are ordinarily used upon street railroads, and such as the elder corporation [illegible] upon the street railroads of its system. A fare of [illegible] cents is charged for passage from any point upon the road of the Cincinnati, Covington and Erlanger Company, to any point on the system of the South [illegible] and Cincin-

nati Street Railway Company and from one point to another upon the entire system of the latter company, and transfers are given for all connecting lines. Many persons, who take passage upon the line of the Cincinnati, Covington and Erlanger Railway Company, at its terminus, near Erlanger and at other places along its line, are transported without change of cars, into Cincinnati, in the State of Ohio, as it connects with the lines of the South Covington and Cincinnati Street Railway Company, at its terminus, in the City of Covington." Separate coaches were not provided as required by the law.

These being the facts the Court of Appeals decided that there was no interference with or regulation of interstate commerce. "Each of the termini," the court said, "as well as all the stations of the Cincinnati, Covington and Erlanger Railway Company's road is within the State of Kentucky." And it was concluded that "the offense charged and for which the" railway was "convicted was the operation of the railroad, in an unlawful manner, within the State, and in violation of one of the measures enacted under the police powers of the State."

In answer and in resistance to the conclusion of the court, the railway company contends that it operates a railway between designated termini, one being in Kentucky and the other in Ohio, that the price of a fare may be the single one of five cents for the complete trip in the same coach taken at or terminating at the respective termini, and that therefore the car and passenger are necessarily interstate. Thus viewed they undoubtedly are, but there are other considerations. There was a distinct operation in Kentucky,—an operation authorized and required by the charters of the companies, and it is that operation the act in question regulates, and does no more, and therefore is not a regulation of interstate commerce. This is the effect of the ruling in *South Covington & Cincinnati Street Ry. Co.* v. *Covington*, 235 U. S. 537. The

regulation of the act affects interstate business incidentally and does not subject it to unreasonable demands.

The cited case points out the equal necessity, under our system of government, to preserve the power of the States within their sovereignties as to prevent the power from intrusive exercise within the National sovereignty, and an interurban railroad company deriving its powers from the State, and subject to obligations under the laws of the State, should not be permitted to exercise the powers given by the State, and escape its obligations to the State under the circumstances presented by this record, by running its coaches beyond the state lines. But we need not extend the discussion. The cited case expresses the principle of decision and marks the limitation upon the power of a State and when its legislation is or is not an interference with interstate commerce. And regarding its principle, we think, as we have said, the act in controversy does not transcend that limitation.

Judgment affirmed.

MR. JUSTICE DAY, dissenting.

If the statute of the State of Kentucky, here involved, as enforced by the decision under review imposes an unreasonable burden upon interstate commerce, the conviction should be reversed. To determine this question it is necessary to have in mind precisely what the charge was, and the nature of the traffic to which it was applied. The South Covington & Cincinnati Street Railway Company was charged with the offense of unlawfully running and operating a coach or car by electricity on a railroad track within the State of Kentucky, without causing or having a separate coach for the transportation of white and colored passengers on its said line of railroad to bear in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart, and without having its coach or car divided by a good and substantial

wooden partition, or other partition, dividing the same into compartments with a door therein, and each separate compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it was set apart.

There is no conflict of testimony, and the record shows that the Company was engaged in the operation of a street railway system whose principal business was interstate commerce, carrying passengers between Cincinnati and Kentucky cities across the Ohio River; that the car in question, described in the indictment, was an ordinary single truck street car seating thirty-two passengers, about twenty-one feet in length, inside measurement, solely engaged in interstate trips from Cincinnati, Ohio, through Covington, Kentucky, and well-populated territory adjacent thereto, to a point near Fort Mitchell, a suburb, about five miles distant. Eighty per cent. of the passengers carried were interstate. Not to exceed 6 per cent. of the passengers carried at any time were colored and on a large proportion of the trips no colored passengers were carried.

The question for determination is: Whether under such circumstances the requirement of the statute of the State of Kentucky that railroad companies doing business in that State shall be required to furnish separate coaches and cars for the travel or transportation of white and colored persons or cars with compartments, as described in the indictment, is constitutional? The nature of the traffic of the South Covington & Cincinnati Street Railway Company was considered by this court in *South Covington & Cincinnati Street Ry. Co.* v. *Covington*, 235 U. S. 537, and we held that the traffic between Kentucky and Ohio on the same cars, under the same management, and for a single fare constituted interstate commerce. (See 235 U. S. 545, and cases cited.) In that case we held that an ordinance of the City of Covington, which under-

took to determine the number of cars and passengers to be carried in interstate transportation was invalid as a burden upon interstate commerce; and that, as to certain regulations affecting the safety and welfare of passengers, the ordinance was valid until Congress saw fit to regulate the interstate transportation involved.

It is true that a portion of the transportation involved in the present case is over the track of a railroad company organized under the laws of Kentucky. But that road had no cars, conducted no railroad operations, and its stock was owned and it was operated by the South Covington & Cincinnati Street Railway Company. The car, for which the indictment was returned, and the conviction had, was operated only in interstate traffic, and, whether over one road or the other, such operation was interstate commerce, and plainly within the authority of Congress. In the absence of congressional regulation the State had power to make reasonable rules, not burdening interstate commerce, which should be enforced until Congress otherwise enacted.

The question in this case then is: Was the application of this statute a reasonable regulation? The traffic consists in running a single car, of the character already described, from Fountain Square, Cincinnati, a distance of about six miles, to Fort Mitchell, a suburb of South Covington, Kentucky. How could this separate car or compartment statute be complied with? It is first suggested a separate car could be put on for the accommodation of colored passengers for the distance of the intrastate run on the Kentucky side of the river. In view of the nature of the transportation and the meagre patronage compared with the expense of such an undertaking, this method would be impracticable without interrupting travel and entailing a great loss upon the Company. Secondly, it is suggested, and this seems to be the weight of the argument, that cars could be constructed with a separate compartment for the few colored

persons who ride in the car after it reaches or before it leaves Kentucky. It is admitted that this regulation would not apply to interstate passengers, and colored passengers going from Kentucky to Cincinnati, or going from Cincinnati to Kentucky on a through trip, would not be subject to the regulation. The few colored passengers traveling exclusively in the State of Kentucky in this car would thus be discriminated against by reason of the different privilege accorded to other colored passengers on the same car, a condition not likely to promote the peace or public welfare.

As this transportation is also subject to regulation in the State of Ohio (see § 12940, Ohio Gen. Code) and as by the laws of that State no such separation of passengers is permitted, it follows that upon the same trip the traffic would be the subject of conflicting regulations, calculated to be destructive of the public policy which it is supposed to be the design of this statute to promote; a condition which we said in *South Covington Street Railway Case, supra*, would breed confusion greatly to the detriment of interstate traffic.

This case is quite different from *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388, in which the statute now under consideration was before the court, and wherein it was held that the law was valid when applied to a carrier operating an interstate road. The act was held to be separable, and capable of being complied with within the State by attaching a car for passengers traveling only within the State. That case presented quite a different situation from the operation of the single street car here involved.

The present indictment is for running an ordinary street car upon an interstate journey of only about six miles, with 80 per cent. of its travel interstate, and not over 6 per cent. of the passengers colored, and on many trips no colored passengers at all. As we have indicated, the attachment of the additional car upon the Kentucky side on so short a

journey would burden interstate commerce as to cost and in the practical operation of the traffic. The provision for a separate compartment for the use of only intrastate colored passengers would lead to confusion and discrimination. The same interstate transportation would be subject to conflicting regulation in the two States in which it is conducted.

It seems to me that the statute in question as applied to the traffic here involved is an unreasonable regulation and burdensome to interstate commerce, and, therefore, beyond the power of the State. I think the judgment should be reversed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE PITNEY concur in this dissent.

CINCINNATI, COVINGTON & ERLANGER RAILWAY COMPANY *v.* COMMONWEALTH OF KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 253. Argued March 18, 19, 1920.—Decided April 19, 1920.

Decided on the authority of *South Covington & Cincinnati Street Ry. Co.* v. *Kentucky*, *ante*, 399.
181 Kentucky, 449, affirmed.

THE case is stated in the opinion.

Mr. Alfred C. Cassatt, with whom *Mr. J. C. W. Beckham*, *Mr. Richard P. Ernst* and *Mr. Frank W. Cottle* were on the briefs, for plaintiff in error.

Mr. Stephens L. Blakely, with whom *Mr. Chas. I. Dawson*, Attorney General of the Commonwealth of Kentucky, was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case was argued with No. 252, *South Covington & Cincinnati Street Ry. Co.* v. *Kentucky*, *ante*, 399. It was disposed of by the Court of Appeals with that case in one opinion. The company was indicted as the other company was for a violation of the Separate Coach Law of the State and found guilty. The facts are in essence the same as in the other case, though the indictment is more elaborate. The defenses and contentions are the same. We have stated them, and upon what they are based, and the character and relation of the companies, in our opinion in the other case.

The company is an interurban road and the Separate Coach Law is applicable to it. It was incorporated under the general laws of the State and authority conferred upon it to construct and operate an electric railway from the City of Covington to the town of Erlanger, and to such further point beyond Erlanger as might be determined. It was constructed from Covington to a point just beyond the suburban town called Fort Mitchell, a town of a few hundred inhabitants.

The South Covington and Cincinnati Street Railway Company furnished the means to build the road and at the time covered by the indictment was operating the road as part of its railway system as described in the other case.

The intimate relations of the roads as stated by the Court of Appeals, we have set forth in the other case, and it is only necessary to add that the indictment in the present case charges that the company in this case was

the lessor of the other company and thereby "permitted and brought about the acquisition of its rights and privileges knowing that" the other company, "would not operate and run separate coaches for its white and colored passengers." And, it is charged that the other company operating the lease violated the law and that the defendant company knowing of the intended method of operation, also violated the law. These facts and other facts the Court of Appeals decided made the company an offender against the statute, and decided further that the statute was not an interference with interstate commerce. The conviction of the company was sustained.

Our reviewing power, we think, is limited to the last point, that is, the effect of the law as an interference with interstate commerce, and that we disposed of in the other case. The distinction counsel make between street railways and other railways, and between urban and interurban roads, we are not concerned with.

Judgment affirmed.

MR. JUSTICE DAY, dissenting.

This case is controlled by the disposition made of No. 252. While it is true that the Erlanger Company was incorporated under the laws of the State of Kentucky, the proof shows that its road was built and operated by the South Covington & Cincinnati Street Railway Company as part of the latter's system. This is not a proceeding to test the right to operate the road. The conviction is justified because the local company permitted the principal company to operate without separate coaches or compartments for its colored passengers. The traffic conducted is of an interstate nature, and the same reasons which impel a dissent in No. 252 require a like dissent in the present case.

In my opinion the single traffic over both railroads being

408. Counsel for Petitioner and Plaintiff in Error.

interstate, the regulation embodied in the statute and for which the conviction was had, as to both roads, is an unreasonable and burdensome interference with interstate commerce.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE PITNEY concur in this dissent.

KENNEY, ADMINISTRATOR OF KENNEY, v. SUPREME LODGE OF THE WORLD, LOYAL ORDER OF MOOSE.

CERTIORARI AND ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Nos. 269, 303. Argued March 23, 1920.—Decided April 19, 1920.

A statute denying jurisdiction to the courts of Illinois in actions for damages occasioned by death occurring in another State in consequence of wrongful conduct was construed by the Supreme Court of the State as applying equally to an action on a sister-state judgment founded on such a cause of action. *Held*, that, so applied, it contravened the full faith and credit clause of the Constitution. P. 414.

The law of Alabama, which gives a right of action in that State for death by wrongful act, cannot, by its declaration that such actions may not be maintained elsewhere, affect the right to enforce by action in another State a judgment recovered on such a cause of action in Alabama. P. 415.

A judgment of a state supreme court giving a meaning and effect to a statute of the State which brings it in conflict with the Federal Constitution is reviewable by writ of error. P. 416.

285 Illinois, 188, reversed; writ of certiorari dismissed.

THE case is stated in the opinion.

Mr. G. R. Harsh for petitioner and plaintiff in error.

Mr. E. J. Henning, with whom *Mr. Ralph C. Putnam* was on the briefs, for respondent and defendant in error:

The matter sought to be reviewed in this court can only be considered upon writ of certiorari, and not by writ of error. *Philadelphia & Reading C. & I. Co.* v. *Gilbert*, 245 U. S. 162; *Bruce* v. *Tobin*, 245 U. S. 18; *Ireland* v. *Woods*, 246 U. S. 327; *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477. The writ of certiorari should be dismissed because the application was not timely submitted under the rules of this court and the statutes of the United States.

A state court is free to determine its own jurisdiction, without reference to the full faith and credit clause of the Federal Constitution. *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373.

Where an action is brought upon a judgment of a sister State, the court may always examine the nature of the cause of action upon which the judgment is founded for the purpose of determining if it would have jurisdiction of the real subject-matter of the action, and, if it appears that the court would not have jurisdiction of the original action, it will not have jurisdiction of an action on the judgment. *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265. In the *Pelican Case*, the binding force of the judgment was not questioned; it was given full faith and credit as a judgment, but the court said, "we have no jurisdiction of an action of that nature." *Fauntleroy* v. *Lum*, 210 U. S. 230, follows the rule laid down in the *Pelican Case* and the *Anglo-American Provision Co. Case*. It clearly distinguishes between an attack upon the judgment or an inquiry into the merits of the judgment and the determining of a question of jurisdiction. *Christmas* v. *Russell*, 5 Wall. 290, establishes no contrary doctrine, as is clearly shown by the discussion in the *Anglo-American Provision Co. Case*.

That the Illinois statute is jurisdictional is held by

Dougherty v. *American McKenna Co.*, 255 Illinois, 369, and *Walton* v. *Pryor*, 276 Illinois, 563. It makes no distinction as to citizenship, and as here applied it does not violate the full faith and credit or privileges and immunities provisions of the Constitution. See *Dougherty* v. *American McKenna Co.*, *supra*, relying on *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142.

The provision of the Alabama statute that an action for death by wrongful act shall be brought in a court of competent jurisdiction within the State of Alabama and not elsewhere is jurisdictional, and no court outside of the State of Alabama has jurisdiction of the subject-matter of such an action.

It has the effect of making the action local and unenforceable in other jurisdictions. 40 Cyc. 46; 22 Ency. Pl. & Pr. 786; *Eachus* v. *Trustees*, 17 Illinois, 534; *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 195; *Coyne* v. *Southern Pacific Co.*, 155 Fed. Rep. 683; 12 Corpus Juris, 441; *Southern Pacific Co.* v. *Dusablon*, 48 Tex. Civ. App. 203; *Pollard* v. *Bailey*, 20 Wall. 520.

We observe that both Alabama and Illinois, through their legislatures, have declared that the Illinois courts shall not have jurisdiction of an action for a death occasioned in Alabama. The principle is plain and universal that the form of the action cannot change its substance and vest jurisdiction where it is in fact lacking. Nor did the Constitution change this rule of law. The full faith and credit clause does not purport to vest courts with jurisdiction contrary to the laws of the States, and this principle is fully recognized in *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action of debt brought in Illinois upon a judgment recovered in Alabama. The defendant pleaded

to the jurisdiction that the judgment was for negligently causing the death of the plaintiff's intestate in Alabama. The plaintiff demurred to the plea, setting up Article IV, §§ 1 and 2 of the Constitution of the United States. A statute of Illinois provided that no action should be brought or prosecuted in that State for damages occasioned by death occurring in another State in consequence of wrongful conduct. The Supreme Court of Illinois held that as by the terms of the statute the original action could not have been brought there, the Illinois Courts had no jurisdiction of a suit upon the judgment. The Circuit Court of Kane County having ordered that the demurrer be quashed its judgment was affirmed. 285 Illinois, 188.

In the court below and in the argument before us reliance was placed upon *Anglo-American Provision Co.* v. *Davis Provision Co., No. 1*, 191 U. S. 373, and language in *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, the former as showing that the clause requiring full faith and credit to be given to judgments of other States does not require a State to furnish a court, and the latter as sanctioning an inquiry into the nature of the original cause of action in order to determine the jurisdiction of a court to enforce a foreign judgment founded upon it. But we are of opinion that the conclusion sought to be built upon these premises in the present case cannot be sustained.

Anglo-American Provision Co. v. *Davis Provision Co.* was a suit by a foreign corporation on a foreign judgment against a foreign corporation. The decision is sufficiently explained without more by the views about foreign corporations that had prevailed unquestioned since *Bank of Augusta* v. *Earle*, 13 Pet. 519, 589–591, cited 191 U. S. 375. Moreover no doubt there is truth in the proposition that the Constitution does not require the State to furnish a court. But it also is true that there are limits to the power of exclusion and to the power to consider the nature of

the cause of action before the foreign judgment based upon it is given effect.

In *Fauntleroy* v. *Lum*, 210 U. S. 230, it was held that the courts of Mississippi were bound to enforce a judgment rendered in Missouri upon a cause of action arising in Mississippi and illegal and void there. The policy of Mississippi was more actively contravened in that case than the policy of Illinois is in this. Therefore the fact that here the original cause of action could not have been maintained in Illinois is not an answer to a suit upon the judgment. See *Christmas* v. *Russell*, 5 Wall. 290; *Converse* v. *Hamilton*, 224 U. S. 243. But this being true, it is plain that a State cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent. The assumption that it could not do so was the basis of the decision in *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 111, 112, and the same principle was foreshadowed in *General Oil Co.* v. *Crain*, 209 U. S. 211, 216, 220, 228, and in *Fauntleroy* v. *Lum*, 210 U. S. 230, 235, 236. See *Keyser* v. *Lowell*, 117 Fed. Rep. 400; *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 148, and cases cited. Whether the Illinois statute should be construed as the Mississippi act was construed in *Fauntleroy* v. *Lum* was for the Supreme Court of the State to decide, but read as that court read it, it attempted to achieve a result that the Constitution of the United States forbad.

Some argument was based upon the fact that the statute of Alabama allowed an action to be maintained in a court of competent jurisdiction within the State "and not elsewhere." But when the cause of action is created the invalidity of attempts to limit the jurisdiction of other States to enforce it has been established by the decisions of this court; *Tennessee Coal, Iron & R. R. Co.* v. *George*, 233 U. S. 354; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Sowers*, 213 U. S. 55; and had these decisions been other-

wise they would not have imported that a judgment rendered exactly as required by the Alabama statute was not to have the respect due to other judgments of a sister State.

As the judgment below upheld a statute that was invalid as construed the writ of error was the proper proceeding and the writ of certiorari must be dismissed.

Judgment reversed.

STATE OF MISSOURI *v.* HOLLAND, UNITED STATES GAME WARDEN.

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

No. 609. Argued March 2, 1920.—Decided April 19, 1920.

Protection of its quasi sovereign right to regulate the taking of game is a sufficient jurisdictional basis, apart from any pecuniary interest, for a bill by a State to enjoin enforcement of federal regulations over the subject alleged to be unconstitutional. P. 431.

The Treaty of August 16, 1916, 39 Stat. 1702, with Great Britain, providing for the protection, by close seasons and in other ways, of migratory birds in the United States and Canada, and binding each power to take and propose to their law-making bodies the necessary measures for carrying it out, is within the treaty-making power conferred by Art. II, § 2, of the Constitution; the Act of July 3, 1918, c. 128, 40 Stat. 755, which prohibits the killing, capturing or selling any of the migratory birds included in the terms of the treaty, except as permitted by regulations compatible with those terms to be made by the Secretary of Agriculture, is valid under Art. I, § 8, of the Constitution, as a necessary and proper means of effectuating the treaty; and the treaty and statute, by bringing such birds within the paramount protection and regulation of the Government do not infringe property rights or sovereign powers, respecting such birds, reserved to the States by the Tenth Amendment. P. 432.

With respect to rights reserved to the States, the treaty-making power is not limited to what may be done by an unaided act of Congress. P. 432.

258 Fed. Rep. 479, affirmed.

THE case is stated in the opinion.

Mr. J. G. L. Harvey and *Mr. John T. Gose*, Assistant Attorney General of the State of Missouri, with whom *Mr. Frank W. McAllister*, Attorney General of the State of Missouri, was on the brief, for appellant:

If the act of Congress now in question would have been unconstitutional when the Constitution and the first amendments were framed and ratified, it is unconstitutional now. The Constitution itself does not change. *South Carolina* v. *United States*, 199 U. S. 447, 448.

Under the ancient law, the feudal law, and the common law in England, the absolute control of wild game was a necessary incident of sovereignty. When, therefore, the United Colonies became "Free and Independent States" with full power to do all "acts and things which Independent States may of right do," the power to control the taking of wild game passed to the States. *Geer* v. *Connecticut*, 161 U. S. 519, 523–530; *Ward* v. *Race Horse*, 163 U. S. 504.

If it had even been suggested that, although Congress had no power to control the taking of wild game within the borders of any State, yet indirectly by means of a treaty with some foreign power it could acquire the power and by this means its long arm could reach into the States and take food from the tables of their people, who can for one moment believe that such a constitution would have been ratified? Wild game and the right of the people thereto have always been a "touchy" subject with all English speaking people. It was of sufficient importance to be a part of the *Magna Charta* and the "Charter of the Forests." See *Parker* v. *People*, 111 Illinois, 581, 647.

This power of the State over wild game within its borders, which "cannot be questioned" and "will not be gainsaid," is derived from the peculiar nature of such property and its common ownership by all the citizens of the State in their collective sovereign capacity. The State in its sovereign capacity is the representative of the people in their common ownership, and holds it in trust for the benefit of all its people. *Geer* v. *Connecticut, supra*, 529, 530; *McCready* v. *Virginia*, 94 U. S. 391; *Martin* v. *Waddell*, 16 Pet. 410; *United States* v. *Shauver*, 214 Fed. Rep. 154; *United States* v. *McCullagh*, 221 Fed. Rep. 288, 294; *Rupert* v. *United States*, 181 Fed. Rep. 87, 90; *Magner* v. *People*, 97 Illinois, 320, 333; *Gentile* v. *State*, 29 Indiana, 409, 417; *Ex parte Maier*, 103 California, 476, 483; *Chambers* v. *Church*, 14 R. I. 398, 400; *Manchester* v. *Massachusetts*, 139 U. S. 240; *Patsone* v. *Pennsylvania*, 232 U. S. 138; *Abby Dodge* v. *United States*, 223 U. S. 166; *Smith* v. *Maryland*, 18 How. 71; *Carey* v. *South Dakota*, 250 U. S. 118; *Silz* v. *Hesterberg*, 211 U. S. 31; *In re Deininger*, 108 Fed. Rep. 623; *Heim* v. *McCall*, 239 U. S. 175.

But the power of the State is not dependent upon the authority which the State derives from common ownership and the trust for the benefit of the people; it is a necessary incident of the power of police—an attribute of sovereignty. *State* v. *Heger*, 194 Missouri, 707.

If a source of food supply is not within the exclusive control of a State under its power of police, is there anything which is? If Congress by means of a treaty can tell the people of a State when and under what conditions they may take wild game which they own in their collective sovereign capacity, and in and over which, while within the borders of the State, neither Congress nor any foreign nation can have, either under national or international law (see Behring Sea Arbitration, 32 Amer. Law Reg. 901), any property rights or any power of control, then

the Tenth Amendment with its powers "reserved" to the States respectively or to the people, is a delusion, and they are States in name only, and our government a very different government from that presupposed and intended by the people who ratified the Constitution. *Passenger Cases*, 7 How. 474.

Upon the authority and principles of the cases above cited it has been held that the Act of Congress, approved March 4, 1913, was unconstitutional. The fact that the present act purports to give effect to a treaty cannot validate it. Every treaty must be presumed to be made subject to the rightful powers of the governments concerned, and neither the treaty-making power alone, nor the treaty-making power in conjunction with any or all other departments of the Government, can bind the Government to do that which the Constitution forbids. *Geofroy* v. *Riggs*, 133 U. S. 258, 267; *People* v. *Gerke*, 5 California, 381, 382 *et seq.*; *George* v. *Pierce*, 148 N. Y. S. 230, 237; *Compagnie* v. *Board*, 51 La. Ann. 645, 662; affd. 186 U. S. 380; *Cantini* v. *Tillman*, 54 Fed. Rep. 969; *Loan Association* v. *Topeka*, 20 Wall. 655, 662, 663; *Cherokee Tobacco Case*, 11 Wall. 616; *Siemessen* v. *Bofer*, 6 Cal. Rep. 250; *People* v. *Naglee*, 1 California, 246, 247; *Kansas* v. *Colorado*, 206 U. S. 80; *Murphy* v. *Ramsay*, 114 U. S. 15, 44; *Head Money Cases*, 112 U. S. 580; *Jones* v. *Meehan*, 175 U. S. 132; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Seneca Nation* v. *Christie*, 126 N. Y. 122; *Fort Leavenworth* v. *Lowe*, 114 U. S. 525; *Pierce* v. *State*, 13 N. H. 576; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 326; *Mormon Church* v. *United States*, 136 U. S. 1; The Federalist, Nos. 33, 45; Works of Calhoun, vol. I, 203, 204, 249, 250, 252, 253; Tucker, Const., vol. II, 725, 726; Butler, Treaty Making Power, vol. I, 64; vol. II, 350, 352; Story, Const., § 1508; Duer, Lectures on Constitutional Jurisprudence of the United States, 2d ed., 228; Cooley, Const. Law, 117; Van Holst, Const. Law,

202; Thayer, Cases on Const. Law, vol. I, 373; Senator Rayner, 59th Cong., 41 Cong. Rec., pt. 1, 299; Cocke's Constitutional History, 235; Jefferson, Manual of Parliamentary Practice, 110, note 3; Elliot's Debates, vol. III, 504, 507; Cooley, Const. Lim., 7th ed., 11; Hamilton's Works, vol. IV, 324.

In the consideration of the questions involving the powers of the federal and state governments there exists the temptation to lodge all sovereign or governmental power in either the United States or the States. This disposition is evidenced by the erroneous statement that there exist in this country dual sovereignties. Cf. 8 Ops. Atty. Gen. 411–415. The power reserved to the people is overlooked. *Kansas* v. *Colorado*, 206 U. S. 90. The Federal Government is a government not only of enumerated powers, but it is also a government to which certain powers are denied. Powers denied are not to be implied: they are to be obtained, if at all, from, and in the manner provided by, those who originally granted the enumerated powers, but who at the same time denied other powers—the people. *Barron* v. *Baltimore*, 7 Pet. 243, 247; *Kansas* v. *Colorado*, *supra*; *United States* v. *Shauver*, 214 Fed. Rep. 154, 156; *Holden* v. *Joy*, 17 Wall. 243; *United States* v. *Rhodes*, 1 Abb. U. S. Rep. 43; Fed. Cases, 16151; *Fairbank* v. *United States*, 181 U. S. 283, 288; Tucker, Const., vol. I, 371–373.

Among the powers so denied are those over purely internal affairs which "concern the lives, liberties and properties of the people and the internal order, improvement and prosperity of the State," including, as held without exception, the control over wild game. When the power of the States over their purely internal affairs is destroyed, the system of government devised by the Constitution is destroyed.

If these reserved powers could be taken over through the device of treaty making, the President and Senate could

control the laws of a State relating to inspection, quarantine, health and internal trade; prescribe the times and modes of elections; force the introduction and sale of opium, intoxicating liquors or other substances, however injurious to the health and well-being of a State; cede to a foreign power a State or any part of its territory, and destroy the securities of liberty and property as effectually as the most despotic government ever formed.

But this is not all. If the treaty-making power is not within the constitutional limitations relating to the powers reserved to the States, it is not limited by any restriction of the Constitution. The Federal Government itself, as well as the several States, would be at the mercy of the President and the Senate. They could regulate foreign commerce in spite of the fact that Congress is expressly authorized to control it. They could provide for duty rates upon articles imported from foreign nations, or admit them free of duty, although Congress has express authority to lay and collect taxes and duties. They could appropriate directly from the public treasury the public moneys in the face of the express power of Congress to originate all such appropriations. They could dispose of any part of the territory of the United States, or any of their property, without the consent of Congress, which alone has power to dispose of and make rules and regulations for the property of the United States. In short, the Federal Government would be a government of men, and not of laws. The question is not whether or not they will do these things but whether or not, under our form of government, they have the power.

If a treaty be "the supreme law of the land," it has become so by construction, for the Constitution as ratified by the people made the supreme law of the land to consist of three things: (1) The Constitution; (2) the laws of the United States which shall be made in pursuance thereof; (3) all treaties made or which shall be made

under the authority of the United States. The powers reserved to the States respectively or to the people are, under this Constitution, as sacred as the power to make treaties. Are they not even more so since they are the object of specific reservation and necessarily limit or restrict the general grant of power made to the treaty-making department of the government? Hamilton's Works, vol. IV, 342; Cooley, The Forum, June, 1893, p. 397; Von Holst, Const. Law of United States, 202; Duer, Lectures on Constitutional Jurisprudence of the United States, 2d ed., 228; Tucker, Lim. Treaty-Making Power, 128, 129, 135–136, 139, 93–94, 86–87; Judge Shackleford Miller, quoted in Tucker, Lim. Treaty-Making Power, 21, 22.

The United States existed under the Articles of Confederation and the purpose was to include treaties made under that authority as well as those which should be made under the Constitution. The "authority of the United States" under the Articles of Confederation and under the Constitution was an authority derived from enumerated powers accompanied by specific reservations, and under both the Articles of Confederation and the Constitution certain rights of the States respectively and the people were jealously guarded by express exceptions. There was and could be no "authority of the United States" outside of and beyond that given by the Articles of Confederation and the Constitution.

That a treaty stands upon an equal footing with a law of the United States is settled. *Cherokee Tobacco Case*, 11 Wall. 616; *Ward* v. *Race Horse*, 163 U. S. 504.

The term "treaty" must undoubtedly be given a broad meaning, and generally speaking, it may be said that by this clause there is conferred the power to make treaties on those matters ordinarily the subject of treaties between sovereign powers. But, in the very nature of things, there must be a limit, else that power would de-

stroy many of the other provisions of the Constitution. Such meaning must be given each part of the Constitution as will not interfere with the meaning of the other parts, in order that effect may be given to the whole.

The cases usually cited by those who advocate the supremacy of a treaty do not in any instance hold that the reserved powers of a State or a trust which the State holds for the benefit of all its people are subject to and may be annulled by a treaty having for its subject the regulation of a matter which is reserved to the States respectively or to the people by the Tenth Amendment. *Ware* v. *Hylton*, 3 Dall. 199; *Chirac* v. *Chirac*, 2 Wheat. 259; *Geofroy* v. *Riggs*, 133 U. S. 266 (cf. *Fox* v. *United States*, 94 U. S. 320); *Orr* v. *Hodgson*, 4 Wheat. 453; *Fairfax* v. *Hunter*, 7 Cranch, 603; *People* v. *Gerke*, 5 California, 381, 384 (cf. Tucker, Address before Georgia Bar Association, June 2, 1917, p. 23; Lim. on Treaty-Making Power, c. 6, pp. 143 *et seq.*); *Hauenstein* v. *Lynham*, 100 U. S. 483; 22 Ops. Atty. Gen. 215.

In the making of the Constitution a negative, in any form, upon laws passed by the States in the exercise of their reserved powers was defeated, though persistently urged, in some form, by some of the ablest men in the Constitutional Convention. It was universally admitted that under the Constitution as it stood the Federal Government had no such power, and by the first ten amendments the people undertook to forestall any attempt on the part of the Federal Government to obtain such power by construction. Works of Calhoun, 246, 247, 249, 250.

Treaties are not to be given a sanctity which shields them from inspection and rejection, if, by their terms they do that which the Constitution forbids, and destroy essential rights of the States or the people. *Downes* v. *Bidwell*, 182 U. S. 244, 344; *Compagnie* v. *Board*, 186 U. S. 380, 395; *Heim* v. *McCall*, 239 U. S. 175, 194.

The High Contracting Powers must be held to have

known that the power of the Federal Government did not extend to the taking over of a trust exercised by the State in relation of the common property of its citizens, or the enactment of mere police regulations within the limits of a State; and the language of Article VIII seems to indicate that they both had acted upon this knowledge. Such construction leaves both the treaty and the laws of Missouri intact. It results in holding unconstitutional only an act of Congress which was not necessarily required by the treaty, and which, under the Constitution, Congress had no power to pass.

The Solicitor General and *Mr. Assistant Attorney General Frierson* for appellee:

A migratory bird law of this kind is sustained, apart from treaty, by the power to dispose of and make all needful rules and regulations respecting the property belonging to the United States (Art. IV, § 3), and by the power to regulate commerce between the States.

The Constitution expressly grants to Congress the power to enact such laws as may be necessary to give effect to treaties. Art. I, § 8; *Baldwin* v. *Franks*, 120 U. S. 678; *United States* v. *Jin Fuey Moy*, 241 U. S. 394; *Chinese Exclusion Case*, 130 U. S. 581.

Whenever a treaty operates of itself, it is to be regarded in the courts as equivalent to an act of Congress. But if it is only promissory, it is then clearly within the province of Congress to enact legislation necessary to put it into effect. *Foster* v. *Neilson*, 2 Pet. 253, 314; *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, 196.

The power of Congress to legislate to make treaties effective is not limited to the subjects with respect to which it is empowered to legislate in purely domestic affairs.

There are many national questions affecting alone this Government or the people of the United States with which

it deals. With respect to this class the line of demarcation between the powers of the state governments and those of the Federal Government is clearly marked by the Constitution. But when we come to deal with national questions affecting the interests of other countries as well as our own, we confront a different situation. At home, we are citizens of dual sovereignties, each supreme within its own sphere. But, in our intercourse with foreign nations, we are one people and one nation. In our relations to foreign countries and their subjects or citizens, our Federal Government is one Government and is invested with the powers which belong to independent nations and which the several States would possess, if separate nations, and the exercise of these powers can be invoked for the maintenance of independence and security throughout the entire country. *Cohens* v. *Virginia*, 6 Wheat. 264, 413; *Knox* v. *Lee*, 12 Wall. 457, 555; *Chinese Exclusion Case*, 130 U. S. 581, 604.

In exercising the treaty-making power, the Federal Government acts for the entire American people, whether we regard them as citizens of the United States or as citizens of the several States, and likewise for every State. As said by this court in *Hauenstein* v. *Lynham*, 100 U. S. 483, 490: "If the National Government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to 'enter into any treaty, alliance, or confederation.'"

Since the power was expressly granted to Congress to enact legislation necessary and proper to put into execution a treaty, the validity of such legislation cannot depend upon whether its subject-matter is included within the general legislative powers of Congress. Rather, it depends upon whether the treaty which is being enforced is within the treaty-making power of the United States. *In re Ross*, 140 U. S. 453, 463.

By the Constitution the complete and unrestricted

treaty-making power possessed by the States is expressly granted to the United States to be exercised by the President and Senate. The exercise of such power is expressly prohibited to the States. Therefore, except as restrained by prohibitions contained in other clauses of the Constitution, the entire treaty-making power of the States was vested in the United States when that instrument was adopted in 1788.

Amendment X (thereafter adopted) reserves to the States or the people all powers not granted to the United States nor prohibited to the States. As the treaty powers had been both granted to the United States and prohibited to the States, they were expressly excepted from the reservations of the Tenth Amendment, and it is wholly irrelevant. A treaty made by the treaty-making power does not derogate from the power of any State. It is an exercise of the treaty-making power of such State in conjunction with the like powers of all of the States by their common government—the agency they appointed in adopting the Constitution.

It is undoubtedly true that, generally, matters of a purely local nature are reserved for the legislative power of the States. But just what these reserved powers are depends upon the extent to which powers, either expressly or by necessary implication, are conferred upon the Federal Government. The police powers are those most generally regarded as having been reserved to the States. But, if the full exertion of any power conferred upon the Federal Government requires the exercise of police powers within the States, such powers may be exercised to the extent necessary, although they may involve an interference with what would otherwise lie exclusively within the province of the State. *United States* v. *Thompson*, 258 Fed. Rep. 257, 264. That the police or other powers of the States cannot be interposed as an obstacle to the exertion of these federal powers to make and enforce

treaties has been too often decided to now admit of doubt. *Wildenhus's Case*, 120 U. S. 1, 17; *Ware* v. *Hylton*, 3 Dall. 199; *Chirac* v. *Chirac*, 2 Wheat. 259, 276; *Geofroy* v. *Riggs*, 133 U. S. 258, 266; *Hopkirk* v. *Bell*, 3 Cranch, 454; *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188; *United States* v. *Winans*, 198 U. S. 371.

It is inconceivable that, since the States were to be denied the treaty-making power, the framers of the Constitution intended that the treaty-making power conferred upon the new Government should be less than that possessed by any other independent government and less than that possessed by the State conferring it. The very general language used in conferring the power negatives such an intention. What was conferred was obviously that power to negotiate treaties which is essential if there is to be intercourse between nations.

Again, those representing the States in the Constitutional Convention understood too well the necessity for the exercise of such a power to have been willing to deprive the States of the ample power that they had unless, at least, as full power was to be vested in some other agency.

It must be remembered that every power which was conferred upon the Federal Government was taken from those powers which the State had the right to exercise, and it would seem impossible to construe the two provisions of the Constitution, above referred to, as accomplishing anything short of the transfer of all the treaty-making power which the several States had to the new Federal Government. *Baldwin* v. *Franks*, 120 U. S. 678, 682, 683.

Before the adoption of the Constitution it cannot be doubted that each State could not only enact such laws as it deemed necessary for the protection of game within its borders, but could, likewise, enter into a treaty with any other State or foreign country for the protection of

migratory game which remained within its borders only a portion of the year. After the adoption of the Constitution, however, as said in *Geer* v. *Connecticut*, 161 U. S. 519, 528, this power remained in the States only "in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal Government by the Constitution." But if the protection of migratory game is a proper subject-matter for treaties between independent nations, the power to secure this protection was expressly conferred upon the Federal Government as a part of the treaty-making power.

The peculiar nature of its property in migratory game, which is in one country during a part of the year and in another during the remainder of the year, makes it impossible for the laws of one State or one country to give ample protection. This can be accomplished only by concert of action on the part of two or more States or countries. This, in the very nature of things, cannot be secured except through the medium of treaties.

The treaty-making power applies to all matters which may properly be the subject of negotiations between the two governments. Calhoun, 4 Elliot's Debates, 464; Story, Const., 5th ed., § 1508; *Ware* v. *Hylton*, 3 Dall. 199, 235; *Geofroy* v. *Riggs*, 133 U. S. 258, 266; *In re Ross*, 140 U. S. 453, 463.

The protection of migratory game is a proper subject of negotiations and treaties between the governments of the countries interested in such game. Van Valkenburgh, J., in the court below, 258 Fed. Rep. 479, 484; *United States* v. *Rockefeller*, 260 Fed. Rep. 346–348.

It may be that, while migratory birds are within a State, that State, as trustee for its people, has the same title to them that it has to birds which remain permanently within its borders. But, when the birds return to Canada, that government has exactly the same title that the State has when they are in the United States. More-

over, while the birds are in Canada, the State to which they customarily migrate is still interested in them, because, when they return, its title again attaches. Manifestly, then, the States of the United States are as much interested in the preservation of these birds while in Canada as while in the United States. But for the protection of these migratory birds while they are in a foreign country, each State is powerless. While in the one case, therefore, it resorts to its own legislative power, in the other it must have resort to an exercise of power by the agent which it has agreed shall act for it in negotiating and making treaties with foreign governments.

Mr. Richard J. Hopkins, Attorney General of the State of Kansas, and *Mr. Samuel W. Moore*, by leave of court, filed a brief as *amici curiæ*, in behalf of the State of Kansas:

Every State possesses the absolute right to deal as it may see fit with property held by it either as proprietor or in its sovereign capacity as a representative of the people, and this right is paramount to the federal legislative or treaty-making power.

The constitutional limitation prohibiting a State without the consent of Congress from entering into any agreement or compact with any State or with a foreign power prohibits "the formation of any combination tending to the increase of political power in the States which may encroach upon or interfere with the just supremacy of the United States." It has no application to agreements or compacts which a State may make in the control and regulation of its own property or property rights.

Congress' lack of legislative power to divest a State of its property right and control over the wild game within its borders cannot be supplied by making a treaty with Great Britain.

The treaty-making power of the National Government

is so limited by other provisions of the Constitution, including the Tenth Amendment, that it cannot divest a State of its police power or of its ownership or control of its wild game.

The courts have never upheld a treaty whose subject-matter extended beyond the constitutional domain of congressional legislation.

The treaty in this case does not, by its terms, purport to create a closed season between December 31st and March 10th. Its executory agreement to pass future legislation covering this period is not the supreme law of the land and cannot have the effect of giving validity to an unconstitutional act.

Mr. Louis Marshall, by leave of court, filed a brief as *amicus curiæ*, in behalf of the Association for the Protection of the Adirondacks:

Irrespective of whether migratory birds may be considered property belonging to the United States and regardless of the sanction of the treaty-making power, the Migratory Bird Treaty Act, as was its precursor the Act of March 4, 1913, c. 145, 37 Stat. 847, is valid as an enactment of "needful rules and regulations" respecting the national forests and other parts of the public domain, which constitute "property belonging to the United States," within the meaning of paragraph 2, § 3 of Article IV of the Constitution.

The fact that the States are trustees of animals *feræ naturæ* within their boundaries, does not prevent the United States from preserving such animals for the purpose of protecting its property.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of

July 3, 1918, c. 128, 40 Stat. 755, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes. The State also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State. *Kansas* v. *Colorado*, 185 U. S. 125, 142. *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237. *Marshall Dental Manufacturing Co.* v. *Iowa*, 226 U. S. 460, 462. A motion to dismiss was sustained by the District Court on the ground that the act of Congress is constitutional. 258 Fed. Rep. 479. Acc. *United States* v. *Thompson*, 258 Fed. Rep. 257; *United States* v. *Rockefeller*, 260 Fed. Rep. 346. The State appeals.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their annual migrations traversed certain parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified close seasons and protection in other forms, and agreed that the two powers would take or propose to their law-making bodies the necessary measures for carrying the treaty out. 39 Stat. 1702. The above mentioned Act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by

the Secretary of Agriculture. Regulations were proclaimed on July 31, and October 25, 1918. 40 Stat. 1812; 1863. It is unnecessary to go into any details, because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. *United States* v. *Shauver*, 214 Fed. Rep. 154. *United States* v. *McCullagh*, 221 Fed. Rep. 288. Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like *Geer* v. *Connecticut*, 161 U. S. 519, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. *Andrews* v. *Andrews*, 188 U. S. 14, 33. What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether

it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.

The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties of course "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States." *Baldwin* v. *Franks*, 120 U. S. 678, 683. No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition; it was recognized as early as *Hopkirk* v. *Bell*, 3 Cranch, 454, with regard to statutes

of limitation, and even earlier, as to confiscation, in *Ware* v. *Hylton*, 3 Dall. 199. It was assumed by Chief Justice Marshall with regard to the escheat of land to the State in *Chirac* v. *Chirac*, 2 Wheat. 259, 275. *Hauenstein* v. *Lynham*, 100 U. S. 483. *Geofroy* v. *Riggs*, 133 U. S. 258. *Blythe* v. *Hinckley*, 180 U. S. 333, 340. So as to a limited jurisdiction of foreign consuls within a State. *Wildenhus's Case*, 120 U. S. 1. See *Ross* v. *McIntyre*, 140 U. S. 453. Further illustration seems unnecessary, and it only remains to consider the application of established rules to the present case.

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. *Carey* v. *South Dakota*, 250 U. S. 118.

Decree affirmed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE PITNEY dissent.

BLUMENSTOCK BROTHERS ADVERTISING AGENCY *v.* CURTIS PUBLISHING COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 197. Submitted January 26, 1920.—Decided April 19, 1920.

Jurisdiction based on diverse citizenship cannot be maintained in the District Court, over defendant's objection, in a district where neither party resides. P. 440.

To confer jurisdiction on the District Court over an action for triple damages under § 7 of the Sherman Anti-Trust Act, a claim under the statute, plainly real and substantial, must be set up by the averments. *Id.*

A business conducted by an advertising agency of placing, by contracts with publishers, advertisements for manufacturers and merchants, in magazines which are published and distributed throughout the United States, is not interstate commerce, although the circulation and distribution of the publications themselves be such; and a declaration claiming triple damages for injury alleged to have resulted from refusal of a publisher to accept such advertisements from such an agency pursuant to an attempt of the publisher to monopolize the business of publishing such advertising matter, fails to state a claim or cause of action of the substantial character requisite to confer jurisdiction on the District Court under the Sherman Anti-Trust Act. P. 441. *International Textbook Co.* v. *Pigg*, 217 U. S. 91, distinguished.

Affirmed.

THE case is stated in the opinion.

Mr. Colin C. H. Fyffe for plaintiff in error. *Mr. Paul N. Dale* and *Mr. David R. Clarke* were on the brief.

Mr. Amos C. Miller for defendant in error. *Mr. Sidney S. Gorham, Mr. Henry W. Wales* and *Mr. Gilbert Noxon* were on the brief.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was brought by the Blumenstock Brothers Advertising Agency against the Curtis Publishing Company in the District Court of the United States for the Northern District of Illinois to recover treble damages under § 7 of the Sherman Anti-Trust Act. 26 Stat. 209. The case here concerns the question of the jurisdiction of the District Court. Judicial Code, § 238. The plaintiff is a corporation of the State of Missouri, the defendant a corporation of the State of Pennsylvania. The defendant appeared specially in the District Court and moved to dismiss the complaint for want of jurisdiction, the grounds stated being:

1. "That in each of the counts of plaintiff's original declaration, and in the additional count thereof, it appears that the plaintiff is a citizen and resident of the State of Missouri, and that this defendant is a citizen and resident of the State of Pennsylvania."

2. "That in none of said counts is a cause of action stated by plaintiff within the provisions of the Act of Congress approved July 2nd, 1890, entitled, 'An Act to protect trade and commerce against unlawful restraints and monopolies.'"

The court entered judgment dismissing the suit for want of jurisdiction over the defendant or the action.

The record contains a certificate stating that the court found that it had no jurisdiction of the defendant and no jurisdiction to entertain the action. The certificate further states, that the question involved is whether the transaction set forth in the several counts of the declaration involves a question of interstate commerce, and whether the averments in said several counts of the declaration state a cause of action within the provisions of the Act of July 2, 1890.

The declaration is voluminous, containing five counts

and an additional count. So far as it is necessary for our purpose the cause of action of the plaintiff may be said to rest upon the allegations: That the plaintiff is engaged at Chicago in conducting an advertising agency. That when customers or principals desire to place advertisements in the magazines and periodicals of the trade they make plaintiff their agent, and plaintiff contracts with the defendant and other publishers and distributors of magazines; that plaintiff had many customers for whom it placed advertisements in the periodicals published and distributed by the defendant and in other periodicals of other publishers, all of which were distributed throughout the United States and the several States thereof; that the defendant was the owner and publisher of three periodicals sold and distributed throughout the United States known as "The Saturday Evening Post," "The Ladies Home Journal," and "The Country Gentleman;" that the business of the defendant in publishing, selling and distributing said periodicals was interstate commerce. The character of each of the several publications is described, and a large circulation is attributed to each of them; and it is stated that in publishing and distributing said periodicals defendant held itself out as desirous of taking, receiving, printing, publishing, and distributing throughout the United States its publications and advertisements to persons, firms and corporations concerning their business and occupation; that in the course of the business the defendant dealt with the plaintiff and other advertising agencies; that the defendant in the regular course of its business dealt with not only advertisers, but with advertising agencies such as the plaintiff, and it is alleged that such dealings were transactions of interstate commerce, and that the business of editing, publishing and distributing throughout the United States the advertising matter contained in said publications, pursuant to contracts made with its customers and advertising

agencies, was interstate commerce; that such commerce is dependent for its operation and growth upon advertising facilities offered by magazines and periodicals such as those of the defendant, and that such publications constitute the chief method of presenting to the buying public the articles held out for sale; that the advertising facilities were necessary to dealers, merchants, and manufacturers in order to bring their products to the notice and attention of purchasers; that the defendant's periodicals, particularly "The Saturday Evening Post," have an important position among such publications, and are largely read throughout the United States; that "The Saturday Evening Post" is the most necessary of such advertising mediums to the customers of the plaintiff; that the defendant's periodicals, together with certain other magazines, periodicals and publications owned by persons other than the defendant, had, to a certain extent, exclusive control of a certain field of advertising; that the magazines and other publications which control and do all the advertising business of the field in question are few in number; that for the advertising of goods and merchandise offered for sale in commerce there were no adequate facilities except those offered by the defendant and other publishers of similar magazines; that the defendant was desirous of using its preponderant position in this special field of advertising as a means of acquiring for itself and its publications, especially for "The Saturday Evening Post," a monopoly of the publication and distribution of advertising matter in this restricted field of advertising throughout the United States in violation of the Anti-Trust Act; that the defendant refused without any reasonable cause to accept proper and ordinary advertising matter or copy offered in the usual way to the defendant by the plaintiff and other advertising agencies unless the plaintiff, and other advertising agencies, would agree to allow the defendant to increase its preponder-

ance in said advertising field by permitting it to control and limit and reduce, at the will of the defendant, the amount of advertising given by the plaintiff and other advertising agencies to the owners and publishers of other magazines, journals, periodicals and other publications aforesaid, which were competing with the defendant in the field of advertising mentioned and described; that by reason of the illegal and wrongful acts, done by the defendant in pursuance of its attempt and scheme to create a monopoly for its own benefit in, and to monopolize the advertising business, plaintiff lost the business of its customers for whom it had been acting as agent in placing of advertisements with defendant's and other publications, and was prevented from making further contracts for the placing of advertising matter in publications of the defendant, and in consequence thereof, in any other publication of a like or similar character, to the damage of the plaintiff in the sum of $25,000.

The declaration contains an alleged cause of action at common law, but as neither the plaintiff nor the defendant reside in the district in which the suit was brought, it is conceded that such cause of action could not be maintained in that court against the defendant's objection. Section 51, Judicial Code.

The Sherman Anti-Trust Act (§ 7) created a cause of action in favor of any person to recover by suit in any District Court of the United States, in the district in which the defendant resides or is found, three-fold damages for injury to his business or property by reason of anything forbidden and declared unlawful in the act. In order to maintain a suit under this act the complaint must state a substantial case arising thereunder. The action is wholly statutory, and can only be brought in a District Court of the United States, and it is essential to the jurisdiction of the court in such cases that a substantial cause of action within the statute be set up.

In some cases it is difficult to determine whether a ruling dismissing the complaint involves the merits of the cause of action attempted to be pleaded or only a question of the jurisdiction of the court. In any case alleged to come within the federal jurisdiction it is not enough to allege that questions of a federal character arise in the case, it must plainly appear that the averments attempting to bring the case within federal jurisdiction are real and substantial. *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 576.

In cases where, as here, the controversy concerns a subject-matter limited by federal law, for which recovery can be had only in the federal courts, the jurisdiction attaches only when the suit presents a substantial claim under an act of Congress. This rule has been applied in bankruptcy cases (*Grant Shoe Co.* v. *Laird Co.*, 212 U. S. 445;) in copyright cases (*Globe Newspaper Co.* v. *Walker*, 210 U. S. 356;) in patent cases (*Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479;) in admiralty cases (*The Jefferson*, 215 U. S. 130).

We come then to inquire whether the cause of action stated was a substantial one within § 7 of the Sherman Anti-Trust Act. It is not contended that any combination, conspiracy, or contract in restraint of trade is alleged such as would bring the case within the first section of the act. The second section is relied upon which in terms punishes persons who monopolize or attempt to monopolize, or combine with others to monopolize any part of trade or commerce among the several States or with foreign nations.

The Anti-Trust Act, it is hardly necessary to say, derives its authority from the power of Congress to regulate commerce among the States. It declares unlawful combinations, conspiracies, and contracts and attempts to monopolize which concern such trade or commerce. It follows that if the dealings with the defendant, which

form the subject-matter of complaint, were not transactions of interstate commerce, the declaration states no case within the terms of the act.

Commerce, as defined in the often quoted definition of Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, is not traffic alone, it is intercourse, "It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

In the present case, treating the allegations of the complaint as true, the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce.

This case is wholly unlike *International Textbook Co.* v. *Pigg*, 217 U. S. 91, wherein there was a continuous interstate traffic in textbooks and apparatus for a course of study pursued by means of correspondence, and the movements in interstate commerce were held to bring the subject-matter within the domain of federal control, and to exempt it from the burden imposed by state legislation. This case is more nearly analogous to such cases as *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, wherein this court held that a broker engaged in negotiating sales between residents of Tennessee and non-resident merchants of goods situated in another State, was not engaged in interstate commerce; and within that line of

cases in which we have held that policies of insurance are not articles of commerce, and that the making of such contracts is a mere incident of commercial intercourse. *Paul* v. *Virginia*, 8 Wall. 168; *Hooper* v. *California*, 155 U. S. 648; *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495. We held in *Hopkins* v. *United States*, 171 U. S. 579, that the buying and selling of livestock in the stockyards of a city by members of the stock exchange was not interstate commerce, although most of the livestock was sent from other States. In *Williams* v. *Fears*, 179 U. S. 270, we held that labor agents engaged within the State of Georgia in hiring persons to be employed outside the State were not engaged in interstate commerce. In *Ware & Leland* v. *Mobile County* 209 U. S. 405, we held that brokers taking orders and transmitting them to other States for the purchase and sale of grain or cotton upon speculation were not engaged in interstate commerce; that such contracts for sale or purchase did not necessarily result in any movement of commodities in interstate traffic, and the contracts were not, therefore, the subjects of interstate commerce. In the recent case of *United States Fidelity & Guaranty Co.* v. *Kentucky*, 231 U. S. 394, we held that a tax upon a corporation engaged in the business of inquiring into and reporting upon the credit and standing of persons in the State, was not unconstitutional as a burden upon interstate commerce as applied to a non-resident engaged in selecting and distributing a list of guaranteed attorneys in the United States, and having a representative in the State. The contention in that case, which this court denied, was that the service rendered through the representatives in Kentucky, and other representatives of the same kind acting as agents of merchants engaged in interstate commerce, to furnish them with information through the mails, or by telegraph, or telephone, as a result of which merchandise might be transported in interstate commerce,

or withheld from such transportation, according to the character of the information reported, was so connected with interstate commerce as to preclude the State of Kentucky from imposing a privilege tax upon such business.

Applying the principles of these cases, it is abundantly established that there is no ground for claiming that the transactions which are the basis of the present suit, concerning advertising in journals to be subsequently distributed in interstate commerce, are contracts which directly affect such commerce. Their incidental relation thereto cannot lay the groundwork for such contentions as are undertaken to be here maintained under § 7 of the Sherman Anti-Trust Act. The court was right in dismissing the suit.

Affirmed.

ASKREN, ATTORNEY GENERAL OF THE STATE OF NEW MEXICO, ET AL. *v.* CONTINENTAL OIL COMPANY.

SAME *v.* SINCLAIR REFINING COMPANY.

SAME *v.* THE TEXAS COMPANY.

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

Nos. 521–523. Argued January 5, 6, 1920.—Decided April 19, 1920.

A law of New Mexico defining "distributors" of gasoline as those who sell it from tank cars, receiving tanks or stations, or in or from tanks, barrels or packages not purchased from a licensed distributor, and "retail dealers" as those other than distributors who sell it in quantities of 50 gallons or less, lays an annual license tax of $50.00

on each distributor for each distributing station, place of business or agency, and of $5.00 on each retailer for every place of business or agency,—besides imposing an excise of 2c per gallon on all gasoline sold or used, to be paid and made return of by distributors and dealers; it provides inspectors to see to its enforcement, and devotes the resulting revenue first to pay their salaries and expenses, and then to a highway fund. *Held*, that it is not an inspection act merely, but a privilege tax; and, as applied to parties who bring gasoline from without and sell it within the State, the act is void—a burden on interstate commerce—in so far as it relates to their business of selling in tank car lots and in barrels and packages, as originally imported from other States, but, if separable, it is valid in its application to sales made from such original packages in retail quantities to suit purchasers. P. 447.

An excise on purely local dealing in a commodity cannot be treated as a discrimination against other States merely because the commodity is not produced in the State imposing the tax but comes wholly from other States. P. 449.

The question whether an act assuming to tax a business in its interstate and intrastate aspects is separable as to the latter, *reserved* for final hearing where the relative importance of the two classes of business as conducted by plaintiffs could not be ascertained from the case as made on application for temporary injunction. P. 450.

Affirmed.

THE case is stated in the opinion.

Mr. A. B. Renehan, with whom *Mr. O. O. Askren*, Attorney General of the State of New Mexico, and *Mr. Harry S. Bowman*, Assistant Attorney General of the State of New Mexico, were on the brief, for appellants.

Mr. Charles R. Brock and *Mr. E. R. Wright*, with whom *Mr. Milton Smith*, *Mr. W. H. Ferguson*, *Mr. S. B. Davis, Jr.*, and *Mr. Elmer L. Brock* were on the briefs, for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

These suits were brought by the three companies, appellees, in the District Court of the United States for the

District of New Mexico, to enjoin the enforcement of an act of the legislature of the State entitled: "An Act providing for an excise tax upon the sale or use of gasoline and for a license tax to be paid by distributors and retail dealers therein; providing for collection and application of such taxes; providing for the inspection of gasoline and making it unlawful to sell gasoline below a certain grade without notifying purchaser thereof; providing penalties for violations of this act and for other purposes." The law is found in Session Laws of New Mexico, 1919, c. 93, p. 182.

The cause came before three judges upon an application for temporary injunction and a counter-motion to dismiss the bills of complaint. The temporary injunction was granted, and a direct appeal taken to this court.

The provisions of the act so far as necessary to be considered define a distributor of gasoline as meaning "every person, corporation, firm, co-partnership and association who sells gasoline from tank cars, receiving tanks or stations, or in or from tanks, barrels or packages not purchased from a licensed distributor of gasoline in this State." A retail dealer is defined as meaning: "A person, other than a distributor of gasoline, who sells gasoline in quantities of fifty gallons or less." Every distributor is required to pay an annual license tax of $50.00 for each distributing station, or place of business, and agency. Every retail dealer is required to pay an annual license tax of $5.00 for every place of business or agency. An excise tax is imposed upon the sale or use of gasoline sold or used in the State after July 1, 1919; such tax to be 2c per gallon on all gasoline so sold or used. Any distributor, or dealer, who shall fail to make return or statement as required in the act, or shall refuse, neglect or fail to pay the tax upon all sales or use of gasoline, or who shall make any false return or statement, or shall knowingly sell, distribute or use any gasoline without the tax upon the sale or use thereof

having been paid as provided in the act shall be deemed guilty of a misdemeanor, and punished by a fine and forfeiture of his license. It is made unlawful for any person (except tourists or travelers to the extent provided in the act) to use any gasoline not purchased from a licensed distributor or retail dealer without paying the tax of 2c per gallon. Inspectors are provided for, for each of the eight Judicial Districts of the State, who are required to see that the provisions of the act are enforced, and privileged to examine books and accounts of distributors and retail dealers, or warehousemen or others receiving and storing gasoline and of railroad and transportation companies, relating to purchases, receipts, shipments, or sales of gasoline; their salaries are provided, and salaries and expense bills are to be paid out of the State Road Fund. Any person who shall engage or continue in the business of selling gasoline without a license or after such license has been forfeited, or shall fail to render any statement, or make any false statement therein, or who shall violate any provision of the act the punishment for which has not been theretofore provided, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine or imprisonment, or both. The State Treasurer is required to set aside from the license fees and taxes collected under the provisions of the act a sufficient sum to pay the salaries and traveling expenses of the inspectors out of the money received from such collections, and to place the balance to the credit of the State Road Fund to be used for the construction, improvement and maintenance of public highways.

It is evident from the provisions of the act thus stated that it is not an inspection act merely; indeed, the inspectors do not seem to be required to make any inspection beyond seeing that the provisions of the act are enforced, and the excess of the salaries and fees of the inspectors is to be used in making roads within the State. Considering

its provisions and the effect of the act, it is a tax upon the privilege of dealing in gasoline in the State of New Mexico.

The bills in the three cases are identical except as to the number of distributing stations alleged to belong to the companies respectively. As there was no answer, and the bills were considered upon application for injunction, and motion to dismiss, their allegations must be taken to be true.

Plaintiffs are engaged in the business of buying and selling gasoline and other petroleum products. The bills state that they purchase gasoline in the States of Colorado, California, Oklahoma, Texas and Kansas, and ship it into the State of New Mexico, there to be sold and delivered. The bills describe two classes of business—first, that they purchase in the States mentioned, or in some one of said States, gasoline, and ship it in tank cars from the State in which purchased into the State of New Mexico, and there, according to their custom and the ordinary method in the conduct of their business, sell in tank cars the whole of the contents thereof to a single customer, before the package or packages, in which the gasoline was shipped have been broken. In the usual and regular course of their business they purchase gasoline in one of the States, other than the State of New Mexico, and ship it, so purchased from that State, in barrels and packages containing not less than two 5-gallon cans, into the State of New Mexico, and there, in the usual and ordinary course of their business, without breaking the barrels and packages, containing the cans, it is their custom to sell the gasoline in the original packages and barrels. The gasoline is sold and delivered to the customers in precisely the same form and condition as when received in the State of New Mexico; that this manner of sale makes the plaintiffs distributors of gasoline as the term is defined in the statute, and they are required to pay the sum of $50.00 per annum for each of their stations

as an annual license tax for purchasing, shipping and selling gasoline as aforesaid.

A second method of dealing in gasoline is described in the bills: That the gasoline shipped to the plaintiffs from the other States, as aforesaid, is in tank cars, and plaintiff, or plaintiffs, sell such gasoline from such tank cars, barrels and packages in such quantities as the purchaser requires.

As to the gasoline brought into the State in the tank cars, or in the original packages, and so sold, we are unable to discover any difference in plan of importation and sale between the instant case and that before us in *Standard Oil Co.* v. *Graves*, 249 U. S. 389, in which we held that a tax, which was in effect a privilege tax, as is the one under consideration, providing for a levy of fees in excess of the cost of inspection, amounted to a direct burden on interstate commerce. In that case we reaffirmed, what had often been adjudicated heretofore in this court, that the direct and necessary effect of such legislation was to impose a burden upon interstate commerce; that under the Federal Constitution the importer of such products from another State into his own State for sale in the original packages, had a right to sell the same in such packages without being taxed for the privilege by taxation of the sort here involved. Upon this branch of the case we deem it only necessary to refer to that case, and the cases therein cited, as establishing the proposition that the license tax upon the sale of gasoline brought into the State in tank cars, or original packages, and thus sold, is beyond the taxing power of the State.

The plaintiffs state in the bills that their business in part consists in selling gasoline in retail in quantities to suit purchasers. A business of this sort, although the gasoline was brought into the State in interstate commerce, is properly taxable by the laws of the State.

Much is made of the fact that New Mexico does not produce gasoline, and all of it that is dealt in within that

State must be brought in from other States. But, so long as there is no discrimination against the products of another State, and none is shown from the mere fact that the gasoline is produced in another State, the gasoline thus stored and dealt in, is not beyond the taxing power of the State. *Wagner* v. *City of Covington*, 251 U. S. 95; and the cases from this court cited therein.

Sales of the class last mentioned would be a subject of taxation within the legitimate power of the State. But from the averments of the bills it is impossible to determine the relative importance of this part of the business as compared with that which is non-taxable, and at this preliminary stage of the cases we will not go into the question whether the act is separable, and capable of being sustained so far as it imposes a tax upon business legitimately taxable. That question may be reserved for the final hearing. The District Court did not err in granting the temporary injunctions, and its orders are

Affirmed.

CAMERON ET AL. *v.* UNITED STATES.

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

No. 205. Argued January 29, 30, 1920.—Decided April 19, 1920.

The inclusion of part of a national forest within a monument reserve under the Act of June 8, 1906, c. 3060, 34 Stat. 225, by a proclamation of the President providing that both reservations shall stand as to the common area but that the monument reserve shall be dominant, and saving valid claims theretofore acquired, withdraws such area, except as to such claims, from the operation of the mineral land law. P. 454.

The Grand Canyon of the Colorado, in Arizona, is an "object of scien-

tific interest," within the meaning of the Act of June 8, 1906, *supra*, empowering the President to reserve such objects as "National Monuments." P. 455.

Mineral character and an adequate discovery of mineral within the location are essential to the validity of a mining claim, and without these the locator has not the right of possession. P. 456.

To bring a mining claim within an exception of "valid claims" in a proclamation establishing a monument reserve, the claim must be founded upon an adequate discovery of mineral made before the reservation; a discovery made later can confer no rights upon the claimant. *Id.*

To support a mining location the discovery must be such as to justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine. P. 459.

A decision of the Secretary of the Interior, made upon an application to patent a mining claim within a monument reserve, finding the land claimed not mineral in character and the location not supported by any discovery antedating the reservation, and therefore rejecting the application and adjudging the location invalid, is conclusive as to the invalidity of the claim in a suit subsequently brought by the Government to enjoin the claimant from occupying and using the land for his private purposes and thus obstructing its use by the public as a part of the reserve. Pp. 459, 464.

A mining location which has not gone to patent is of no higher quality, and no more immune from attack and investigation, than unpatented claims under the homestead and kindred laws; and, so long as the legal title remains in the United States, the Land Department, in virtue of its general statutory duty and function, is empowered, after proper notice and upon adequate hearing, to determine whether such a location is valid, and, if found invalid, to declare it null and void. P. 460.

250 Fed. Rep. 943, affirmed.

THE case is stated in the opinion.

Mr. William C. Prentiss, with whom *Mr. Robert E. Morrison* and *Mr. Joseph E. Morrison* were on the brief, for appellants:

Possessory title to a mining claim is acquired under the mining laws wholly independently of the Land Department. Such title has the quality of a grant and is

property in the highest sense of the term. While, upon application for patent, the Land Department *ex necessitate* must pass upon the validity of the location, it does so administratively and not judicially. In case it refuses patent, its action is not conclusive, final, or binding, even as to itself. 42 L. D. 584; 43 L. D. 79.

Where the department, rightly or wrongly, denies patent to an applicant, without issuing patent to an adversary applicant, the effect is merely to wipe the application from the land records *pro tempore*. The department may afterward review its ruling, reinstate the application or entry, and grant patent.

Where, as here, the Land Department undertakes to go further and declare void the location upon which an application for mineral patent is predicated, such action is not conclusive, final, or binding, even as to itself.

The department is without power to enter a judgment of ejectment or in any manner to execute such an attempted declaration of illegality of a possessory mining claim.

Congress has not empowered the Land Department to pass upon the validity of a possessory mining claim otherwise than as involved in the actual issuance of patent to the claimant or an adversary claimant, and, then subject to limitations. Nor has Congress given the courts power, or imposed upon them the duty, of enforcing a mere declaration by the department of the invalidity of a possessory mining claim (not merged into disposition of the title to the land by issuance of patent to another), even assuming, for the sake of the argument, that Congress would have the power so to legislate.

It is only by the issuance of patent that action of the Land Department becomes effective, and then within limitations recognized by the courts.

The rule that decisions of the Land Department upon questions of fact are binding upon the courts is raised as an incident of, and in support of the integrity of patents,

recognizes that action by the Land Department upon applications for patent is not judicial but administrative, and is based upon the assumption that Congress, in vesting the department with administration of the laws governing the disposition of the title to public lands, conferred upon it the power and duty of deciding questions of fact involved in the granting of patents.

And the rule that decision by the Land Department of questions of law involved in the issuance of patent is not binding upon the courts, is recognition that the department acts administratively and not judicially.

The statement in the opinion in *Clipper Mining Co.* v. *Eli Mining Co.*, 194 U. S. 220, to the effect that the department, in rejecting an application to patent a mining claim, may go farther and set aside the location, is an *obiter dictum*, as clearly appears from a consideration of that case as it stood in the department. 7 Copp's L. O. 36; 11 L. D. 441, 442; 22 L. D. 527, 528; 33 L. D. 660, 665; 34 L. D. 401, 409.

Jurisdiction to cancel mining claims was disclaimed in 34 L. D. 276, and in the Instructions of February 6, and May 15, 1907, 35 L. D. 566; *id.* 565. The practice of investigating and passing upon mining locations in forest reserves, administratively (*H. H. Yard et al.*, 38 L. D. 59), was rejected in the unreported case of *Nichols and Smith*, October 24, 1913.

Lane v. *Cameron*, 45 App. D. C. 404, went upon the erroneous assumption that the power to determine the character of land as between the United States and a mining locator was vested exclusively in the Land Department, and that the courts alone would be powerless, which is contrary to *Gauthier* v. *Morrison*, 232 U. S. 452 (1 Lindley on Mines, 3d ed., § 108, pp. 188 *et seq.*), and contrary to the practice of the Government in bringing many suits attacking the possessory titles of oil land claimants.

The logical and proper tribunals to try the issue of discovery, upon which the miner's title depends, are the courts of the vicinage—not an administrative body two or three thousand miles away acting both as prosecutor or plaintiff and judge or jury. *Overman Silver Mining Co.* v. *Corcoran*, 15 Nevada, 147; *Erhardt* v. *Boaro*, 113 U. S. 527.

We submit that the decision of the department, in final analysis, resolves into a ruling, not that Cameron had not made discovery sufficient to validate the location, but that he had not developed a paying mine, and that, in any view, it was not entitled to judicial recognition.

The attempted setting apart of the land as the Grand Canyon National Monument was unauthorized, violative of the Forest Reserve Laws, and void.

Mr. Assistant Attorney General Nebeker, with whom *Mr. H. L. Underwood*, Special Assistant to the Attorney General, was on the brief, for the United States.

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

This is a suit by the United States to enjoin Ralph H. Cameron and others from occupying, using for business purposes, asserting any right to, or interfering with the public use of, a tract of land in Arizona, approximately 1500 feet long and 600 feet wide, which Cameron is claiming as a lode mining claim, and to require the defendants to remove therefrom certain buildings, filth and refuse placed thereon in the course of its use by them as a livery stable site and otherwise. In the District Court there was a decree for the United States, and this was affirmed by the Circuit Court of Appeals. 250 Fed. Rep. 943.

The tract is on the southern rim of the Grand Canyon of the Colorado, is immediately adjacent to the railroad

terminal and hotel buildings used by visitors to the canyon and embraces the head of the trail [1] over which visitors descend to and ascend from the bottom of the canyon. Formerly it was public land and open to acquisition under the public land laws. But since February 20, 1893, it has been within a public forest reserve [2] established and continued by proclamations of the President under the Acts of March 3, 1891, c. 561, § 24, 26 Stat. 1095, 1103, and June 4, 1897, c. 2, 30 Stat. 34–36; and since January 11, 1908, all but a minor part of it has been within a monument reserve [3] established by a proclamation of the President under the Act of June 8, 1906, c. 3060, 34 Stat. 225. The forest reserve remained effective after the creation of the monument reserve, but in so far as both embraced the same land the monument reserve became the dominant one. 35 Stat. 2175. The inclusion of the tract in the forest reserve withdrew it from the operation of the public land laws, other than the mineral land law; and the inclusion of the major part of it in the monument reserve withdrew that part from the operation of the mineral land law, but there was a saving clause in respect of any "valid" mining claim theretofore acquired. The United States still has the paramount legal title to the tract, and also has the full beneficial ownership if Cameron's asserted mining claim is not valid.

The defendants insist that the monument reserve should be disregarded on the ground that there was no authority for its creation. To this we cannot assent. The act under which the President proceeded empowered him to establish reserves embracing "objects of historic or scientific interest." The Grand Canyon, as stated in his proclamation, "is an object of unusual scientific in-

[1] The Bright Angel Trail.

[2] Originally the Grand Canyon Forest Reserve and now the Tusayan National Forest.

[3] Called the Grand Canyon National Monument.

terest." It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.

The defendants also insist that in holding the United States entitled to the relief sought the courts below gave undue effect and weight to decisions of the Secretary of the Interior dealing with Cameron's asserted claim and pronouncing it invalid. Rightly to appreciate and dispose of this contention requires a further statement.

The claim in question is known as the Cape Horn lode claim and was located by Cameron in 1902 after the creation of the forest reserve and before the creation of the monument reserve. To make the claim valid, or to invest the locator with a right to the possession, it was essential that the land be mineral in character and that there be an adequate mineral discovery within the limits of the claim as located, Rev. Stats., § 2320; *Cole* v. *Ralph*, *ante*, 286; and to bring the claim within the saving clause in the withdrawal for the monument reserve the discovery must have preceded the creation of that reserve.

Cameron applied to the land department for the issue to him of a patent for the claim and similarly sought patents for other claims embracing other portions of the trail into the canyon. A protest was interposed charging that the land was not mineral, that there had been no supporting mineral discoveries and that the claims were located and used for purposes not contemplated by the mineral land law; and the Secretary of the Interior directed that a hearing be had in the local land office to enable the parties concerned,—the protestant, Cameron and the Government,—to produce evidence bearing on the questions thus presented. 35 L. D. 495; 36 L. D. 66. After due notice the hearing was had, Cameron fully

participating in it. This was shortly after the creation of the monument reserve. In due course the evidence was laid before the Commissioner of the General Land Office and he concluded therefrom that the claims were not valuable for mining purposes, and therefore were invalid. The matter was then taken before the Secretary of the Interior and that officer rendered a decision in which, after reviewing the evidence, he said:

"It is not pretended that the applicant has as yet actually disclosed any body of workable ore of commercial value; nor does the evidence reveal such indications and conditions as would warrant the belief or lead to the conclusion that valuable deposits are to be found, save, apparently, in the case of the Magician lode claim. With that possible exception, the probabilities of such deposits occurring are no stronger or more evident at the present time than upon the day the claims were located. The evidence wholly fails to show that there are veins or lodes carrying valuable and workable deposits of gold, silver, or copper, or any other minerals within the limits of the locations. Sufficient time has elapsed since these claims were located for a fair demonstration of their mineral possibilities."

And further:

"It follows from the foregoing that each of Cameron's applications for patent . . . must be rejected and canceled, and it is so ordered.

"It is the further result of the evidence, and the Department holds, that the several mining locations, with the apparent exception of the Magician lode claim, do not stand upon such disclosures or indications of valuable mineral in rock in place therein, prior to the establishment of the National Monument and the withdrawal of the lands therein embraced, as to bring them within the saving clause of the Executive Order. The right of Cameron to continue possession or exploration of those claims

is hereby denied, and the land covered thereby is declared to be and remain part of the Grand Canyon National Monument as if such locations had not been attempted."

Directions were given for a further hearing respecting the Magician claim, but this is of no moment here.

That decision was adhered to on a motion for review, and in a later decision denying a renewed application by Cameron for a patent for the claim here in question the Secretary said:

"As the result of a hearing had after the creation of the national monument, the Department expressly found that no discovery of mineral had been made within the limits of the Cape Horn location, and that there was no evidence before the Department showing the existence of any valuable deposits or any minerals within the limits of the location. . . . So far as the portion of the claim included within the exterior limits of the national monument is concerned, no discovery which would defeat the said monument can have been made since the date of the previous hearing in this case, nor do I find that one is claimed to have been made since the former decision in any part of the alleged location."

After and notwithstanding these decisions Cameron asserted an exclusive right to the possession and enjoyment of the tract, as if the lode claim were valid; and he and his co-defendants, who were acting for or under him, continued to occupy and use the ground for livery and other business purposes, and in that and other ways obstructed its use by the public as a part of the reserves. In this situation, and to put an end to what the Government deemed a continuing trespass, purpresture and public nuisance, the present suit was brought.

The courts below ruled that the decisions of the Secretary of the Interior should be taken as conclusively determining the non-mineral character of the land and the absence of an adequate mineral discovery, and also as

showing that the matter before the Secretary was not merely the application for a patent but also the status of the claim,—whether it was valid or was wanting in essential elements of validity, and whether it entitled Cameron to the use of the land as against the public and the Government. As before stated, the defendants complain of that ruling. The objections urged against it are, first, that the Secretary's decisions show that he proceeded upon a misconception of what under the law constitutes an adequate mineral discovery, and, second, that although the Secretary had ample authority to determine whether Cameron was entitled to a patent, he was without authority to determine the character of the land or the question of discovery, or to pronounce the claim invalid.

As to the first objection little need be said. A reading of each decision in its entirety, and not merely the excerpts to which the defendants invite attention, makes it plain that the Secretary proceeded upon the theory that to support a mining location the discovery should be such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine. That is not a novel or mistaken test, but is one which the land department long has applied and this court has approved. *Chrisman* v. *Miller*, 197 U. S. 313, 322.

The second objection rests on the naked proposition that the Secretary was without power to determine whether the asserted lode claim, under which Cameron was occupying and using a part of the reserves to the exclusion of the public and the reserve officers, was a valid claim. We say "naked proposition" because it is not objected that Cameron did not have a full and fair hearing, or that any fraud was practised against him, but only that the Secretary was without any power of decision in the matter. In our opinion the proposition is not tenable.

By general statutory provisions the execution of the

laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. Rev. Stats., §§ 441, 453, 2478; *United States* v. *Schurz*, 102 U. S. 378, 395; *Lee* v. *Johnson*, 116 U. S. 48, 52; *Knight* v. *United States Land Association*, 142 U. S. 161, 177, 181; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316.

A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.

Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. This is well illustrated in *Orchard* v. *Alexander*, 157 U. S. 372, 383, where in giving effect to a decision of the Secretary of the Interior canceling a preëmption claim theretofore passed to cash entry, but still unpatented, this court said: "The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. His interest is subject to state taxation. *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210. The

government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department." And to the same effect is *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 593, where in giving effect to a decision of the Secretary canceling a swamp land selection by the State of Michigan theretofore approved, but as yet unpatented, it was said: "It is, of course, not pretended that when an equitable title has passed the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. *Cornelius* v. *Kessel*, 128 U. S. 456; *Orchard* v. *Alexander*, 157 U. S. 372, 383; *Parsons* v. *Venzke*, 164 U. S. 89. In other words, the power of the department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed."

True, the mineral land law does not in itself confer such authority on the land department. Neither does it place the authority elsewhere. But this does not mean that the authority does not exist anywhere, for, in the absence of some direction to the contrary, the general statutory provisions before mentioned vest it in the land department. This is a necessary conclusion from this court's decisions. By an Act of 1848 the title to public land in Oregon then occupied as missionary stations, not exceeding six hundred and forty acres in any instance, was confirmed to the several religious associations maintaining those stations, but the act made no provision for determining where the stations were, by whom they were maintained or the area occupied. The land department proceeded to a determination of these questions in the

exercise of its general authority, and in *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 166, 167, where that determination was challenged as to a particular tract, it was said: "While there may be no specific reference in the act of 1848 of questions arising under this grant to the land department, yet its administration comes within the scope of the general powers vested in that department. . . . It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary." And in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301, 308, where a claimant asserting a full equitable title under the lieu land provision of the Forest Reserve Act of 1897 questioned the authority of the land department to inquire into and pass on the validity of his claim and sought to have it recognized and enforced by a suit in equity, it was said: "There can be, as we think, no doubt that the general administration of the forest reserve act, and also the determination of the various questions which may arise thereunder before the issuing of any patent for the selected lands, are vested in the Land Department. The statute of 1897 does not in terms refer any question that might arise under it to that department, but the subject-matter of that act relates to the relinquishment of land in the various forest reservations to the United States, and to the selection of lands, in lieu thereof, from the public lands of the United States, and the administration of the act is to be governed by the general system adopted by the United States for the administration of

the laws regarding its public lands. Unless taken away by some affirmative provision of law, the Land Department has jurisdiction over the subject." There is in the mineral land law a provision referring to the courts controversies between rival mineral claimants arising out of conflicting mining locations (Rev. Stats., §§ 2325, 2326), but it does not reach or affect other controversies and so is without present bearing. *Creede & Cripple Creek Mining Co.* v. *Uinta Tunnel Mining Co.*, 196 U. S. 337, 356, *et seq.*

It is rightly conceded that in the case of a conflict between a mining location and a homestead claim the department has authority to inquire into and determine the validity of both and, if the mining location be found invalid and the homestead claim valid, to declare the former null and void and to give full effect to the latter; and yet it is insisted that the department is without authority, on a complaint preferred in the public interest, to inquire into and determine the validity of a mining location, and, if it be found invalid, to declare it of no effect and recognize the rights of the public. We think the attempted distinction is not sound. It has no support in the terms of the mineral land law, is not consistent with the general statutory provisions before mentioned, and if upheld would encourage the use of merely colorable mining locations in the wrongful private appropriation of lands belonging to the public.

Instances in which this power has been exercised in respect of mining locations are shown in the *Yard Case*, 38 L. D. 59, and the *Nichols-Smith Case* (on rehearing), 46 L. D. 20; instances in which its exercise has received judicial sanction are found in *Lane* v. *Cameron*, 45 App. D. C. 404, and *Cameron* v. *Bass*, 19 Arizona, 246; and an instance in which its existence received substantial, if not decisive, recognition by this court is found in *Clipper Mining Co.* v. *Eli Mining Co.*, 194 U. S. 220, 223, 234.

The argument is advanced that the department necessarily is without authority to pronounce a mining location invalid, because it has within itself no means of executing its decision, such as dispossessing the locator. But this is not a proper test of the existence of the authority, for the department is without the means of executing most of its decisions in the sense suggested. When it issues a patent it has no means of putting the grantee in possession, and yet its authority to issue patents is beyond question. When it awards a tract to one of two rival homestead claimants it has no means of putting the successful one in possession or the other one out, and yet its authority to determine which has the better claim is settled by repeated decisions of this court. And a similar situation exists in respect of most of the claims or controversies on which the department must pass in regular course. Its province is that of determining questions of fact and right under the public land laws, of recognizing or disapproving claims according to their merits and of granting or refusing patents as the law may give sanction for the one or the other. When there is occasion to enforce its decisions in the sense suggested, this is done through suits instituted by the successful claimants or by the Government, as the one or the other may have the requisite interest.

Whether the tract covered by Cameron's location was mineral and whether there had been the requisite discovery were questions of fact, the decision of which by the Secretary of the Interior was conclusive in the absence of fraud or imposition, and none was claimed. *Catholic Bishop of Nesqually* v. *Gibbon, supra; Burfenning* v. *Chicago, St. Paul, etc., Ry. Co.*, 163 U. S. 321, 323. Accepting the Secretary's findings that the tract was not mineral and that there had been no discovery, it is plain that the location was invalid, as was declared by the Secretary and held by the courts below.

450. Argument for the United States.

Of other complaints made by the defendants, it suffices to say that, in our opinion, the record shows that the Government was entitled to the relief sought and awarded.

Decree affirmed.

UNITED STATES v. SIMPSON.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 444. Submitted March 5, 1920.—Decided April 19, 1920.

The transportation by their owner of five quarts of whiskey for his personal use, in his own automobile, into a State whose laws prohibit the manufacture or sale of intoxicating liquors for beverage purposes, is transportation in interstate commerce and violates the Reed Amendment if the liquor is not intended for any of the purposes therein excepted. P. 466.

257 Fed. Rep. 860, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Frierson for the United States:

This case is ruled by *United States* v. *Hill*, 248 U. S. 420.

The judgment in the present case rests solely upon the idea that, in order to be transportation in interstate commerce, transportation must be by common carrier. But transportation, in order to constitute interstate commerce, need not be by common carrier, and may be transportation by the owner of the goods. *Railroad Company* v. *Husen*, 95 U. S. 465, 469-70; *Kirmeyer* v. *Kansas*, 236 U. S. 568, 572; *Kelley* v. *Rhoads*, 188 U. S. 1; *Pipe Line Cases*, 234 U. S. 548, 560; *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512.

No appearance for defendant in error.

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

This is an indictment under § 5 of the Act of March 3, 1917, known as the Reed Amendment, c. 162, 39 Stat. 1069, which declares that "whoever shall . . . cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State . . . the laws of which . . . prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished," etc.; and the question for decision is whether the statute was applicable where the liquor—five quarts of whiskey—was transported by its owner in his own automobile and was for his personal use, and not for an excepted purpose. The District Court answered the question in the negative and on that ground sustained a demurrer to the third count, which is all that is here in question, and discharged the accused. 257 Fed. Rep. 860.

We think the question should have been answered the other way. The evil against which the statute was directed was the introduction of intoxicating liquor into a prohibition State from another State for purposes other than those specially excepted,—a matter which Congress could and the States could not control. *Danciger* v. *Cooley*, 248 U. S. 319, 323. The introduction could be effected only through transportation, and whether this took one form or another it was transportation in interstate commerce. *Kelley* v. *Rhoads*, 188 U. S. 1; *United States* v. *Chavez*, 228 U. S. 525, 532–533; *United States* v. *Mesa*, 228 U. S. 533; *Pipe Line Cases*, 234 U. S. 548, 560; *United States* v. *Hill*, 248 U. S. 420. The statute makes no distinction between different modes of transportation and we think it was intended to include them all, that being

the natural import of its words. Had Congress intended to confine it to transportation by railroads and other common carriers it well may be assumed that other words appropriate to the expression of that intention would have been used. And it also may be assumed that Congress foresaw that if the statute were thus confined it could be so readily and extensively evaded by the use of automobiles, auto-trucks and other private vehicles that it would not be of much practical benefit. See *Kirmeyer* v. *Kansas*, 236 U. S. 568. At all events, we perceive no reason for rejecting the natural import of its words and holding that it was confined to transportation for hire or by public carriers.

The published decisions show that a number of the federal courts have regarded the statute as embracing transportation by automobile, and have applied it in cases where the transportation was personal and private, as here. *Ex parte Westbrook*, 250 Fed. Rep. 636; *Malcolm* v. *United States*, 256 Fed. Rep. 363; *Jones* v. *United States*, 259 Fed. Rep. 104; *Berryman* v. *United States*, 259 Fed. Rep. 208.

That the liquor was intended for the personal use of the person transporting it is not material, so long as it was not for any of the purposes specially excepted. This was settled in *United States* v. *Hill*, *supra*.

We conclude that the District Court erred in construing the statute and sustaining the demurrer.

Judgment reversed.

MR. JUSTICE CLARKE, dissenting.

The indictment in this case charges that the defendant, being in the City of Cheyenne, Wyoming, "bought, paid for and owned" five quarts of whiskey and thereafter, in his own automobile, driven by himself, transported it into the City of Denver, Colorado, intending to there devote it to his own personal use. Colorado prohibited the manu-

facture and sale therein of intoxicating liquor for beverage purposes. The court decides that this liquor was unlawfully "transported in interstate commerce," from Wyoming into Colorado within the meaning of the Act of Congress of March 3, 1917 (39 Stat. 1069).

With this conclusion I cannot agree.

By early (*Gibbons* v. *Ogden*, 9 Wheat. 1, 193) and by recent decisions (*Second Employers' Liability Cases*, 223 U. S. 1, 46) of this court and by the latest authoritative dictionaries, interstate commerce, in the constitutional sense, is defined to mean commercial, business, intercourse—including the transportation of passengers and property—carried on between the inhabitants of two or more of the United States,—especially (we are dealing here with property) the exchange, buying or selling of commodities, of merchandise, on a large scale between the inhabitants of different States. The liquor involved in this case, after it was purchased and while it was being held for the personal use of the defendant, was, certainly, withdrawn from trade or commerce as thus defined—it was no longer in the channels of commerce, of trade or of business of any kind—and when it was carried by its owner, for his personal use, across a state line, in my judgment it was not moved or transported in interstate commerce, within the scope of the act of Congress relied upon or of any legislation which Congress had the constitutional power to enact with respect to it at the time the Reed Amendment was approved. The grant of power to Congress is over commerce,—not over isolated movements of small amounts of private property, by private persons for their personal use.

I think the *Hill Case*, 248 U. S. 420, was wrongly decided and that the judgment of the District Court in this case should be affirmed.

HOUSTON, SECRETARY OF THE TREASURY, ET AL. v. ORMES, ADMINISTRATOR OF LOCKWOOD.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 86. Argued January 23, 1920.—Decided April 19, 1920.

Where a fund has been appropriated by Congress for payment to a specified person in satisfaction of a finding of the Court of Claims, the duty of the Treasury officials to pay it over is ministerial; and a suit by one who has an equitable right in the fund, for attorney's fees, to establish such right as against the owner, and to require the Treasury officials to pay the fund to a receiver, is not a suit against the United States, and may be maintained in the courts of the District of Columbia if the owner, as well as the officials, is made a party and bound by the decree so that it may afford due acquittance to the Government. P. 472.

The situs of the debt in such cases is not material, if its owner voluntarily appears and answers without objecting to the jurisdiction. P. 474.

Section 3477 of the Revised Statutes does not prevent assignment by operation of law after a claim has been allowed. P. 473.

47 App. D. C. 364, affirmed.

THE case is stated in the opinion.

The Solicitor General, with whom *Mr. Morgan Beach* and *Mr. A. F. Myers* were on the brief, for appellants:

The test whether or not a suit is one against the United States or against an officer as an individual depends upon the nature of the decree to be entered. If the decree would control the action of the officer outside the scope of his authority, the interest of the Government would not be involved and the suit would be one against the individual. *Philadelphia Company* v. *Stimson*, 223 U. S.

605, 620. But if the decree would control the action of the officer within the scope of his authority, or interfere with the United States in the use of its property or performance of its functions, the suit would be one against the United States. *Wells* v. *Roper*, 246 U. S. 335, 337.

In the case at bar it is sought to enjoin these government officers from discharging an official duty devolved upon them by statute. The payment of the fund in question to the defendant Sanders is a ministerial duty, the performance of which could be compelled by mandamus. *Parish* v. *MacVeagh*, 214 U. S. 124. This conclusively establishes the character of the suit as one to control the official action of the appellants.

Moreover, the suit is an attempt to control the property of the United States in the hands of these officials. That this cannot be done is made clear by *Belknap* v. *Schild*, 161 U. S. 10. See also *Goldberg* v. *Daniels*, 221 U. S. 218.

If high officials of the Government, acting wholly within the scope of their authority, may be sued in proceedings of this kind, officials of the Treasury Department will be subject to be sued by creditors of the successful claimant whenever an appropriation is made in satisfaction of a claim against the United States, and will be greatly hampered in the discharge of their official duties. This would be contrary to public policy. *Morgan* v. *Rust*, 100 Georgia, 346, and cases cited.

Debts due from the United States have no situs at the seat of Government. This has been many times decided.

The appropriation, which is made payable "out of any money in the Treasury not otherwise appropriated," segregates no special fund from the general funds of the Government. The situation simply is that there is a debt due from the Government to a resident of Vinita, Okla., and this debt, it is contended, has no situs in the District of Columbia which would warrant a proceeding by publication. *Vaughan* v. *Northup*, 15 Pet. 1; *Wyman* v. *Hal-*

stead, 109 U. S. 654; *Mackey* v. *Coxe*, 18 How. 100; *Borcherling* v. *United States*, 35 Ct. Clms. 311, affd. 185 U. S. 223.

Miss Mary O'Toole for appellee.

Mr. Chapman W. Maupin, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was a suit in equity, brought by the late Belva A. Lockwood in her lifetime in the Supreme Court of the District of Columbia, to establish an equitable lien for attorney's fees upon a fund of $1,200 in the Treasury of the United States, appropriated by Congress (Act of March 4, 1915, c. 140, 38 Stat. 962, 981) to pay a claim found by the Court of Claims to be due to one Susan Sanders, who was made defendant together with the Secretary of the Treasury and the Treasurer of the United States. There were appropriate prayers for relief by injunction and the appointment of a receiver. Defendant Sanders voluntarily appeared and answered denying her indebtedness to plaintiff; the other defendants answered admitting the existence of the fund and declaring that as a matter of comity and out of deference to the court it would be retained under their control to await the final disposition of the case; but objecting to the jurisdiction of the court over the cause upon the ground that debts due from the United States have no situs in the District of Columbia, that there was nothing to show that either the United States or the defendant Sanders had elected to make the sum alleged to be due from the United States payable to her in the District, and that in the absence of personal service upon her the court could make no decree that would protect the United States. There was a final decree adjudging that

the sum of $90 was due from the defendant Sanders to Mrs. Lockwood, with costs, and appointing a receiver to collect and receive from the Secretary of the Treasury the $1,200 appropriated in favor of Sanders, directing the Secretary to pay the latter sum to the receiver, and decreeing that his receipt should be a full acquittance to the United States for any and all claims and demands of the parties arising out of or connected with said claim. The Secretary of the Treasury and the Treasurer appealed to the Court of Appeals of the District of Columbia, the defendant Sanders not appealing. That court affirmed the decree, 47 App. D. C. 364; and a further appeal taken by the officials of the Treasury under § 250, Judicial Code, brings the case here.

The principal contention is that because the object of the suit and the effect of the decree were to control the action of the appellants in the performance of their official duties the suit was in effect one against the United States. But since the fund in question has been appropriated by act of Congress for payment to a specified person in satisfaction of a finding of the Court of Claims, it is clear that the officials of the Treasury are charged with the ministerial duty to make payment on demand to the person designated. It is settled that in such a case a suit brought by the person entitled to the performance of the duty against the official charged with its performance is not a suit against the Government. So it has been declared by this court in many cases relating to state officers. *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541; *Louisiana* v. *Jumel*, 107 U. S. 711, 727; *In re Ayers*, 123 U. S. 443, 506. In *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386, while holding that a suit against officers of the United States might be in effect a suit against the United States, the court said (p. 386): "Of course, this statement has no reference to and does not include those cases in which officers of the United States are sued, in appropriate

form, to compel them to perform some ministerial duty imposed upon them by law, and which they wrongfully neglect or refuse to perform. Such suits would not be deemed suits against the United States within the rule that the Government cannot be sued except by its consent, nor within the rule established in the *Ayers* case." And in *Parish* v. *MacVeagh*, 214 U. S. 124, the court upheld the right of a claimant, in whose favor an appropriation had been made by Congress, to have a mandamus against the Secretary of the Treasury requiring him to pay the claim. To the same effect, *Roberts* v. *United States*, 176 U. S. 221, 231.

In the present case it is conceded, and properly conceded, that payment of the fund in question to the defendant Sanders is a ministerial duty, the performance of which could be compelled by mandamus. But from this it is a necessary consequence that one who has an equitable right in the fund as against Sanders may have relief against the officials of the Treasury through a mandatory writ of injunction, or a receivership which is its equivalent, making Sanders a party so as to bind her and so that the decree may afford a proper acquittance to the Government. The practice of bringing suits in equity for this purpose is well established in the courts of the District (*Sanborn* v. *Maxwell*, 18 App. D. C. 245; *Roberts* v. *Consaul*, 24 App. D. C. 551, 562; *Jones* v. *Rutherford*, 26 App. D. C. 114; *Parish* v. *McGowan*, 39 App. D. C. 184; *s. c.* on appeal, *McGowan* v. *Parish*, 237 U. S. 285, 295). Confined, as it necessarily must be, to cases where the officials of the Government have only a ministerial duty to perform, and one in which the party complainant has a particular interest, the practice is a convenient one, well supported by both principle and precedent.

Section 3477, Rev. Stats., regulating the assignment of claims against the United States, is not an obstacle. As has been held many times, the object of Congress in this legis-

lation was to protect the Government, not the claimant; and it does not stand in the way of giving effect to an assignment by operation of law after the claim has been allowed. *Erwin* v. *United States*, 97 U. S. 392, 397; *Goodman* v. *Niblack*, 102 U. S. 556, 560; *Price* v. *Forrest*, 173 U. S. 410, 423–425.

In support of the contention that a court of equity may not control the action of an officer of the United States within the scope of his authority, *Wells* v. *Roper*, 246 U. S. 335, is cited; but it is not in point; the official duty sought to be subjected to control in that case was not ministerial but required an exercise of official discretion, as the opinion shows (p. 338).

It is further objected that debts due from the United States have no situs at the seat of Government, and *Vaughan* v. *Northup*, 15 Pet. 1, 6; *Mackey* v. *Coxe*, 18 How. 100, 105; *Wyman* v. *Halstead*, 109 U. S. 654, 657, are cited. But in the present case the question of situs is not material. If the jurisdiction as to the defendant Sanders had depended upon publication of process against her as a non-resident under § 105 of the District Code (Act of March 3, 1901, c. 854, 31 Stat. 1189, 1206), upon the theory that her claim against the Government was "property within the District," the point would require consideration. But the jurisdiction over her rests upon her having voluntarily appeared and answered the bill without objection. Hence there is no question that the decree binds her, and so constitutes a good acquittance to the United States as against her.

The decree will be

Affirmed.

HULL, ADMINISTRATRIX OF HULL, &c. v. PHILADELPHIA & READING RAILWAY COMPANY.

CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 151. Argued January 16, 1920.—Decided April 19, 1920.

The terms "employee" and "employed" in the Employers' Liability Act are used in their natural sense, importing the conventional relation of employer and employee. P. 479.

Under an agreement for through freight service between two railroads, each retained control of its own train crews while on the other's line, subject to regulations, orders and discipline imposed by the other for the purpose of coördinating their movements to its own operations and for insuring safety and furthering the general object of the agreement; and the acts of each company's employees while on the line of the other were performed as part of their duty to their general employer. *Held*, that an employee of one company did not become an employee of the other, within the meaning of the Employers' Liability Act, while so operating on the other's line. *Id.* *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, distinguished. 132 Maryland, 540, affirmed.

THE case is stated in the opinion.

Mr. Charles D. Wagaman, with whom *Mr. Omer T. Kaylor* and *Mr. Frank G. Wagaman* were on the brief, for petitioner:

Where one in the general service of another performs work in which that other and a third person are both interested, he remains the servant of that other or becomes the servant of the third person according as the work in its doing is the work of that other, or is, in its doing, the work of the third person. And this principle is true no matter who hires, pays or has the power to discharge the servant. *Standard Oil Co.* v. *Anderson*, 212 U. S. 215; *Murray* v. *Currie*, L. R. 6 C. P. 24; *Rourke* v.

White Moss Colliery Co., L. R. 2 C. P. Div. 205 (1877); *Byrne* v. *Kansas City &c. Ry. Co.*, 61 Fed. Rep. 605; *Donovan* v. *Construction Syndicate*, [1893] 1 Q. B. 629; *Powell* v. *Construction Company*, 88 Tennessee, 692; *Miller* v. *Railroad Company*, 76 Iowa, 655.

The law imposes upon a railroad corporation the non-delegable duty of the operation of its road. *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24.

One who performs the non-delegable duty of another with the knowledge and assent of that other becomes the employee of him for whom he is performing the work. *Atlantic Coast Line R. R. Co.* v. *Treadway's Administratrix*, 120 Virginia, 739.

Responsibility of one for the manner of the performance of the work of another always creates the relation of employee and employer. *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248.

Mr. Henry H. Keedy, Jr., for respondent, relied on the following:

Robinson v. *Baltimore & Ohio R. R. Co.*, 237 U. S. 84; *Chicago & Alton R. R. Co.* v. *Wagner*, 239 U. S. 452; *Fowler* v. *Pennsylvania R. R. Co.*, 229 Fed. Rep. 375; *Missouri, Kansas & Texas Ry. Co.* v. *West*, 38 Oklahoma, 581; *Little* v. *Hackett*, 116 U. S. 366; *Bentley, Shriver & Co.* v. *Edwards*, 100 Maryland, 652; *Quarman* v. *Burnett*, 6 M. & W. 499; *Zeigler* v. *Danbury &c. R. R. Co.*, 52 Connecticut, 543; *Tierney* v. *Syracuse &c. R. R. Co.*, 85 Hun, 146; *Sullivan* v. *Tioga R. R. Co.*, 112 N. Y. 643; *Bosworth* v. *Rogers*, 82 Fed. Rep. 975; *Hamble* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 164 Fed. Rep. 410; *Phillips* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 64 Wisconsin, 475; *McAdow* v. *Kansas City Western Ry. Co.*, 164 S. W. Rep. 188; *Kastl* v. *Wabash R. R. Co.*, 114 Michigan, 53; Labatt, Master & Servant, 2d ed., 83, note c; *P. W. & B. Ry. Co.* v. *Bitzer*, 58 Maryland, 372; *Delaware, Lackawanna &*

Western R. R. Co. v. *Hardy*, 59 N. J. L. 35; *Morgan* v. *Smith*, 159 Massachusetts, 570; *Berry* v. *New York Central R. R. Co.*, 202 Massachusetts, 197.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an action brought in a state court of Maryland under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291, by petitioner as administratrix of John M. Hull, deceased, to recover damages because of his death occurring, as alleged, while he was employed by defendant in interstate commerce. The trial court directed a verdict in favor of defendant, the Court of Appeals of Maryland affirmed the resulting judgment upon the ground that the deceased at the time he was killed was not in the employ of defendant within the meaning of the act of Congress, 132 Maryland, 540; and upon this federal question the case is brought here by certiorari.

The pertinent facts are not in dispute. John M. Hull, at the time he was killed and for a long time before, was in the general employ of the Western Maryland Railway Company, an interstate carrier operating, among other lines, a railway from Hagerstown, Maryland, to Lurgan, Pennsylvania, at which point it connected with a railway owned and operated by defendant, the Philadelphia and Reading Railway Company, which extended from Lurgan to Rutherford, in the same State. Through freight trains were operated from Hagerstown to Rutherford over these two lines, and Hull was employed as a brakeman on such a train at the time he received the fatal injuries. On the previous day a crew employed by the Western Maryland Railway Company, and of which he was a member, had taken a train hauled by a Western Maryland engine from Hagerstown to Rutherford, and at the time in question the same crew was returning with a train from Rutherford

to Hagerstown. Before starting they received instructions from the yardmaster at Rutherford (an employee of defendant company) as to the operation of the train, including directions to pick up seven cars at Harrisburg. They proceeded from Rutherford to Harrisburg, stopped there for the purpose of picking up the seven cars, and while this was being done Hull was run over and killed by one of defendant's locomotives.

The through freight service was conducted under a written agreement between the two railway companies, which was introduced in evidence and constitutes the chief reliance of petitioner. Its provisions, so far as they need to be quoted, are as follows:

"2. Freight trains to run through between Hagerstown and Rutherford in both directions and each Company agrees to supply motive power in the above proportions [based upon mileage] so as to equalize the service performed.

* * * * * * * *

"4. Crews of each road to run through with their engines over the line of the other Company.

"5. Each Company to compensate the other for the use of the other's engines and crews on their line at the following rates per hour: . . . Time to begin at Rutherford and Hagerstown when crew is called for. . . . Time to cease when the engines arrive on the fire track at Rutherford and Hagerstown. . . .

"6. The division of earnings of the traffic not to be disturbed or in any way affected by this arrangement.

"7. Each Company to furnish fuel and other supplies to its own engines and crews; any furnished by one to the other to be upon agreed uniform rates.

* * * * * * * *

"9. Neither Company to be expected to do the engine cleaning and wiping for the other; where done, a charge of seventy-five (75) cents per engine to be made.

"10. Each Company to be responsible and bear all damage and expenses to persons and property caused by all accidents upon its road.

* * * * * * * *

"16. Each Company to relieve and return as promptly as practicable the engines and crews of the other at ends of runs.

"17. Each Company to have the right to object and to enforce objection to any unsatisfactory employee of the other running upon its lines.

"18. All cases of violation of rules or other derelictions by the employees of one Company while upon the road of the other shall be promptly investigated by the owning Company, and the result reported to the employing Company, with or without suggestions for disciplining, the employing Company to report to the other the action taken.

"19. Accident reports on prescribed forms to be promptly made of all such occurrences, and where a crew of one Company is operating upon the road of the other, a copy must be sent to the proper officer of each Company.

"20. Employees of each Company to be required to report promptly, on notice, to the proper officer of the other, for investigations of accidents, etc., the fullest coöperation to be given by the one Company to the other in all such matters.

"21. The employees of each Company while upon the tracks of the other shall be subject to and conform to the rules, regulations, discipline and orders of the owning Company."

We hardly need repeat the statement made in *Robinson* v. *Baltimore & Ohio R. R. Co.*, 237 U. S. 84, 94, that in the Employers' Liability Act Congress used the words "employee" and "employed" in their natural sense, and intended to describe the conventional relation of employer and employee. The simple question is whether, under the

facts as recited and according to the general principles applicable to the relation, Hull had been transferred from the employ of the Western Maryland Railway Company to that of defendant for the purposes of the train movement in which he was engaged when killed. He was not a party to the agreement between the railway companies, and is not shown to have had knowledge of it; but, passing this, and assuming the provisions of the agreement can be availed of by petitioner, it still is plain, we think, from the whole case, that deceased remained for all purposes—certainly for the purposes of the act—an employee of the Western Maryland Company only. It is clear that each company retained control of its own train crews; that what the latter did upon the line of the other road was done as a part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline, and orders, this was for the purpose of coördinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies. See *Standard Oil Co.* v. *Anderson*, 212 U. S. 215, 226.

North Carolina R. R. Co. v. *Zachary*, 232 U. S. 248, is cited, but is not in point, since in that case the relation of the parties was controlled by a dominant rule of local law, to which the agreement here operative has no analogy.

The Court of Appeals of Maryland did not err in its disposition of the federal question, and hence its judgment is

Affirmed.

MR. JUSTICE CLARKE, dissenting.

The Western Maryland Railroad Company owned a line of railroad, extending from Hagerstown, Maryland, to Lurgan, where it connected with the line of the Reading

Company, extending to Rutherford, in Pennsylvania. The two companies entered into a contract by which through freight trains, made up and manned by crews primarily employed by either, should run through over the rails of the other company to Rutherford or Hagerstown, as the case might be. A crew from either line, arriving at the terminus of the other should return with a train made up by the company operating the latter—together with any cars which might be "picked up" on the way.

Thus, for the purposes of operation, the line over which train crews worked was 81 miles in length, 34 miles of Western Maryland track and 47 miles of Reading track, and the relation of the men to the company, other than the one which originally employed them, while on its line, was defined by the contract quoted from in the opinion of the court.

Five of the paragraphs of this contract seem to me decisive of what that relation was, and of this case, viz:

5. Each company to pay the other an agreed compensation for the service of its engines and crews while on its line.

"10. Each Company to be responsible and bear all damage and expenses to persons and property caused by all accidents upon its road."

"17. Each Company to have the right to object to *and to enforce objection to* any unsatisfactory employee of the other running upon its lines.

"18. All cases of violation of rules or other derelictions by the employees of one Company while upon the road of the other shall be promptly investigated by the owning Company, and the result reported to the employing Company, *with or without suggestions for disciplining*, the employing Company to report to the other the action taken."

"21. *The employees of each Company while upon the*

tracks of the other shall be subject to and conform to the rules, regulations, discipline and orders of the owning Company."

The deceased brakeman, Hull, was killed on the Reading tracks at Harrisburg, thirty miles away from any Western Maryland track, by the alleged negligence of a Reading engineer, when engaged, under the direction of a local Reading yardmaster, in "picking up" cars to be added to a train which was made up by the Reading Company at Rutherford and dispatched by Reading officials from that terminal.

Thus, when he was killed, Hull was working on the Reading Railroad, subject to the "rules, regulations, discipline and orders" of the Reading Company and at the moment was acting under specific direction of a Reading yardmaster. The Reading Company was paying for the service which he was rendering when he was killed, it had authority to cause his discharge if his service was not satisfactory to it (paragraphs 17 and 18 of the contract, *supra*), and it had specifically contracted to be responsible for all damage to persons and property caused by accidents on its line growing out of the joint operation.

It is admitted that the service he was rendering was in the movement of interstate commerce, but upon the facts thus stated it is concluded in the opinion, that he was not within the scope of the act providing that "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury *while he is employed* by such carrier in such commerce, or, in case of the death," etc., (35 Stat. 65, c. 149, § 1).

I cannot concur in this decision of the court for the reason that the case seems to me to be ruled by a conclusion as to the applicable law, stated in a strongly reasoned opinion in *Standard Oil Co.* v. *Anderson*, 212 U. S. 215, in this paragraph:

"One may be in the general service of another, and,

nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation."

By the contract of hiring Hull was in the general service of the Maryland Company, but "by his consent and acquiescence," he was transferred to the service of the Reading Company whenever his train passed on to its tracks. From that moment until his return to the Maryland Company's tracks again he was engaged exclusively in the work of the Reading Company, that company paid for his services, he was under its "rules, regulations, discipline and orders," and it had authority to cause his discharge if his service was not satisfactory. He was under the control of that company as to what he was to do and as to the details of the manner of doing it as completely as if he had no other employer. He ceased for the time being to be the servant of the Maryland Company and became the servant of the Reading Company (212 U. S. 215, 224).

The Federal Employers' Liability Act does not require that a person shall be in the exclusive employ of a railroad common carrier in order to come within its scope. It provides that such carrier shall be "liable in damages to any person suffering injury *while he is employed* [*engaged*] *by such carrier in such commerce*," and it is impossible for me to accept the conclusion that Hull, when in the pay of the Reading Company, assisting in operating Reading interstate trains on Reading tracks, under the direction solely of Reading officials, general and local, was not "employed" by it in interstate commerce, within the meaning of this provision.

We are not dealing here with mere words or with merely "conventional relations," but with very serious realities. Enacted as the Federal Employers' Liability Act was to bring the United States law up to the humanitarian level

of the laws of many of the States, by abolishing the unjust and irritating fellow servant rule, by modifying the often harsh contributory negligence rule, and by otherwise changing the common-law liability of interstate rail carriers to their employees, it should receive a liberal construction to promote its important purpose. Its terms invite the application of the rule, widely applied by other courts and clearly approved by this court, in the case cited, that a man may be in the general service of one, and also, with respect to a part of his service—to particular work—be in the service of another employer, so that he becomes for the time being the servant of the latter "with all the legal consequences of the new relation." The line of demarcation could not be more clearly drawn than it was in this case, and the rule seems to me to be sharply and decisively applicable.

In the opinion of the court it is said: "It is clear that each company retained control of its own train crews." Upon the contrary, it seems to me, it is clear that neither company retained any control whatever over the crews primarily employed by it while they were on the line of the other company.—"21. The employees of each Company while upon the tracks of the other shall be subject to and conform to the rules, regulations, discipline and orders of the owning Company," was the contract between the two companies under which they were operating when Hull was negligently killed.

UNITED STATES v. CHASE NATIONAL BANK.

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

No. 134. Argued January 14, 15, 1920.—Decided April 19, 1920.

A drawee who pays a draft drawn to the drawer's order, upon which the drawer's signature, as well as his endorsement, is forged, cannot recover the money from a *bona fide* holder for value, guilty of no bad faith or negligence contributing to the success of the forgery. P. 493.

In order to recover money as paid under mistake of fact, the plaintiff must show that the defendant cannot in good conscience retain it. *Id.*

250 Fed. Rep. 105, affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Spellacy, with whom *Mr. Leonard B. Zeisler* and *Mr. Charles H. Weston* were on the briefs, for the United States:

The plaintiff may recover, since the defendant did not change its position to its prejudice in reliance on the fact of payment and since its indorser was guilty of acts of negligence contributing to the success of the forgery. The law recognizes no such thing as a holder in due course of a negotiable instrument void in its inception because of the forgery of the drawer's signature. If plaintiff is permitted to assert as against the Howard National Bank that the drawer's signature was forged, it may also do so against the defendant. As between plaintiff and the Howard National Bank this case is not within the rule that one who has paid a check drawn upon him cannot deny the genuineness of the drawer's signature, but within the exceptions to it.

The Howard National Bank must have known that for almost two months prior to the presentation of this check Sumner had not been acting as quartermaster. This circumstance alone should have aroused its suspicion as to the authority of Howard to cash the check. It is true that Howard's endorsement on the check was not necessary for negotiation; but the universal custom of bankers, of which this court will take judicial notice, requires a person receiving payment of a check or draft to endorse his name on it as a form of receipt and as a means of identification. Morse, Banks and Banking, 5th ed., § 391. This is especially true where the check is being cashed by a bank on whom it is not drawn.

The check when presented to the Treasurer showed no endorsements intervening between that of Sumner and the bank, and the Treasurer was justified in believing that the money had been paid to Sumner in person. The bank's guaranty of Sumner's endorsement amounted to a representation that it knew it to be genuine. Since his signatures as drawer and endorser were indistinguishable, such a guaranty could not but allay any suspicion plaintiff might have as to the genuineness of his signature as drawer. It certainly amounted to a statement that the bank did not intend to call on the Treasurer to verify the signature. Had plaintiff been doubtful of the signature it might well rely upon that guaranty as evidence that the drawer's signature was genuine. Further, had Howard's endorsement appeared on the check, the plaintiff would have had notice that the money had not been paid to Sumner directly and the case might have called upon it to scrutinize the drawer's signature with more care. This is sufficient to defeat defendant's claim. *Danvers Bank* v. *Salem Bank*, 151 Massachusetts, 280, 283; *Ford & Co.* v. *Bank*, 74 S. Car. 180; *People's Bank* v. *Franklin Bank*, 88 Tennessee, 299; *Greenwald* v. *Ford*, 21 S. Dak. 28; *McCall* v. *Corning*, 3 La. Ann. 409; *Farmers' National Bank* v.

Farmers' & Traders' Bank, 159 Kentucky, 141; *Canadian Bank of Commerce* v. *Bingham*, 30 Washington, 484; *National Bank* v. *Bangs*, 106 Massachusetts, 441; *Williamsburgh Trust Co.* v. *Tum Suden*, 120 App. Div. 518; *Ronvant* v. *San Antonio National Bank*, 63 Texas, 610.

The general rule that money paid under a mistake of fact may be recovered, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund, has been modified in the class of cases under consideration only to the extent that where the mistake is that of a drawee in failing to discover the forgery of his drawer's signature, he cannot recover where the person receiving the money has been free from negligence, or affirmative action, contributing to the success of the deception. The drawee is bound to know the signature of one who draws upon him, and his failure to detect a forgery is negligence as a matter of law. The rule applies only where the holder is himself entirely free from fault and slight circumstances have been laid hold of to show negligence on his part so as to take the case out of the operation of the exceptional rule. See cases cited *supra*, and *Ellis* v. *Trust Company*, 4 Oh. St. 628; *First National Bank* v. *State Bank*, 22 Nebraska, 769; *Woods* v. *Colony Bank*, 114 Georgia, 683; *Newberry Bank* v. *Bank of Columbia*, 91 S. Car. 294.

The doctrine that a check payable to a fictitious person is payable to bearer is inapplicable. The plaintiff is not barred from recovery in this case by negligence in failing sooner to discover and notify the bank of the forgery. Even if it was negligent in this respect, that would not avail the defendant, for the latter was itself negligent in cashing the draft under suspicious circumstances without inquiring into the right to receive the

money. *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96, distinguished.

All the authorities which lay down the rule that it is the duty of a depositor to exercise reasonable diligence to discover forgeries of his checks and that if the bank suffers a loss because of his negligence in failing to promptly discover and notify the bank of forgeries, the depositor cannot recover money paid out, recognize that where the bank has itself been guilty of negligence in paying a forged check it cannot receive a credit for the amount. *New York Produce Exchange Bank* v. *Houston*, 169 Fed. Rep. 785, 788; *Merchants National Bank* v. *Nichols & Co.*, 223 Illinois, 41, 52; *National Dredging Co.* v. *Farmers Bank*, 6 Penn. (Del.), 580, 590; *Brixen* v. *National Bank*, 5 Utah, 504; *United States* v. *National Bank of Commerce*, 205 Fed. Rep. 433, 436; *Danvers Bank* v. *Salem Bank*, 151 Massachusetts, 280.

Mr. Henry Root Stern for defendant in error:

The drawee of a check or draft is bound, at his peril, to know the drawer's signature and cannot, after payment to an innocent holder for value, recover back the amount from the latter. *Price* v. *Neal*, 3 Burr. 1354; *United States Bank* v. *Bank of Georgia*, 10 Wheat. 333; *United States* v. *Bank of New York*, 219 Fed. Rep. 648; *National Park Bank* v. *Ninth National Bank*, 46 N. Y. 77; *Bank of St. Albans* v. *Farmers' & Mechanics' Bank*, 10 Vermont, 141; *First National Bank of Belmont* v. *First National Bank of Barnesville*, 58 Ohio St. 207; *State National Bank* v. *Bank of Magdalena*, 21 N. Mex. 653; *Bergstrom* v. *Ritz-Carlton Restaurant & Hotel Co.*, 171 App. Div. 776; *Germania Bank* v. *Boutell*, 60 Minnesota, 189; Ames, 4 Harvard Law Review, 275.

This is equally true, even though the endorsement of the purported payee also is forged. *Postal Telegraph-Cable Co.* v. *Citizens' National Bank*, 228 Fed. Rep. 601;

State Bank v. *Cumberland Savings Bank*, 168 N. Car. 605; *Deposit Bank of Georgetown* v. *Fayette National Bank*, 90 Kentucky, 10; *First National Bank* v. *Marshalltown State Bank*, 107 Iowa, 327; *Howard & Preston* v. *Mississippi Valley Bank of Vicksburg*, 28 La. Ann. 727; *Bank of England* v. *Vagliano Bros.*, L. R. (1891) A. C. 107; *National Park Bank* v. *Ninth National Bank*, 46 N. Y. 77; *National Bank of Commerce* v. *United States*, 224 Fed. Rep. 679; *s. c.*, 205 Fed. Rep. 433; 2 Parsons on Notes and Bills, 591; *Robinson* v. *Yarrow*, 7 Taunt. 455; *Cooper* v. *Meyer*, 10 B. & C. 468; *Beeman* v. *Duck*, 11 M. & W. 251; *Williams* v. *Drexel*, 14 Maryland, 566.

Inasmuch as the individual drawing this instrument did not intend that the person named as payee therein should have any interest in it or even possession, such payee was, within the negotiable instruments law, a "fictitious" payee, and hence the instrument was payable to bearer, and the endorsement surplusage.

The record fails to disclose any facts sufficient to justify a finding that the Howard National Bank was negligent. *Dedham National Bank* v. *Everett National Bank*, 177 Massachusetts, 392.

Both parties having moved for the direction of a verdict, the exception to the finding of the trial judge in favor of the defendant does not permit the plaintiff to raise the question of the negligence of the Howard National Bank for review by this court upon writ of error.

Even assuming that the Howard National Bank was negligent in cashing the check, such negligence could not be charged to the defendant bank, which was a *bona fide* purchaser for value. *Merchants National Bank* v. *Santa Maria Sugar Co.*, 162 App. Div. 248; *National Park Bank* v. *Seaboard Bank*, 114 N. Y. 28; *Rickerson Roller-Mill Co.* v. *Farrell Foundry & Machine Co.*, 75 Fed. Rep. 554; *National Park Bank* v. *Ninth National Bank*, 46 N. Y. 77; *Jones* v. *Miners, etc., Bank*, 144 Mo. App. 428;

Pennington County Bank v. *Moorehead First State Bank*, 110 Minnesota, 263; *Raphael* v. *Bank of England*, 17 C. B. 161; *United States* v. *Bank of New York*, 219 Fed. Rep. 648.

The stipulated facts establish such negligence on the part of the plaintiff as will, irrespective of any other question in the case, preclude its right to recovery. The general verdict directed in favor of the defendant necessarily constituted a finding of such negligence which this court will not disturb upon writ of error. *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96, 115; *Marks* v. *Anchor Savings Bank*, 252 Pa. St. 304, 310; *Gloucester Bank* v. *Salem Bank*, 17 Massachusetts, 32; *United States* v. *Central National Bank*, 6 Fed. Rep. 134; *Salas* v. *United States*, 234 Fed. Rep. 842; *United States* v. *Bank of New York*, 219 Fed. Rep. 648, 649.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Plaintiff in error sued the defendant bank, at law, to recover money paid out under mistake of fact. The complaint alleged:

"First. That at all the times hereinafter mentioned, the plaintiff was and is a corporation sovereign, and the defendant was and is an association organized for and transacting the business of banking in the city, State, and Southern District of New York, under and pursuant to the provisions of the acts of Congress in such case made and provided;

"Second. That on or about the 18th day of December, 1914, the defendant presented to the Treasurer of the United States at Washington, D. C., for payment, a draft in the sum of $3,571.47, drawn on the Treasurer of the United States, payable to the order of E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., and purporting to be drawn by E. V. Sumner, Acting Quartermaster, U. S. A., and to be endorsed by E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., the

Howard National Bank, and the defendant; a copy of said draft and the indorsements on the back thereof is hereto attached and marked Exhibit A,[1] and made a part hereof;

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[1] (Ex. A.) [Face.]

OFFICE OF THE QUARTERMASTER.
Fort Ethan Allen, Vermont.

War — December
Quartermaster — 15, 1914.
Thesaur Amer — 444
(Shield) Treasurer of the United States — 15-51
Septent Sigil.

Pay to the order of E. V. Sumner, 2d Lt., 2d Cav., A. Q. M. . . . $3571.47
Thirty-five hundred seventy-one & 47/100 dollars.
Object for which drawn: Vo. No. Cash transfers.

E. V. Sumner,
Acting Quartermaster, U. S. A. 21739.

[Back.]

Form Approved by the
Comptroller of the
Treasury
January 27, 1913.

This check must be indorsed on the line below by the person in whose favor it is drawn, and the name must be spelled exactly the same as it is on the face of the check.

If indorsement is made by mark (X) it must be witnessed by two persons who can write, giving their place of residence in full.

E. V. Sumner,
(Sign on this line)
2d Lt., 2d Cav., AQM.

Pay Chase National Bank
New York, or Order,
Restrictive endorsements guaranteed.
Howard Nat'l Bank,
58-3 Burlington, Vt. 58-3,
M. T. Rutter, Cashier.

Received payment from
The Treasurer of the United States
Dec. 16, 1914.
1-74 The Chase National Bank 1-74
Of the City of New York.

"Third. That at the date of the presentation of said draft by the defendant to the Treasurer of the United States, the defendant was a depository of the funds of the United States of America, and payment of said draft to the defendant was thereupon made by the plaintiff, by passing a credit for the amount of said draft to the defendant upon the accounts of the defendant, as depository for the funds of the plaintiff;

"Fourth. That the name of said E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., endorsed upon the back of said draft, was forged and had been wrongfully and fraudulently written upon the same by a person other than the said E. V. Sumner, without his knowledge or consent, and no part of the proceeds of said draft were ever received by him;

"Fifth. That the payment of said draft made by the plaintiff to the defendant, as described in paragraph three of this complaint, was made under a mistake of fact and without knowledge that the signature of the said E. V. Sumner, 2d Lt., 2d Cav., A. Q. M., payee thereof, had been forged upon the back of said draft;

"Sixth. That the plaintiff has duly requested the defendant to repay to it the amount of said draft, to wit, $3,571.47, but the defendant has failed and refused to pay the same or any part thereof to the plaintiff.

"Wherefore, the plaintiff demands judgment against the defendant in the sum of $3,571.47, with interest thereon from the 18th day of December, 1914, together with the costs and disbursements of this action."

The bank denied liability and among other things claimed that the same person wrote the name E. V. Sumner upon the draft both as drawer and indorser. The facts were stipulated.

It appears: Lieutenant Sumner, Quartermaster and Disbursing Officer at Fort Ethan Allen, near Burlington, Vermont, had authority to draw on the United States Treasurer. Sergeant Howard was his finance clerk and so

known at the Howard National Bank of Burlington. Utilizing the official blank form, Howard manufactured *in toto* the draft in question—Exhibit A. Having forged Lieutenant Sumner's name both as drawer and indorser he cashed the instrument over the counter at the Howard National Bank without adding his own name. That bank immediately indorsed and forwarded it for collection and credit to the defendant at New York City; the latter promptly presented it to the drawee (The Treasurer), received payment and credited the proceeds as directed. Two weeks thereafter the Treasurer discovered the forgery and at once demanded repayment which was refused. Before discovery of the forgery the Howard National Bank withdrew from the Chase National Bank sums aggregating more than its total balance immediately after such proceeds were credited; but additional subsequent credit items had maintained its balance continuously above the amount of the draft.

Both sides asked for an instructed verdict without more. The trial court directed one for the defendant (241 Fed. Rep. 535) and judgment thereon was affirmed by the Circuit Court of Appeals. 250 Fed. Rep. 105. If important, the record discloses substantial evidence to support the finding necessarily involved that no actual negligence or bad faith, attributable to defendant, contributed to success of the forgery. *Williams* v. *Vreeland*, 250 U. S. 295, 298.

The complaint placed the demand for recovery solely upon the forged indorsement—neither negligence nor bad faith is set up. If the draft had been a valid instrument with a good title thereto in some other than the collecting bank, nothing else appearing, the drawee might recover as for money paid under mistake. *Hortsman* v. *Henshaw*, 11 How. 177, 183. But here the whole instrument was forged, never valid, and nobody had better right to it than the collecting bank.

Price v. *Neal* (1762), 3 Burrow's, 1354, 1357, held that it is incumbent on the drawee to know the drawer's hand and that if the former pay a draft upon the latter's forged name to an innocent holder not chargeable with fault there can be no recovery. "The plaintiff can not recover the money, unless it be against conscience in the defendant to retain it." "But it can never be thought unconscientious in the defendant, to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had *bona fide* paid, without the least privity or suspicion of any forgery." And the doctrine so announced has been approved and adopted by this court. *Bank of United States* v. *Bank of Georgia*, 10 Wheat. 333, 348. *Hoffman & Co.* v. *Bank of Milwaukee*, 12 Wall. 181, 192. *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96, 109. *United States* v. *National Exchange Bank*, 214 U. S. 302, 311.

In *Bank of United States* v. *Bank of Georgia*, through Mr. Justice Story, this court said concerning *Price* v. *Neal:*

"There were two bills of exchange, which had been paid by the drawee, the drawer's handwriting being a forgery; one of these bills had been paid, when it became due, without acceptance; the other was duly accepted, and paid at maturity. Upon discovery of the fraud, the drawee brought an action against the holder, to recover back the money so paid, both parties being admitted to be equally innocent. Lord Mansfield, after adverting to the nature of the action, which was for money had and received, in which no recovery could be had, unless it be against conscience for the defendant to retain it, and that it could not be affirmed, that it was unconscientious for the defendant to retain it, he having paid a fair and valuable consideration for the bills, said, 'Here was no fraud, no wrong; it was incumbent upon the plaintiff to be satisfied, that the bill drawn upon him was the drawer's hand, before he accepted or paid it; but [it] was not incumbent upon the defendant

to inquire into it. There was a notice given by the defendant to the plaintiff, of a bill drawn upon him, and he sends his servant to pay it, and take it up; the other bill he actually accepts, after which, the defendant, innocently and *bona fide*, discounts it; the plaintiff lies by for a considerable time after he has paid these bills, and then found out that they were forged. He made no objection to them, at the time of paying them; whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff for negotiating the second bill, from the plaintiff's having, without any scruple or hesitation, paid the first; and he paid the whole value *bona fide*. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man, upon another innocent man. But, in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant.' The whole reasoning of this case applies with full force to that now before the court. In regard to the first bill, there was no new credit given by any acceptance, and the holder was in possession of it, before the time it was paid or acknowledged. So that there is no pretence to allege, that there is any legal distinction between the case of a holder before or after the acceptance. Both were treated in this judgment as being in the same predicament, and entitled to the same equities. The case of *Price* v. *Neal* has never since been departed from; and in all the subsequent decisions in which it has been cited, it has had the uniform support of the court, and has been deemed a satisfactory authority."

Does the mere fact that the name of Lieutenant Sumner was forged as indorser as well as drawer prevent application here of the established rule? We think not. In order to recover plaintiff must show that the defendant cannot retain the money with good conscience. Both are

innocent of intentional fault. The drawee failed to detect the forged signature of the drawer. The forged indorsement puts him in no worse position than he would occupy if that were genuine. He cannot be called upon to pay again and the collecting bank has not received the proceeds of an instrument to which another held a better title. The equities of the drawee who has paid are not superior to those of the innocent collecting bank who had full right to act upon the assumption that the former knew the drawer's signature or at least took the risk of a mistake concerning it. *Bank of England* v. *Vagliano Bros.*, L. R. App. Cas. [1891] 107; *Dedham Bank* v. *Everett Bank*, 177 Massachusetts, 392, 395; *Deposit Bank* v. *Fayette Bank*, 90 Kentucky, 10; *National Park Bank* v. *Ninth National Bank*, 46 N. Y. 77, 80; *Howard* v. *Mississippi Valley Bank*, 28 La. Ann. 727; *First National Bank* v. *Marshalltown State Bank*, 107 Iowa, 327; *State Bank* v. *Cumberland Savings & Trust Co.*, 168 N. Car. 606; 4 Harvard Law Review, 297, Article by Prof. Ames. And see, *Cooke* v. *United States*, 91 U. S. 389, 396.

The judgment of the court below is

Affirmed.

MR. JUSTICE CLARKE dissents.

BOEHMER *v.* PENNSYLVANIA RAILROAD COMPANY.

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

No. 191. Argued March 10, 11, 1920.—Decided April 19, 1920.

Section 4 of the Safety Appliance Act of 1893, in requiring grab irons or handholds "in the ends and sides of each car," should be interpreted and applied in view of practical railroad operations, and does

not mean that the handholds on the sides shall be supplied at all four corners, but is satisfied if they are placed at corners diagonally opposite. P. 498.

Whether a railroad company was negligent in not notifying a brakeman that a car was not supplied with handholds on its sides at all four corners, *held* a matter dependent on appreciation of peculiar facts concerning which this court will accept the concurrent judgment of the two courts below without entering upon a minute analysis of evidence. *Id.*

252 Fed. Rep. 553, affirmed.

THE case is stated in the opinion.

Mr. Edwin C. Brandenburg and *Mr. Thomas A. Sullivan* for petitioner.

Mr. Frederic D. McKenney, with whom *Mr. John Spalding Flannery* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Relying upon the Federal Employers' Liability Act, petitioner sought damages for personal injuries sustained by him November 8, 1915, while employed by respondent as brakesman. He claimed that the railroad was negligent in using a freight car not equipped with handholds or grab irons on all *four* outside corners; and also in failing to instruct him that he would be required to work about cars not so equipped. The car in question had secure and adequate handholds on the diagonally opposite corners. Being of opinion that this equipment sufficed to meet the commands of the statute and that, under the circumstances disclosed, failure to instruct the petitioner concerning possible use of such car did not constitute negligence, the trial court directed verdict for respondent.

The Circuit Court of Appeals affirmed the consequent judgment. 252 Fed. Rep. 553.

Section 4 of the Safety Appliance Act of 1893 (27 Stat. 531), provides:

"That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

Petitioner insists that the Act of 1893 was designed for the safety of employees and specified grab irons or handholds in the end and sides of each car as one of the essential requirements. That while it did not specifically command that these should be placed at all four corners, this was the obvious intent. But the courts below concurred in rejecting that construction, and we cannot say they erred in so doing. Section 4 must be interpreted and applied in view of practical railroad operations; and having considered these the courts below ruled against petitioner's theory.

Likewise we accept the concurrent judgment of the lower courts that the carrier was not negligent in failing to give warning concerning the use of cars with handholds only at two diagonal corners. Whether this constituted negligence depended upon an appreciation of the peculiar facts presented, and the rule is well settled that in such circumstances where two courts have agreed we will not enter upon a minute analysis of the evidence. *Chicago Junction Ry. Co.* v. *King*, 222 U. S. 222.

The judgment is

Affirmed.

MUNDAY, TRUSTEE, ET AL. v. WISCONSIN TRUST COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 288. Argued March 25, 1920.—Decided April 19, 1920.

Whether a state statute is intended to validate a contract previously unenforceable under the state law is for the state courts finally to decide and involves no federal question. P. 502.

As applied to transactions subsequent to its enactment, a state law providing that conveyances of local realty taken by sister-state corporations before they have filed their articles with the local secretary of state shall be wholly void on behalf of them or their assigns, violates neither the contract clause nor the due process clause of the Fourteenth Amendment. P. 503.

The power of the State to exact such conditions of outside corporations precedent to acquisition of land within the State, and the rule that conveyances are governed by the *lex loci rei sitæ*, are not affected by delivery of the deeds, etc., in another State; the transaction does not thus become a matter of interstate commerce. *Id.*

168 Wisconsin, 31, affirmed.

THE case is stated in the opinion.

Mr. Walter Bachrach, *Mr. Hamilton Moses* and *Mr. Thomas M. Kearney*, for plaintiffs in error, submitted:

Under § 1770b, and more particularly sub-section 10 thereof, both as written, and as construed by the Supreme Court of Wisconsin prior to the making of the contract and the execution and delivery of the deeds in controversy, such deeds were merely voidable and not void. Such statute as now administered and enforced against plaintiffs in error by the Supreme Court of Wisconsin, so as to

render such deeds absolutely void, impairs the obligation of such contract and deeds and deprives plaintiffs in error of their property without due process of law. *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478; *Mackay Telegraph Co.* v. *Little Rock*, 250 U. S. 94, 98; *Kaukauna Co.* v. *Green Bay, etc., Canal Co.*, 142 U. S. 269; *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 544, 570; *Sauer* v. *New York*, 206 U. S. 536, 549; *Ohio Life Ins. Co.* v. *Debolt*, 16 How. 432; *Gelpcke* v. *Dubuque*, 1 Wall. 206; *Douglass* v. *Pike County*, 101 U. S. 687.

Section 1770b, and more particularly sub-section 10 as administered and enforced in the case at bar, so as to render void the contract and deeds made and delivered in Illinois, violates the due process clause of the Fourteenth Amendment.

The judgment of the Supreme Court of Wisconsin in declaring the deeds void and in refusing to give them efficacy, notwithstanding the validating statute of 1917, deprived plaintiffs in error of their property, without due process of law in violation of the Fourteenth Amendment. *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 233, 234; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 147; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Louisiana Ry. & Nav. Co.* v. *New Orleans*, 235 U. S. 164; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486; *Houston &c. R. R. Co.* v. *Texas*, 177 U. S. 77; *McCullough* v. *Virginia*, 172 U. S. 109.

The legislature of Wisconsin, by the passage of the amendatory Act of May 11, 1917, confirmed the title of the Realty Company, its grantee and successors in title, and absolutely and unconditionally validated the title theretofore attempted to be granted by the Trust Company and Robinson.

Mr. William E. Black, with whom *Mr. John B. Simmons* was on the brief, for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The court below declared null and void two separate deeds whereby defendants in error undertook to convey to the Realty Realization Company, a Maine corporation, certain land in Wisconsin upon the ground that the grantee had failed to comply with the statute of the State prescribing conditions under which foreign corporations might acquire title to property therein. The deeds were dated and delivered in Illinois February 28, 1913. A subsequent deed from the Realty Company and a mortgage by its grantee were also declared ineffective, but they need not be separately considered here. 168 Wisconsin, 31.

At the time of the transactions in question the applicable statutory provisions concerning foreign corporations were sub-sections 2 and 10 of § 1770b, Wisconsin Statutes, 1911, which follow:

Sec. 1770b. "2. No corporation, incorporated or organized otherwise than under the laws of this state, except railroad corporations, corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, shall transact business or acquire, hold, or dispose of property in this state until such corporation shall have caused to be filed in the office of the secretary of state a copy of its charter, articles of association or incorporation and all amendments thereto duly certified by the secretary of state of the state wherein the corporation was organized. . . ."

Sec. 1770b. "10. . . . Every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within this state, before it shall have complied with the provisions

of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them."

The original proceeding was instituted March 30, 1913. While it was pending in the Circuit Court the Realty Company complied with § 1770b and obtained a license to do business and hold property in Wisconsin—October, 1915. On May 11, 1917, the legislature enacted c. 211, Laws of 1917, which amended sub-section 1 of § 1770j of the statute to read:

"Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of section 1770b of the statutes, and *which is now not required to comply with said section or* which has thereafter, and before the passage of this section, complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired, and the title so acquired, or attempted to be acquired, is hereby confirmed."

Plaintiffs in error unsuccessfully challenged the validity of § 1770b upon the ground of conflict with the contract clause, § 10, Article I of the Federal Constitution and the due process clause of the Fourteenth Amendment. They further insisted that if § 1770j as amended by c. 211, Laws of 1917, was not so applied as to validate the deeds in question, rights, privileges and immunities guaranteed to them by the Fourteenth Amendment would be infringed.

Obviously, no impairment of any federal right resulted from the construction placed upon § 1770j as amended in 1917. Whether that section did or did not validate a contract theretofore unenforceable was a question for the

state court finally to decide—it involved no right under the Constitution or laws of the United States.

Section 1770b was enacted prior to the transactions here in question and the settled doctrine is that the contract clause applies only to legislation subsequent in time to the contract alleged to have been impaired. *Cross Lake Shooting & Fishing Club* v. *Louisiana*, 224 U. S. 632, 639.

In support of the claim that sub-section 10, § 1770b as construed by the court below conflicts with the due process clause it is said: "The contract between the defendants in error and the Realty Company, and the deeds delivered in compliance therewith were all made in Illinois They have been declared void in the State of Wisconsin. So applied the statute deprives plaintiffs in error of their property without due process of law."

Allgeyer v. *Louisiana*, 165 U. S. 578, 591, is relied upon as adequate authority to support the point presented; but we think it is wholly irrelevant.

Where interstate commerce is not directly affected, a State may forbid foreign corporations from doing business or acquiring property within her borders except upon such terms as those prescribed by the Wisconsin statute. *Fritts* v. *Palmer*, 132 U. S. 282, 288; *Chattanooga National Building & Loan Association* v. *Denson*, 189 U. S. 408; *Interstate Amusement Co.* v. *Albert*, 239 U. S. 560, 568.

No interstate commerce was directly involved in the transactions here questioned. Moreover, this court long ago declared—"The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated." *United States* v. *Crosby*, 7 Cranch, 115, 116.

The judgment of the court below is

Affirmed.

FIRST NATIONAL BANK OF CANTON, PENNSYLVANIA, *v.* WILLIAMS, COMPTROLLER OF THE CURRENCY.

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

No. 618. Argued March 3, 1920.—Decided April 19, 1920.

A cause of action arises "under" the laws of the United States when an appropriate statement by the plaintiff, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of an act of Congress. P. 512.

A suit by a national bank to restrain the Comptroller of the Currency from alleged unlawful and malicious practices, wherein plaintiff's right turns on construction and application of the National Banking Law, is a suit to enjoin him under that law, within the intendment of Jud. Code, §§ 24, 49, must be brought in the district where the bank is established and may be maintained upon service made elsewhere—in this case in the District of Columbia. P. 509.

260 Fed. Rep. 674, reversed.

THE case is stated in the opinion.

Mr. John B. Stanchfield, with whom *Mr. M. J. Martin*, *Mr. John P. Kelly*, *Mr. Charles A. Collin* and *Mr. Henry P. Wolff* were on the brief, for appellant.

The Solicitor General and *Mr. La Rue Brown*, Special Assistant to the Attorney General, with whom *Mr. A. F. Myers* was on the brief, for appellee:

The District Court did not have jurisdiction of the person of the defendant. He was not personally served in the Middle District of Pennsylvania. Service of process outside the district in which suit is brought cannot be had without express statutory authority. *Winter* v. *Koon, Schwarz & Co.*, 132 Fed. Rep. 273; *Cely* v. *Griffin*,

113 Fed. Rep. 981; *Toland* v. *Sprague*, 12 Pet. 300; *Green* v. *Railway Co.*, 205 U. S. 530; Hughes, Federal Procedure, 264, 265. As the bill was originally drawn against the defendant individually, the service was insufficient, and no amendment at the hearing could cure the defect of the original service.

There is no statute expressly authorizing the service of process outside the district. Because a statute may provide for the bringing of suit in a district other than that in which the defendant resides, it does not follow that the defendant may be served outside the district in which suit is brought. Thus, § 51 of the Judicial Code, providing that suits based alone on diversity of citizenship may be brought in the place of residence of either the plaintiff or the defendant, does not dispense with the necessity for personal service in the district in which suit is brought. Rose, The Federal Courts, § 239; see also note to § 1033, Comp. Stats. 1916, vol. I, pp. 1154–1156. Any implication of authority to serve process outside the district, in order to override the rule requiring express statutory authority, would have to be so plain as to negative any contrary inference. *United States* v. *Congress Construction Co.*, 222 U. S. 199, is not inconsistent with this view.

Sections 24 (16) and 49, Judicial Code, relate to injunction proceedings brought under the national banking laws. The only proceedings of that nature are those provided by Rev. Stats., § 5237,—to enjoin proceedings by the Comptroller on account of an alleged refusal by a bank to redeem its circulating notes. The present suit is not of that class. Section 380, Rev. Stats., merely provides for the conduct of cases specifically authorized by the national banking act.

The District Court did not have jurisdiction of the subject-matter of the suit. Jurisdiction was not conferred by § 5198, Rev. Stats. The proviso to that section

(added by the Act of February 17, 1875) is in no sense a reënactment of § 57 of the Act of 1864; it is not general in scope, but only confers jurisdiction in the cases *against* national banks in cases arising under the national banking act. The interpretation placed on § 57 of the Act of 1864 in *Kennedy* v. *Gibson*, 8 Wall. 498, has no application to § 5198. See *First Natl. Bank of Charlotte* v. *Morgan*, 132 U. S. 141, 143.

Nor was jurisdiction of the subject-matter conferred by § 24 (16) of the Judicial Code, derived from § 57 of the Act of 1864; Rev. Stats., § 629 (10), (11). The contention that, as the words "or any receiver acting under his direction, as provided by said title," first appeared in Rev. Stats., § 629, the closing words "as provided by said title" must be construed as applicable only to the preceding portion of the new clause, and that therefore the District Court, under said section, has jurisdiction of *all* suits to enjoin the Comptroller, and not merely suits "as provided by said title," is untenable. The section is expressly limited to suits brought by national banks "under the provisions of title 'National Banks,' Revised Statutes." Furthermore, Rev. Stats., § 629, was expressly repealed by the Judicial Code, § 297. If provision for receivers acting under the direction of the Comptroller had first been made in the Revised Statutes, it might with some force be argued that the words "as provided by said title" referred only to the preceding words. But such is not the case. See §§ 26–29, Act of 1863, and §§ 47–50, Act of 1864. As above pointed out, the only provision of "said title" for suits against the Comptroller is contained in § 5237.

The contentions here made by complainant were for the most part adversely decided in *Van Antwerp* v. *Hulburd*, 7 Blatchf. 426, which has never been overruled or questioned. That case shows conclusively that §§ 24 (16) and 49, Jud. Code, and § 380, Rev. Stats., (all of

which were derived from the Act of 1864) cannot be relied upon to give the court below jurisdiction over the subject-matter of this suit or to authorize it to serve process outside of the Middle District of Pennsylvania.

This suit is one between citizens of different States and involves federal questions. It cannot, therefore, be maintained in the Middle District of Pennsylvania. It is not a suit for a statutory injunction under § 5237, Rev. Stats., and jurisdiction cannot therefore be maintained under §§ 24 (16) and 49 of the Judicial Code. If jurisdiction is to be maintained at all, it must be under §§ 24 (1) and 51 of the Judicial Code. Except in suits for statutory injunctions, national banks have no greater rights than other citizens in the matter of suing in the federal courts, and, where federal jurisdiction is based upon diversity of citizenship only, the defendant must be found and served within the district where such suit is brought. But § 51 cannot be invoked as authority for the court's jurisdiction; the jurisdiction is not founded only on diverse citizenship but federal questions also are involved, —the court is called upon to determine the Comptroller's powers under Rev. Stats., §§ 5211, 5213, 5240.

Where a suit involves federal questions in addition to diversity of citizenship, it can only be brought in the district of the residence of the defendant. This suit could not, therefore, be maintained in the Middle District of Pennsylvania, even though personal service had been effected upon the defendant. See *Macon Grocery Co.* v. *Atlantic Coast Line*, 215 U. S. 501; *Male* v. *Atchison &c. Ry. Co.*, 240 U. S. 97, 102; *Cound* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 173 Fed. Rep. 527; *Memphis* v. *Board of Directors*, 228 Fed. Rep. 802; *Whittaker* v. *Illinois Central R. R. Co.*, 176 Fed. Rep. 130; *Sunderland* v. *Chicago &c. Ry. Co.*, 158 Fed. Rep. 877; *Smith* v. *Detroit &c. R. R. Co.*, 175 Fed. Rep. 606; *Newell* v. *Baltimore &c. R. R. Co.*, 181 Fed. Rep. 698.

The defendant did not waive objection to the defective service by interposing a second motion to dismiss after the preliminary motions made on the special appearance had been denied.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Appellant, whose place of business is within the Middle District of Pennsylvania, brought this suit in the United States District Court for that District, seeking an injunction to prevent John Skelton Williams, Comptroller of the Currency, from doing certain things under color of his office declared to be threatened, unlawful, arbitrary and oppressive.

The bill alleges that, in order to injure complainant's president, towards whom he entertained personal ill will, the Comptroller determined to destroy its business and to that end he had maliciously persecuted and oppressed it for three years, in the following ways among others: By often demanding special reports and information beyond the powers conferred upon him by law; by disclosing confidential and official information concerning it to banks, Members of Congress, representatives of the press, and the public generally; by inciting litigation against it and its officers; by publishing and disseminating false statements charging it with unlawful acts and improper conduct and reflecting upon its solvency; and by distributing to depositors, stockholders and others alarming statements intended to affect its credit, etc., etc. And further that, unless restrained, he would continue these and similar malicious and oppressive practices.

Williams is a citizen of Virginia, officially stationed at Washington. He was not summoned while in the Middle District of Pennsylvania, but a subpœna was served upon him in Washington by the United States marshal. Having

specially appeared he successfully challenged the jurisdiction of the court; and the cause is here upon certificate to that effect.

Generally, a District Court cannot acquire jurisdiction over an individual without service of process upon him while in the district for which it is held. But here a national bank seeks to enjoin the Comptroller, and the claim is that by statutory direction the proceeding must be had in the district where the association is located and not elsewhere. The court below took the contrary view. 260 Fed. Rep. 674.

Determination of the matter requires consideration of three sections of the Judicial Code.

"Sec. 24. The district courts shall have original jurisdiction as follows: . . .

"Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located."

"Sec. 49. All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located."

"Sec. 51. Except as provided in the five succeeding sections, no person shall be arrested in one district for trial

in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

If §§ 24 and 49 properly construed restrict this proceeding to the district where the bank is located, they displace § 51 *pro tanto* and authorize service of process upon defendant wherever found. *United States* v. *Congress Construction Co.*, 222 U. S. 199, 203.

It is said for appellee that both §§ 24 and 49 relate to injunction proceedings brought *under* the National Banking Law—such proceedings as are thereby expressly authorized and no others. And further that such law only authorizes suit by a bank to enjoin the Comptroller when he undertakes to act because of its alleged refusal to redeem circulating notes. Rev. Stats., § 5237.

The Act of February 25, 1863, establishing National Banks, c. 58, 12 Stat. 665, 681—

"Sec. 59. *And be it further enacted*, That suits, actions, and proceedings by and against any association under this act may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established."

An Act to provide a National Currency, secured by a Pledge of United States bonds, approved June 3, 1864, c. 106, 13 Stat. 99, 116—

"Sec. 57. *And be it further enacted*, That suits, actions, and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or

municipal court in the county or city in which said association is located, having jurisdiction in similar cases: *Provided, however*, That all proceedings to enjoin the comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located."

In *Kennedy* v. *Gibson* (1869), 8 Wall. 498, 506, this court ruled that § 57 should be construed as if it read, "*And be it further enacted*, That suits, actions, and proceedings, *by and* against," etc., the words "by and" having been accidentally omitted. "It is not to be supposed that Congress intended to exclude associations from suing in the courts where they can be sued." "Such suits may still be brought by the associations in the courts of the United States." And it further held, "that receivers also may sue in the courts of the United States by virtue of the act, without reference to the locality of their personal citizenship."

The Revised Statutes—

"Sec. 629. The circuit courts shall have original jurisdiction as follows: . . .

"Tenth. Of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations.

"Eleventh. Of all suits brought by [*or against*] any banking association established in the district for which the court is held, under the provisions of Title 'The National Banks,' to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title."

"Sec. 736. All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such an association is located."

Parts of the foregoing sub-sections 10 and 11 were

joined in sub-section 16, § 24, and § 736 became § 49, Judicial Code.

What constitutes a cause arising "under" the laws of the United States has been often pointed out by this court. One does so arise where an appropriate statement by the plaintiff, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of an act of Congress. If the plaintiff thus asserts a right which will be sustained by one construction of the law, or defeated by another, the case is one arising under that law. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Boston & Montana Mining Co.* v. *Montana Ore Purchasing Co.*, 188 U. S. 632; *Devine* v. *Los Angeles*, 202 U. S. 313; *Taylor* v. *Anderson*, 234 U. S. 74; *Hopkins* v. *Walker*, 244 U. S. 486, 489. Clearly the plaintiff's bill discloses a case wherein its right to recover turns on the construction and application of the National Banking Law; and we think the proceeding is one to enjoin the Comptroller under provisions of that law within the true intendment of the Judicial Code.

The decree below must be

Reversed.

BURNAP *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 228. Argued March 12, 1920.—Decided April 19, 1920.

The power to remove from public office or employment is, in the absence of any statutory provision to the contrary, an incident of the power to appoint, and the power to suspend is an incident of the power of removal. P. 515.

In § 169, Rev. Stats., which authorizes each "head of a Department"

to employ clerks, messengers, laborers, etc., and other employees, "head of a Department" means the Secretary in charge of a great division of the executive branch, who is a member of the Cabinet, and does not include heads of bureaus or lesser divisions. P. 515.

The term "employ" as thus used is the equivalent of appoint. *Id.*

The terms "clerks" and "other employees," as used in Rev. Stats., § 169, include persons filling positions which require technical skill, learning and professional training. *Id.*

Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto. P. 516.

Although the Office of Public Buildings and Grounds is part of the bureau of the Chief of Engineers, in the War Department, appointment of a landscape architect (whose employment is authorized by general appropriation acts) is not to be made by the Secretary of War under the general authority of Rev. Stats., § 169, but by the Chief of Engineers, under the specific authority given him by § 1799, to employ in such office and in and about the public buildings and grounds under his control such persons as may be appropriated for from year to year. *Id.*

The power to remove such landscape architect is with the Chief of Engineers as an incident of the power of appointment, and is not affected by the fact that the appointment, acquiesced in by the Chief of Engineers, was made without authority by the Secretary. P. 518.

In the absence of regulations prescribed by the President through the War Department under Rev. Stats., § 1797, and assuming the regulations governing the classified Civil Service as applied to the Engineer Department at large do not affect the Office of Public Buildings and Grounds, the power of the Chief of Engineers to remove the landscape architect is to be exercised in the manner prescribed by the Act of August 24, 1912, c. 389, § 6, 37 Stat. 555, and Civil Service Rule XII. P. 519.

The landscape architect in the Office of Public Buildings and Grounds is not an officer but an employee. *Id.*

53 Ct. Clms. 605, affirmed.

THE case is stated in the opinion.

Mr. George A. King, with whom *Mr. William B. King* and *Mr. William E. Harvey* were on the brief, for appellant.

Mr. Assistant Attorney General Davis, with whom *Mr. Harvey D. Jacob* was on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

On July 1, 1910, Burnap entered upon duty in the Office of Public Buildings and Grounds as landscape architect at the salary of $2400 a year, having been appointed to that position by the Secretary of War. On September 14, 1915, he was suspended, upon charges, from duty and pay; and on August 3, 1916, he was discharged "in order to promote the efficiency of the service." His successor was not appointed until July 20, 1917. Burnap contends that his suspension and discharge were illegal and hence inoperative; that he retained his position until his successor was appointed; and that until such appointment he was entitled to his full salary. *United States* v. *Wickersham*, 201 U. S. 390. His claim for such salary was rejected by the Auditor of the War Department (of which the Office of Public Buildings and Grounds is a part), and, upon appeal, also by the Comptroller of the Treasury. Then this suit was brought in the Court of Claims. There his petition was dismissed and the case comes here on appeal.

Burnap rests his claim mainly upon the fact that he was appointed by the Secretary of War, contending that, therefore, only the Secretary of War could remove him (21 Ops. Atty. Gen. 355), and that no action tantamount to a removal by the Secretary was taken until his successor was appointed. Before discussing the nature and effect of the action taken, it is necessary to consider the general rules of law governing appointment and removal in the civil service of the United States, the statutes relating to the Office of Public Buildings and Grounds, and those providing for the appointment of a landscape architect therein.

First. The Constitution (Art. II, § 2) confers upon the

President the power to nominate, and with the advice and consent of the Senate to appoint, certain officers named and all other officers established by law whose appointments are not otherwise therein provided for; but it authorizes Congress to vest the appointment of inferior officers either in the President alone, in the courts of law or in the heads of departments (6 Ops. Atty. Gen. 1). The power to remove is, in the absence of statutory provision to the contrary, an incident of the power to appoint. *Ex parte Hennen*, 13 Pet. 230, 259, 260; *Blake* v. *United States*, 103 U. S. 227, 231; *United States* v. *Allred*, 155 U. S. 591, 594; *Keim* v. *United States*, 177 U. S. 290, 293, 294; *Reagan* v. *United States*, 182 U. S. 419, 426; *Shurtleff* v. *United States*, 189 U. S. 311, 316. And the power of suspension is an incident of the power of removal.

Section 169 of the Revised Statutes provides that:

"Each head of a Department is authorized to employ in his Department such number of clerks of the several classes recognized by law, and such messengers, assistant messengers, copyists, watchmen, laborers, and other employés, and at such rates of compensation, respectively, as may be appropriated for by Congress from year to year."

The term head of a Department means, in this connection, the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, and War, who is a member of the Cabinet. It does not include heads of bureaus or lesser divisions. *United States* v. *Germaine*, 99 U. S. 508, 510. Persons employed in a bureau or division of a department are as much employees in the department within the meaning of § 169 of the Revised Statutes as clerks or messengers rendering service under the immediate supervision of the Secretary. *Manning's Case*, 13 Wall. 578, 580; *United States* v. *Ashfield*, 91 U. S. 317, 319. The term employ is used as the equivalent of appoint. 21 Ops. Atty. Gen. 355, 356. The term clerks and other employees, as there

used, is sufficiently broad to include persons filling positions which require technical skill, learning and professional training. 29 Ops. Atty. Gen. 116, 123; 21 Ops. Atty. Gen. 363, 364; 20 Ops. Atty. Gen. 728. The distinction between officer and employee in this connection does not rest upon differences in the qualifications necessary to fill the positions or in the character of the service to be performed. Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto. 15 Ops. Atty. Gen. 3; 17 Ops. Atty. Gen. 532; 26 Ops. Atty. Gen. 627; 29 Ops. Atty. Gen. 116; *United States* v. *Hartwell*, 6 Wall. 385; *United States* v. *Moore*, 95 U. S. 760, 762; *United States* v. *Perkins*, 116 U. S. 483; *United States* v. *Mouat*, 124 U. S. 303; *United States* v. *Hendee*, 124 U. S. 309; *United States* v. *Smith*, 124 U. S. 525; *Auffmordt* v. *Hedden*, 137 U. S. 310; *United States* v. *Schlierholz*, 137 Fed. Rep. 616; *Martin* v. *United States*, 168 Fed. Rep. 198.

Second. The powers and duties of the Office of Public Buildings and Grounds had their origin in the Act of July 16, 1790, c. 28, 1 Stat. 130, which authorized the President to appoint three Commissioners to lay out a district for the permanent seat of the Government. By Act of May 1, 1802, c. 41, 2 Stat. 175, the offices of Commissioners were abolished and their duties devolved upon a Superintendent, to be appointed by the President. By Act of April 29, 1816, c. 150, 3 Stat. 324, the office of Superintendent was abolished and his duties devolved upon a Commissioner of Public Buildings. By Act of March 2, 1867, c. 167, § 2, 14 Stat. 466, the office of Commissioner was abolished and his duties devolved upon the Chief of Engineers. By § 1797 of the Revised Statutes as amended by Act of April 28, 1902, c. 594, 32 Stat. 152, it is declared that the Chief of Engineers has "charge of the public buildings and grounds in the District of Columbia, under such regula-

tions as may be prescribed by the President, through the War Department." And § 1812 requires the Chief of Engineers, as Superintendent of Public Buildings and Grounds, to submit annual reports to the Secretary of War to accompany the annual message of the President to Congress.

Third. There is no statute which creates an office of landscape architect in the Office of Public Buildings and Grounds nor any which defines the duties of the position. The only authority for the appointment or employment of a landscape architect in that office is the legislative, executive, and judicial appropriation Act of June 17, 1910, c. 297, 36 Stat. 504 (and later appropriation acts in the same form, 36 Stat. 1207; 37 Stat. 388, 766; 38 Stat. 482, 1024; 39 Stat. 93), which reads as follows:

"PUBLIC BUILDINGS AND GROUNDS.

"Office of Public Buildings and Grounds: Assistant Engineer, two thousand four hundred dollars; assistant and chief clerk, two thousand four hundred dollars; clerk of class four; clerk of class three; clerk and stenographer, one thousand four hundred dollars; messenger; landscape architect, two thousand four hundred dollars; surveyor and draftsman, one thousand five hundred dollars; in all, fourteen thousand three hundred and forty dollars." (Then follow the foremen and night and day watchmen in the parks.)

Prior to July 1, 1910, similar appropriation acts had provided for a "landscape gardener" at the same salary. There is no statute which provides specifically by whom the landscape architect in the Office of Public Buildings and Grounds shall be appointed. As the Office of Public Buildings and Grounds is a part of the bureau of the Chief of Engineers, and that bureau is in the War Department, the Secretary of War would, under § 169, have the power to appoint the landscape architect as an employee in his department, in the absence of other provision dealing with

the subject. 21 Ops. Atty. Gen. 355. But § 1799 of the Revised Statutes provides that:

"The Chief of Engineers in charge of public buildings and grounds is authorized to employ in his office and about the public buildings and grounds under his control such number of persons for such employments, and at such rates of compensation, as may be appropriated for by Congress from year to year."

This more specific provision excludes positions in the office of Public Buildings and Grounds from the operation of the general provision of § 169 conferring the power of appointment upon the heads of departments. Compare 10 Dec. of Comptroller of Treas. 577, 583. The appointment of Burnap by the Secretary of War, instead of by the Chief of Engineers, was without authority in law.

Fourth. As the power to remove is an incident of the power to appoint, the Chief of Engineers would clearly have had power to remove Burnap, if the appointment had been made by him instead of by the Secretary of War. The fact that Burnap was, by inadvertence, appointed by the Secretary, does not preclude the Chief of Engineers from exercising in respect to him the general power to remove employees in his office conferred, by implication, in § 1799 of the Revised Statutes. The defect in Burnap's original appointment was cured by the acquiescence of the Chief of Engineers throughout five years, so that Burnap's status was better than that of a mere *de facto* officer. But it was not superior to what it would have been if he had been regularly appointed by the Chief of Engineers. *United States* v. *Mouat*, 124 U. S. 303.

Fifth. The question remains, whether there was a legal exercise by the Chief of Engineers of his power of removal. The suspension of Burnap was by letter from his immediate superior, the officer in charge of the Office of Public Buildings and Grounds under the Chief of Engineers; and to the latter the papers were promptly transmitted. The

discharge was by direct command of the Chief of Engineers. Both the suspension and the discharge purported to be ordered pursuant to Paragraph 13 of § 5 of General Orders Number 5 of the Office of Chief of Engineers, 1915, being regulations governing the classified Civil Service as applied to the Engineer Department at Large, approved by the Civil Service Commission and the Secretary of War.[1] Burnap contends that the provisions of that paragraph were inapplicable to his position; (1) because these regulations relate to the Engineer Department at Large and the Office of Public Buildings and Grounds is not included therein; and (2) because they relate to employees and that the landscape architect was an officer, not an employee. As has been shown Burnap was an employee. But the main contention is wholly immaterial. If Paragraph 13 does not apply to the position of landscape architect, the exercise of the right of removal which rested in the Chief of Engineers was governed only by the provisions of the Act of August 24, 1912, c. 389, § 6, 37 Stat. 555,[2] and Civil Service Rule XII. For no regulations

[1] Par. 13: "Discharge for Cause.—Discharge for cause of any regularly appointed classified employee will be subject to the provisions of Civil Service Rule XII and cannot be made without the approval of the Chief of Engineers. An employee may be suspended without pay by the officer in charge, who should at once furnish the employee with a statement in writing of the charges against him and give him a reasonable time within which to make answer thereto in writing. As soon as reply is received, or in case no reply is received within the time given him, all papers should be submitted to the Chief of Engineers with full statement of the facts in the case and the officer's recommendations."

[2] C. 389, § 6: "No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; etc."

relating to the matter appear to have been "prescribed by the President, through the War Department" under the authority reserved in Revised Statutes, § 1797, as amended. It is not contended that the procedure adopted in suspending and removing Burnap disregarded any requirement of the Act of 1912 or of the Civil Service Rule. Nor are we asked to review the discharge as having been made without adequate cause. The power of removal was legally exercised by the Chief of Engineers; and no irregularity has been pointed out in the suspension which was incident to it.

Sixth. As the power of discharge was vested in the Chief of Engineers and was unaffected by the fact that the appointment had been inadvertently made by the Secretary of War, we have no occasion to consider the contention of Burnap, that it was beyond the Secretary's power to delegate to the Chief of Engineers authority to remove employees in his bureau. Nor need we consider the contention of the Government, that the action taken was tantamount to a removal by the Secretary, because the discharge was ordered by the Chief of Engineers after consideration of the matter at Burnap's request by the Secretary of War, a reference of it by him to the Judge Advocate General, and a return of the papers by the Secretary of War to the Chief of Engineers for action in accordance with the Judge Advocate General's suggestions.

The judgment of the Court of Claims is

Affirmed.

ONEIDA NAVIGATION CORPORATION, CLAIMANT OF THE SAILING VESSEL "PERCY R. PYNE, 2D." &c. v. W. & S. JOB & COMPANY, INC.

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

No. 259. Argued March 19, 1920.—Decided April 19, 1920.

In a libel of a vessel for damage to cargo due to unseaworthiness, the owner and claimant, having answered denying liability, by leave filed a petition to bring in another party as indemnitor. *Held*, that a decree dismissing such petition was not appealable by the claimant to this court in advance of any determination of the main issue of claimant's liability. A case cannot be brought up piecemeal. *Collins* v. *Miller*, *ante*, 364.

Appeal dismissed.

THE case is stated in the opinion.

Mr. Geo. Whitefield Betts, Jr., with whom *Mr. George C. Sprague* was on the brief, for appellant.

Mr. Peter S. Carter, for appellee, submitted.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

James W. Smith and another libelled the Schooner Percy R. Pyne 2d in the District Court of the United States for the Southern District of New York claiming damages for injury to cargo resulting from unseaworthiness due to the cutting away of timbers and frame for the installation of an auxiliary engine. The Oneida Navigation Company claimed the vessel as owner and answered denying liability. Then it filed, by leave of court, a

petition to bring in, under Admiralty Rule 15 of that court in analogy to Admiralty Rule 59 of this court, W. & S. Job & Co., Inc., as defendants, alleging them to be the party through whose fault, if any, the damages complained of had occurred, and that if liability should be established it would be entitled to be indemnified by them. W. & S. Job & Co., Inc., excepted to the petition and denied jurisdiction on the ground that the petition did not set forth a cause of action in admiralty. Their exception was sustained and the petition was dismissed on that ground. The case comes here by direct appeal, the District Judge having certified the question of jurisdiction.

The petition to make W. & S. Job & Co., Inc., party defendants was merely an incident in the progress of the case in the District Court. The liability of indemnitors thereby sought to be enforced would in no event arise unless the vessel should be held liable. The petitioner had as claimant denied liability in its answer to the libel and the issue thus raised had not been tried. While the decree dismissing the petition as to W. & S. Job & Co., Inc., was final as to them, there was no decree disposing of the case below. A case may not be brought here in fragments. This court has jurisdiction under § 238 of the Judicial Code, as under other sections, only from judgments which are both final and complete. *Collins* v. *Miller*, decided by this court March 29, 1920, *ante*, 364; *Hohorst* v. *Hamburg-American Packet Co.*, 148 U. S. 262. The case was not ripe for appeal. Although the objection was not raised by the appellee, the appeal is

Dismissed for want of jurisdiction.

PENN MUTUAL LIFE INSURANCE COMPANY v. LEDERER, COLLECTOR OF INTERNAL REVENUE.

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

No. 499. Argued March 22, 23, 1920.—Decided April 19, 1920.

The Income Tax Law of October 3, 1913, c. 16, 38 Stat. 172, § II G. (b), provides that life insurance companies "shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year," and that "there be deducted from gross income . . . the sums other than dividends paid within the year on policy and annuity contracts." *Held*, that money derived by a mutual company from redundancy of premiums paid in previous years, and paid to policyholders during the tax year as dividends in cash, not applied in abatement or reduction of their current premiums, should not be deducted from premium receipts in computing gross income. P. 527.

No aid in construing an act of Congress can be derived from the legislative history of another passed six years later. P. 537.

258 Fed. Rep. 81, affirmed.

THE case is stated in the opinion.

Mr. George Wharton Pepper for petitioner.

Mr. Assistant Attorney General Frierson for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Penn Mutual Life Insurance Company, a purely mutual legal reserve company which issues level-premium

insurance, brought this action in the District Court of the United States for the Eastern District of Pennsylvania to recover $6,865.03 which was assessed and collected as an income tax of one per cent. upon the sum of $686,503, alleged to have been wrongly included as a part of its gross income, and hence also of its net income, for the period from March 1, 1913, to December 31, 1913. The latter sum equals the aggregate of the amounts paid during that period by the company to its policyholders in cash dividends which were *not* used by them during that period in payment of premiums. The several amounts making up this aggregate represent mainly a part of the so-called redundancy in premiums paid by the respective policyholders in some previous year or years. They are, in a sense, a repayment of that part of the premium previously paid which experience has proved was in excess of the amount which had been assumed would be required to meet the policy obligations (ordinarily termed losses) or the legal reserve and the expense of conducting the business.[1] The District Court allowed recovery of the full amount with interest. (247 Fed. Rep. 559.) The Circuit Court of Appeals for the Third Circuit, holding that nothing was recoverable except a single small item, reversed the judgment and awarded a new trial. (258 Fed. Rep. 81.) A writ of certiorari from this court was then allowed. (250 U. S. 656.)

Whether the plaintiff is entitled to recover depends wholly upon the construction to be given certain provisions in § II G. (b) of the Revenue Act of October 3, 1913, c. 16, 38 Stat. 114, 172, 173. The act enumerates among

[1] The manner in which mutual level-premium life insurance companies conduct their business, and the nature and application of dividends are fully set forth in *Mutual Benefit Life Ins. Co.* v. *Herold*, 198 Fed. Rep. 199; *Connecticut General Life Ins. Co.* v. *Eaton*, 218 Fed. Rep. 188; *Connecticut Mutual Life Ins. Co.* v. *Eaton*, 218 Fed. Rep. 206.

the corporations upon which the income tax is imposed, "every insurance company" other than "fraternal beneficiary societies, orders, or associations operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system." It provides (G. (b) pp. 172–174) how the net income of insurance companies shall be ascertained for purposes of taxation, prescribing what shall be included to determine the gross income of any year, and also specifically what deductions from the ascertained gross income shall be made in order to determine the net income upon which the tax is assessed. Premium receipts are a part of the gross income to be accounted for.

In applying to insurance companies the system of income taxation in which the assessable net income is to be ascertained by making enumerated deductions from the gross income (including premium receipts) Congress naturally provided how, in making the computation,[1] repayment of the redundancy in the premium should be dealt with. In a mutual company, whatever the field of its operation, the premium exacted is necessarily greater than the expected cost of the insurance, as the redundancy in the premium furnishes the guaranty fund out of which extraordinary losses may be met, while in a stock company they may be met from the capital stock subscribed. It is of the essence of mutual insurance that the excess in the premium over the actual cost as later ascertained shall be returned to the policyholder. Some payment to the

[1] The percentage of the redundancy to the premium varies, from year to year, greatly, in the several fields of insurance, and likewise in the same year in the several companies in the same field. Where the margin between the probable losses and those reasonably possible is very large, the return premiums rise often to 90 per cent. or more of the premium paid. This is true of the manufacturers' mutual fire insurance companies of New England. See Report Massachusetts Insurance Commissioner (1913), vol. I, p. 16.

policyholder representing such excess is ordinarily made by every mutual company every year; but the so-called repayment or dividend is rarely made within the calendar year in which the premium (of which it is supposed to be the unused surplus) was paid. Congress treated the so-called repayments or dividends in this way (p. 173):

(a) Mutual fire companies "shall not return as income any portion of the premium deposits returned to their policyholders."

(b) Mutual marine companies "shall be entitled to include in deductions from gross income amounts repaid to policyholders on account of premiums previously paid by them and interest paid upon such amounts between the ascertainment thereof and the payment thereof."

(c) Life insurance companies (that is both stock and strictly mutual) "shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year."

(d) For all insurance companies, whatever their field of operation, and whether stock or mutual, the act provides that there be deducted from gross income "the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts."

The Government contends, in substance, for the rule that in figuring the gross income of life insurance companies, there shall be taken the aggregate of the year's net premium receipts made up separately for each policyholder.[1] The Penn Mutual Company contends for the

[1] A separate account is kept by the company with each policyholder. In that account there is entered each year the charges of the premiums payable and all credits either for cash payments or by way of credit of dividends, or by way of abatement of premium.

rule that in figuring the gross income there shall be taken the aggregate full premiums received by the company less the aggregate of all dividends paid by it to any policyholder by credit upon a premium or by abatement of a premium and also of all dividends whatsoever paid to any policyholder in cash whether applied in payment of a premium or not. The non-inclusion clause, (c) above, excludes from gross income those premium receipts which were actually or in effect paid by applying dividends. The company seeks to graft upon the clause so restricted a provision for what it calls non-including, but which in fact is deducting, all cash dividends not so applied. In support of this contention the company relies mainly, not upon the words of the statute, but upon arguments which it bases upon the nature of mutual insurance, upon the supposed analogy of the rules prescribed in the statute for mutual fire and marine companies and upon the alleged requirements of consistency.

First: The reason for the particular provision made by Congress seems to be clear: Dividends may be made, and by many of the companies have been made largely, by way of abating or reducing the amount of the renewal premium.[1] Where the dividend is so made the actual premium receipt of the year is obviously only the reduced amount. But, as a matter of bookkeeping, the premium is

[1] The dividend provision of the Mutual Benefit Life Insurance Company involved in the *Herold Case, supra*, 198 Fed. Rep. 199, 204, was, in part: "After this policy shall have been in force one year, each year's premium subsequently paid shall be subject to reduction by such dividend as may be apportioned by the directors." The dividend provision in some of the participating policies involved in the *Connecticut General Life Ins. Co. Case, supra*, 218 Fed. Rep. 188, 192, was: "Reduction of premiums as determined by the company will be made annually beginning at the second year, or the insured may pay the full premium and instruct the company to apply the amount of reduction apportioned to him in any one of the following plans:" (Then follow four plans.)

entered at the full rate and the abatement (that is, the amount by which it was reduced) is entered as a credit. The financial result both to the company and to the policyholders is, however, exactly the same whether the renewal premium is reduced by a dividend or whether the renewal premium remains unchanged but is paid in part either by a credit or by cash received as a dividend. And the entries in bookkeeping would be substantially the same. Because the several ways of paying a dividend are, as between the company and the policyholder, financial equivalents, Congress, doubtless, concluded to make the incidents the same, also, as respects income taxation. Where the dividend was used to abate or reduce the full or gross premium—the direction to eliminate from the apparent premium receipts is aptly expressed by the phrase "shall not include," used in clause (c) above. Where the premium was left unchanged, but was paid in part by a credit or cash derived from the dividend the instruction would be more properly expressed by a direction to deduct those credits. Congress doubtless used the words "shall not include" as applied also to these credits because it eliminated them from the aggregate of taxable premiums as being the equivalent of abatement of premiums.

That such was the intention of Congress is confirmed by the history of the non-inclusion clause, (c) above. The provision in the Revenue Act of 1913, for taxing the income of insurance companies is in large part identical with the provision for the special excise tax upon them imposed by the Act of August 5, 1909, c. 6, § 38, 36 Stat. 112. By the latter act the net income of insurance companies was, also, to be ascertained by deducting from gross income "sums other than dividends, paid within the year on policy and annuity contracts"; but there was in that act no non-inclusion clause whatsoever. The question arose whether the provision in the Act of 1909, identical with (c)

above, prevented using in the computation the reduced renewal premiums instead of the full premiums, where the reduction in the premium had been effected by means of dividends. In *Mutual Benefit Life Insurance Co.* v. *Herold*, 198 Fed. Rep. 199, decided July 29, 1912, it was held that the renewal premium as reduced by such dividends should be used in computing the gross premium; and it was said (p. 212) that dividends so applied in reduction of renewal premiums "should not be confused with dividends declared in the case of a full-paid participating policy, wherein the policyholder has no further premium payments to make. Such payments having been duly met, the policy has become at once a contract of insurance and of investment. The holder participates in the profits and income of the invested funds of the company." On writ of error sued out by the Government the judgment entered in the District Court was affirmed by the Circuit Court of Appeals on January 27, 1913, 201 Fed. Rep. 918; but that court stated that it refrained from expressing any opinion concerning dividends on full-paid policies, saying that it did so "not because we wish to suggest disapproval, but merely because no opinion about these matters is called for now, as they do not seem to be directly involved." The non-inclusion clause in the Revenue Act of 1913, (c) above, was doubtless framed to define what amounts involved in dividends should be "non-included," or deducted, and thus to prevent any controversy arising over the questions which had been raised under the Act of 1909.[1] The petition for writ of certiorari applied for by the Government was not denied by this court until December 15, 1913, (231 U. S. 755), that is, after the passage of the act.

[1] Substantially the same questions were involved, also, in *Connecticut General Life Ins. Co.* v. *Eaton*, 218 Fed. Rep. 188, and *Connecticut Mutual Life Ins. Co.* v. *Eaton*, 218 Fed. Rep. 206, in which decisions were not, however, reached until the following year.

Second: It is argued that the nature of life insurance dividends is the same, whatever the disposition made of them; and that Congress could not have intended to relieve the companies from taxation to the extent that dividends are applied in payment of premiums and to tax them to the extent that dividends are not so applied. If Congress is to be assumed to have intended, in obedience to the demands of consistency, that all dividends declared under life insurance policies should be treated alike in connection with income taxation regardless of their disposition, the rule of consistency would require deductions more far-reaching than those now claimed by the company. Why allow so-called non-inclusion of amounts equal to the dividends paid in cash but not applied in reduction of renewal premium and disallow so-called non-inclusion of amounts equal to the dividends paid by a credit representing amounts retained by the company for accumulation or to be otherwise used for the policyholders' benefit? The fact is, that Congress has acted with entire consistency in laying down the rule by which in computing gross earnings certain amounts only are excluded; but the company has failed to recognise what the principle is which Congress has consistently applied. The principle applied is that of basing the taxation on receipts of net premiums, instead of on gross premiums. The amount equal to the aggregate of certain dividends is excluded, although they are dividends, because by reason of their application the net premium receipts of the tax are to that extent less. There is a striking difference between an aggregate of individual premiums, each reduced by means of dividends, and an aggregate of full premiums, from which it is sought to deduct amounts paid out by the company which have no relation whatever to premiums received within the tax year but which relate to some other premiums which may have been received many years earlier. The difference between the two

cases is such as may well have seemed to Congress sufficient to justify the application of different rules of taxation.

There is also a further significant difference. All life insurance has in it the element of protection. That afforded by fraternal beneficiary societies, as originally devised, had in it only the element of protection. There the premiums paid by the member were supposed to be sufficient, and only sufficient, to pay the losses which will fall during the current year; just as premiums in fire, marine, or casualty insurance are supposed to cover only the losses of the year or other term for which the insurance is written. Fraternal life insurance has been exempted from all income taxation; Congress having differentiated these societies, in this respect as it had in others, from ordinary life insurance companies. Compare *Supreme Council of the Royal Arcanum* v. *Behrend*, 247 U. S. 394. But in level-premium life insurance, while the motive for taking it may be mainly protection, the business is largely that of savings investment. The premium is in the nature of a savings deposit. Except where there are stockholders, the savings bank pays back to the depositor his deposit with the interest earned less the necessary expense of management. The insurance company does the same, the difference being merely that the savings bank undertakes to repay to each individual depositor the whole of his deposit with interest; while the life insurance company undertakes to pay to each member of a class the average amount (regarding the chances of life and death); so that those who do not reach the average age get more than they have deposited, that is, paid in premiums (including interest) and those who exceed the average age less than they deposited (including interest). The dividend of a life insurance company may be regarded as paying back part of these deposits called premiums. The dividend is made possible because the amounts paid in as premium have earned

more than it was assumed they would when the policy contract was made, or because the expense of conducting the business was less than it was then assumed it would be or because the mortality, that is the deaths in the class to which the policyholder belongs, proved to be less than had then been assumed in fixing the premium rate. When for any or all of these reasons the net cost of the investment (that is, the right to receive at death or at the endowment date the agreed sum) has proved to be less than that for which provision was made, the difference may be regarded either as profit on the investment or as a saving in the expense of the protection. When the dividend is applied in reduction of the renewal premium, Congress might well regard the element of protection as predominant and treat the reduction of the premium paid by means of a dividend as merely a lessening of the expense of protection. But after the policy is paid up, the element of investment predominates and Congress might reasonably regard the dividend substantially as profit on the investment.

The dividends, aggregating $686,503, which the Penn Mutual Company insists should have been "non-included," or more properly deducted, from the gross income, were, in part, dividends on the ordinary limited payment life policies which had been paid-up. There are others which arose under policy contracts in which the investment feature is more striking; for instance, the Accelerative Endowment Policy or such special form of contract as the 25-year "6% Investment Bond" matured and paid March, 1913, on which the policyholder received besides dividends, interest and a "share of forfeitures." In the latter, as in "Deferred Dividend" and other semi-tontine policies, the dividend represents in part what clearly could not be regarded as a repayment of excess premium of the policyholder receiving the dividend. For the "share of the forfeiture" which he receives is the share of the redundancy in premium of other policyholders who

did not persist in premium payments to the end of the contract period.

Third: The non-inclusion clause here in question, (c) above, is found in § II G. (b) in juxtaposition to the provisions, concerning mutual fire and mutual marine companies, clauses (a) and (b) above. The fact that in three separate clauses three different rules are prescribed by Congress for the treatment of redundant premiums in the three classes of insurance, would seem to be conclusive evidence that Congress acted with deliberation and intended to differentiate between them in respect to income taxation. But the company, ignoring the differences in the provisions concerning fire and marine companies respectively, insists that mutual life insurance rests upon the same principles as mutual fire and marine and that as the clauses concerning fire and marine companies provide specifically for non-inclusion in or deduction from gross income of all portions of premiums returned, Congress must have intended to apply the same rule to all. Neither premise nor conclusion is sound.

Mutual fire, mutual marine and mutual life insurance companies are analogous in that each performs the service called insuring wholly for the benefit of their policyholders and not like stock insurance companies in part for the benefit of persons who as stockholders have provided working capital on which they expect to receive dividends representing profits from their investment. In other words, these mutual companies are alike in that they are coöperative enterprises. But in respect to the service performed fire and marine companies differ fundamentally, as above pointed out, from legal reserve life companies. The thing for which a fire or marine insurance premium is paid is protection, which ceases at the end of the term. If after the end of the term a part of the premium is returned to the policyholder, it is not returned as something purchased with the premium, but as a part of the premium

which was not required to pay for the protection; that is, the expense was less than estimated. On the other hand, the service performed in level-premium life insurance is both protection and investment. Premiums paid—not in the tax year, but perhaps a generation earlier—have earned so much for the coöperators, that the company is able to pay to each not only the agreed amount but also additional sums called dividends; and have earned these additional sums, in part at least, by transactions not among the members, but with others; as by lending the money of the coöperators to third persons who pay a larger rate of interest than it was assumed would be received on investments. The fact that the investment resulting in accumulation or dividend is made by a coöperative as distinguished from a capitalistic concern does not prevent the amount thereof being properly deemed a profit on the investment. Nor does the fact that the profit was earned by a coöperative concern afford basis for the argument that Congress did not intend to tax the profit. Congress exempted certain coöperative enterprises from all income taxation, among others, mutual savings banks; but, with the exception of fraternal beneficiary societies, it imposed in express terms such taxation upon "every insurance company." [1]

The purpose of Congress to differentiate between mutual fire and marine insurance companies on the one hand and life insurance companies on the other is further manifested by this: The provision concerning return premiums in computation of the gross income of fire and marine insurance companies is limited in terms to mutual companies, whereas the non-inclusion clause, (c) above, relating to life

[1] The alleged unwisdom and injustice of taxing mutual life insurance companies while mutual savings banks were exempted had been strongly pressed upon Congress. Briefs and statements filed with Senate Committee on Finance on H. R. 3321—Sixty-third Congress, first session, Vol. 3, pp. 1955–2094.

insurance companies, applies whether the company be a stock or a mutual one. There is good reason to believe that the failure to differentiate between stock and mutual life insurance companies was not inadvertent. For while there is a radical difference between stock fire and marine companies and mutual fire and marine companies, both in respect to the conduct of the business and in the results to policyholders, the participating policy commonly issued by the stock life insurance company is, both in rights conferred and in financial results, substantially the same as the policy issued by a purely mutual life insurance company. The real difference between the two classes of life companies as now conducted lies in the legal right of electing directors and officers. In the stock company stockholders have that right; in the mutual companies, the policyholders who are the members of the corporation.

The Penn Mutual Company, seeking to draw support for its argument from legislation subsequent to the Revenue Act of 1913, points also to the fact that by the Act of September 8, 1916, c. 463, 39 Stat. 756, 768, § 12, subsection second, subdivision c, the rule for computing gross income there provided for mutual fire insurance companies was made applicable to mutual employers' liability, mutual workmen's compensation and mutual casualty insurance companies. It asserts that thereby Congress has manifested a settled policy to treat the taxable income of mutual concerns as not including premium refunds; and that if mutual life insurance companies are not permitted to "exclude" them, these companies will be the only mutual concerns which are thus discriminated against. Casualty insurance, in its various forms, like fire and marine insurance, provides only protection, and the premium is wholly an expense. If such later legislation could be considered in construing the Act of 1913, the conclusion to be drawn from it would be clearly the opposite of that urged. The later act would tend to show that Congress

persists in its determination to differentiate between life and other forms of insurance.

Fourth: It is urged that in order to sustain the interpretation given to the *non-inclusion* clause by the Circuit Court of Appeals (which was, in effect, the interpretation set forth above) it is necessary to interpolate in the clause the words "within such year," as shown in italics in brackets, thus:

"And life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder [*within such year*] as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year."

What has been said above shows that no such interpolation is necessary to sustain the construction given by the Circuit Court of Appeals. That court did not hold that the permitted non-inclusion from the year's gross income is limited to that portion of the premium received within the year which, by reason of a dividend, is paid back within the same year. What the court held was that the non-inclusion is limited to that portion of the premium which, although entered on the books as received, was not actually received, within the year, because the full premium was, by means of the dividend, either reduced, or otherwise wiped out to that extent. Nor does the Government contend that any portion of a premium, not received within the tax year, shall be included in computing the year's gross income. On the other hand what the company is seeking is not to have "non-included" a part of the premiums which were actually received within the year, or which appear, as matter of bookkeeping to have been received but actually were not. It is seeking to have the aggregate of premiums actually received within the year *reduced* by an amount which the company paid out within

the year; and which it paid out mainly on account of premiums received long before the tax year. What it seeks is not a *non-inclusion* of amounts paid in—but a *deduction* of amounts paid out.

If the terms of the non-inclusion clause, (c) above, standing alone, permitted of a doubt as to its proper construction, the doubt would disappear when it is read in connection with the deduction clause, (d) above. The deduction there prescribed is of "the sums other than dividends paid within the year on policy and annuity contracts." This is tantamount to a direction that dividends shall not be deducted. It was argued that the dividends there referred to are "commercial" dividends like those upon capital stock; and that those here involved are dividends of a different character. But the dividends which the deduction clause says, in effect, shall not be deducted, are the very dividends here in question, that is dividends "on policy and annuity contracts." None such may be deducted by any insurance company except as expressly provided for in the act, in clauses quoted above, (a) (b) and (c). That is, clauses (a) (b) and (c) are, in effect, exceptions to the general exclusion of dividends from the permissible deductions as prescribed in clause (d) above.

In support of the company's contention that the interpolation of the words "within the year" is necessary in order to support the construction given to the act by the Circuit Court of Appeals we are asked to consider the legislative history of the Revenue Act of 1918 (enacted February 24, 1919, c. 18, 40 Stat. 1057); and specifically to the fact that in the bill as introduced in and passed by the House, the corresponding section (233 (a)) contained the words "within the taxable year" and that these words were stricken out by the Conference Committee (Report No. 1037, 65th Cong., 3d sess.) The legislative history of an act may, where the meaning of the words used is doubt-

ful, be resorted to as an aid to construction. *Caminetti* v. *United States*, 242 U. S. 470, 490. But no aid could possibly be derived from the legislative history of another act passed nearly six years after the one in question. Further answer to the argument based on the legislative history of the later act would, therefore, be inappropriate.

We find no error in the judgment of the Circuit Court of Appeals. It is

Affirmed.

ESTATE OF P. D. BECKWITH, INC. *v.* COMMISSIONER OF PATENTS.

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

No. 178. Argued January 23, 1920.—Decided April 19, 1920.

The Trade-Mark Registration Act declares (§ 5) that no mark by which the goods of the owner may be distinguished from other goods of the same class shall be refused registration on account of the nature of such mark, with certain exceptions, and with the proviso that no mark shall be registered which consists merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods. *Held*, that a mark consisting of a fanciful design in combination with certain words forming part of it was not debarred from registration by reason of the fact that some of the words—"Moistair Heating System"—were descriptive; that to require the deletion of such descriptive words because of their descriptive quality as a condition to registration of the mark, was erroneous; and that the act would be fully complied with if registration were permitted with an appropriate declaration on the part of the applicant disclaiming any right to the exclusive use of the descriptive words except in the setting and relation in which they appeared in the drawing, description and samples filed with the application. P. 543.

While there is no specific provision for disclaimers in the statute, the practice of using them is approved. P. 545.

The statute should be construed liberally, in fulfillment of its purpose, to promote the domestic and foreign trade of the country. P. 545. 48 App. D. C. 110, reversed.

THE case is stated in the opinion.

Mr. Harry C. Howard for petitioner.

Mr. Assistant Attorney General Davis, for respondent, submitted. *Mr. Edward G. Curtis*, Special Assistant to the Attorney General, was on the brief.

MR. JUSTICE CLARKE delivered the opinion of the court.

The petitioner, a corporation, filed an application in the Patent Office for the registration of a trade-mark, which is described as follows:

"A design like a seal, comprising the head of an Indian chief surmounting a scroll bearing his name, 'Doe-Wah-Jack,' and surrounded by a circle, outside of which appear the words 'Round Oak' and 'Moistair Heating System' in a circle, and the whole being surrounded by a wreath of oak leaves."

It will be useful to reproduce the drawing filed with this application:

It was averred that the petitioner had used the mark for more than eighteen months before the application

was made by applying it to "Hot air and combined hot air and hot water heaters and furnaces . . . by having the same cast into the metal of which the systems are constructed."

The Commissioner found that the mark did not conflict with any other that was registered, and that the petitioner was entitled to the exclusive use of it excepting the words "Moistair Heating System." It was ordered that the mark might be registered if the excepted words, objectionable because descriptive, were "erased" or "removed" from it, but that the filing of a disclaimer would not suffice to secure registration.

Not satisfied with this result, the petitioner appealed to the Court of Appeals of the District of Columbia, and its judgment affirming the decision of the Commissioner of Patents is before us for review.

The ground of both decisions is that the words "Moistair Heating System" are merely descriptive of a claimed merit of the petitioner's system—that in the process of heating, moisture is added to the air—and that one person may not lawfully monopolize the use of words in general use which might be used with equal truthfulness to describe another system of heating. For this reason it was held that the case falls within the proviso of the Registration Act of 1905, declaring that no mark consisting merely in words or devices which are descriptive of the goods with which they are used or of the character or quality of such goods shall be registered under the terms of the act. (Act of February 20, 1905, c. 592, § 5, 33 Stat. 725, amended January 8, 1913, c. 7, 37 Stat. 649.)

No question of patent right or of unfair competition, or that the design of the trade-mark is so simple as to be a mere device or contrivance to evade the law and secure the registration of non-registrable words, is involved. *Nairn Linoleum Co.* v. *Ringwalt Linoleum Works*, 46 App. D. C. 64, 69.

This statement makes it apparent that the question presented for decision is: Whether the applicant may lawfully register the words "Moistair Heating System" when combined with the words "Round Oak," as a part of its purely fanciful and arbitrary trade-mark design, as shown in the drawing filed, and when claim to exclusive use of the words apart from the mark shown in the drawing is disclaimed on the record?

An account of the process of decision, in the Patent Office and in the Court of Appeals, by which the result in this case was arrived at, as it appears in the brief of the Commissioner of Patents, is suggestive and useful. From this we learn that when a mark has been presented for registration consisting merely (only) of descriptive words or devices, registration has been uniformly refused. When "composite" marks—such as contain both registrable and non-registrable matter—have been presented for registry with features in them which conflicted with earlier marks, registered by other than the applicant, the complete rejection, "eradication," of the conflicting portions has been uniformly required before registry was allowed. But where there was no such conflict, and the only objection was that descriptive words were used, the practice of the Patent Office prior to the decision, in 1909, of *Johnson* v. *Brandau*, 32 App. D. C. 348, was to permit the registration of marks containing such words, where they were associated with registrable words or were a part of an arbitrary or fanciful design or device, it being considered not necessary to delete the descriptive matter, even when it was an essential part of the composite trade-mark as it had been used by the applicant, provided it was clearly not susceptible of exclusive appropriation under the general rules of law. After the decision of *Johnson* v. *Brandau*, 32 App. D. C. 348, a practice grew up in the Patent Office, not provided for in the statute, of allowing an applicant to disclaim objectionable de-

scriptive words in cases where to require their actual removal would result in so changing the mark that it would not readily be recognized as that shown in the drawing or specimen filed with the application. The customary form of such disclaimer was a statement filed that no claim was made to the designated words, as for example, "Moistair Heating System," apart from the mark shown in the drawing—this was interpreted as meaning that only when taken in connection with the remaining features of the mark did the applicant make claim to their exclusive use. *Ex parte Illinois Seed Co.*, 219 O. G. 931.

Such disclaimer became a part of the applicant's statement in the record and necessarily formed a part of the certificate of registration as it would appear in the copies of it furnished to the applicant and the public, pursuant to § 11 of the act.

Then came the decisions in *Fishbeck Soap Co.* v. *Kleeno Manufacturing Co.*, 44 App. D. C. 6, and *Nairn Linoleum Co.* v. *Ringwalt Linoleum Works*, 46 App. D. C. 64, which, says the Commissioner of Patents, were understood as disapproving the practice of disclaimer, and since they were rendered, registration of merely descriptive matter has not been allowed in any form, but its actual deletion from the trade-mark drawing has been required,—with, however, an apparent exception in the case of *Rhynsburger*, 8 T. M. Rep. 467; 128 MS. Dec. 141. The judgment we are considering requiring, as it does, the "elimination" of the descriptive words, shows that the Commissioner correctly interpreted these two decisions of the Court of Appeals.

It is apparent from this rehearsal that the Commissioner of Patents has promptly and cordially accepted for his guidance the decisions of the Court of Appeals and, although he avoids a controversial attitude in his brief and gives a colorless history of the practice of his office,

still it is manifest that, in this case and in others, the court has very radically changed that practice with respect to permitting registry of composite trade-marks and that its decisions have turned upon the construction of the second proviso, referred to, in the fifth section of the Registration Act, which is made the basis of the judgment we are reviewing.

The Registration Act of 1905 (33 Stat. 724), amended in 1906 (34 Stat. 168) and in 1909 (35 Stat. 627) and in 1913 (37 Stat. 649), without changing the substantive law of trade-marks, provided, in the manner prescribed, for the registration of marks, (subject to special exceptions) which, without the statute, would be entitled to legal and equitable protection, and the case before us calls chiefly for the construction of the provisions of § 5 of that act, which, so far as here involved, are as follows:

"That no *mark* by which the goods of the owner of the mark may be distinguished from other goods of the same class *shall be refused registration* as a trade-mark on account of the nature of such mark unless, etc. . . .

"*Provided*, That *no mark which consists* . . . merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods . . . *shall be registered* under the terms of this Act."

It was settled long prior to the Trade-Mark Registration Act that the law would not secure to any person the exclusive use of a trade-mark consisting merely of words descriptive of the qualities, ingredients or characteristics of an article of trade. This for the reason that the function of a trade-mark is to point distinctively, either by its own meaning or by association, to the origin or ownership of the wares to which it is applied, and words merely descriptive of qualities, ingredients or characteristics, when used alone, do not do this. Other like goods, equal to them in all respects, may be manufactured or

dealt in by others, who, with equal truth, may use, and must be left free to use, the same language of description in placing their goods before the public. *Canal Co.* v. *Clark*, 13 Wall. 311, 322, 323, 324; *Manufacturing Co.* v. *Trainer*, 101 U. S. 51, 54; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218, 222; *Goodyear's India Rubber Glove Mfg. Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537, 547; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *Elgin National Watch Co.* v. *Illinois Watch Case Co.*, 179 U. S. 665; *Standard Paint Co.* v. *Trinidad Asphalt Mfg. Co.*, 220 U. S. 446.

Thus the proviso quoted, being simply an expression in statutory form of the prior general rule of law that words merely descriptive are not a proper subject for exclusive trade-mark appropriation, if the application in this case had been to register only the words "Moistair Heating System" plainly it would have fallen within the terms of the prohibition, for they are merely descriptive of a claimed property or quality of the petitioner's heating system,—that by it moisture is imparted to the air in the process of heating. But the application was not to register these descriptive words "merely," alone and apart from the mark shown in the drawing, but in a described manner of association with other words, "Round Oak," which are not descriptive of any quality of applicant's heating system, and as a definitely positioned part of an entirely fanciful and arbitrary design or seal, to which the Commissioner found the applicant had the exclusive right.

Since the proviso prohibits the registration not of merely descriptive words but of a trade-mark "which consists . . . merely" (only) of such words—the distinction is substantial and plain—we think it sufficiently clear that such a composite mark as we have here does not fall within its terms. In this connection it must be noted that the requirement of the statute that

no trade-mark shall be refused registration, except in designated cases, is just as imperative as the prohibition of the proviso against registration in cases specified.

While there is no specific provision for disclaimers in the trade-mark statute, the practice of using them is commended to our judgment by the statement of the Commissioner of Patents that, so far as known, no harm came to the public from the practice of distinguishing, without deleting, non-registrable matter in the drawing of the mark as registered, when a statement, forming a part of the record, was required that the applicant was not making claim to an exclusive appropriation of such matter except in the precise relation and association in which it appeared in the drawing and description.

It seems obvious that no one could be deceived as to the scope of such a mark, and that the registrant would be precluded by his disclaimer from setting up in the future any exclusive right to the disclaimed part of it. It seems obvious also that to require the deletion of descriptive words must result often in so changing the trade-mark sought to be registered from the form in which it had been used in actual trade that it would not be recognized as the same mark as that shown in the drawing, which the statute requires to be filed with the application, or in the specimens produced as actually used, and therefore registration would lose much, if not all, of its value. The required omission might so change the mark that in an infringement suit it could be successfully urged that the registered mark had not been used,—and user is the foundation of registry (§ 2). Of this last the case before us furnishes an excellent example. To strike out "Moistair Heating System" from the applicant's trade-mark would so change its appearance that its value must be largely lost as designating to prior purchasers or users the origin of the heating system to which it was applied.

The commercial impression of a trade-mark is derived

from it as a whole, not from its elements separated and considered in detail. For this reason it should be considered in its entirety (*Johnson* v. *Brandau*, *supra*) and to strike out any considerable part of it, certainly any conspicuous part of it, would be to greatly affect its value. Of course, refusal to register a mark does not prevent a former user from continuing its use, but it deprives him of the benefits of the statute, and this should not be done if it can be avoided by fair, even liberal, construction of the act, designed as it is to promote the domestic and foreign trade of our country.

Thus the case comes to this: That the Commissioner found that the trade-mark presented for registration did not conflict with any theretofore registered and there is no suggestion of unfair practice in the past or contemplated in the future; that it had been used for eighteen months in the form proposed for registry; that the words ordered to be stricken out from the drawing are descriptive but the mark does not consist "merely" in such words, but is a composite of them with others, and with an arbitrary design which, without these words, both the Commissioner and the court found to be registrable; that the language of the statute that no mark not within its prohibitions or provisos shall be denied registration is just as imperative as the prohibitory words of the proviso; and, very certainly, that a disclaimer on the part of applicant that no claim is made to the use of the words "Moistair Heating System" apart from the mark as shown in the drawing and as described, would preserve to all others the right to use these words in the future to truthfully describe a like property or result of another system, provided only that they be not used in a trade-mark which so nearly resembles that of the petitioner "as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers" when applied "to merchandise of the same descriptive properties" (§ 5).

Such being the ultimate facts of this controversy, we cannot doubt that the Court of Appeals fell into error in ruling that the words "Moistair Heating System" must be "eliminated" from the trade-mark of the applicant as it had been theretofore used, and that the requirement of the act of Congress for the registration of trade-marks would be fully complied with if registration of it were permitted with an appropriate declaration on the part of the applicant that no claim is made to the right to the exclusive use of the descriptive words except in the setting and relation in which they appear in the drawing, description and samples of the trade-mark filed with the application.

It results that the judgment of the Court of Appeals must be

Reversed.

MR. JUSTICE MCREYNOLDS dissents.

SIMPSON, SURVIVING EXECUTOR OF MOORE, v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 213. Argued March 17, 18, 1920.—Decided April 19, 1920.

In computing succession taxes payable under the War Revenue Act of 1898, upon legacies of the net income for life from funds placed with trustees for investment and reinvestment, it was lawful for the Commissioner of Internal Revenue to assess the legacies by means of general tables based on approved mortuary tables and on four per cent. as the assumed value of money. P. 550. 30 Stat. 448, §§ 29, 30; Rev. Stats., §§ 321, 3182.

The court takes judicial notice that, at the time when the taxes involved in this case were collected, four per cent. was very generally

assumed to be the fair value or earning power of money safely invested. P. 550.

Where a will directed conversion of residuary estate into money and its payment by the executors to a trustee of their selection, in trust for certain legatees, and where the trustee had been selected and the payments largely made, and there remained funds of the estate, clearly exceeding the requirements of pending claims, the payment of which to the trustee had become a duty of the executors enforceable by the legatees under the state law, *held*, that the interests of the legatees in such funds were vested, within the meaning of the Refunding Act of June 27, 1902, § 3, 32 Stat. 406. New York Code of Civil Procedure, 1899, §§ 2718, 2721 and 2722, considered. P. 551.

Proof that a suit by stockholders to obtain an accounting for promotion profits was pending against a firm of which a testator was a member, without showing the pleadings, the issues or character of the suit, the amount or merit of the claim, or the result of the litigation, *held*, insufficient to establish that legacies in funds in the hands of his executors were not vested, within the meaning of the Refunding Act of June 27, 1902, *supra*. P. 552.

53 Ct. Clms. 640, affirmed.

THE case is stated in the opinion.

Mr. Thomas M. Day, with whom *Mr. H. T. Newcomb* was on the brief, for appellant.

The Solicitor General, with whom *Mr. A. F. Myers* was on the brief, for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is a suit to recover the whole, or failing that, a large part of a succession tax assessed under the Spanish War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, and paid by the appellants as executors of the will of John G. Moore, deceased, a citizen of New York, who died in June, 1899.

The assessment was made against the appellants as persons having in charge or trust, as executors, legacies arising from personal property, and the contention is that right to recovery may be derived, either from the Act of Congress, approved July 27, 1912, c. 256, 37 Stat. 240, directing the Secretary of the Treasury to refund the amount of any claims which should be satisfactorily shown to have been "erroneously or illegally" assessed under warrant of § 29 of the War Revenue Act, or from the Act, approved June 27, 1902, c. 1160, 32 Stat. 406, which directs the Secretary of the Treasury to refund to executors so much of any tax as may have been collected under warrant of that act "on contingent beneficial interests which shall not have become vested prior to" July 1, 1902.

The decedent in his will directed his executors to convert a large residuary estate into money, to divide the same into three equal shares, and to transfer two of such shares to a trustee, to be selected by them, in trust to invest and reinvest and to pay to each of his two daughters the whole of the net income of one share so long as she should live.

Pursuant to authority derived from § 31 of the War Revenue Act and Rev. Stats., §§ 321 and 3182, the Commissioner of Internal Revenue, in order to provide for the determination of the amount of taxes to be assessed on legacies such as are here involved, on December 16, 1898, issued instructions to Collectors of Internal Revenue throughout the country, which contained tables showing the present worth of life interests in personal property, with directions for computing the tax upon the same. These tables were based on "Actuaries'" or "Combined Experience Tables," and were used in arriving at the amounts paid in this case.

On June 30, 1899, letters testamentary were issued to appellants as executors, and on April 1, 1901, the United States Commissioner of Internal Revenue, pursuant to the provisions of § 29 of the Spanish War Revenue Act, as-

sessed a tax of about $12,000 on the share of each daughter, which was paid on April 15, 1901.

On October 29, 1907, appellants presented to the Government their claim, which was rejected, for the refund of $21,640.55 of the taxes so paid, "or such greater amount thereof as the Commissioner might find to be refundable, under the Refunding Act of June 27, 1902, or other remedial statutes."

The judgment of the Court of Claims, dismissing the amended petition as to the claims for refund of the tax paid on the legacies of the two daughters, and on three small legacies which will follow the disposition of these, and need no further notice, is before us for review.

Of the two claims of error argued, the first is, that the Court of Claims erred in refusing to hold that it was illegal to use mortuary tables and to assume four per cent. as the value of money in computing the tax that was paid, and that, therefore, the whole amount of it should be refunded.

The objection is not to the particular table that was used but to the use of any such table at all—to the method. Such tables, indeed the precise table which was made the basis of the one used by the collector, had been resorted to for many years prior to 1899 by courts, legislatures and insurance companies for the purpose of determining the present value of future contingent interests in property, and we take judicial notice of the fact that at the time this tax was collected four per cent. was very generally assumed to be the fair value or earning power of money safely invested. Both the method and the rate adopted in this case have been assumed by this court, without discussion, as proper in computing the amount of taxes to be collected under this War Revenue Act in *Knowlton* v. *Moore*, 178 U. S. 41, 44; *United States* v. *Fidelity Trust Co.*, 222 U. S. 158; *Rand* v. *United States*, 249 U. S. 503, 506, and in *Henry* v. *United States*, 251 U. S. 393. It is much too late to successfully assail a method so generally ap-

plied, and as to this claim of error the judgment of the Court of Claims is affirmed.

The facts following are essential to the disposition of the remaining question. The appellant executors appointed a trust company trustee for the two daughters of decedent and prior to July 1, 1902, they paid to it, in trust for each of them the sum of $426,086.66. After making these payments the executors had in their custody in cash and securities in excess of $1,797,000, from which, prior to March 16, 1906, they made further payments, amounting approximately to $500,000 to the trust fund for each of the daughters, thereby making each of them exceed $926,000. The assessment of each was $665,000 in April, 1901.

The contention is that the excess of the assessment above the amount which had been actually paid to the trustee prior to July 1, 1902, had not become vested prior to that date, within the meaning of the Act of June 27, 1902 (32 Stat. 406, § 3), and that it should therefore be refunded.

The law of New York in force when the estate was in process of administration, provided (New York Code of Civil Procedure, 1899, § 2721) that "after the expiration of one year (from the time of granting letters testamentary) the executors . . . must discharge the specific legacies bequeathed by the will and pay general legacies, if there be assets," and § 2722 gave to legatees the right to petition in an appropriate court to compel payment of their legacies after the expiration of such year.

Letters testamentary were granted to the appellants on June 30, 1899, and we have seen that assets abundantly sufficient to have increased the trust fund legacies of the daughters much beyond the amount at which they were assessed for taxation were in the custody of the executors prior to July 1, 1902, and therefore under this law of New York it was their duty to have made such payments prior to that date unless cause was shown for not so doing.

The state law also authorized (§ 2718) the executors to publish a notice once in each week for six months, requiring all creditors to present their claims against the estate, and provided that in suits brought on any claim not presented within six months from the first publication of such notice, the executors should not be chargeable for any assets which they may have paid out in satisfaction of legacies.

The appellants first published the notice to creditors on April 25, 1900, and therefore they might safely have made payment on the daughters' legacies after the 1st of November, 1900, one year and eight months prior to July 1, 1902, unless cause to the contrary was shown.

The only excuse given in the record for not complying with this state law is that in March, 1902, a stockholders' suit was commenced against the partnership of Moore & Schley, of which the deceased was a member, in which an accounting was sought for a large amount of promotion profits in connection with the organization of the American Malt Company. As to this the Court of Claims finds that the evidence does not show the pleadings, issues or the character of the suit, or the amount or merit of the claim, or the result of the litigation. Obviously, such a showing of such a suit cannot be considered to have been a genuine obstacle to settlement of the estate, and the other claims against it were negligible in comparison with the available assets.

It is thus apparent that for many months prior to July 1, 1902, there were abundant assets with which to make payments upon these two legacies, in an amount larger than was necessary to make them equal to, and greater than, that for which they were assessed for taxation; that for many months before that date it was the legal duty of the executors to make such payment; and that for a like time the legatees had a statutory right to institute suit to compel payment.

It is obvious that legacies which it was thus the legal

duty of the executors to pay before July 1, 1902, and for compelling payment of which a statutory remedy was given to the legatees before that date, were vested in possession and enjoyment, within the meaning of the Act of June 27, 1902, as it was interpreted in *United States* v. *Fidelity Trust Co.*, 222 U. S. 158; *McCoach* v. *Pratt*, 236 U. S. 562, 567; and in *Henry* v. *United States*, 251 U. S. 393. The case would be one for an increased assessment, rather than for a refund, if the War Revenue Act had not been repealed.

Affirmed.

MR. JUSTICE MCREYNOLDS did not participate in the discussion or decision of this case.

CANADIAN NORTHERN RAILWAY COMPANY *v.* EGGEN.

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

No. 281. Argued March 1, 1920.—Decided April 19, 1920.

The "privileges and immunities" clause of the Constitution, Art. IV, § 2, protects rights which are in their nature fundamental, including the right of a citizen of one State to institute and maintain actions in the courts of another; but in that respect the requirement is satisfied if the non-resident be given access to the courts upon terms that are reasonable and adequate for enforcing whatever rights he may have, even though the terms be not the same as are accorded to resident citizens. P. 562.

The power is in the courts, ultimately in this one, to decide whether the terms allowed the non-resident are reasonable and adequate. *Id.*

A Minnesota statute, in force since 1858, provides that when a cause of action has arisen outside of the State and, by the laws of the place

where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in the State unless the plaintiff be a citizen thereof who has owned the cause of action ever since it accrued. *Held* constitutional as applied to an action in Minnesota by a citizen of South Dakota against a Canadian corporation for personal injuries sustained by the plaintiff in Canada, the Canadian limitation in such cases being one year, whereas the time allowed in Minnesota, apart from the above provision, is six years. P. 559.
255 Fed. Rep. 937, reversed.

THE case is stated in the opinion.

Mr. William D. Mitchell, with whom *Mr. Pierce Butler* was on the brief, for petitioner:

The power to classify exists, and a difference in right or privilege resulting from classification is not objectionable, provided the classification has a reasonable basis, and rests on a real distinction which bears a just relation to the attempted classification and is not a mere arbitrary selection. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 294.

Granting the power of classification, we must grant government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322, 331. Such classification need not be either logically appropriate or scientifically accurate. *District of Columbia* v. *Brooke*, 214 U. S. 138, 150. *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 148, 149, must be read in the light of these principles.

The Constitution does not prohibit a discrimination between residents of different States as to the time within which a suit may be commenced if it is based upon a practical difference in the conditions which have surrounded the prosecution of the claim, resulting from a difference in residence. Residence, as affecting the facility for bringing suit, is an important factor in all statutes of limitation. A difference is made in the time allowed to

bring suit against resident and non-resident defendants. Such discrimination in favor of a resident defendant is not invalid.

In the Minnesota statute, the basis for the distinction made by the exception is not merely the fact of residence or citizenship in Minnesota, but the fact that the resident plaintiff, who has owned the cause of action since it accrued, cannot be charged with the same delinquency in prosecuting his claim against a non-resident as is chargeable to a non-resident plaintiff or is imputed to a resident plaintiff who has purchased the claim by assignment from a non-resident. The statute is not a clear and hostile discrimination against citizens of other States. Citizenship is not the sole basis for the discrimination. The exception favors only those who have owned the cause of action since it accrued. Again, it is only where the foreign statute prescribes a shorter period of limitation than the Minnesota statute that any difference exists between resident and non-resident plaintiffs. It applies only to causes of action arising outside of the State.

It may be suggested that the test applied by the statute is not residence, but citizenship, and therefore the justification for classification fails. But the word "citizen," as used in state statutes, is often synonymous with the word "resident" and may be so construed. *Cairnes* v. *Cairnes*, 29 Colorado, 260; *Union Hotel Co.* v. *Hersee*, 79 N. Y. 454; *Smith* v. *Birmingham Water Works Co.*, 104 Alabama, 315; *Risewick* v. *Davis*, 19 Maryland, 82, 93; *Judd* v. *Lawrence*, 55 Massachusetts, 531; *Bacon* v. *Board of State Tax Commissioners*, 126 Michigan, 22; *Cobbs* v. *Coleman*, 14 Texas, 594, 597; *State* v. *Trustees*, 11 Ohio St. 24, 28; *Baughman* v. *National Waterworks Co.*, 46 Fed. Rep. 4, 7; *Harding* v. *Standard Oil Co.*, 182 Fed. Rep. 421; *Devanney* v. *Hanson*, 60 W. Va. 3; *Sedgwick* v. *Sedgwick*, 50 Colorado, 164; *Stevens* v. *Larwill*, 110 Mo. App. 140.

The evident purpose of the legislature and the principles underlying this statute would justify this interpretation if necessary to sustain it. The word "citizen" was used to make it clear that permanent residence or domicile, and not temporary residence, is the test. But if the word "citizen" be accepted as having a different meaning than "resident," the result is the same. Under the Fourteenth Amendment, to be a citizen of Minnesota a person must be a resident of the State.

If the validity of this statute be in doubt, legislative and judicial acquiescence in the validity of such statutes for a long period should operate to resolve that doubt in favor of the statute. The statutes of many other States are substantially identical in terms with, or embody the same principle as, the Minnesota statute. They use the word "citizen," instead of "resident." They have been applied by the courts in hundreds of cases, covering over a period of nearly three-quarters of a century. See, for example, *Penfield* v. *Chesapeake &c. R. R. Co.*, 134 U. S. 351.

The validity of such statutes has been questioned in but four cases (*Chemung Canal Bank* v. *Lowery*, 93 U. S. 72; *Aultman & Taylor Co.* v. *Syme*, 79 Fed. Rep. 238; *Robinson* v. *Oceanic Steam Nav. Co.*, 112 N. Y. 315; *Klotz* v. *Angle*, 220 N. Y. 347), but in each the discrimination between residents and non-residents has been sustained. If there be doubt as to the constitutionality of the law, this long acquiescence would be persuasive, and should be controlling. *Stuart* v. *Laird*, 1 Cranch, 299; *Field* v. *Clark*, 143 U. S. 649, 691.

Although there is a difference between a statute making a distinction between citizens and one making a distinction between residents, only aliens could take exception to the use of the word "citizen" instead of "resident." The privileges and immunities clause does not apply to aliens, and, as to the equal protection clause, it is enough

to say that no alien is a party to this suit, and only those injuriously affected can urge the invalidity of a statute. *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540.

Mr. Ernest A. Michel, with whom *Mr. Tom Davis* was on the brief, for respondent:

The effect and intent of the Minnesota statute is to give to citizens of Minnesota privileges which are denied to non-citizens. *Fletcher* v. *Spaulding*, 9 Minnesota, 54. The statute permits a discrimination based solely on the ground of citizenship.

A right of action to recover damages for an injury is property, which the legislature has no power to destroy. *Angle* v. *Chicago &c. Ry. Co.*, 151 U. S. 1. The action being properly brought, the State cannot keep and retain this privilege for its own citizens and deny it to citizens of other States. The word "privileges" must be confined to those privileges which are fundamental; and includes the right to institute and maintain actions of any kind in the courts of the State. *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 380. See also *Paul* v. *Virginia*, 8 Wall. 168, 180; *Ward* v. *Maryland*, 12 Wall. 418, 430; *Cole* v. *Cunningham*, 133 U. S. 107, 114; *Slaughter-House Cases*, 16 Wall. 36, 77. The right is not "merely procedural."

Respondent is denied the right to seek redress in the courts of Minnesota, because he is not a citizen of Minnesota, but is a citizen of South Dakota. Article IV, § 2, of the Constitution, intended to confer a general citizenship upon all citizens of the United States. *Cole* v. *Cunningham*, *supra;* and because the discrimination in the statute is based solely on citizenship, the statute must fall.

That the Minnesota statute is unconstitutional is conclusively settled by *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142. That case leaves it undisputed that the right to maintain actions in the courts is one of the fundamental privileges guaranteed and protected by the

Constitution, and that this right must be given to non-citizens the same as to citizens, no more, no less, and without any restrictions or reservations that are not of equal application to citizens and non-citizens. See also *Blake* v. *McClung*, 172 U. S. 239, 266; *Chalker* v. *Birmingham & Northwestern Ry. Co.*, 249 U. S. 522; *Maxwell* v. *Bugbee*, 250 U. S. 525.

The contention that to hold the statute unconstitutional would nullify statutes in existence for many years is not of great weight. *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364.

The statute also contravenes the Fourteenth Amendment.

Chemung Canal Bank v. *Lowery*, 93 U. S. 72, is not in point. The question of the authority of the legislature to pass the statute there involved is left wholly untouched. The question here is not a question of a reason for the statute; it is a question of power.

None of the cases cited by petitioner, holding generally that a reasonable classification is not a violation of the privileges and immunities clause, hold that any State may take away any fundamental right or privilege of a citizen of the United States solely because he does not happen to be a citizen of that State.

MR. JUSTICE CLARKE delivered the opinion of the court.

The only question presented for decision in this case is as to the validity of § 7709 of the Statutes of Minnesota (General Statutes of Minnesota, 1913), which reads:

"When a cause of action has arisen outside of this state and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintaind in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued."

The Circuit Court of Appeals, reversing the District

Court, held this statute invalid for the reason that the exemption in favor of citizens of Minnesota rendered it repugnant to Article IV, § 2, of the Constitution of the United States, which declares that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The action was commenced in the District Court of the United States for the District of Minnesota, Second Division, by the respondent, a citizen of South Dakota, against the petitioner, a corporation organized under the laws of the Dominion of Canada, to recover damages for personal injuries sustained by him on November 29, 1913, when employed by the petitioner as a switchman in its yards at Humboldt, in the Province of Saskatchewan. The respondent, a citizen and resident of South Dakota, went to Canada and entered the employ of the petitioner as a switchman a short time prior to the accident complained of. He remained in Canada for six months after the accident and then returned to live in South Dakota. He commenced this action on October 15, 1915, almost two years after the date of the accident. By the laws of Canada, where the cause of action arose, an action of this kind must be commenced within one year from the time injury was sustained. If the statute of Minnesota, above quoted is valid, it is applicable to the action, which, being barred in Canada, cannot be maintained in Minnesota by a non-resident plaintiff. If, however, the statute is invalid, the general statute of limitations of Minnesota, allowing a period of six years within which to commence action, would be applicable. The record properly presents the claim of the petitioner that the Circuit Court of Appeals erred in holding the statute involved unconstitutional and void.

It is plain that the act assailed was not enacted for the purpose of creating an arbitrary or vexatious discrimination against non-residents of Minnesota.

It has been in force ever since the State was admitted into the Union in 1858; it is in terms precisely the same as those of several other States, and in substance it does not differ from those of many more. It gives a non-resident the same rights in the Minnesota courts as a resident citizen has, for a time equal to that of the statute of limitations where his cause of action arose. If a resident citizen acquires such a cause of action after it has accrued, his rights are limited precisely as those of the non-resident are, by the laws of the place where it arose. If the limitation of the foreign State is equal to or longer than that of the Minnesota statute, the non-resident's position is as favorable as that of the citizen.

It is only when the foreign limitation is shorter than that of Minnesota, and when the non-resident who owns the cause of action from the time when it arose has slept on his rights until it is barred in the foreign State (which happens to be the respondent's case), that inequality results—and for this we are asked to declare a statute unconstitutional which has been in force for sixty years.

This court has never attempted to formulate a comprehensive list of the rights included within the "privileges and immunities" clause of the Constitution, Art. IV, § 2, but it has repeatedly approved as authoritative the statement by Mr. Justice Washington, in 1823, in *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 380 (the first federal case in which this clause was considered), saying: "We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental*." *Slaughter-House Cases*, 16 Wall. 36, 76; *Blake* v. *McClung*, 172 U. S. 239, 248; *Chambers* v. *Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 155. In this *Corfield Case* the court included in a partial list of such fundamental privileges, "The right of a citizen of one state, . . . to institute and maintain actions of any kind in the courts of another."

The State of Minnesota, in the statute we are considering, recognized this right of citizens of other States to institute and maintain suits in its courts as a fundamental right, protected by the Constitution, and for one year from the time his cause of action accrued the respondent was given all of the rights which citizens of Minnesota had under it. The discrimination of which he complains could arise only from his own neglect.

This is not disputed, nor can it be fairly claimed that the limitation of one year is unduly short, having regard to the likelihood of the dispersing of witnesses to accidents such as that in which the respondent was injured, their exposure to injury and death, and the failure of memory as to the minute details of conduct on which questions of negligence so often turn.—Thus, the holding of the Circuit Court of Appeals comes to this, that the privilege and immunity clause of the Constitution guarantees to a non-resident precisely the same rights in the courts of a State as resident citizens have, and that any statute which gives him a less, even though it be an adequate remedy, is unconstitutional and void.

Such a literal interpretation of the clause cannot be accepted.

From very early in our history, requirements have been imposed upon non-residents in many, perhaps in all, of the States as a condition of resorting to their courts, which have not been imposed upon resident citizens. For instance, security for costs has very generally been required of a non-resident, but not of a resident citizen, and a non-resident's property in many States may be attached under conditions which would not justify the attaching of a resident citizen's property. This court has said of such requirements:

"Such a regulation of the internal affairs of a State cannot reasonably be characterized as hostile to the fundamental rights of citizens of other States. . . .

It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each State of the privileges and immunities secured by the Constitution to citizens of the several States." *Blake* v. *McClung*, 172 U. S. 239, 256.

The principle on which this holding rests is that the constitutional requirement is satisfied if the non-resident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms. A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.

This is the principle on which this court has repeatedly ruled that contracts were not impaired in a constitutional sense by change in limitation statutes which reduced the time for commencing actions upon them, provided a reasonable time was given for commencing suit before the new bar took effect. *Sohn* v. *Waterson*, 17 Wall. 596; *Terry* v. *Anderson*, 95 U. S. 628, 632; *Tennessee* v. *Sneed*, 96 U. S. 69, 74; *Antoni* v. *Greenhow*, 107 U. S. 769, 774.

A like result to that which we are announcing was reached with respect to similar statutes, in *Chemung Canal Bank* v. *Lowery*, 93 U. S. 72; by the Circuit Court of Appeals, Second Circuit, in *Aultman & Taylor Co.* v. *Syme*, 79 Fed. Rep. 238; *in Klotz* v. *Angle*, 220 N. Y. 347, and in *Robinson* v. *Oceanic Steam Navigation Co.*, 112 N. Y. 315, 324. In this last case the Court of Appeals of New York pertinently says:

"A construction of the constitutional limitation [the one we are considering] which would apply it to such a case as this would strike down a large body of laws which have existed in all the states from the foundation of the government, making some discrimination between residents and non-residents in legal proceedings and other matters."

The laws of Minnesota gave to the non-resident respondent free access to its courts, for the purpose of enforcing any right which he may have had, for a year,—as long a time as was given him for that purpose by the laws under which he chose to live and work—and having neglected to avail himself of that law, he may not successfully complain because his expired right to maintain suit elsewhere is not revived for his benefit by the laws of the State to which he went for the sole purpose of prosecuting his suit. The privilege extended to him for enforcing his claim was reasonably sufficient and adequate and the statute is a valid law.

It results that the judgment of the Circuit Court of Appeals must be reversed and that of the District Court affirmed.

Reversed.

COMMONWEALTH OF PENNSYLVANIA v. STATE OF WEST VIRGINIA.

STATE OF OHIO v. STATE OF WEST VIRGINIA.

IN EQUITY.

Nos. 23 and 24, Original. Motions for appointment of special master, of commissioner and to consolidate submitted February 2, 1920.—Order entered April 19, 1920.

Order Consolidating Causes for the Purpose of Taking Testimony, Designating Times for Taking Testimony and Appointing Commissioner.

ON CONSIDERATION of the respective motions of the complainants for the appointment of a Special Master and of the defendant for the appointment of a Commissioner to take the testimony and report the same to the Court and of the motions to consolidate the cases for the purpose of taking such testimony,

IT IS NOW HERE ORDERED that the motions to consolidate the cases for the purpose of taking the proofs be, and the same are hereby, granted.

IT IS FURTHER ORDERED that Mr. Levi Cooke, of the District of Columbia, be, and he is hereby, appointed a Commissioner to take and return the testimony in these causes, with the powers of a Master in Chancery, as provided in the rules of this Court; but said Commissioner shall not make any findings of fact or state any conclusions of law.

IT IS FURTHER ORDERED that the complainants shall take their evidence, at such place or places as they may indicate, between the first day of May, 1920, and the first day of October, 1920, upon giving ten days' notice of the time and place of taking such evidence to the counsel for the defendant; that the defendant may take evidence, at such place or places as it may indicate, between the first day of October, 1920, and the first day of March, 1921, upon giving ten days' notice of the time and place of taking such evidence to the counsel for the complainants; that the complainants shall take their evidence in rebuttal between the first day of March, 1921, and the first day of April, 1921, at such place or places as they may indicate, upon giving ten days' notice to counsel for defendant, and the defendant shall then conclude the taking of its evidence in surrebuttal on or before the first day of May, 1921, upon giving ten days' notice of the time and place of taking such evidence to the counsel for complainants. *Provided, however*, that if complainants shall conclude the taking of their evidence in chief before

563. Order.

the first day of October, 1920, and shall give notice thereof, that time for the taking of evidence in chief on the part of defendant shall begin to run fifteen days after the giving of said notice by the complainants; and if the defendant shall conclude the taking of its evidence before the first day of March, 1921, and shall give notice thereof, the thirty-one days' time for the taking of evidence in rebuttal on behalf of the complainants shall begin to run fifteen days after the giving of said notice by the defendant; and the thirty days' time for the taking of evidence on behalf of defendant in surrebuttal shall begin to run from the termination of said thirty days' allowed for the taking of the evidence in rebuttal by the complainants; but nothing in this proviso contained shall operate or be construed to postpone the ultimate dates for the commencement of the time for the taking of the defendant's evidence in chief, the complainants' evidence in rebuttal and the defendant's evidence in surrebuttal, respectively, first above specified.

It is Further Ordered that the said complainants and the defendant, respectively, shall make such deposits with the Clerk of this Court for fees, costs and expenses of the said Clerk and of the said Commissioner as they may from time to time be requested by said Clerk.

DECISIONS PER CURIAM, FROM MARCH 1, 1920, TO AND INCLUDING APRIL 19, 1920, NOT INCLUDING ACTION ON PETITIONS FOR WRITS OF CERTIORARI.

No. 418. PRUDENTIAL INSURANCE COMPANY OF AMERICA *v.* ROBERT T. CHEEK. Error to the Supreme Court of the State of Missouri. Motion to dismiss submitted March 1, 1920. Decided March 8, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Schlosser* v. *Hemphill*, 198 U. S. 173, 175; *Louisiana Navigation Co.* v. *Oyster Commission of Louisiana*, 226 U. S. 99, 101; *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, 255; *Bruce* v. *Tobin*, 245 U. S. 18, 19. *Mr. Samuel W. Fordyce, Jr.*, and *Mr. Thomas W. White* for plaintiff in error. *Mr. Frederick H. Bacon* for defendant in error.

No. 669. GULF & SHIP ISLAND RAILROAD COMPANY ET AL. *v.* CARL BOONE ET AL., ETC. Error to the Supreme Court of the State of Mississippi. Motion to dismiss or affirm submitted March 1, 1920. Decided March 8, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *McCorquodale* v. *Texas*, 211 U. S. 432; *Consolidated Turnpike Co.* v. *Norfolk, etc., Ry. Co.*, 228 U. S. 326, 334; *St. Louis & San Francisco R. R. Co.* v. *Shepherd*, 240 U. S. 240, 241; *Bilby* v. *Stewart*, 246 U. S. 255, 257. *Mr. T. J. Wills* and *Mr. B. E. Eaton* for plaintiffs in error. *Mr. George Anderson* for defendants in error.

No. 692. CHEATHAM ELECTRIC SWITCHING DEVICE COMPANY *v.* TRANSIT DEVELOPMENT COMPANY ET AL.

Appeal from the District Court of the United States for the Eastern District of New York. Motion to dismiss or affirm submitted March 1, 1920. Decided March 8, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31, 37; *Brown* v. *Alton Water Co.*, 222 U. S. 325, 332–334; *Metropolitan Water Co.* v. *Kaw Valley District*, 223 U. S. 519, 522; *Shapiro* v. *United States*, 235 U. S. 412, 416. And see *Red Jacket, Jr., Coal Co.* v. *United Thacker Coal Co.*, 248 U. S. 531. *Mr. Albert M. Austin* for appellant. *Mr. Thomas J. Johnston* for appellees.

No. ——. UNION TRUST COMPANY *v.* WOODWARD & LOTHROP. Petition for allowance of an appeal herein submitted March 1, 1920. Denied March 8, 1920. *Mr. William G. Johnson* for petitioner.

No. ——, Original. *Ex parte;* IN THE MATTER OF JAMES F. BISHOP, ADMINISTRATOR, ETC., PETITIONER. Motion for leave to file a petition for a writ of prohibition herein submitted March 1, 1920. Denied March 8, 1920. *Mr. Harry W. Standidge* for petitioner.

No. 312. JOHN M. TANANEVICZ *v.* PEOPLE OF THE STATE OF ILLINOIS. Error to the Supreme Court of the State of Illinois. Motion to dismiss submitted March 8, 1920. Decided March 15, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) *Consolidated Turnpike Co.* v. *Norfolk, etc., Ry. Co.*, 228 U. S. 326, 334; *St. Louis & San Francisco R. R. Co.* v. *Shepherd*,

240 U. S. 240, 241; *Bilby* v. *Stewart*, 246 U. S. 255, 257. (2) *Brolan* v. *United States*, 236 U. S. 216, 218; *United Surety Co.* v. *American Fruit Co.*, 238 U. S. 140, 142; *Sugarman* v. *United States*, 249 U. S. 182, 184. (3) Section 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. *Mr. Emory J. Smith* for plaintiff in error. *Mr. Edward J. Brundage* and *Mr. Edward C. Fitch* for defendant in error.

No. 262. VIRGINIA AND WEST VIRGINIA COAL COMPANY *v.* GREEN CHARLES. Error to the Circuit Court of Appeals for the Fourth Circuit. Motion to dismiss submitted March 8, 1920. Decided March 15, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of: (1) Section 128 of the Judicial Code; *Shulthis* v. *McDougal*, 225 U. S. 561, 568; *Hull* v. *Burr*, 234 U. S. 712, 720; *St. Anthony Church* v. *Pennsylvania R. R. Co.*, 237 U. S. 575, 577; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439, 444. (2) *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526, 530; *Devine* v. *Los Angeles*, 202 U. S. 313, 333; *Shulthis* v. *McDougal*, 225 U. S. 561, 569. *Mr. A. M. Belcher* and *Mr. S. B. Avis* for plaintiff in error. *Mr. William H. Werth*, *Mr. A. S. Higenbotham* and *Mr. Edgar Lee Greever* for defendant in error.

No. 230. C. C. TAFT COMPANY *v.* STATE OF IOWA. Error to the Supreme Court of the State of Iowa. Argued March 12, 1920. Decided March 15, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of the Act of September 6, 1916, c. 448, § 6, 39 Stat. 726, 727. *Mr. Fred P. Carr* and *Mr. Robert M. Haines* for plaintiff in error, submitted. *Mr. F. C. David-*

son, with whom *Mr. H. M. Havner* was on the brief, for defendant in error.

No. 236. JAMES P. PARSONS *v.* WILLIAM H. MOOR ET AL. Error to the Supreme Court of the State of Ohio. Argued March 12, 1920. Decided March 15, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. *Mr. Charles F. Carusi* and *Mr. C. A. Thacher*, for plaintiff in error, submitted. *Mr. Herbert P. Whitney* for defendants in error.

No. —, Original. STATE OF NEW JERSEY *v.* A. MITCHELL PALMER, ATTORNEY GENERAL, ET AL. On motion for leave to file original bill. Motion submitted March 8, 1920. Order entered March 15, 1920.

ORDER. Application for leave to file bill granted and process ordered; but should the Attorney General be advised to move to dismiss, a motion to advance the hearing on the motion to dismiss to the earliest practicable day will be entertained, in order that the issues arising from such motion may be considered in connection with the controversies now under advisement resulting from the original bill filed by the State of Rhode Island and other causes involving kindred questions which are now also under submission. *Mr. Thomas F. McCran* for complainant.

No. 111. UNION PACIFIC COAL COMPANY *v.* MARK A. SKINNER, COLLECTOR OF INTERNAL REVENUE. Certiorari to the Circuit Court of Appeals for the Eighth Circuit. Submitted December 19, 1919. Decided March

22, 1920. *Per Curiam.* Affirmed with costs upon the authority of *Lynch* v. *Hornby*, 247 U. S. 339. *Mr. Henry W. Clark* for petitioner. *The Solicitor General* and *Mr. A. F. Myers* for respondent.

No. 227. McCay Engineering Company *v.* United States. Appeal from the Court of Claims. Argued March 11, 12, 1920. Decided March 22, 1920. *Per Curiam.* Affirmed by an equally divided court. Mr. Justice McReynolds took no part in the decision of this case. *Mr. George A. King*, with whom *Mr. M. Walton Hendry* and *Mr. George R. Shields* were on the brief, for appellant. *Mr. Assistant Attorney General Davis*, with whom *Mr. Chas. F. Jones* was on the brief, for the United States.

No. 241. Kansas City Bolt & Nut Company *v.* Kansas City Light & Power Company. Error to the Supreme Court of the State of Missouri. Argued March 15, 1920. Decided March 22, 1920. *Per Curiam.* Affirmed upon the authority of *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372. *Mr. Rees Turpin* for plaintiff in error. *Mr. John H. Lucas*, with whom *Mr. Frank Hagerman* was on the brief, for defendant in error.

No. 257. New Orleans Land Company *v.* Willis J. Roussel, Administrator, etc., et al. Error to the Supreme Court of the State of Louisiana. Argued March 19, 1920. Decided March 22, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of

September 6, 1916, c. 448, § 2, 39 Stat. 726. *Mr. Charles Louque*, with whom *Mr. W. O. Hart* was on the brief, for plaintiff in error. *Mr. William Winans Wall*, for defendants in error, submitted.

No. 261. EDWARD C. MASON, AS HE IS TRUSTEE IN BANKRUPTCY, ETC., *v.* THOMAS J. SHANNON ET AL. Error to the Superior Court of the State of Massachusetts. Argued March 19, 1920. Decided March 22, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. *Mr. Harold Williams, Jr.*, with whom *Mr. Charles E. Fay* was on the briefs, for plaintiff in error. *Mr. John T. Hughes*, with whom *Mr. James H. Vahey* and *Mr. Philip Mansfield* were on the brief, for defendants in error.

No. 541. UNITED STATES ET AL. *v.* ALASKA STEAMSHIP COMPANY ET AL. Appeal from the District Court of the United States for the Southern District of New York. Argued December 16, 17, 1919. Order entered March 22, 1920. Counsel requested to file briefs concerning the effect upon the issues herein involved resulting from the act of Congress terminating the federal control of railroads and amending the act to regulate commerce in certain particulars, approved February 28, 1920. [See 253 U. S. 113.]

No. 297. QUEENS LAND & TITLE COMPANY ET AL. *v.* KINGS COUNTY TRUST COMPANY ET AL. Appeal from the District Court of the United States for the Eastern Dis-

trict of New York. Argued March 25, 1920. Decided April 19, 1920. *Per Curiam.* Affirmed with costs upon the authority of *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Brolan* v. *United States*, 236 U. S. 216, 218; *Sugarman* v. *United States*, 249 U. S. 182, 184. And see *Blumenstock Bros. Advertising Agency* v. *Curtis Publishing Co.*, this day decided, *ante*, 436. *Mr. William G. Cooke* for appellants. *Mr. George E. Brower* for appellees.

No. 266. MARY WILLEM, A CREDITOR, ETC., *v.* DAWSON E. BRADLEY, TRUSTEE, ETC. Appeal from the District Court of the United States for the Southern District of Ohio. Argued March 22, 1920. Decided April 19, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Empire State-Idaho Mining Co.* v. *Hanley*, 205 U. S. 225, 232; *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Brolan* v. *United States*, 236 U. S. 216, 218; *Sugarman* v. *United States*, 249 U. S. 182, 184. *Mr. William W. Symmes*, with whom *Mr. Saul S. Klein* and *Mr. Stanley D. Willis* were on the brief, for appellant. *Mr. Paul V. Connolly*, with whom *Mr. Thomas A. Connolly*, *Mr. Dawson E. Bradley* and *Mr. George W. Cowles* were on the brief, for appellee.

No. 282. METROPOLITAN WEST SIDE ELEVATED RAILWAY COMPANY ET AL. *v.* MACLAY HOYNE, STATE'S ATTORNEY, ETC., ET AL.; and

No. 283. METROPOLITAN WEST SIDE ELEVATED RAILWAY COMPANY ET AL. *v.* SANITARY DISTRICT OF CHICAGO ET AL. Error to the Supreme Court of the State of Illinois. Argued March 25, 1920. Decided April 19, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the

authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. *Mr. Frank J. Loesch* and *Mr. Timothy J. Scofield*, with whom *Mr. Addison L. Gardner* and *Mr. Gilbert E. Porter* were on the briefs, for plaintiffs in error. *Mr. Edmund D. Adcock*, with whom *Mr. George I. Haight* was on the brief, for defendants in error in No. 282. *Mr. C. Arch Williams*, for defendants in error in No. 283, submitted.

No. 295. E. W. BLANCETT *v.* STATE OF NEW MEXICO. Error to the Supreme Court of the State of New Mexico. Submitted March 25, 1920. Decided April 19, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. *Mr. A. B. Renehan* for plaintiff in error. *Mr. O. O. Askren*, *Mr. Harry S. Bowman* and *Mr. N. D. Meyer* for defendant in error.

No. 423. CHICAGO & NORTHWESTERN RAILWAY COMPANY *v.* HERMAN VAN DE ZANDE. Error to the Supreme Court of the State of Wisconsin. Motion to dismiss or affirm submitted March 29, 1920. Decided April 19, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. *Mr. R. N. Van Doren* for plaintiff in error. *Mr. Robert A. Kaftan* for defendant in error.

No. 233. UNITED STATES *v.* WAYNE COUNTY, KENTUCKY. Appeal from the Court of Claims. Argued

March 12, 1920. Decided April 19, 1920. *Per Curiam.* Affirmed upon the authority of: (1) *United States* v. *Cress*, 243 U. S. 316, 329; *United States* v. *Welch*, 217 U. S. 333, 339; *United States* v. *Grizzard*, 219 U. S. 180, 185. (2) *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 101; *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160, 169. And see *Stockton* v. *Baltimore & New York R. R. Co.*, 32 Fed. Rep. 9. (3) *Farrell* v. *O'Brien*, 199 U. S. 89, 100; *Goodrich* v. *Ferris*, 214 U. S. 71, 79; *Brolan* v. *United States*, 236 U. S. 216, 218; *Sugarman* v. *United States*, 249 U. S. 182, 184. *Mr. Assistant Attorney General Davis*, with whom *The Solicitor General* and *Mr. Geo. T. Stormont* were on the brief, for the United States. *Mr. Jackson H. Ralston*, with whom *Mr. George W. Hott* was on the brief, for appellee.

No. 263. B. T. Backus *v.* Norfolk Southern Railroad Company. Error to the Supreme Court of Appeals of the State of Virginia. Argued March 22, 1920. Decided April 19, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. *Mr. J. Edward Cole*, with whom *Mr. Edward R. Baird, Jr.*, was on the briefs, for plaintiff in error. *Mr. Jas. G. Martin* for defendant in error.

No. 287. F. R. Glascock et al. *v.* Ellis McDaniel et al., Minors, by J. O. Cravens, Guardian. Error to the Supreme Court of the State of Oklahoma. Submitted March 22, 1920. Decided April 19, 1920. *Per Curiam.* Dismissed for want of jurisdiction upon the authority of § 237 of the Judicial Code, as amended by the Act of

September 6, 1916, c. 448, § 2, 39 Stat. 726. *Mr. William B. Moore* and *Mr. George S. Ramsey* for plaintiffs in error. *Mr. Grant Foreman, Mr. James D. Simms* and *Mr. Charles F. Runyan* for defendants in error.

DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI, FROM MARCH 1, 1920, TO AND INCLUDING APRIL 19, 1920.

(A.) PETITIONS GRANTED.[1]

No. 697. JOHN P. GALBRAITH *v.* JOHN VALLELY, TRUSTEE, ETC. March 8, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Fred B. Dodge* for petitioner. *Mr. Francis J. Murphy* for respondent.

No. 712. WESTERN UNION TELEGRAPH COMPANY *v.* ADDIE SPEIGHT. March 8, 1920. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina granted. *Mr. Francis Raymond Stark, Mr. Charles W. Tillett* and *Mr. Thomas C. Guthrie* for petitioner. *Mr. Murray Allen* for respondent.

No. 746. HENRY KRICHMAN *v.* UNITED STATES. March 8, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Harrison P. Lindabury* and *Mr. Edward Schoen* for petitioner. No brief filed for the United States.

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[1] For petitions denied, see *post*, 577.

Nos. 779 and 780. UNITED STATES *v.* NATIONAL SURETY COMPANY. April 19, 1920. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *The Solicitor General* and *Mr. Assistant Attorney General Spellacy* for the United States. *Mr. S. W. Fordyce* and *Mr. Thomas W. White* for respondent.

No. 836. H. SNOWDEN MARSHALL, AS RECEIVER, ETC. *v.* PEOPLE OF THE STATE OF NEW YORK. April 19, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. A. S. Gilbert* and *Mr. William J. Hughes* for petitioner. *Mr. Cortlandt A. Johnson* for respondent.

(B.) PETITIONS DENIED.

No. 678. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* O. C. SWAIM. March 8, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Iowa denied. *Mr. Joseph G. Gamble, Mr. Thomas P. Littlepage* and *Mr. Sidney F. Taliaferro* for petitioner. *Harriet B. Evans* for respondent.

No. 682. J. B. POLLARD *v.* UNITED STATES. March 8, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William H. Atwell* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 686. ADA GRIFFITH *v.* UNITED STATES. March 8, 1920. Petition for a writ of certiorari to the Circuit Court

of Appeals for the Seventh Circuit denied. *Mr. Benjamin C. Bachrach* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 701. FREDERICK M. KILMER, TRUSTEE, ETC., *v.* CHARLES H. KEITH, TRUSTEE, ETC. March 8, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Elbridge R. Anderson* for petitioner. *Mr. Lee M. Friedman* and *Mr. Percy A. Atherton* for respondent.

No. 703. ROME LANE, ON BEHALF OF HIMSELF AND OTHERS *v.* EQUITABLE TRUST COMPANY OF NEW YORK. March 8, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Wells H. Blodgett* and *Mr. Clifford B. Allen* for petitioner. *Mr. G. W. Murray* and *Mr. Lawrence Greer* for respondent.

No. 704. MARIA ELOISA ROCHA *v.* EMILIA TUASON Y PATINO ET AL. March 8, 1920. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. W. A. Kincaid, Mr. Alex. Britton* and *Mr. Evans Browne* for petitioner. No appearance for respondents.

No. 711. HUDSON NAVIGATION COMPANY *v.* J. ARON & COMPANY, INC., ET AL. March 8, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Seth Shepard* and *Mr. Stuart G.*

Gibboney for petitioner. *Mr. Charles R. Hickox* and *Mr. Geo. H. Mitchell* for respondents.

No. 718. CAMP BIRD, LIMITED, *v.* FRANK W. HOWBERT, AS COLLECTOR OF INTERNAL REVENUE, ETC. March 8, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William V. Hodges* for petitioner. *The Solicitor General* and *Mr. W. C. Herron* for respondent.

No. 721. PHILLIPS COMPANY *v.* BYRON F. EVERITT, TRUSTEE, ETC. March 8, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William L. Carpenter* for petitioner. *Mr. Clarence A. Lightner* and *Mr. Stewart Hanley* for respondent.

No. 722. ALFRED R. SWANN *v.* W. W. AUSTELL, EXECUTOR, ETC., ET AL. March 8, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Daniel W. Rountree* and *Mr. Clifford L. Anderson* for petitioner. *Mr. Jack J. Spalding* and *Mr. Charles T. Hopkins* for respondents.

No. 732. WILLIAM F. HANRAHAN *v.* PACIFIC TRANSPORT COMPANY, LTD. March 8, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Silas B. Axtell* and *Mr. Fayette B. Dow* for petitioner. *Mr. Robert S. Erskine* and *Mr. L. de Grove Potter* for respondent.

No. 748. E. B. CAPPS, ADMINISTRATOR, ETC. *v.* ATLANTIC COAST LINE RAILROAD COMPANY. March 8, 1920. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina denied. *Mr. James S. Manning* for petitioner. *Mr. Frederic D. McKenney, Mr. J. Spalding Flannery* and *Mr. P. A. Willcox* for respondent.

No. 749. J. W. ATKINS *v.* L. G. GARRETT. March 8, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Walter S. Penfield, Mr. W. B. Spencer* and *Mr. Charles Payne Fenner* for petitioner. No appearance for respondent.

No. 750. MARYANNE SHIPPING COMPANY, CLAIMANT OF STEAMSHIP "MARYANNE," *v.* RAMBERG IRON WORKS. March 8, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Horace L. Cheyney* and *Mr. Ralph J. M. Bullowa* for petitioner. *Mr. Francis Martin* for respondent.

No. 754. CRICKET STEAMSHIP COMPANY *v.* JOHN P. PARRY. March 8, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Cletus Keating* for petitioner. *Mr. Silas B. Axtell* for respondent.

No. 709. WALTER F. BRITTON, TRUSTEE, ETC., *v.* UNION INVESTMENT COMPANY. March 15, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for

the Eighth Circuit denied. *Mr. Harrison L. Schmitt* for petitioner. *Mr. William A. Lancaster* and *Mr. David F. Simpson* for respondent.

No. 725. WALTER M. REEDER ET AL. *v.* UNITED STATES. March 15, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. John W. Scothorn* for petitioners. *Mr. Assistant Attorney General Stewart* and *Mr. W. C. Herron* for the United States.

No. 739. ATCHAFALAYA LAND COMPANY *v.* PAUL CAPDEVIELLE, AUDITOR, ET AL. March 15, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied. *Mr. George Janvier* for petitioner. No appearance for respondents.

No. 716. E. J. FRAZIER *v.* STATE OF OREGON. March 22, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Oregon denied. *Mr. Enos S. Stockbridge* for petitioner. *Mr. George M. Brown* for respondent.

No. 723. ALFRED J. KEPPELMANN ET AL., EXECUTORS AND TRUSTEES, ETC. *v.* A. MITCHELL PALMER, AS ALIEN PROPERTY CUSTODIAN. March 22, 1920. Petition for a writ of certiorari to the Court of Chancery of the State of New Jersey denied. *Mr. Edward M. Colie* for petitioners. *Mr. Assistant Attorney General Spellacy* for respondent.

No. 724. CARL GOEPEL ET AL., PARTNERS, ETC. *v.* A. MITCHELL PALMER, AS ALIEN PROPERTY CUSTODIAN. March 22, 1920. Petition for a writ of certiorari to the Court of Chancery of the State of New Jersey denied. *Mr. Ruby R. Vale* for petitioners. *Mr. Assistant Attorney General Spellacy* for respondent.

No. 735. LOUIS DE F. MUNGER *v.* FIRESTONE TIRE & RUBBER COMPANY; and

No. 736. LOUIS DE F. MUNGER *v.* B. F. GOODRICH COMPANY. March 22, 1920. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William A. Redding* for petitioner. *Mr. Charles Neave*, *Mr. William G. McKnight* and *Mr. Edward Rector* for respondents.

No. 747. AMERICAN ORE RECLAMATION COMPANY *v.* DWIGHT & LLOYD SINTERING COMPANY, INC. March 22, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry B. Gayley* for petitioner. *Mr. Otto C. Wierum* for respondent.

No. 757. EMPIRE FUEL COMPANY *v.* J. E. LYONS. March 22, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Arthur S. Dayton*, *Mr. Melvin G. Sperry* and *Mr. Frank E. Wood* for petitioner. *Mr. Murray Seasongood* for respondent.

No. 770. CARL H. RICHARDSON, AS TRUSTEE, ETC. *v.* GERMANIA BANK OF THE CITY OF NEW YORK. March 22,

1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Carroll G. Walter* for petitioner. *Mr. Bernard Hershkopf* for respondent.

No. 783. S. J. LINDSEY *v.* UNITED STATES. March 22, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. A. Johnston Ackiss* for petitioner. *Mr. Assistant Attorney General Frierson* for the United States.

No. 784. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *v.* INDUSTRIAL COMMISSION OF THE STATE OF ILLINOIS (MARIA KILEY, ADMINISTRATRIX, ETC.). March 22, 1920. Petition for a writ of certiorari to the Supreme Court of the State of Illinois denied. *Mr. Gardiner Lathrop* for petitioner. *Mr. Leo L. Donahoe* for respondent.

No. 479. HOUSTON & TEXAS CENTRAL RAILROAD COMPANY *v.* CITY OF ENNIS ET AL. March 29, 1920. Petition for a writ of certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas denied. *Mr. H. M. Garwood, Mr. J. L. Gammon* and *Mr. Jesse Andrews* for petitioner. *Mr. Rhodes S. Baker* for respondents.

No. 745. ANTONIO CISNEROS CHAPA *v.* UNITED STATES. March 29, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. C. M. Chambers* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 760. CENTRAL ELEVATOR COMPANY OF BALTIMORE CITY *v.* NAAM LOOZE VENNOOT SCHAP, ETC. March 29, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Frederic D. McKenney* and *Mr. Shirley Carter* for petitioner. *Mr. Charles R. Hickox* and *Mr. John M. Woolsey* for respondent.

No. 761. PENNSYLVANIA RAILROAD COMPANY *v.* NAAM LOOZE VENNOOT SCHAP, ETC. March 29, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Frederic D. McKenney* and *Mr. Shirley Carter* for petitioner. *Mr. Charles R. Hickox* and *Mr. John M. Woolsey* for respondent.

No. 762. CENTRAL ELEVATOR COMPANY OF BALTIMORE CITY *v.* EDWIN DYASON, MASTER OF THE STEAMSHIP "WELBECK HALL," ETC. March 29, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Frederic D. McKenney* and *Mr. Shirley Carter* for petitioner. *Mr. James K. Symmers* for respondent.

No. 763. PENNSYLVANIA RAILROAD COMPANY *v.* EDWIN DYASON, MASTER OF THE STEAMSHIP "WELBECK HALL," ETC. March 29, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Frederic D. McKenney* and *Mr. Shirley Carter* for petitioner. *Mr. James K. Symmers* for respondent.

No. 766. V. F. MILLER *v.* UNITED STATES. March 29, 1920. Petition for a writ of certiorari to the Circuit Court

of Appeals for the Fifth Circuit denied. *Mr. A. M. Chambers* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 773. FRANCE & CANADA STEAMSHIP CORPORATION *v.* KONRAD STORGARD. March 29, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Bertrand L. Pettigrew* for petitioner. *Mr. Silas B. Axtell* for respondent.

No. 774. SOUTHWESTERN GAS & ELECTRIC COMPANY *v.* CITY OF SHREVEPORT. March 29, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Max Pam* for petitioner. No appearance for respondent.

No. 778. ALEC ERICKSON *v.* JOHN A. ROEBLING'S SONS COMPANY OF NEW YORK. March 29, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Silas B. Axtell* for petitioner. *Mr. Bertrand L. Pettigrew* for respondent.

No. 787. KARL SANDGREN ET AL. *v.* ULSTER STEAMSHIP COMPANY, LTD., OWNER AND CLAIMANT, ETC. March 29, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William J. Waguespack* for petitioners. No appearance for respondent.

No. 693. BENJAMIN HOROWITZ ET AL. *v.* UNITED STATES. Error to the Circuit Court of Appeals for the Second Circuit. April 19, 1920. Petition for a writ of certiorari herein denied. *Mr. John J. Fitzgerald* and *Mr. Elijah N. Zoline*, for plaintiffs in error, in support of the petition. *Mr. Assistant Attorney General Stewart*, for the United States, in opposition to the petition.

No. 737. BARBER & COMPANY, INC. *v.* STEAMSHIP "KNUTSFORD," LIMITED. April 19, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. D. Roger Englar* for petitioner. *Mr. Charles R. Hickox* and *Mr. L. de Grove Potter* for respondent.

No. 753. ARTHUR BAIN *v.* UNITED STATES. April 19, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Abram M. Tillman* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 758. CHARLES L. BAENDER *v.* UNITED STATES. April 19, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George D. Collins* for petitioner. *Mr. Assistant Attorney General Stewart* and *Mr. H. S. Ridgely* for the United States.

No. 759. WEBB JAY ET AL. *v.* FREDERICK WEINBERG ET AL. April 19, 1920. Petition for a writ of certiorari to

the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles S. Burton* and *Mr. George L. Wilkinson* for petitioners. *Mr. R. A. Parker* and *Mr. Elliott J. Stoddard* for respondents.

No. 769. JESSE C. WASHBURN ET AL. *v.* E. N. GILLESPIE. April 19, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. L. T. Michener, Mr. Henry S. Johnston* and *Mr. Horace Speed* for petitioners. No appearance for respondent.

No. 772. MURLE L. ROWE, AS TRUSTEE, ETC. *v.* JAMES L. DROHEN ET AL. April 19, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Herman J. Westwood* for petitioner. *Mr. Grafton L. McGill* and *Mr. Francis S. Maguire* for respondents.

No. 785. SHELLEY B. HUTCHINSON *v.* WILLIAM M. SPERRY ET AL. April 19, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William Mayo Atkinson* for petitioner. *Mr. W. Benton Crisp* and *Mr. Frederick Geller* for respondents.

No. 799. CHRISTIAN TJOSEVIG ET AL. *v.* T. J. DONOHOE ET AL. April 19, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John Rustgard* for petitioners. *Mr. Edmund Smith* for respondents.

No. 804. NEW YORK CENTRAL RAILROAD COMPANY, CLAIMANT, ETC. *v.* JOHN S. HOWELL ET AL. April 19, 1920. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Oscar R. Houston* for petitioner. No appearance for respondents.

No. 834. ELIZABETH DENNY GREGG *v.* FRANCIS P. GARVAN, ALIEN PROPERTY CUSTODIAN; and

No. 835. A. J. KELLY, JR., ET AL., TRUSTEES, ETC. *v.* FRANCIS P. GARVAN, ALIEN PROPERTY CUSTODIAN. April 19, 1920. Petition for writs of certiorari to the Supreme Court of the State of Pennsylvania denied. *Mr. Frederic W. Miller* for petitioners. *Mr. Assistant Attorney General Spellacy* for respondent.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM MARCH 1, 1920, TO AND INCLUDING APRIL 19, 1920.

No. 225. D. H. GILL ET AL. *v.* CITY OF DALLAS ET AL. Error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas. March 5, 1920. Dismissed with costs, pursuant to the tenth rule. *Mr. William H. Clark* for plaintiffs in error. No appearance for defendants in error.

No. 237. THE GLOBE WORKS *v.* UNITED STATES. Appeal from the Court of Claims. March 11, 1920. Dismissed, pursuant to the sixteenth rule, on motion of

Mr. Assistant Attorney General Davis for the United States. *Mr. John S. Blair* for appellant.

No. 293. UNITED STATES *v.* H. L. SPRINKLE. Error to the District Court of the United States for the Southern District of Florida. March 15, 1920. Dismissed, on motion of *The Solicitor General* for the United States. *Mr. N. P. Bryan* for defendant in error.

No. 267. E. B. HOWARD, STATE AUDITOR OF THE STATE OF OKLAHOMA, *v.* H. V. FOSTER ET AL., ETC. Appeal from the District Court of the United States for the Western District of Oklahoma. March 19, 1920. Dismissed with costs, on motion of counsel for appellant. *Mr. S. P. Freeling* and *Mr. John B. Harrison* for appellant. *Mr. John H. Burford* and *Mr. Frank B. Burford* for appellees.

No. 284. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY *v.* H. T. TRUE, JR. Error to the Supreme Court of the State of Oklahoma. March 22, 1920. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Thomas B. Pryor* for plaintiff in error. *Mr. Finis E. Riddle* for defendant in error.

No. 298. UNION PACIFIC RAILROAD COMPANY ET AL. *v.* W. H. JENKINS ET AL. Error to the Supreme Court of the State of Nebraska. March 24, 1920. Dismissed with costs, pursuant to the tenth rule. *Mr. Charles H Sloan*

and *Mr. William E. Flynn* for plaintiffs in error. No appearance for defendants in error.

No. 347. NATIONAL SURETY COMPANY *v.* UNITED STATES FOR THE USE OF AMERICAN SHEET METAL WORKS ET AL. Appeal from the Circuit Court of Appeals for the Fifth Circuit. March 29, 1920. Dismissed with costs, on motion of counsel for appellant. *Mr. William B. Grant* and *Mr. William J. Griffin* for appellant. *Mr. J. S. Sexton* for appellees.

No. 209. LOUIS C. TIFFANY, SOLE SURVIVING EXECUTOR, ETC. *v.* UNITED STATES. Appeal from the Court of Claims. April 19, 1920. Reversed, upon confession of error, and cause remanded for further proceedings in conformity with law, on motion of *The Solicitor General* for the United States. *Mr. Simon Lyon* and *Mr. R. B. H. Lyon* for appellant.

No. 502. SOUTHERN COTTON OIL COMPANY ET AL. *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY. Appeal from the District Court of the United States for the Eastern District of Arkansas. April 19, 1920. Dismissed with costs, per stipulation. *Mr. W. E. Hemingway, Mr. G. B. Rose* and *Mr. J. F. Loughborough* for appellants. *Mr. J. M. Moore* for appellee.

No. 698. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY ET AL. *v.* MARIE L. THOMPSON. Certificate from the Circuit Court of Appeals for the Third Cir-

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No. 796. NEW YORK EVENING POST COMPANY *v.* JOHN ARMSTRONG CHALONER. On petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit. April 19, 1920. Dismissed, on motion of counsel for petitioner. *Mr. William M. Wherry, Jr.*, for petitioner. No appearance for respondent.

No. 366. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* ROAD IMPROVEMENT DISTRICT No. 1 OF PRAIRIE COUNTY, ARKANSAS. Error to the Supreme Court of the State of Arkansas. April 19, 1920. Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. Thomas S. Buzbee, Mr. Thomas P. Littlepage, Mr. Sidney F. Taliaferro, Mr. George B. Pugh, Mr. J. G. Gamble* and *Mr. W. F. Dickinson* for plaintiff in error. *Mr. Charles A. Walls* for defendant in error.

No. 367. MISSOURI PACIFIC RAILROAD COMPANY ET AL. *v.* MONROE COUNTY ROAD IMPROVEMENT DISTRICT ET AL. Error to the Supreme Court of the State of Arkansas. April 19, 1920. Dismissed with costs, on motion of counsel for plaintiffs in error. *Mr. Thomas S. Buzbee, Mr. Thomas P. Littlepage, Mr. Sidney F. Taliaferro, Mr. George B. Pugh, Mr. J. G. Gamble, Mr. W. F. Dickinson* and *Mr. Troy Pace* for plaintiffs in error. *Mr. W. E. Hemingway, Mr. G. B. Rose, Mr. D. H. Cantrell* and *Mr. J. F. Loughborough* for defendants in error.

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4. *Id. What is Income.* Determined in each case according to truth and substance, without regard to form. *Id.*

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5. *Id. Intent.* Averments that defendants unlawfully, wilfully or feloniously committed the forbidden acts import unlawful motive. *Id.*

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7. *Id. Evidence. Held* to warrant jury's finding that defendants, in violation of act, conspired to commit and committed offense of attempting to cause insubordination in military forces, and conveyed false statements with intent to interfere with those forces in war with Germany, by circulating printed matter tending to produce those results. *Id.*

8. *Id. Intent.* Fact that defendants understood contents of pamphlets furnished of itself ground for attributing to them an intent, and for finding that they attempted, to bring about such consequences as reasonably might be anticipated from their distribution. *Id.*

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6. *Id. Raising Objection.* This court will examine and determine question of finality, whether raised by parties or not. *Id.*

7. *Judgment not Final.* Judgment dealing with detention of relator for foreign extradition on three charges, and denying relief as to one but assuming to order further hearing by commissioner as to the others. *Id.*

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8. *Preliminary Injunction.* Where court not only refuses injunction but dismisses bill, appeal should be under Jud. Code, § 238, from final decree, and not under § 266. *Shaffer* v. *Carter*. 37

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9. *Error or Certiorari.* Judgment of state Supreme Court giving meaning and effect to statute which brings it in conflict with Constitution is reviewable by writ of error. *Kenney* v. *Supreme Lodge*. 411

10. *Id.* Claim that tax is void because of discrimination of officials in making assessments, but which does not draw in question before state court validity of statute under which they acted, will not support writ of error. *Jett Bros. Co.* v. *Carrollton*. 1

11. *Raising Federal Question; Rehearing.* Petition, merely overruled by state court without opinion, is not a basis for writ of error. *Id.*

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teenth Amendment in granting powers of eminent domain not conferred on rival company organized under general law. *Hiawassee Power Co.* v. *Carolina-Tennessee Co.*. 341

13. *Id.* Not raised in state Supreme Court by assignment alleging error in admitting such evidence and not mentioning Amendment. *Id.*

14. *Id.* Constitutional question not presented by assignments or otherwise, or passed upon, in state Supreme Court, does not afford jurisdiction to review. *Id.*

15. *Id. When Too Late.* When raised by petition for writ of error and assignments filed here; allowance by chief justice of state court does not cure omission. *Id.*

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1. *Final Decisions.* Order of District Court denying application of state receiver to vacate federal receivership, in case depending on diverse citizenship, and to have assets of insolvent corporation turned over to him for distribution, etc., on ground that proceedings in state court had deprived District Court of jurisdiction, *held* a final decision, within Jud. Code, § 128, appealable to Circuit Court of Appeals. *Ex parte Tiffany* 32

2. *Id.* "Final decision" means same thing as "final judgments and decrees" in former acts regulating appellate jurisdiction. *Id.*

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5. *Id. National Banks; Service of Process.* Suit to restrain Comptroller of Currency from malicious and unlawful practices, is suit to enjoin him under National Banking Law, within Jud. Code, §§ 24, 49; must be in district where bank is established; process may be served elsewhere. *Id.*

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2. *Id. Situs of Debt.* Immaterial, in such cases, if owner voluntarily appears and answers without objecting to jurisdiction. *Id.*

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6. *Id. Purchaser under Foreclosure,* to which company's interest in lands was made subject as after-acquired property covered by mortgage, is in no better position. *Id.*

7. *Id. Failure of Consideration.* Obligation attaches, however disproportionate the aid to cost of construction, notwithstanding company relied on other lands included in state patent but which it lost through state decisions holding them inapplicable to its road under granting act and state law passed in pursuance of it. *Id.*

8. *Id.* Obligation cannot be escaped because contract with State, resting on entire consideration, in part illegal, was void, where United States was not a party to contract and where its reversionary title was relinquished by Congress to State. *Id.*

9. *Transportation; Schedules; Fines.* Railroad which contracts to carry mails upon conditions prescribed by law is liable to fines or deductions from compensation for failures

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10. *Id. Departmental Construction.* Fact that Post Office Department long abstained from making such deductions under Rev. Stats., § 3962, where delays were less than 24 hours, does not amount to construing section as inapplicable to shorter delays. *Id.*

11. *Id.* Such construction cannot be claimed by company whose contract was made after order of Postmaster General for deductions in future when trains arrived 15 or more minutes late, and soon after Act of 1906, directing imposition of fines for failure to comply with contracts respecting times of arrival and departure of trains. *Id.*

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4. *Id. Selection of Servant.* Rule of *respondeat superior* applies in Panama; due care in selecting servant no defense. *Id.*

5. *Id. Damages; Pain.* In Panama damages for physical pain are allowable. *Id.*

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2. *Id. Discovery.* Mineral character and adequate discovery within location essential to validity of claim. *Id.*

3. *Id. Valid Claims.* To bring claim within exception of "valid claims" in proclamation establishing monument reserve, claim must be founded on adequate discovery made before reservation. *Id.*

4. *Id.* Discovery must be such as to justify expenditure of time and means to develop a paying mine. *Id.*

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5. *Invalid Locations; Jurisdiction of Secretary of Interior.* Finding of non-mineral character and that location not supported by discovery antedating reservation, is conclusive as to invalidity of claim within monument reserve in subsequent suit by Government to enjoin claimant from occupying land and obstructing its use as part of the reserve. *Id.*

6. *Id.* Mining location which has not gone to patent is of no higher quality, and no more immune from attack and investigation, than unpatented claims under homestead and kindred laws. *Id.*

7. *Id.* Secretary may determine, after notice and hearing, whether location is valid, and, if found invalid, declare it null and void. *Id.*

8. *Contracts; Recording; Nevada Law.* Contract for share in proceeds of mining location with right to have it made productive need not be recorded to be good *inter partes*. *Cole* v. *Ralph* 286

9. *Id. Adverse Suit; Parties.* One who has such contractual interest is proper party to adverse suit to protect claim, and, under Nevada law, may come in as plaintiff before trial. *Id.*

10. *Location; Community Property; Nevada Law.* Interest in claim arising from husband's location and deeded to his wife for money consideration is community property; and husband may file adverse claim against hostile application for patent and sue to protect claim in his own name. *Id.*

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14. *Id.* Placer discovery will not sustain lode location, nor a lode discovery a placer location. *Id.*

15. *Id.* Location—acts whereby boundaries of claim are marked—confers no rights in absence of discovery. *Id.*

16. *Id.* Assessment work does not take place of discovery. *Id.*

17. *Id.* Junior placer location with earlier placer discovery prevails over senior lode location with later lode discovery. *Id.*

18. *Evidence of Discovery. Held* sufficient to go to jury on question of prior discovery as between lode and placer claims, and as to whether latter initiated by trespass or peaceably and openly or even with acquiescence of lode claimant. *Id.*

19. *Of Possession.* Presence of buildings on claim but not used in connection with it *held* evidence of claimant's actual possession of them, but ineffectual to prevent others from entering claim peaceably and in good faith under mining laws. *Id.*

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21. *Id.* Generally, and specifically in Nevada, recitals of discovery, in location notices, are self-serving declarations, not evidence against adverse claimants. *Id.*

22. *Long Possession as Ground for Patent.* Rev. Stats., § 2332, providing that where claim has been held and worked for period prescribed by state statutes evidence thereof shall be sufficient to establish right to patent in absence of adverse claim, does not dispense with, or cure absence of, discovery. *Id.*

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3. *Id.* *"Employ"* equivalent of appoint. *Id.*

4. *Id.* *"Clerks"* and "other employees" include persons filling positions which require technical skill, learning and professional training. *Id.*

5. *Id.* *Officer or Employee.* Status determined by manner in which Congress has provided for creation of positions, their duties and appointment thereto. *Id.*

6. *Id.* *Landscape Architect,* in Office of Public Buildings and Grounds, is an employee. *Id.*

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8. *Id.* *Power to Remove* landscape architect, is with Chief of Engineers, and unaffected by fact that appointment was made without authority by Secretary of War. *Id.*

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3. *Id.* The Act of 1916, to the extent that it imposes such taxes, is unconstitutional. *Id.*

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6. *Id.* Income is gain derived from capital, from labor, or from both combined, including profit gained through sale or conversion of capital. *Id.*

7. *Id.* Growth of value in capital investment is not income; income is essentially a gain or profit in itself of exchangeable value, proceeding from capital, severed from it, and derived or received by the taxpayer for his separate use, benefit and disposal. *Id.*

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