Michigan Law Review

Volume 19 | Issue 3

1921

Constitutional Law in 1919-1920, III

Thomas Reed Powell
Columbia University

CONSTITUTIONAL LAW IN 1919-1920. III[1]

VI. Retroactive Civil Legislation

FIVE of the corporations which fought in vain against exercises of the police power profited nothing from their grasp at the obligation-of-contracts clause. In *Milwaukee Electric Ry. & Light Co.* v. *Wisconsin*[2] the contract relied on was a clause in the charter of a street railroad imposing on it the duty to keep the space between and near its tracks in good repair "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 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 contended that "its obligation is, in any event, limited to repaving with such material as the city had last used between the rails." Mr. Justice Brandeis, for all the court except Justices Pitney and McReynolds, answered: "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 ordinance." This makes the phrase "these spaces *and* the street" equivalent to "these spaces *or* the street." The pavement required of the company was the same as that which the city had laid on all the street but the railway zone. The complaint of the road that the expense would reduce its income below a reasonable return on its investment was answered by saying that "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."

The contract relied on in *Hardin-Wyandot Lighting Co.* v. *Upper Sandusky*[3] was the statute in force in 1889 when the company's

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[1] For the previous installments reviewing cases on Miscellaneous Federal Powers, Regulation of Commerce, Taxation, Police Power and Eminent Domain, see 19 Mich. L. Rev. 1-24, 117-151 (November and December, 1920).

[2] 252 U. S. 100, 40 Sup. Ct. 306 (1920), 19 Mich. L. Rev. 138.

[3] 252 U. S. 173, 40 Sup. Ct. 104 (1919), 19 Mich. L. Rev. 139.

franchise was granted and accepted. This declared that the "mode" of use of the streets "shall be such as shall be agreed upon between the municipal authorities of the . . . village and the company, but if they cannot agree, the probate court of the county shall direct what the mode of use shall be." In 1896 the state law was amended so that it forbade the construction or maintenance of wires, fixtures and appliances for conducting electricity without the consent of the municipality. In 1913 the company took down certain poles and wires used for lighting the streets. The Supreme Court held that it could not restore these or erect new additional ones without obtaining the consent of the city; but it interpreted the injunction granted below as not applying to the repair and replacing of poles and wires which had been continuously used for commercial lighting and affirmed the judgment of the state court with the qualification, "restrained to the scope of its opinion, as we have interpreted it." The case thus rests on the abandonment by the company of its rights under the ordinance of 1889 in its poles and wires used for street lighting. The statute of 1896, requiring the consent of the city, is sustained as a reasonable exercise of the police power; such modification of the company's rights as it may suffer from the decree of the state court is said "not to constitute an impairing of the obligation of its contract with the state or village." In *Pacific Gas & Electric Co.* v. *Police Court*[4] the only contract right adduced against a municipal command to sprinkle the streets was the general authority conferred by the franchise to operate a road in the streets; but the ordinance was found to be within the police power, and the police power was said to dominate the right of the company under its franchise to use the streets.

In two cases the contracts unsuccessfully relied on were with private persons rather than with some public authority. *Munday* v. *Wisconsin Trust Co.*[5] sustained the state court in holding a deed invalid because the grantee was a foreign corporation which had failed to file the requisite papers with the state in which the land lay. As the obstructing statute was in force before the transaction in question, the court reminded the aggrieved litigant that "the settled doctrine is that the contract clause applies only to legislation

[4] 251 U. S. 22, 40 Sup. Ct. 79 (1919), 19 MICH. L. REV. 139.
[5] 252 U. S. 499, 40 Sup. Ct. 365 (1920), 19 MICH. L. REV. 144.

subsequent in time to the contract alleged to have been impaired." Before the suit began the grantee had obtained a license to do business and hold property within the state, but the state court had held that this did not validate prior invalid transactions. This was said by the Supreme Court to be wholly a matter of state law and to involve no right under the Constitution or laws of the United States.

In *Producers' Transportation Co.* v. *Railroad Commission*[6] the plaintiff had previously fixed its rates by private contract and now insisted that it was not a common carrier; but the court disagreed with it and allowed the state railroad commission to take it in hand. Mr. Justice Van Devanter reiterated the well-settled rule that "a common carrier cannot, by making contracts for future transportation or by mortgaging its property or pledging its income, prevent or postpone the exertion by the state of the power to regulate the carrier's rates and practices." To make the matter certain, he added: "Nor does the contract clause of the Constitution impose any obstacle to the assertion of that power."

In three cases the contract clause was grasped not as a mere makeweight but as the only hope against legislation concededly within the general police power. In *Bank of Oxford* v. *Love*[7] it was recognized that the charter of a bank was a contract, but the provision that the business shall be controlled by the stockholders under such rules and regulations as the company may see fit to adopt was held not to confer any immunity from a statute requiring periodic examination by the state banking department and the imposition of moderate fees for the maintenance of the scrutinizing agency.

In *Piedmont Power & Light Co.* v. *Graham*[8] the plaintiff attempted unsuccessfully to spell out an exclusive franchise from a provision in its charter that the town "warrants that it will, by its proper authorities, provide for the full and free use of its streets, lanes," etc. Mr. Justice Clarke called the contention "fatuous and futile," and declared that "grants of rights and privileges by a state or municipality are strictly construed and whatever is not unequivo-

[6] 251 U. S. 228, 40 Sup. Ct. 131 (1920), 19 MICH. L. REV. 137.
[7] 250 U. S. 603, 40 Sup. Ct. 22 (1919).
[8] 253 U. S. 193, 40 Sup. Ct. 453 (1920).

cally granted is withheld; nothing passes by implication." The alleged federal question was found so frivolous that the appeal from the court below was dismissed for want of jurisdiction.

A similar summary disposition was given to the appeal in *Cuyahoga River Power Co.* v. *Northern Ohio T. & L. Co.*[9] A water-power company which had been granted the right of eminent domain was told that it acquired no exclusive right to any particular lands by filing with its articles of incorporation a plan specifying the places where it planned to erect dams. "The contention of plaintiff," observes Mr. Justice McKenna, "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." The acts of a competing company of which the frustrated plaintiff complained were held not acts that might be attributed to the state as an impairment of plaintiff's contract. No wrong was done the plaintiff by incorporating other power companies under the same general law or by sanctioning the transfer of the rights and franchises of a corporation older than itself to one younger.

The contract clause was one of the supports picked out by the successful lighting company in *Los Angeles* v. *Los Angeles Gas & Electric Corporation,*[10] and figured at least indirectly in the decision. The case held that the city could not compel the company to remove poles and wires to make room for a competing municipal system. Since the attempt was not a valid police measure and was unaccompanied by any proffer of compensation, it was held to be inhibited by the Fourteenth Amendment. But the property rights thus wrongfully threatened seem to be regarded as not confined to property acquired for the purpose of exercising the powers conferred by the franchise, but to embrace also property rights in the franchise itself. To quote Mr. Justice McKenna:

> "A franchise conveys rights, and if their exercise could be prevented or destroyed by a simple declaration of a municipal council, they would be infirm indeed in tenure and

[9] 252 U. S. 388, 40 Sup. Ct. 404 (1920).

[10] 251 U. S. 32, 40 Sup. Ct. 76 (1919), 19 MICH. L. REV. 139. Justices Pitney and Clarke dissent.

> substance. It is to be remembered that they came into existence by compact, having, therefore, its sanction, urged by reciprocal benefits, and are attended and can only be exercised by expenditure of money, making them a matter of investments and property, and entitled as such against being taken without the proper process of law—the payment of compensation."

The distinction between a breach of contract and an impairment of its obligation finds illustration in *Hays* v. *Port of Seattle*,[11] already considered in the section on eminent domain. Back in 1896 the plaintiff made a contract with the state for excavating part of Seattle harbor, the state engaging "to hold the lands subject to the operation of the contract pending its execution, and subject to the ultimate lien of the contractor thereon." After long delay and disagreement as to plans, the state in 1913 turned the property over to the Port of Seattle, which proceeded to go ahead with the excavation on its own account. This was held to be nothing but a possible breach by the state of its contract with the plaintiff, Mr. Justice Pitney observing:

> "Supposing the contract had not been abandoned by complainant himself or terminated by his long delay, its obligation remained as before, and formed the measure of his right to recover from the state for the damages sustained."

As the state by general law provided ample opportunity to sue and to collect a judgment against it, and the infliction on the plaintiff, if any, was for a recognized public purpose, an injunction was denied and the plaintiff left to his action for damages.

Two of the tax cases already treated dealt also with objections to retroactive legislation. The plaintiff in *Oklahoma Ry. Co.* v. *Severns Paving Co.*[12] was told that its charter obligation to pave a portion of its right of way implied no agreement on the part of the city that prevented a special assessment on the railroad right of way to defray part of the expense of paving the main portion of

[11] 251 U. S. 233, 40 Sup. Ct. 125 (1920), 19 MICH. L. REV. 149.
[12] 251 U. S. 104, 40 Sup. Ct. 73 (1919), 19 MICH. L. REV. 129.

the street. *Ward* v. *Love County*[13] reiterated the point established earlier[14] that a tax exemption of Indian lands granted by Congress was a property right which could not, consistently with due process of law, be taken away by withdrawal of the exemption. This was not directly in issue in the principal case, as the dispute was over the question whether the taxes which the Indians sought to get back had been paid voluntarily. Another case in which a tax exemption, concededly contractual, was held to cover the particular property in question is *Central of Georgia Ry. Co.* v. *Wright*.[15] This was a rehearing of a portion of a case[16] decided the preceding term. The opinion is merely a postscript to its predecessor and cannot be understood independently.[17]

VII. Immunities of Persons Charged with Crime

The unanimity with which the Supreme Court sustained convictions under the Espionage Law in 1918-1919 is broken in upon in 1919-1920. The minority judges, however, do not fully indicate how much of their dissent is based on the First Amendment and how much goes only to the propriety of the convictions under the terms of the statute and the general canons of criminal law. The

[13] 253 U. S. 17, 40 Sup. Ct. 419 (1920), 19 Mich. L. Rev. 133. To the same effect is Broadwell v. Carter County, 253 U. S. 25, 40 Sup. Ct. 422 (1920).

[14] Choate v. Trapp, 224 U. S. 665, 32 Sup. Ct. 565 (1912).

[15] 250 U. S. 519, 40 Sup. Ct. 1 (1919).

[16] Central of Georgia Ry. Co. v. Wright, 248 U. S. 525, 39 Sup. Ct. 181 (1919), 14 Am. Pol. Sci. Rev. 63.

[17] For notes on Union Dry Goods Co. v. Georgia, 248 U. S. 372, 39 Sup. Ct. 117 (1919), 14 Am. Pol. Sci. Rev. 61, holding that a public utility can not by contract with its patrons defeat the power of rate regulation, and Columbus Ry. Power & Light Co. v. Columbus, 249 U. S. 399, 39 Sup. Ct. 349 (1919). 13 Am. Pol. Sci. Rev. 632, holding that a company cannot escape from a clause in its franchise restricting the fare to be charged, notwithstanding the increase of operating costs incident to conditions produced by the war, see 33 Harv. L. Rev. 97, 116. The latter case is considered in 18 Mich. L. Rev. 320. For discussions of the power to fix rates by contract in the grant of a franchise and the power of state authorities to permit an increase of rates as against a contract between the company and a city, and other phases of the same general problem, see Charles K. Burdick, "Regulating Franchise Rates," 29 Yale L. J. 589, N. C. Collier, "Change of Rates of Public Utility Which Have Been Fixed by Franchise Ordinance," 90 Cent. L. J. 42, Clarence Dallam, "The Public Utility and the Public Highway," 6 Va.

offense in the cases was committed by publishing or distributing literature that contained unflattering remarks about the motives and justifications for American participation in the war or that covertly or directly encouraged or advised restraint from actions that would aid in its prosecution. In *Abrams* v. *United States*[18] it was laid down by Mr. Justice Clarke for the majority that the only question before the court was whether "there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict." There was denunciation of the President as vehement as any in a journal devotedly dedicated to uncomplimentary shafts in that direction. The court, however, refrained from passing on the propriety of the convictions on the counts charging "disloyal, scurrilous and abusive language about the form of government of the United States," or language "intended to bring that government into contempt, scorn, contumely, and disrepute." Mr. Justice Clarke remarked that "a technical distinction may perhaps be taken between

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L. REV. 35, Godfrey Goldmark, "The Struggle for Higher Public Utility Rates Because of War-time Costs," 5 CORNELL L. Q. 227, A. Raymond Sanborn, "The Power of the Public Utilities Commissions to Alter Rates," 13 MAINE L. REV. 1, and editorial notes in 20 COLUM. L. REV. 704, 5 IOWA L. B. 265, 18 MICH. L. REV. 806, 4 MINN. L. REV. 526, 68 U. PA. L. REV. 280, and 26 W. VA. L. Q. 67.

For a discussion of United Railroads v. San Francisco, 249 U. S. 517, 39 Sup. Ct. 361 (1919), 14 AM. POL. SCI. REV. 60, holding that a statute forbidding two railroads to occupy the same street does not enter into a franchise as a promise on the part of the municipal grantor not to compete with the grantee, see 33 HARV. L. REV. 576, 614. The effect on a contract with a city for reduced fares for workmen of a statute prohibiting discrimination is considered in 29 YALE L. J. 563. The retroactive effect of soldiers' and sailors' relief acts is discussed in 4 MINN. L. REV. 353; the amendment of statutes of limitation, in 29 YALE L. J. 91; and the retroactive taking away of a right of action for wrongful death in another state, in 33 HARV. L. REV. 727.

[18] 250 U. S. 616, 40 Sup. Ct. 17 (1919). See Zechariah Chafee, Jr., FREEDOM OF SPEECH (New York, Harcourt, Brace and Howe, 1920), Chapter 3, "A Contemporary State Trial", 33 HARV. L. REV. 747, Edward S. Corwin, "Freedom of Speech and Press Under the First Amendment", 30 YALE L. J. 48, "Constitutional Law in 1919-1920, 14 AM. POL. SCI. REV. 635, at pp. 655-658, M. G. Wallace, "Constitutionality of Sedition Laws", 6 VA. L. REV. 385, John H. Wigmore, "Abrams v. United States: Freedom of Speech and Freedom of Thuggery in War-time and Peace-time", 14 ILL. L. REV. 539, and notes in 20 COLUM. L. REV. 90, 33 HARV. L. REV. 442, 474, 14, ILL. L. REV. 601, 18 MICH. L. REV. 236, 5 VA. L. REG. *n. s.* 715, 29 YALE L. J. 337, and 30 YALE L. J. 68.

disloyal and abusive language applied to the *form* of our government or language intended to bring the *form* of our government into contempt and disrepute, and language of like character and intended to produce like results directed against the President and Congress, the agencies through which that form of government must function in time of war." But he did not press the point, as he found the language fully sufficient to warrant conviction on the counts charging utterances intended to provoke resistance to the United States in time of war and advocating the curtailment of production of ordnance and munitions necessary and essential to the prosecution of the war. This was enough to sustain the sentences, as they did not exceed those that might be imposed for conviction on these counts alone. Among the exhortations of the defendants were the following:

> "Yes, friends, there is only one enemy of the workers of the world, and that is CAPITALISM. . . .
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> With the money which you have loaned or are going to loan them they will make bullets not only for the Germans but also for the Workers' Soviets of Russia. *Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans but also your dearest, best, who are in Russia and are fighting for freedom. . . .*
>
> *Workers, our reply to the barbaric intervention has to be a general strike.*
>
> Do not let the government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. *Workers, up to fight.*
>
> *Know, you lovers of freedom, that in order to save the Russian revolution we must keep the armies of the allied countries busy at home.*
>
> We, the toilers of America, who believe in real liberty, shall *pledge ourselves,* in case the United States will participate in that bloody conspiracy against Russia, *to create so great a disturbance that the autocrats of America shall be compelled to keep their armies at home, and not be able to spare any for Russia."*

For the majority Mr. Justice Clarke declared that "while the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution in this country for the purpose of embarrasing and if possible defeating the military plans of the government in Europe." He had earlier laid down that "it will not do to say . . . that the only intent of these defendants was to prevent injury to the Russian cause," for "men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce."

The dissenting opinion of Mr. Justice Holmes is difficult to deal with from the standpoint of constitutional law, as it does not make clear how much it is based on the Constitution. The learned Justice conceded that defendants urged curtailment in the production of things necessary to the prosecution of the war, and that one of the leaflets if published for this purpose might be punishable. He recognized also that "intent" is at common law satisfied by knowledge of facts from which common experience shows that the consequences would follow. He adheres to his previously expressed conviction that "the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent." This recognizes that speech which produces such danger is punishable even though the danger is not intended in the strict sense of the word. But Mr. Justice Holmes finds the danger lacking in the present case, for he says:

> "Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so."

This seems to be the nub of the dissent so far as it goes on constitutional grounds. The majority allow the jury to infer sufficient danger from the circumstances. The minority think the inference

unjustified because of the silliness of the leaflet and the unimportance of its authors. To them the circumstances do not as a mere matter of inference show that degree of danger which is necessary before freedom of speech can be curtailed consistently with the First Amendment. The opinion at this point is plainly concerned with the constitutional issue, for it follows the introduction:

> "The power undoubtedly is greater in time of war than in time of peace, because war opens dangers that do not exist at other times.
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> But as against dangers peculiar to war, as against others, the principle of the right of free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country."

On the question of the interpretation of the statute the dissenting opinion takes the position that "encouraging resistance" is not satisfied by encouraging abstinence from assistance, and that "intent" must be construed in the strict and accurate sense and not as vaguely used in ordinary legal discussion. The inference from the opinion is that the First Amendment requires either intent in the sense of aim, motive, or object, or else a clearer, nearer danger from the words used than could be thought by a reasonable man to be present in the principal case. There is also the suggestion that the First Amendment limits the degree of punishment for speech concededly punishable, though it may be that Mr. Justice Holmes has the due-process clause of the Fifth Amendment in mind when he says:

> "In this case sentences of twenty years' imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; the most nominal punishment seems to me all that could pos-

> sibly be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow—a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to doubt that it was held here, but which, although made the subject of examination at the trial, no one has a right even to consider in dealing with charges before this Court."

The concluding clause may refer to Mr. Justice Clarke's remark on "this particular outbreak of lawlessness, on the part of the defendant alien anarchists." That the difference of opinion among the judges goes back to a difference in fundamental faiths as to what is most important in the process of government is evident from the concluding paragraph of the dissenting opinion. Mr. Justice Holmes reveals not a little of what constitutional interpretation owes to the fundamental faiths of the judges when he says:

> "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition. To allow opposition by speeeh seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against

attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 (Act July 14, 1798, c. 73, 1 Stat. 596) by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.' Of course, I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States."

Mr. Justice Brandeis, who joined in this dissent, wrote the dissenting opinion in *Pierce* v. *United States*,[19] in which Mr. Justice Holmes was again of the minority. This opinion is largely concerned with maintaining that the pamphlet distributed by the defendants did not contain false statements within the meaning of the statute. In insisting that the question of the truth or falsity should not have been left to the jury, Mr. Justice Brandeis observed:

> "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 discussion in times when feelings run high and the questions involved are deemed fundamental."

On the constitutional issue, the dissenting opinion relied on the conviction that the nature of the leaflet and the circumstances of

[19] 251 U. S. 205, 40 Sup. Ct. 239 (1920).

its distribution were not such as to create any clear and present danger of harmful results. It refers to the note of despair in the offending tract, with its recognition of the hopelessness of protest under the existing system and the irresistible military might of the government, and says that "it is not conceivable that any man of ordinary intelligence and normal judgment would be induced" thereby to commit offense and run the risk of the penalties. Mr. Justice Brandeis closes by saying:

> "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 and 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.'"

Here, as in the *Abrams* case, the majority took the position that whether the printed words would in fact produce as a proximate result the substantive evils which concededly Congress may strive to prevent "is a question for the jury to decide in view of all the circumstances of the time and considering the place and manner of distribution." Intent under the statute and under the Constitution is something that the jury may infer from probable consequences. The words that can be punished are those that have a sufficiently dangerous tendency.

This is reiterated by Mr. Justice McKenna in the majority opinion in *Schaefer* v. *United States*,[20] in which the defendants were convicted of publishing false statements with the intent of promoting the success of the enemies of the United States. The gist of the offending articles was that the motives of Great Britain in entering the war were not so disinterested as they might have been, and that the United States was bluffing and would never send an effective

[20] 251 U. S. 466, 40 Sup. Ct. 259 (1920). See 29 YALE L. J. 677.

army to the front. Mr. Justice Brandeis in dissenting insisted that "men, judging in calmness . . . could not reasonably have said that this coarse and heavy humor immediately threatened the success of recruiting." But Mr. Justice McKenna answered:

> "Coarse, indeed, this was, and vulgar to us; but it was expected to produce, and it may be did produce, a different effect upon its readers. To them its derisive contempt may have been truly descriptive of American feebleness and inability to combat Germany's prowess, and thereby chill and check the ardency of patriotism and make it despair of success, and in hopelessness relax energy both in preparation and action. If it and the other articles . . . had not that purpose, what purpose had they? Were they the mere expression of peevish discontent, aimless, vapid, and innocuous? We cannot so conclude. We must take them at their word, as the jury did, and ascribe to them a more active and sinister purpose. They were the publications of a newspaper, deliberately prepared, systematic, always of the same trend, more specific in some instances, it may be, than in others. Their effect, or the persons affected, could not be shown, nor was it necessary. The tendency of the articles and their efficacy were enough for the offense—their 'intent' and 'attempt,' for those are the words of the act—and to have required more would have made the law useless. It was passed in precaution. The incidence of its violation might not be immediately seen, evil appearing only in disaster, the result of the disloyalty engendered and the spirit of mutiny."

Mr. Justice Holmes joined in the dissent of Mr. Justice Brandeis; and Mr. Justice Clarke this time opposed the majority, but not on constitutional grounds. The disagreement between the judges on the constitutional issue comes down to a question of degree as to the extent to which the court will allow the jury to surmise as to the probable effect of the objectionable language. In all the cases which have come before the Supreme Court the defendants were preaching a gospel which, if acted upon, would be a drag on the prosecution of the war. It seems safe to sum up the constitutional law made by the decisions by saying that the First Amendment

confers no immunity on such preaching even when confined to insinuation and innuendo. Yet it would be easy to think of much advocacy which would in fact hamper the conduct of the war much more grievously than any words of those now serving sentence, but which would never be thought punishable if coming from those whose heart is in the popular place. It might be that in dealing with prosecutions under such circumstances Mr. Justice Holmes would find more agreement with his emphasis on the stricter meaning of "intent." He suggests hypothetical cases where patriots, thinking that we were wasting money on aeroplanes or making more cannon of a certain kind than necessary, successfully advocated a curtailment of production which turned out to hinder the prosecution of the war.[21]

Two more espionage cases may be disposed of briefly. In *O'Connell* v. *United States*[22] the court was unanimous in sustaining the Espionage Law and the Selective Service Law on the authority of cases decided since the writ of error was sued out. The latter act was held to cover obstruction by non-official as well as official persons. No question of freedom of speech was involved. *Stilson* v. *United States*[23] did not review the evidence in any detail and adds nothing to the cases already considered. On one of the counts the government did not press the conviction; Justice Holmes and Justice Brandeis thought that as the sentence was upon a general verdict of guilty on both counts, the judgment should be reversed, but none of their colleagues agreed. The case also held that the trial by an impartial jury guaranteed by the Sixth Amendment does not include the privilege of peremptory challenges and that therefore defendants tried jointly cannot complain that the peremptory challenges are no more numerous than when one is tried alone.

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[21] For general articles on freedom of speech, see Thomas F. Carroll, "Freedom of Speech and the Press in the Federalist Period", 18 MICH. L. REV. 615, Robert Ferrari, "Political Crime", 20 COLUM. L. REV. 308, Fred B. Hart, "Power of Government over Speech and Press", 29 YALE L. J. 410, and Theodore Schroeder, "Political Crimes Defined", 18 MICH. L. REV. 30. Notes on various aspects of espionage and similar laws appear in 20 COLUM. L. REV. 222, 483, 700, 18 MICH. L. REV. 167, 798, and 6 VA. L. REV. 53.

[22] 253 U. S. 142, 40 Sup. Ct. 444 (1920).

[23] 250 U. S. 583, 40 Sup. Ct. 28 (1919). See 29 YALE L. J. 363 for comment on the question of challenge involved in the case.

In *Stroud* v. *United States*[24] there were contentions of double jeopardy and self-incrimination. Mr. Stroud had been convicted of murder, with a recommendation by the jury against capital punishment, which under the statute was binding. He asked for a new trial and got it, and this time was convicted of murder, with no recommendation by the jury as to sentence. Under the statute he was sentenced to death. The court found that the first conviction as well as the second was of murder in the first degree and applied the established rule that, since the defendant himself invoked the action of the court which resulted in a second trial, he was not thereby placed in second jeopardy within the meaning of the Constitution.[25] Allegations that the jury which brought in the second verdict was not an impartial one, as guaranteed by the Sixth Amendment, were based on the facts that some of the prospective jurors were present at preliminary proceedings at which statements prejudicial to the defendant were made and that the trial court refused to transfer the case to another division of the district. Jurors from the immediate vicinity were, however, excluded from the panel, and Mr. Justice Day said that "matters of this sort are addressed to the discretion of the trial judge, and we see nothing in the record to amount to abuse of discretion such as would authorize an appellate court to interfere with the judgment." The complaint of self-incrimination was founded on the refusal of the trial court to grant an application for a return to the defendant of letters written by him in prison and turned over by the warden to the district attorney. The court answered that the letters were voluntarily written, that no threat or coercion was used to obtain them, nor were they seized without process, and that having come into the possession of the prison officials "under established practice, reasonably designed to promote the discipline of the institution * * * there was neither testimony required of the accused, nor unreasonable search and seizure in violation of his constitutional rights."

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[24] 251 U. S. 15, 40 Sup. Ct. 50 (1919). See 5 VA. L. REG. *n. s.* 882, and 6 VA. L. REV. 457. For a rehearing on the question of challenge under the statute, see Stroud v. United States, 251 U. S. 380, 40 Sup. Ct. 176 (1920).

[25] For discussions of double jeopardy, see 68 U. PA. L. REV. 70, on former conviction for robbery as a bar to prosecution for murder, and 6 VA. L. REV. 372, on the same act as an offense against the state and a municipality.

A different result was reached in *Silverthorne Lumber Co.* v. *United States.*[26] Governmental officials raided the offices of a corporation after arresting its officers, took away papers without any search warrant, photographed them, retained photographs and copies after returning the originals by order of the court upon application by the defendants, framed a new indictment on the basis of the knowledge thus gained, and then obtained a subpoena to produce the originals. For refusing to obey the subpoena the corporation and one of its officers were found guilty of contempt. The Supreme Court held the subpoena unlawful as a violation of the constitutional prohibition against unreasonable searches and seizures. As Mr. Justice Holmes puts it:

> "The proposition could not be presented more nakedly. It is that, although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and may then use the knowledge that it has gained to call upon the owners in more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act."

It had already been held that papers so seized could not, after proper objection, be laid directly before the grand jury. The idea that this means only that two steps are required instead of one was said to reduce the Fourth Amendment to a form of words. Mr. Justice Holmes then continues:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the

[26] 252 U. S. 385, 40 Sup. Ct. 182 (1920). See 8 CALIF. L. REV. 347, 20 COL. L. REV. 484, 33 HARV. L. REV. 869, 4 MINN. L. REV. 447, 6 VA. L. REG. *n. s.* 223, and 29 YALE L. J. 553.

> Government's own wrong cannot be used by it in the way proposed."

The protection of the decision was accorded to the corporation as well as to the aggrieved individual. While corporations are not privileged to refuse to produce self-incriminating books and papers, as individuals are, under a judicial blending of the search-and-seizure and self-incrimination clauses of the Fourth and Fifth Amendments, "the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in another way." The case is rested on the Fourth Amendment without any admixture of the Fifth with its privilege against self-incrimination. Chief Justice White and Mr. Justice Pitney dissented, but without opinion.[27]

The clause of the Sixth Amendment entitling persons accused of crime against the federal government to trial "by an impartial jury of the state and district wherein the crime shall have been committed" is involved in *Gayon* v. *McCarthy*,[28] though the issue does not appear to have been raised by the accused. Gayon while in New York conspired with persons in Texas, and the acts of his fellow conspirators in Texas were declared to establish the jurisdiction of the federal district court in Texas to indict Gayon.[29] This case and another[30] passed on procedural questions relating to removal of the accused from one federal district to another. A third case[31] involved similar questions of procedure in arrest for extradition to a foreign country.[32]

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[27] For discussions of self-incrimination, see A. M. Kidd, "The Right to Take Finger-prints, Measurements and Photographs", 8 CALIF. L. REV. 25, D. O. McGovney, "Self-Criminating and Self-Disgracing Testimony", 5 IOWA L. BULL. 175, Roy Cleasey Merrick, "The Privilege Against Self-Incrimination as to Charges of Contempt", 14 ILL. L. REV. 171, a note in 8 CALIF. L. REV. 241 on powers exercised under the federal Trade Commission Act, and a note in 14 ILL. L. REV. 644 on self-incrimination under the National Prohibition Act.

[28] 252 U. S. 171, 40 Sup. Ct. 244 (1920).

[29] For question of venue for trial when blow is in one county and death in another, see 20 COLUM. L. REV. 619, and 33 HARV. L. REV. 843, 863.

[30] Stallings v. Splain, 253 U. S. 339, 40 Sup. Ct. 537 (1920).

[31] Collins v. Miller, 252 U. S. 364, 40 Sup. Ct. 347 (1920).

[32] Caldwell v. Parker, 252 U. S. 376, 40 Sup. Ct. 388 (1920), held that a

VIII. Jurisdiction and Procedure of Courts

1. *The Extent of Federal Judicial Power*

An attempt by a citizen of New Jersey to sue that state in an original proceeding in the Supreme Court of the United States was readily frustrated in *Duhne* v. *New Jersey*.[33] The bill was brought to enjoin the enforcement of the Eighteenth Amendment. The only possible ground for starting such a proceeding in the Supreme Court was that the suit was one in which a state is a party. But the court pointed out through the Chief Justice that the third section of Article III, which describes the original jurisdiction of the Supreme Court, "relates solely to the grounds of federal jurisdiction" conferred in the preceding section, "and hence solely deals with cases in which the original jurisdiction of this court may be resorted to in the exercise of the judicial power as previously given." Since it is well settled that the federal judicial power does not embrace a suit brought by a citizen against a state without its consent, the contention of the plaintiff was said to come "to the proposition that the clause relied upon provides for the exercise by this court of original jurisdiction in a case where no federal judicial power is conferred." Permission to file the bill was therefore refused. Whether the action was one against the federal government, in so far as it sought to enjoin federal officers, was not considered, inasmuch as the action against those officers had no claim to be brought originally in the Supreme Court, and the effort necessarily fell flat

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soldier in the army charged with the murder of a civilian is within the jurisdiction of state courts even in time of war, since the Articles of War do not clearly make the jurisdiction of courts martial exclusive.

For discussions of the Court-martial system, see S. T. Ansell, "Military Justice", 5 Cornell L. Q. 1, George Gleason Bogert, "Courts-Martial: Criticisms and Proposed Reform", 5 Cornell L. Q. 18, and Edmund M. Morgan, "Court-Martial Jurisdiction over Non-Military Persons Under the Articles of War", 4 Minn. L. Rev. 79, and "The Existing Court-Martial System and the Ansell Army Articles", 29 Yale L. J. 52.

See 18 Mich. L. Rev. 810 for discussion of question whether a criminal statute is void for indefiniteness; 33 Harv. L. Rev. 449, 473, for differing penalties for men and women under equal protection of the laws; and 6 Va. L. Rev. for imprisonment for non-payment of alimony.

[33] 251 U. S. 311, 40 Sup. Ct. 154 (1920). See 5 Va. L. Reg. *n. s.* 881, and 29 Yale L. J. 471.

when it was determined that the plaintiff could not hale the state before that court.[34]

An effort by the Secretary of the Treasury to resist proceedings brought against him in the Supreme Court of the District of Columbia, on the ground that the suit was one against the United States, met with defeat in *Houston* v. *Ormes*.[35] The proceeding was one by an attorney to establish an equitable lien for her fees in a fund in the treasury of the United States appropriated to pay a claim found by the Court of Claims to be due her client. The client had been made a party and had appeared and unsuccessfully defended. This was held to get rid of the objection that debts due from the United States have no *situs* at the seat of government and that therefore the decree against the secretary in favor of the attorney could not protect the government from subsequent suit by the client. The federal statute forbidding the assignment of claims against the government was put to one side as not standing in the way of assignment by operation of law after the claim has been allowed. This left only the question whether the suit to establish a lien on the fund was a suit against the United States. As to this, Mr. Justice Pitney said:

> "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."[36]

The extent of the admiralty jurisdiction was involved in two cases already dealt with. In *Peters* v. *Veasey*,[37] a longshoreman

[34] See 4 MINN L. REV. 364 for a discussion of a provision in the Virginia constitution held to be self-executing and to give the right to sue the state and its subdivisions without further legislative action.

[35] 252 U. S. 469, 40 Sup. Ct. 369 (1920).

[36] For consideration of other instances in which suit was resisted as one against the United States, see 8 CALIF. L. REV. 342, 20 COLUM. L. REV. 217, 5 CORNELL L. Q. 203, and 33 HARV. L. REV. 322.

[37] 251 U. S. 121, 40 Sup. Ct. 65 (1919).

injured on a ship by falling through a hatchway, and in *Knickerbocker Ice Co.* v. *Stewart*,[38] a bargeman injured when doing unnamed work said to be of a maritime nature, were held not entitled to the remedies of state compensation laws. There appeared to be no dispute in either case that the injury was within the admiralty jurisdiction. The decision that Congress could not permit the application of state compensation laws has already been reviewed.[39]

The question whether a case is within the federal jurisdiction because one arising under the Constitution of the United States necessarily involves an interpretation of the clause of the Constitution relied on by the party who seeks to get into the federal courts. The Supreme Court has develepod the practice of saying that it has no jurisdiction to answer frivolous questions or questions already completely disposed of. So it turns down preposterous objections by dismissing them for want of jurisdiction. There is, of course, only a formal difference between such procedure and the alternative one of entertaining jurisdiction and holding the objection one worth making but nevertheless ill-founded. Cases in which substantive federal questions have actually been disposed of have been treated together in this review, whether or not objection was raised to the exercise of jurisdiction.

The question whether the suit arose under a law of the United States was the issue in *Pell* v. *McCabe*.[40] This was a bill brought in the district court to enjoin a suit for fraud against the petitioner who in previous bankruptcy proceedings brought primarily against others had been determined not to be a general partner and therefore not subject to having his assets administered in the bankruptcy proceedings. The later suit against him for fraud was held to be quite independent of anything adjudicated in the bankruptcy proceedings and therefore one properly within the jurisdiction of the state court and not to be enjoined by the federal court by reason of its jurisdiction over bankruptcy matters. In *First National Bank* v. *Williams*,[41] however, a suit by a national bank against the comptroller of the currency to enjoin alleged harassing actions on his

[38] 253 U. S. 149, 40 Sup. Ct. 438 (1920).
[39] 19 MICH. L. REV. 13-14.
[40] 250 U. S. 573, 40 Sup. Ct. 43 (1919).
[41] 252 U. S. 504, 40 Sup. Ct. 372 (1920).

part was held to be one in which the right to recover turns on the construction and application of the National Banking Act, and therefore one arising *under* that act, even though not expressly authorized by it to be brought. It followed from this that under another statute the comptroller might be sued in the district where the bank is located.

In such cases as the foregoing it is often difficult to tell whether the issue is constitutional or merely one of statutory construction. When jurisdiction is entertained, the case is of course within the federal judicial power. But jurisdiction may be denied solely for want of statutory warrant for entertaining it. Sometimes the statutory limits are coterminous with the constitutional limits and sometimes not. Clearly questions whether the judgment below is a final one,[42] whether the federal issue is raised in season,[43] whether

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[42] Ex parte Tiffany, 252 U. S. 32, 40 Sup. Ct. 239 (1920), held final an order of the district court denying an application to require a receiver to turn over property to a receiver appointed by a state court. United States v. Thompson, 251 U. S. 407, 40 Sup Ct. 289 (1920), held a ruling sustaining a motion to quash an indictment to be a "decision or judgment sustaining a special plea in bar" so as to authorize the government to take a direct writ of error from the district court to the Supreme Court under the Criminal Appeals Act. The case held also that the Pennsylvania rule that a grand jury may not, without leave of court, bring in a new bill on matters previously submitted to another grand jury, is not the common law, as rightly perceived, and therefore not the rule for federal courts. The federal rule is not statutory, but is the product of the federal court's superior conception of the common law. The Pennsylvania rule is not adopted as the rule for federal courts by section 722 of the Revised Statutes, for that applies only in the absence of a federal rule on the subject. Collins v. Miller, 252 U. S. 364, 40 Sup. Ct. 347 (1920), held a decision of the district court not final because it disposed finally of only a part of the case. The Supreme Court raised of its own motion the question of the lack of finality. It remarked *obiter* that the construction of a treaty by the district court in a final decision is subject to direct review by the Supreme Court. Oneida Navigation Corporation v. W. & S. Job & Co., 252 U. S. 521, 40 Sup. Ct. 357 (1920) held not final the dismissal by the district court of a petition to bring in another defendant alleged to be liable for a collision. Here again the Supreme Court raised the question of finality of its own motion. See 33 HARV. L. REV. 1076 for a note on finality of decision for purposes of appeal.

[43] Godchaux Co. v. Estinople, 251 U. S. 179, 40 Sup. Ct. 116 (1920) held it too late to raise a federal question for the first time on a petition for a rehearing in the state supreme court, where that court does not actually enter-

the suit involves the requisite amount to be brought in the federal courts,[44] and whether the complaint goes to the validity of some authority exercised or only to some other right, title or interest under the federal Constitution or laws,[45] are questions solely of statutory construction. No constitutional issue seems to be involved in decisions dismissing a bill because the question raised has become

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tain the petition and pass on the objection. Mergenthaler Linotype Co. v. Davis, 251 U. S. 256, 40 Sup. Ct. 133 (1920), affirms the same point, and also decides that the state decision was final. Hiawassee River Power Co. v. Carolina-Tennessee Power Co., 252 U. S. 341, 40 Sup. Ct. 331 (1920), holds the federal question presented too late when first raised on petition for writ of error filed in the federal Supreme Court. Objection was seasonably raised to introducing in evidence a charter, but its reception in evidence was held to violate no federal right.

[44] Chesbrough v. Northern Trust Co., 252 U. S. 83, 40 Sup. Ct. 237 (1920), refused to order the district court to dismiss for want of jurisdiction an action for tort in which the alleged damages exceeded the prescribed amount and there was nothing to show that such a recovery was impossible or that there was bad faith. Scott v. Frazier, 253 U. S. 243, 40 Sup .Ct 503 (1920), ordered a bill dismissed for want of allegation that the amount in controversy equals that required by the statute. See 33 HARV. L. REV. 477 for a note on good faith in alleging the amount in controversy.

[45] Mergenthaler Linotype Co. v. Davis, 251 U. S. 256, 40 Sup. Ct. 133 (1920), note 43, *supra,* held that the claim that a lease contract was an inter-state-commerce contract and therefore not subject to state statutes does not challenge the validity of the statute so as to justify a writ of error from the state court, but at most asserts a right, title, or interest under the federal Constitution which might be the basis for a writ of certiorari. Jett Bros. Co. v. City of Carrollton, 252 U. S. 1, 40 Sup. Ct. 255 (1920), held that a complaint that petitioner's property was assessed at full value while other property was assessed at thirty or forty per cent of its value does not question the validity of a statute or an authority exercised under it as against the Constitution of the United States so as to warrant a writ of error. Mr. Justice Day says that "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 to this court." This case repeats that it is too late to raise the federal question on petition for a rehearing in the state court when that court does not give it consideration. For an extensive note on the considerations determining whether writ of error or certiorari is the proper device to bring a case from the state court to the United States Supreme Court, see 33 HARV. L. REV. 102. The cases outlined in the present note and in the two preceding do not exhaust the list of those in which the Supreme Court considered similar issues during the past term, but are given merely to illustrate the blunders that occur in matters of practice.

moot by the amendment of a statute,[46] or allowing an alien enemy to proceed as party plaintiff where adequate precautions are taken against paying a judgment to him personally,[47] or holding that a soldier in the army charged with the murder of a civilian is within the jurisdiction of a state court even in time of war, since the Articles of War do not clearly make the jurisdiction of the courts martial exclusive.[48] The reports of the decisions of each term are crowded with disputes on questions of federal practice. The ignorance and/or the perversity of attorneys impose on the Supreme Court an excess of unnecessary burden. The burden appears not only in the cases in which opinions are written but still more in the many instances in which decisions are disposed of in a memorandum. Cases of this latter character are not included in this review. Needless to say, they frequently represent the determination of a constitutional question. If the question is not regarded by the Supreme Court as one worth discussing, the reviewer may perhaps be pardoned for emulating its example.[49]

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[46] United States v. Alaska S. S. Co., 253 U. S. 113, 40 Sup. Ct 448 (1920).

[47] Birge-Forbes Co. v. Heye, 251 U. S. 317, 40 Sup. Ct. 160 (1920).

[48] Caldwell v. Parker, 252 U. S. 376, 40 Sup. Ct. 388 (1920).

[49] For other discussions of the jurisdiction of the federal courts see Armistead M. Dobie, "Jurisdiction of the United States District Court as Affected by Assignment", 6 VA. L. REV. 553, and notes in 33 HARV. L. REV. 970, 985, and 6 VA. L. REV. 124.

Discussions of various aspects of the judicial interpretation of constitutional limitations will be found in George J. Danforth, "The Influence of the Lawyer upon the Trend of Modern Legislation", 89 CENT. L. J. 392, W. F. Dodd, "The Problem of State Constitutional Construction", 20 COLUM. L. REV. 635, "Implied Powers and Implied Limitations in Constitutional Law", 29 YALE L. J. 137. W. L. Jenks, "Judicial System of Michigan Under the Governor and Judges", 18 MICH. L. REV. 16; Shippen Lewis, "Revising the Constitution of Pennsylvania", 68 U. PA. L. REV. 120, Fred A. Maynard, "Five to Four Decisions of the Supreme Court of the United States", 89 CENT. L. J. 206, William Renwick Riddell, "The Constitutions of the United States and Canada", 4 MINN. L. REV. 165, and G. Sweetman Smith, "Judicial Encroachment upon the Legislative Prerogative", 3 BI. MON. L. REV. 1.

The practice of foreign countries in respect to declaring laws unconstitutional is considered in 8 CALIF. L. REV. 91. In 5 CORNELL L. Q. is a note on the right of a legislature to validate an act previously declared invalid by the courts. The duty of federal courts to follow the law of the state in cases where jurisdiction is obtained by diversity of citizenship is treated in 20

2. Requisites of Jurisdiction over Defendants

The question in *Chipman* v. *Thomas B. Jeffrey Co.*[50] was whether a Wisconsin corporation formerly doing business in New York, which had complied with the New York statute and designated a New York agent on whom process against it might be served, is subject to suit in New York on an extra-New-York cause of action after it has ceased to do business in New York but before it has revoked the designation of its New York agent. The case was started in the New York court and removed to the federal district court on motion of the defendant. In that court a motion was made to have the service set aside for lack of jurisdiction over the so-called person of the defendant. The district judge granted the motion and his action was affirmed by the Supreme Court. But the reason given was that the New York courts had said that "unless a foreign corporation is engaged in business within the state, it is not brought within the state by the presence of its agents." Of course the validity of the service depended primarily upon the statute. If the statute did not authorize service in the case in question there was no constitutional issue. The Supreme Court, however, was careful to guard against any inference that it would have approved of such an exercise of jurisdiction had it been found warranted by the statute. For Mr. Justice McKenna says that "in resting the case on the New York decisions we do not wish to be understood that the validity of such service as here involved would not be of federal cognizance." Perhaps a hint of what the Supreme Court thinks about the constitutional issue may be gathered from the comment that the state court in sustaining service in a case in which the corporation was doing business within the state showed a conscious solicitude of the necessity of making that the ground of its decision.[51]

COLUM. L. REV. 612. The requirement that state courts must follow the federal rule of burden of proof in cases under the federal Employers' Liability Law is discussed in 33 HARV. L. REV. 861.

[50] 251 U. S. 373, 40 Sup. Ct. 172 (1920). See 20 COLUM. L. REV. 618, 33 HARV. L. REV. 730, and 29 YALE L. J. 554.

[51] For notes on jurisdiction over foreign corporations, see 20 COLUM. L. REV. 205, 33 HARV. L. REV. 114, 14 ILL. L. REV. 653, and 29 YALE L. J. 567. Jurisdiction for divorce or annulment of marriage is treated in 20 COLUM. L. REV. 479, and 5 CORNELL L. Q. 174; service of process on a person in the

3. *Procedural Requirements*

An interesting question touching the inherent powers of federal courts and the restriction on those powers by the guarantee of trial by jury contained in the Seventh Amendment arose in *In re Peterson*.[52] Judge A. N. Hand of the district court appointed an auditor in an action at law on a contract, instructed him to examine the accounts of the parties, gave him power to take testimony and compel the attendance of witnesses, and ordered him to file a report with the clerk with a view to simplifying the issues for the jury. The auditor was to make no final determination and his report was to be merely evidence to submit to the jury, which was to retain the power of final determination of all issues of fact in the case. An original petition was brought in the Supreme Court for writs of mandamus and/or prohibition directed to Judge Hand to restrain him from proceeding in this manner and to direct him to restore the case to the calendar for trial in the usual way. Leave to file the petition was granted;[53] but, after hearing, the petition was denied. The Seventh Amendment was held not to forbid changes in practice or procedure or new methods of determining what facts are in issue. The auditor's task of simplifying the issues was called a function in essence the same as that of pleading. The proposed admission of his report as evidence was likened to statutory provisions making the findings of administrative commissions *prima facie* evidence. As the jury was to be free to deal with this report as with any other evidence and the parties were not restricted in the introduction of other evidence, the constitutional right to trial by jury was not impaired. It was recognized that the Seventh Amendment would forbid a compulsory reference to the auditor with power to determine any of the issues. As for the source of the power exercised by Judge Hand, the Supreme Court found it in the inherent powers of courts to take action, not forbidden by statute or Constitution, that will aid them in the performance of their duties.

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state on public duty, in 33 HARV. L. REV. 721, 734. See also Emil W. Colombo, "Service on Parties Fraudulently Brought Within the Jurisdiction", 3 BI. MONTH. L. REV. 23.

[52] 253 U. S. 543, 40 Sup. Ct. 543 (1920). See Thomas W. Shelton, "A Useful Procedural Innovation—Auditors in Law Cases", 91 CENT. L. J. 59.

[53] In re Peterson, —— U. S. ——, 40 Sup. Ct. 178 (1920).

This inherent power was said to be the same whether the court sits in law or in equity. Owing to provisions in the federal statutes, a discretion reserved by the trial judge as to apportioning the costs of the enterprise was negatived and it was declared that the expense must be borne by the losing party. Mr. Justice Brandeis wrote the opinion of the court. Justices McKenna, Pitney and McReynolds dissented, without opinion.

Several cases involved questions of procedure in the state courts. *Chicago, R. I. & P. R. Co.* v. *Cole*[54] found it proper for a state to provide that the defenses of contributory negligence and assumption of risk shall in all cases be a question of fact for the jury, since those defenses might be abolished altogether. Mr. Justice Holmes declared that a state may do away with the jury altogether, or modify its constitution, the procedure before it, or the requirements of a verdict, "as it may confer legislative and judicial powers upon a commission not known to the common law." So, he continued, the state may confer upon a jury larger powers than those that generally prevail. The cases cited for a number of these propositions were civil actions, but Mr. Justice Holmes does not include this qualification in his recital. The actual decision is of course restricted to civil actions and is limited by the concluding statement that "in the present instance the plaintiff in error cannot complain that its chance to prevail upon a certain ground is diminished when the ground might have been altogether removed." It seemed to be conceded that the plaintiff's intestate had been guilty of what was contributory negligence at common law.[55]

Minor complaints met with short answers in two cases. In *Goldsmith* v. *Prendergast Construction Co.*[56] Mr. Justice Day declared brusquely: "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." In *Lee* v. *Central of Georgia Ry.*

[54] 251 U. S. 54, 40 Sup. Ct. 68 (1919). See 90 CENT. L. J. 167 and 5 VA. L. REG. *n. s.* 799.

[55] The question whether the acquisition of the privilege of voting entitles women to sit on juries is considered in 90 CENT. L. J. 205 and 68 U. PA. L. REV. 398. In 68 U. PA. L. REV. 369 is a note on the right to trial by jury in will cases under the Pennsylvania constitution.

[56] 252 U. S. 12, 40 Sup. Ct. 273 (1920), 19 MICH. L. REV. 129.

Co.[57] a plaintiff suing in the state court under the federal Employers' Liability Law complained because the state practice did not allow him to sue the company and the negligent engineer jointly in a single count. Mr. Justice Brandeis told him that such questions are normally matters of pleading and practice relating solely to the form of remedy and therefore wholly questions of state law. Only when they become matters of substance which affect a federal right, as in the case of the burden of proof in actions under the Employers' Liability Law,[58] does the state decision become subject to federal review.

Such questions as that involved in the preceding case might appropriately be classified together under the head of substantive elements in rights of action, and dealt with under the police power rather than in the section on judicial procedure. Such a group of cases would embrace also *Canadian Northern Ry. Co.* v. *Eggen*,[59] which sustained a Minnesota statute providing that "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 maintained in this state unless the plaintiff be a citizen of this state who has owned the cause of action ever since it accrued." A North Dakota citizen injured in Canada was barred from suing in Canada by the Canadian statute of limitations. He brought his action in Minnesota within the time available for a Minnesota citizen. He complained that the Minnesota statute which barred him but did not bar citizens of Minnesota violated the provision in the federal Constitution that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The Circuit Court of Appeals agreed with him. But the Supreme Court said that the provision does not guarantee citizens of other states absolute equality with citizens of the state whose action is questioned, and that the plaintiff had all that he deserved if he had as long to sue in Minnesota as in the country where he worked and got hurt. For a year he is on an equality with

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[57] 252 U. S. 109, 40 Sup. Ct. 254 (1920).

[58] See Central Vermont Railway Co. v. White, 238 U. S. 507, 35 Sup. Ct. 865 (1915), and New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 38 Sup. Ct. 535 (1918).

[59] 252 U. S. 553, 40 Sup. Ct. 402 (1920).

citizens of Minnesota; if he does not avail himself of this equality when he has it, he cannot complain that it does not continue longer, when the restriction as to him is reasonable in itself. It may be observed that Mr. Justice Clarke adduces no reasons why a distinction should be made between citizens of Minnesota and those of her sister states, as the court has done in the other cases when a discrimination has been sanctioned. The case, therefore, seems to stand for a principle that if citizens of other states have treatment which is fair intrinsically, and if they are in no way prejudiced by what is allowed to citizens of the state whose favor they are seeking, they cannot complain that a state is kinder to its own citizens than to others.[60]

4. Faith and Credit to Proceedings of Sister States

An important question was settled in *Kenny* v. *Supreme Lodge*,[61] in which Illinois was told that it could not refuse to allow suit in its courts on a judgment obtained in a sister state, although the original cause of action could not have been sued on in Illinois. The Illinois statute provided that no action should be brought in that state for damages occasioned by death in another state in consequence of wrongful action. The Illinois court construed this to forbid suit in Illinois on an Alabama judgment for an Alabama death, and sustained the statute as constitutional. But the Supreme Court distinguished the earlier cases allowing a state to refuse suit on a foreign judgment obtained by one foreign corporation against another[62] and on a judgment for a penalty for violation of the law of a sister state,[63] and held the case before it governed by an earlier decision that Mississippi was bound to recognize a Missouri judgment on a Mississippi transaction that was void by the law of Miss-

[60] On the power of a state to close its courts to actions for wrongful death in other jurisdictions, see 33 HARV. L. REV. 727; on closing the courts to suits between foreign corporations on a foreign cause of action, see 29 YALE L. J. 457.

[61] 252 U. S. 411, 40 Sup. Ct. 371 (1920). See 29 YALE L. J. 812. For notes on the contrary decision of the state court, see 2 ILL. L. BULL. 361 and 28 YALE L. J. 264.

[62] Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 373, 24 Sup. Ct. 92 (1903).

[63] Wisconsin v. Pelican Insurance Co., 127 U. S. 265, 8 Sup. Ct. 1370 (1888).

issippi.[64] Mr. Justice Holmes recognized that "there is truth in the proposition that the Constitution does not require the state to furnish a court," but he declared that "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," and that "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." An argument that suit was foreclosed in Illinois because Alabama provided that the action could be maintained in a court of competent jurisdiction within the state "and not elsewhere" was dealt with by saying that "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," and further that "had these decisions been otherwise 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."

A question of *res adjudicata* was decided in *Napa Valley Electric Co. v. California,*[65] but as the case involved the credit to be given to a state judgment in a federal court, it is not technically an application of the full-faith-and-credit clause. Yet the case is a precedent that would be followed when the second action is brought in the court of a sister state. Constitutional questions are frequently questions of common law which constitutional clauses make matters of adjudication in the Supreme Court. The Constitution brings the question before the Supreme Court, but does not direct how it shall be decided. The quarrel in the instant case was whether the refusal of the California Supreme Court to entertain an appeal from the state railroad commission or to order the record to be certified by the commission for review in the court was a final adjudication or merely a refusal to adjudicate. In holding it to be the former, Mr. Justice McKenna referred to the "common, and at times necessary, practice of courts to determine upon the face of a pleading what action should be taken upon it." It was for the state court to decide what was proper practice under the statute—whether it might act without having the record of the commission before it. The Cali-

[64] Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641 (1908).
[65] 251 U. S. 366, 40 Sup. Ct. 174 (1920).

fornia cases were thought to show that the state court regarded the refusal of applications for certiorari to review the orders of the commission as decisions that those orders are lawful. The refusal in question was therefore held to be an exercise of judicial power, and as the refusal was not appealed from, it was held a final judgment which precluded a reëxamination of the same issues in a subsequent proceeding.[66]

IX. Administrative Power and Procedure

Underlying all questions as to the propriety or the effect of administrative action are the constitutional issues whether the delegation of power to the administrative officer is within the restrictions set by what is left of the principle of the separation of powers, whether the general regulations or the specific findings of the administration can be accepted as final, and whether the procedure indulged in by the administration is proper. These questions are frequently interrelated. The finality of administrative adjudications may depend upon whether they were reached by appropriate methods. The validity of the regulation or order may depend upon the scope of the power that may be delegated. The requisites of the procedure may vary with the effect to be ascribed to the action taken. Summary proceedings may be sanctioned where the action taken is necessarily

[66] As the Supreme Court's decision of constitutional issues involving questions of jurisdiction and of *res adjudicata* depends often upon its conception of the proper principles of conflict of laws, the following notes and articles may be of interest to students of constitutional law: on domicil, 20 Colum. L. Rev. 87, 33 Harv. L. Rev. 863, 18 Mich. L. Rev. 331, 332; on law governing question of capacity, 5 Cornell L. Q. 312, 33 Harv. L. Rev. 612, 726, and Ernest G. Lorenzen, "The Theory of Qualifications and the Conflict of Laws", 20 Colum. L. Rev. 247; on jurisdiction for divorce and effect of decree in other states, 20 Colum. L. Rev. 491, 617, 33 Harv. L. Rev. 729, 4 Minn. L. Rev. 456, 29 Yale L. J. 119; on foreign judgments, 33 Harv. L. Rev. 984, 18 Mich. L. Rev. 142, 4 Minn. L. Rev. 546, Herbert F. Goodrich, "Enforcement of a Foreign Equitable Decree", 5 Iowa L. Bull. 230, and Ernest G. Lorenzen, "The Enforcement of American Judgments Abroad", 29 Yale L. J. 188, 268; on injunction to restrain foreign proceedings, 33 Harv. L. Rev. 92; on service of process at request of a foreign court, 33 Harv. L. Rev. 978; on construction or enforcement of foreign statutes, 29 Yale L. J. 230, 329, 798; on proof of foreign law, 33 Harv. L. Rev. 315; on "renvoi", 29 Yale L. J. 214.

subject to judicial review, while more careful investigation is required for determinations that may be conclusive. Above all, the extent of possible delegation and the propriety of modes of action vary with the nature of the interests with which the administration is dealing. Wide delegation and drastic procedure may be proper when the administration is running public business or dispensing public bounty, but improper when it is directly interfering with individual liberty. Indeed, there are few, if any, general principles of administrative law under our Constitution. Instead we have one set of rules for police interferences and other sets of rules for administrative action in the exercise of the powers of taxation or of eminent domain, the conduct of public business or the bestowal of public privileges.[67]

The cases involving administrative action in the fields of taxation and of eminent domain have already been reviewed. The wide scope allowed to administrative authorities in determining the area to be subjected to a special assessment is illustrated by *Branson* v. *Bush*[68] and *Goldsmith* v. *Prendergast Construction Co.*[69] The hearing afforded the taxpayer on the question of his proportion of benefit was held adequate in *Farncomb* v. *Denver*,[70] but found doubtful in *Oklahoma Ry. Co.* v. *Severns Paving Co.*[71] Other questions as to the relief open to taxpayers against alleged unconstitutional levies

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[67] See John A. Fairlie, "Administrative Legislation", 2 ILL. L. BULL. 373, and Frederick Green, "Separation of Governmental Powers", 2 ILL. L. BULL. 373, and 29 YALE L. J. 369. Questions of the delegation of power are considered in 15 ILL. L. REV. 108, 18 MICH. L. REV. 328, and 6 VA. L. REV. 441. Various phases of judicial control over administrative action are discussed in 20 COLUM. L. REV. 97, 33 HARV. L. REV. 462, 478, and 29 YALE L. J. 358, 361. Cases on the liability of officers are dealt with in 19 COLUM. L. REV. 418, 20 COLUM. L. REV. 94, 210, 227, and 29 YALE L. J. 361. On the power of equity over public elections, see 29 YALE L. J. 655; on eligibility of women for public office, 33 HARV. L. REV. 295; on effect of Nineteenth Amendment on exclusion of women from juries, 8 VA. L. REV. 589, on right of *de jure* officer to salary after payment to *de facto* officer, 18 MICH. L. REV. 434; on expiration of term of office, 29 YALE L. J. 118.

[68] 251 U. S. 182, 40 Sup. Ct. 113 (1919), 19 MICH. L. REV. 127.

[69] 252 U. S. 12, 40 Sup. Ct. 273 (1920), 19 MICH. L. REV. 129.

[70] 252 U. S. 7, 40 Sup. Ct. 271 (1920), 19 MICH. L. REV. 129.

[71] 251 U. S. 104, 40 Sup. Ct. 73 (1919), 19 MICH. L. REV. 129.

are considered in *Wallace* v. *Hines*,[72] *Shaffer* v. *Carter*,[73] *Ward* v. *Love County*,[74] and *Bradwell* v. *Carter County*,[75] though these cases relate only indirectly to administrative action. Administrative power and procedure in taking property by eminent domain is considered in *Hays* v. *Port of Seattle*[76] and *Bragg* v. *Weaver*,[77] which show that administrative officers may determine the necessity and expediency of the taking, that the taking may precede the determination of compensation where adequate provision is made for getting compensation later, and that the property owner is not entitled to a hearing before the administration on the question of compensation where the statute allows him to appeal from its award and get a judicial hearing of the question of what is due him.

Administrative exercise of the police power was involved in a number of the cases reviewed under that head, and under miscellaneous federal powers and the regulation of commerce. In *Pennsylvania R. Co.* v. *Pennsylvania*[78] it was declared that a state cannot give a public service commission power to do what the laws of the United States forbid, whether its action be called administrative or judicial. Several of the cases dealing with public utilities show that an administrative order is subject to all the judicial scrutiny that would be visited on a direct legislative prescription. The requirement that administrative action regulating rates must be so exercised as to afford to the victim a fair opportunity to contest the reasonableness of the rates before a judicial tribunal was passed upon in *St. Louis, I. M. & S. Ry. Co.* v. *Williams*,[79] *Ohio Valley Water Co.* v. *Ben Avon Borough*,[80] *Oklahoma Operating Co.* v. *Love*,[81] and *Oklahoma Gin Co.* v. *Oklahoma*.[82] The reasonableness of rates prescribed by a commission was reviewed in *Grosbeck* v.

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[72] 253 U. S. 66, 40 Sup. Ct. 435 (1920), 19 MICH. L. REV. 30, 121.
[73] 252 U. S. 37, 40 Sup. Ct. 221 (1920), 19 MICH. L. REV. 124.
[74] 253 U. S. 17, 40 Sup. Ct. 419 (1920), 19 MICH. L. REV. 133.
[75] 253 U. S. 25, 40 Sup. Ct. 422 (1920), 19 MICH. L. REV. 133.
[76] 251 U. S. 233, 40 Sup. Ct. 125 (1920), 19 MICH. L. REV. 149.
[77] 251 U. S. 57, 40 Sup. Ct. 63 (1919), 19 MICH. L. REV. 149.
[78] 250 U. S. 566, 40 Sup. Ct. 36 (1919), 19 MICH. L. REV. 27.
[79] 251 U. S. 63, 40 Sup. Ct. 71 (1919), 19 MICH. L. REV. 141.
[80] 253 U. S. 287, 40 Sup. Ct. 527 (1920), 19 MICH. L. REV. 142.
[81] 252 U. S. 331, 40 Sup. Ct. 338 (1920), 19 MICH. L. REV. 143.
[82] 252 U. S. 339, 40 Sup. Ct. 341 (1920), 19 MICH. L. REV. 143.

Duluth, S. S. & A. Ry. Co.[83] An industrial commission's award of damages for permanent facial disfigurement was sustained in *New York Central Ry. Co.* v. *Bianc.*[84] The jurisdiction and procedure of the Federal Trade Commission was considered in *Federal Trade Commission* v. *Gratz.*[85] The internal law of administration was involved in *Burnap* v. *United States,*[86] which dealt with the removal of federal officers. In *Houston* v. *Ormes*[87] a suit against the Secretary of the Treasury was held not to be a suit against the United States.[88]

While the federal government has no police power as such, it often uses its recognized powers for police purposes. Indeed, the term federal police power has now won recognition even from the Supreme Court. Several administrative exercises of this so-called federal police power were questioned in cases decided during the past term. In *United States* v. *Standard Brewery,*[89] which held that the War Prohibition Act of 1918 applied only to intoxicating liquors, it was laid down that contrary rulings of the internal revenue department could not alter the terms of the statute and make conduct criminal which the statute does not. In *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.*[90] it was declared that the question whether a stipulation in an interstate bill of lading violates the federal statute against limiting liability for loss is a question of law

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[83] 250 U. S. 607, 40 Sup. Ct. 38 (1919), 19 MICH. L. REV. 140.

[84] 250 U. S. 596, 40 Sup. Ct. 45 (1919), 19 MICH. L. REV 145.

[85] 253 U. S. 421, 40 Sup. Ct. 572 (1920), 19 MICH. L. REV. 23, note 39.

[86] 252 U. S. 512, 40 Sup. Ct. 374 (1920), 19 MICH. L. REV. 18.

[87] 252 U. S. 469, 40 Sup. Ct. 369 (1920), *supra*, p. 302.

[88] For a note on Ball Engineering Co. v. J. G. White Co., 250 U. S. 45, 39 Sup. Ct. 393 (1919), on the subject of suits against the United States under the Tucker Act, see 29 YALE L. J. 125. For other discussions of the liability of a government for the acts of its officers, see 19 COLUM. L. REV. 407, 5 CORNELL L. Q. 78, 338, 33 HARV. L. REV. 713, 735, 18 MICH. L. REV. 433, and George DeForest Lord, "Admiralty Claims Against the Government", 19 COLUM. L. REV. 465. For comment on the tort liability of municipal corporations see 20 COLUM. L. REV. 619, 620, 5 CORNELL L. Q. 90, 18 MICH. L. REV. 708, 29 YALE L. J. 117, 911. The contractual powers and liabilities of municipal corporations are treated in 20 COLUM. L. REV. 336, 349, and 29 YALE L. J. 364. On another phase of the law of municipal corporations, see Richard W. Montague, "Law of Municipal Home Rule in Oregon", 8 CALIF. L. REV. 151.

[89] 251 U. S. 210, 40 Sup. Ct. 139 (1920).

[90] 253 U. S. 97, 40 Sup. Ct. 504 (1920).

which the courts must decide for themselves, regardless of any determination by the Interstate Commerce Commission that the stipulation in question is reasonable.

The effect to be given to a reparation order of the Interstate Commerce Commission was considered in *Spiller* v. *Atchison, T. & S. F. R. Co.*[91] The statute provided that the order of the commission that reparation is due the shipper should be *prima facie* evidence in actions brought by him against the carrier in courts. The carrier based his objections to such weight being accorded to the commission's findings on the ground that its procedure was unduly lax. Its reception of hearsay evidence was overlooked, not on the ground that it was entitled to accept such evidence, but for the reason that the carrier had failed to object to its reception on the ground of hearsay during the hearing before the commissioner. Yet the opinion hints that the commission has wide latitude in the matter of evidence, especially when its findings are made only *prima facie* evidence. It was explicitly declared that where the essential facts found by the commission are based on substantial evidence, and there has been no denial of the right to a fair hearing, its findings and order will not be rejected because improper evidence was admitted or the best possible available evidence was not produced or because a different conclusion might have been reached.

Two more important cases protected Chinamen from deportation orders of immigration officials. Both involved Chinamen who had previously been in the United States and were returning to the United States after a temporary visit to China. *White* v. *Ching Fong*[92] involved an alien who was conceded by the administrative authorities to have been previously in this country, but who was ordered deported on the strength of an administrative finding that his original entry was unlawful. A writ of habeas corpus was awarded on the ground that under the statute a Chinese person already in the United States is entitled to a judicial determination of his right to remain and that this right is not lost by a temporary visit to China. His situation upon his return is not that of one first seeking to enter.

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[91] 253 U. S. 117, 40 Sup. Ct. 466 (1920).
[92] 253 U. S. 90, 40 Sup. Ct. 449 (1920).

Kwock Jan Fat v. *White*[93] had to do with a claim to citizenship. Here the petitioner while in this country and intending to visit China filed an application as provided by law for a "preinvestigation of his claimed status as an American citizen." The investigation resulted in an official determination that he was an American citizen. During his absence in China anonymous communications to the commissioner of immigration started a new investigation, and upon his return he was denied entry. Objections to the hearing accorded on this occasion included the facts that the examining inspector submitted to the commissioner as evidence statements reported to be made by unnamed persons, that a demand by the petitioner for the names was refused, and that the examining inspector failed to record in the testimony taken the fact that the three white persons of reputable character who testified to the petitioner's American citizenship were confronted with him and recognized him as the boy they had known in his youth. These allegations were admitted by demurrer. While the court indicated disapproval of the reception in evidence of unsworn statements by unnamed persons, it stated that in view of the declaration by the commissioner that this report did not influence his decision, it might not say that this "rendered the hearing so manifestly unfair as to require reversal, if there were nothing else objectionable in the record." But the failure to record the fact that there was mutual recognition between the petitioner and the three white witnesses was held enough to entitle the petitioner to a writ of habeas corpus. While the decision goes on the ground that the hearing did not fulfil the requirements of the statute, it is likely that the court would hold, if necessary, that a fair hearing on the question of citizenship is essential to due process of law. Having found the administrative hearing unfair, the Supreme Court ordered the district court to hear and determine the question of citizenship on its merits, after the practice approved in an earlier case.[94] It would seem that under the *Chin Fong* case, just considered, the petitioner was also entitled to a judicial hearing

[93] 253 U. S. 454, 40 Sup. Ct. 566 (1920).

[94] Chin How v. United States, 208 U. S. 8, 28 Sup. Ct. 201 (1908). For a discussion of this procedure see "Judicial Review of Administrative Action in Immigration Proceedings", 32 HARV. L. REV. 360.

because he had concededly been a long-time resident prior to his recent visit to China.

Plainly greater latitude is allowed administrative officers in action which decides only whether individuals are entitled to the benefits conferred by statutes. Thus, in *United States* v. *Lane*[95] the court accepted without question the finding of the land department that work done by a prospector was not enough to entitle him to privileges open to those who have "opened or improved" a coal mine. Mr. Justice McKenna said that, where there is discretion, the finding of the land department, though disputable, is impregnable to mandamus. So, in *Cameron* v. *United States*[96] it was held that the findings of the Secretary of the Interior that a tract covered by a mineral location is not mineral land, and that there had been no sufficient discovery, are conclusive, in the absence of fraud or imposition. *United States* v. *Poland*[97] held that where a land patent was issued by land officers in violation of the statute the government is entitled to have it canceled unless a successor of the patentee is a *bona fide* purchaser. A patent was also canceled in *United States* v. *Southern Pacific Co.*[98] In this same group may be put *National Lead Co.* v. *United States*,[99] which accepted the interpretation of the Treasury Department that the drawback allowed on exportation of products from raw materials previously imported should, when more than one product is derived from those materials, be apportioned according to the relative value of the respective products and not according to their relative weight. This was an instance where the administration had to fill in a gap in the statute. Though in the particular case the court plainly thought the administrative ruling right in itself, it often shows an inclination not to substitute its opinion for that of the administration, particularly when the complainant is in the position of looking a gift horse in the mouth.

Several cases involved administrative determinations in the course of carrying on government business. *Grand Trunk Western Ry.*

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[95] 250 U. S. 549, 40 Sup. Ct. 33 (1919).
[96] 252 U. S. 450, 40 Sup. Ct. 410 (1920).
[97] 251 U. S. 221, 40 Sup. Ct. 127 (1920).
[98] 251 U. S. 1, 40 Sup. Ct. 47 (1919). See 20 COLUM. L. REV. 228.
[99] 252 U. S. 140, 40 Sup. Ct. 237 (1920).

Co. v. *United States*[100] refused to give weight to a long-continued administrative construction that a certain statute relating to overpayments for carrying the mails does not apply to a certain railroad, where this construction was due to a mistake of fact as to whether the road in question was in the class of the land-aided roads. In *Kansas City So. Ry. Co.* v. *United States*[101] it was held that the failure of the Postmaster General to fine companies for less than twenty-four hours' delay in delivery of the mails is not to be taken as an administrative construction that the statute empowered him to impose fines only when the delay exceeds twenty-four hours. *New York, N. H. & H. R. Co.* v. *United States*[102] accepted the administrative practice of weighing the mails only once in four years, as warranted by the letter of the statute. *The Mail Divisor Cases*[103] held railroads bound by the average weight of mails determined by the administration. Only four of the judges thought that the method employed was warranted by the statute, but two others held the statute directory only and not mandatory, and thought that, since the Postmaster General had discretion as to the rate of pay and as the companies had carried the mails on his terms when they were not by law obliged to, they were bound by the conditions under which they undertook the service. In *Eastern Extension, Australasia & China Tel. Co.* v. *United States*[104] and *E. W. Bliss Co.* v. *United States*[105] the court had to consider whether the action of administrative officers had been such as to create a claim against the government on which it would be subject to suit in the court of claims.[106]

Two cases involved administrative dealings with the Indian tribes. *United States* v. *Omaha Tribe of Indians*[107] denied recovery against

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[100] 252 U. S. 112, 40 Sup. Ct. 309 (1920).

[101] 252 U. S. 147, 40 Sup. Ct. 257 (1920).

[102] 251 U. S. 123, 40 Sup. Ct. 67 (1919). Mr. Justice Brandeis dissents. See 29 YALE L. J. 666.

[103] 251 U. S. 326, 40 Sup. Ct. 162 (1920). Justices Day and Van Devanter dissent. Mr. Justice McReynolds did not sit.

[104] 251 U. S. 355, 40 Sup. Ct. 168 (1920).

[105] 253 U. S. 187, 40 Sup. Ct. 455 (1920).

[106] For references to discussions of claims against governments see note 88, *supra*.

[107] 253 U. S. 275, 40 Sup. Ct. 522 (1920).

the United States for depredations committed by a hostile tribe, and held that the agreement in a treaty to give protection so long as the President may deem it necessary imposed no liability in the absence of a finding that there was failure to provide such protection as the President deemed necessary. The case illustrates the principle that a right dependent upon administrative action cannot arise unless the requisite action is taken. *United States* v. *Payne*[108] held that the Secretary of the Interior is the final judge of whether names shall be enrolled as members of the Creek Nation and that until he has taken final action he may abandon his preliminary conclusions. The Secretary had written the commissioner approving his report, but he was allowed to rescind this without giving any hearing or adducing any reasons. Such action prior to any actual enrollment was held not to deny due process of law.

Two other cases accepted long-continued administrative constructions of statutes. *Ash Sheep Co.* v. *United States*[109] adopted the administrative conclusion that "cattle" includes sheep, in view of warrant in the dictionaries aided by the presumption that Congress would have amended the statute had it disliked the administrative interpretation of its scope. In *Corsicana National Bank* v. *Johnson*[110] Mr. Justice Pitney declared:

> "Whatever view we might entertain, were the matter *res nova*, we are advised that by the practice and administrative rulings of the Comptroller of the Currency during a long period, if not from the beginning of national banking, liabilities which are incurred by one person avowedly and in fact as surety or as indorser for money borrowed by another are not included in the computation. We feel constrained to accept this as a practical construction of the section. * * *"

The question arose in a suit by a national bank against one of its officers for loaning amounts in excess of that permitted by the statute to a single borrower.

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[108] 253 U. S. 209, 40 Sup. Ct. 513 (1920).
[109] 252 U. S. 159, 40 Sup. Ct. 241 (1920).
[110] 251 U. S. 68, 40 Sup. Ct. 82 (1919).

X. Intergovernmental Relations

Several of the cases already reviewed involve relations between the states and the United States. In *Hawke* v. *Smith*[111] and *National Prohibition Cases*[112] it was settled that a state legislature acts as a federal agency in passing upon proposed amendments to the federal Constitution, and that therefore a state cannot subject the action of the legislature to a referendum. *Evans* v. *National Bank of Savannah*[113] illustrates the familiar rule that national banks are subject to state control only to the extent permitted by Congress. *Ervien* v. *United States*[114] shows that a stipulation in an enabling act as to the use to be made of lands therein granted to the thereby newly-created state is binding on the state after it attains a full-fledged status and will be enforced by the federal courts. *United States* v. *Osage County*[115] lets the United States as guardian of Indians sue in a federal court to protect its wards from wrongful state taxation. *Duhne* v. *New Jersey*[116] holds that the original jurisdiction of the Supreme Court in controversies to which a state is a party is confined to cases in which the federal judicial power extends to suits against a state, and therefore does not include a suit sought to be brought against a state by one of its citizens.[117]

Relations between states brought several cases to the Supreme Court. Questions of fact with regard to boundaries were adjudicated in *Minnesota* v. *Wisconsin*[118] *and Arkansas* v. *Mississippi*.[119] In *Ohio* v. *West Virginia*[120] and *Pennsylvania* v. *West Virginia*[121]

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[111] 253 U. S. 221, 40 Sup. Ct. 495 (1920), 19 Mich. L. Rev. 2.

[112] 253 U. S. 350, 40 Sup. Ct. 486 (1920), 19 Mich. L. Rev. 4.

[113] 251 U. S. 108, 40 Sup. Ct. 58 (1919), 19 Mich. L. Rev. 18.

[114] 251 U. S. 41, 40 Sup. Ct. 75 (1919), 19 Mich. L. Rev. 16.

[115] 251 U. S. 128, 40 Sup. Ct. 100 (1919), 19 Mich. L. Rev. 17.

[116] 251 U. S. 311, 40 Sup. Ct. 154 (1920), *supra*, p. 301.

[117] A question of intergovernmental relations is considered in M. G. Wallace, "Taxation by the States of United States Bonds Held by Corporations", 6 Va. L. Rev. 20.

[118] 252 U. S. 273, 40 Sup. Ct. 314 (1920).

[119] 252 U. S. 344, 40 Sup. Ct. 333 (1920).

On such questions of fact as those involved in this and in the preceding case, see Harvey Hoshour, "Boundary Controversies Between States Bordering on a Navigable River", 4 Minn. L. Rev. 463.

[120] 252 U. S. 563, 40 Sup. Ct. 357 (1920).

[121] 252 U. S. 563, 40 Sup. Ct. 357 (1920).

the court granted motions to consolidate the cases for the purpose of taking testimony, and appointed a commissioner for that purpose. Four cases each styled *Oklahoma* v. *Texas*[122] dealt with petitions to intervene or granted leave to file them. One issued an order granting an injunction and appointing a receiver, and another issued an order instructing the receiver.

Columbia University. THOMAS REED POWELL.

[122] 252 U. S. 372, 40 Sup. Ct. 353 (1920); 253 U. S. 465, 40 Sup. Ct. 580, 580, 582 (1920).