MAHLON PITNEY

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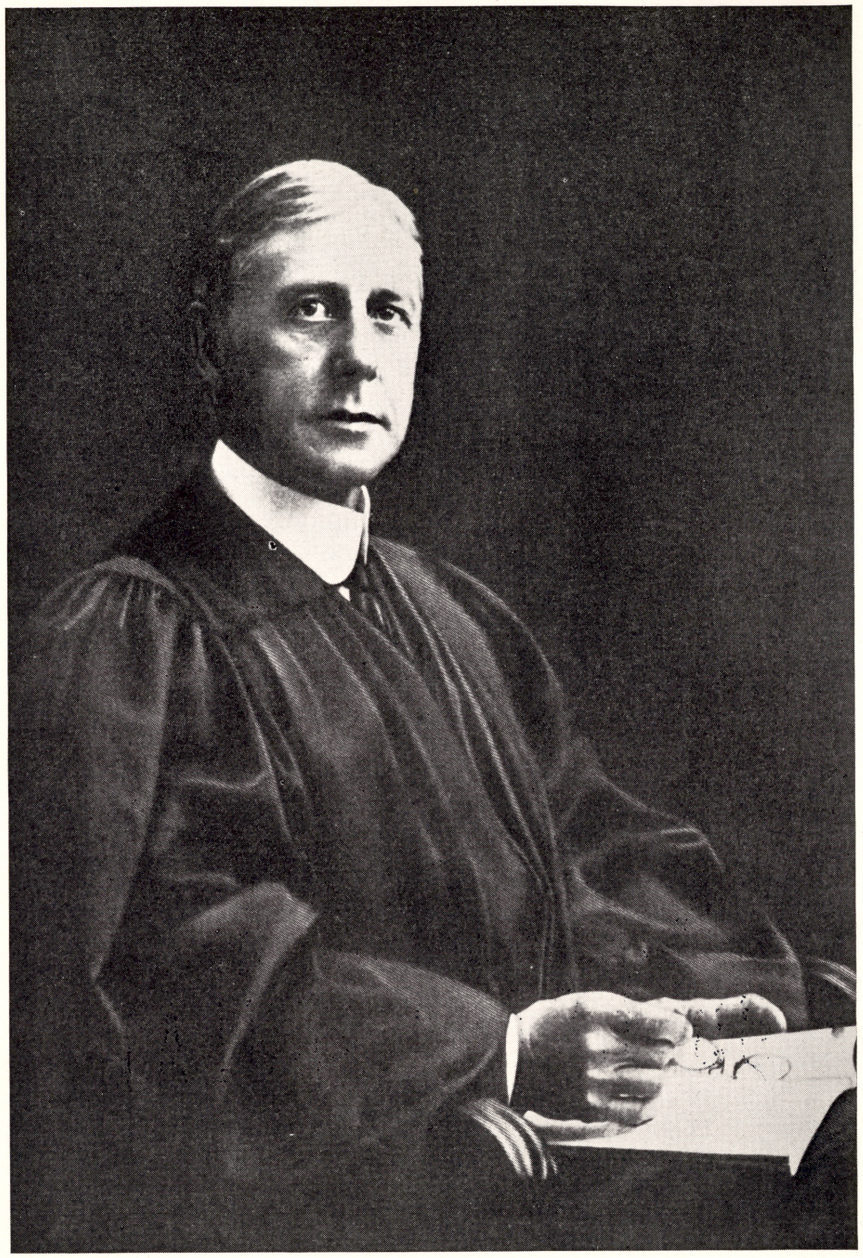

Mahlon Pitney

MAHLON PITNEY

His Life and Career
Political and Judicial

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by
ALAN RYDER BREED

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Preface

IN THE preparation of the life of Mahlon Pitney and the work involved in gathering material bearing on his career as a lawyer and Justice of the Supreme Court of the United States, it has afforded me great pleasure to make the acquaintance of Mrs. Mahlon Pitney, the widow of Mr. Justice Pitney, his brother Henry C. Pitney, and his son Shelton Pitney, and other relatives, all of whom have been exceedingly generous of their time in gathering together documents that have assisted in my effort to portray the life work of a noted jurist. I am deeply appreciative of this aid and assistance, and take this opportunity of expressing such appreciation.

In order to obtain more intimate and comprehensive information as to the judicial career of Mr. Justice Pitney, it has been my great privilege to have conferred with Mr. Chief Justice Charles E. Hughes, Mr. Justice Willis VanDevanter, and Mr. Justice James C. McReynolds of the Supreme Court of the United States, and I am deeply grateful for the valuable information they contributed.

I also wish to express my sincere thanks for the aid furnished me in various ways by Mr. Charles Elmore Cropley, Clerk of the Supreme Court of the United States, Mr. William Tyler Page, Clerk of the House of Representatives, and Mr. Joseph P. Tumulty, former Secretary to President Woodrow Wilson.

I have also had the pleasure of meeting and obtaining data from Chancellor Edwin Robert Walker of New Jersey, Mr. Edward C. Katzenbach, former Attorney-General of the State of New Jersey, Mr. John R. Hardin of Pitney, Hardin & Skinner, of Newark, New Jersey, Mr. John P. Dullard, State Librarian of the State of New Jersey, Mr. John D. Faussett, Assistant State Librarian, and Mr. Frank Schroth, editor of the Trenton Times, for whose kindness and courtesy I am deeply grateful.

A. R. B.

March 15, 1932.

Chapter I

Education and Early Training

THROUGHOUT American history, members of the Bar have been the most prominent leaders in public affairs. The training required to practice law and the varied experiences necessarily resulting from intimate association with individuals and business activities qualify a lawyer for duties which lie outside the sphere of that profession and touch the general interests of society.

Mahlon Pitney was a lawyer who brought his keen discrimination and thorough wisdom to the Bar, not only professionally, but also for the benefit of his community. He merits a place among the most representative lawyers and citizens of New Jersey. The story of his life, while not dramatic in action, offers a typical example of that alert American spirit carrying on the traditions of an old and honorable English family, thereby rising to a position of influence and renown solely through native talent, indomitable intellectual honesty and perseverance.

Mahlon Pitney, the second son of Vice Chancellor Henry Cooper Pitney, of New Jersey, was born on his father's farm near Morristown, New Jersey, on February 5, 1858. His mother was Sarah Louise Halstead. He was descended from James Pitney, who immigrated to the United States from England. His great-grandfather, on his father's side, for whom he was named, was a soldier in the Revolutionary War. It is interesting to note that at a banquet on May 3, 1912, given in his honor by The Lotos Club in New York after his appointment to the Supreme Court of the United States, he remarked in a joking way that his maternal grandfather had once owned the site on which The Drexel Building at Wall and Broad Streets, New York City, once stood, and in which for years was located the office of J. P. Morgan & Company. However, he added, that that was a long time ago and his good grandfather disposed of the property when land was as cheap in Wall Street as it is now in the remotest parts of the city.

Pitney prepared for college in the schools of Morristown, New Jersey. He first attended Miss Mary Morrow's Kinder-

garten, which he soon left, and then entered Miss Jane Morrow's school for older children. At the age of fourteen he went to the Morris Academy and later to the classical school of George L. Wright (Yale '67) and Wilbur W. Perry (Yale '70), at 14 South Street.

He was admitted to the freshman class at Princeton in 1875. This tall, slim young man had not been many days in that peaceful university before he had made the acquaintance of another first year man, which grew into a long and lasting friendship. This was Thomas Woodrow Wilson. During much of their college course they sat opposite each other at the same dining club. Wilson showed his ability as a speaker on literary subjects. Pitney participated in many interesting debates and made a most successful record in this line of endeavor.

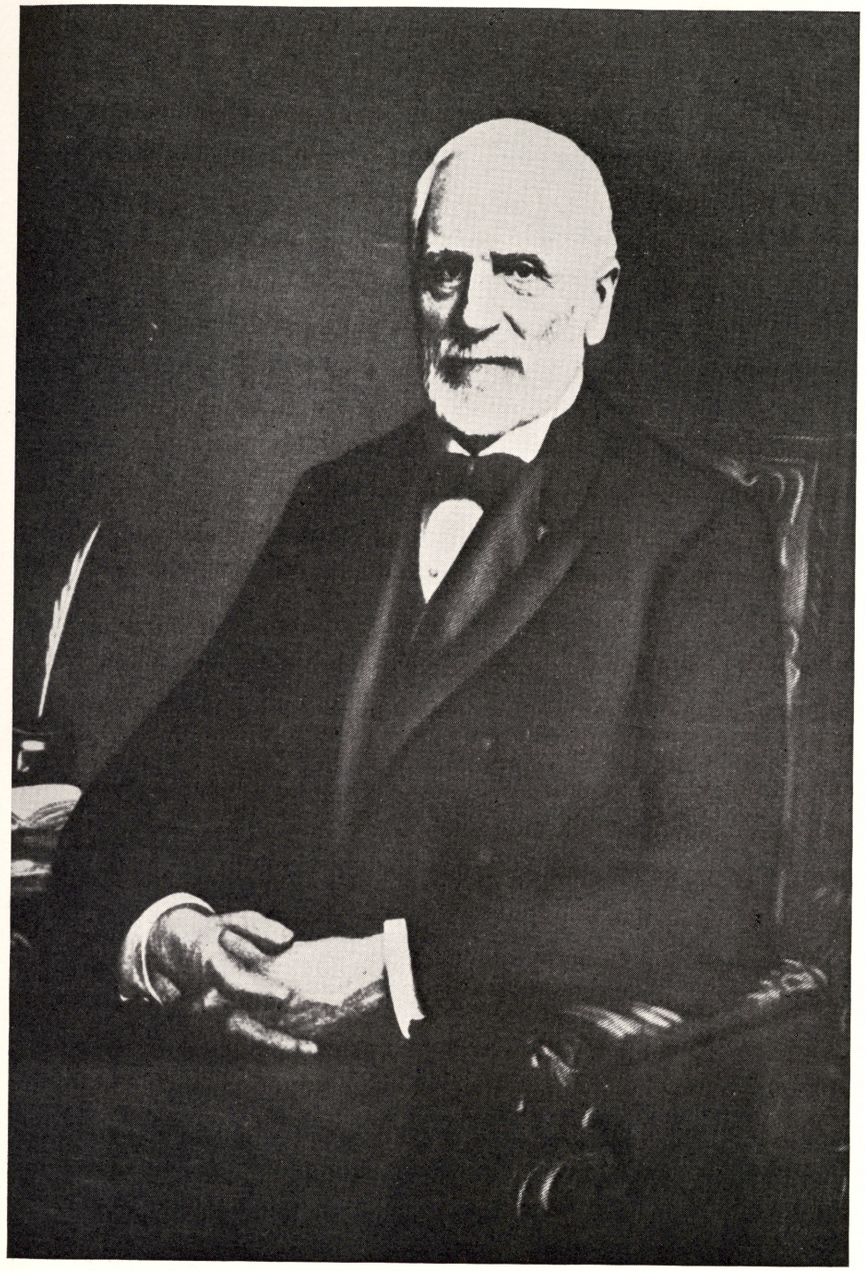
In senior year, Pitney inaugurated a change in Princeton athletics which has since been followed by all colleges throughout the country. At that time professional baseball was growing more and more popular, but the practice of engaging professional coaches for college teams was unknown. Young Pitney, as manager, was interested in the Princeton baseball team of '79. As he looked over the material he shook his head dubiously, saying, "These boys are raw; they need someone to teach them the fine points of the game."[1] Deciding something must be done, Mahlon journeyed to Philadelphia, and after a long talk with Jim Delvin, a famous big league player of the time, induced him to come to Princeton and coach the team. So far as is known, this is the first time that a professional baseball coach was hired by a college. Now every college employs one.

On the completion of the four year course, Pitney was graduated in the Class of '79 with the degree of Bachelor of Arts. Three years later he was honored by the University with the degree of Master of Arts.

During the period intervening between graduation and 1882, Pitney studied law under the direction of his father, one of the most eminent jurists of the State.

One day, when asked why he entered the law, Mr. Pitney replied, "I could hardly have escaped it, for my father lived in his work and was always ready to talk law, day and night. But he never asked me about future plans. One evening, some time before I left college, he was walking up and down the gravel

[1] The Philadelphia Record, March 17, 1912.



Henry Cooper Pitney

walk in front of our home; it was about sunset, and I came out on the porch, where I stood watching him. I remember the scene very well. He had his back toward me, and his hands were clasped behind. 'Father,' I said, 'I think it's time I made up my mind what to do in this world.' He turned and looked at me. 'What do you want to do?' I explained that I wanted to do something well and make a living at it. I'd like to be a lawyer if I thought I could make it go, but I want to be a good one. Better be a good cobbler than a poor lawyer. How, I continued, does a man make a living at the law? Father smiled, and we sat down together to talk it over. 'I'll tell you how it's done,' he said. Thereupon he told me the story of his early days as a country lawyer, possessed of grit and energy, but without influence; how he waited for his first clients, and studied law while he waited; with what intensity he applied himself to the first business which came his way; how success in his earliest cases made friends and clients for him, so that he found his law practice gradually growing larger and more lucrative, until he had attained a position of leadership at the Bar. 'My son,' he said, 'if you will work as hard as I did; if you will attend thoroughly to everything you have to do, and if you are strictly honorable and upright in all your dealings, there is no reason why you should not succeed as well as I have done.' As a result of this interview I went into my father's law office as soon as I received my college diploma * * *.'"[2]

Reading and study of the more impractical kind did not please Pitney, for at the time of his appointment to the Supreme Court of the United States in 1912, in speaking of his work preparatory to admission to the Bar, he said, "I found the work very dull at first, and Blackstone very dry reading."[3]

The work at his father's office occupied most of his time. As the bar examinations were approaching he decided to abandon temporarily this office work for intensive preparation. With his close friend, Francis J. Swayze, who was also preparing for his Bar examinations, Pitney went to Newton, Sussex County, New Jersey, where he could study without interruption. Mr. Swayze later became a Justice of the Court of Errors and Appeals of New Jersey, and was also considered in 1912 for appointment to the United States Supreme Court. In after years, referring to his preparatory work for the Bar, Pitney made the following

2 *Ibid.*1
3 *Ibid.*1

statement: "I learned my law by absorption. I read and studied, of course, but I got most of it from my father who was a walking encyclopedia of law."[4]

After admission to the Bar as an attorney-at-law, Pitney determined to establish his own office in Dover, New Jersey, a very prosperous little town, then one of the leading centers of the iron industry in this country. He practiced there from 1882 to 1889, being counsel, a director and an officer of the Cranbury Iron Company, and almost entirely managing the George A. Richards Department Store. In 1885 he became a counsellor-at-law of the State of New Jersey, and in 1889 returned to assume charge of his father's law office in Morristown because of the latter's appointment as a Vice Chancellor of the State of New Jersey.

In the autumn of 1891 he married Miss Florence T. Shelton, of Morristown, who was born in New York and three years before her marriage had moved to Morristown, New Jersey. They had three children: Guy Shelton Pitney, named for his mother, born in 1893; Mahlon Pitney, Jr., born in 1899; and Beatrice Louise Pitney, now Mrs. Horace R. Lamb, born in 1904. Mrs. Pitney's father, William H. Shelton, was a prominent broker and member of the New York Stock Exchange, and lived much of his life, after retiring from active business, in Morristown, New Jersey.

During his connection with his father's firm, Pitney & Youngblood, Pitney increased its clientele and created for himself an enviable reputation as a reliable and conscientious lawyer. He was noted for his able presentation and argument of cases before Appellate Courts and also as a clever trial lawyer before a jury, always being thoroughly familiar with the law and facts concerned.

Mr. Pitney practiced law in Morristown only until 1895, when he was given the opportunity to represent his district in the United States House of Representatives.

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4 *Ibid.*1

Chapter II

Legislative and Political Activities

SINCE Mahlon Pitney was vitally interested in the law, it was with extreme difficulty that he was persuaded to enter politics, but notwithstanding this aversion Mr. Pitney, in 1894, became the acknowledged Republican leader of the Fourth Congressional District of New Jersey, comprising Morris, Hunterdon, Warren and Sussex Counties. In this year, over Democratic opposition, strong and usually prevailing in the district, he was elected to serve in the United States House of Representatives by a plurality of 1407 votes over Johnston Cornish. During his first term Pitney distinguished himself by becoming a member of the House Committee on Appropriations, of which Joseph G. Cannon (Uncle Joe) was chairman. This was unusual for a new member of the House. He was also a member of the House Committee on Reform in the Civil Service, from which, on March 6, 1896, he reported a bill regarding certain reforms in the civil service. The bill, however, did not become law.

While in the House of Representatives he frequently returned to New Jersey, where, on one occasion, he was chosen to preside over the Republican State Convention which nominated John W. Griggs for Governor. He was the first successful Republican candidate in twenty years, a tribute to the good management and executive ability of Mahlon Pitney.

In 1896 Mr. Pitney was again elected to the House, winning by a plurality of 2977 votes over Augustus W. Cutler, the strongest man the Democrats could nominate. This was the result of a vigorous campaign in which he took an uncompromising stand in favor of sound money as defined in the party platform. At this time Pitney was at the height of his political popularity, winning the plaudits of Republicans throughout the State, and was endorsed by the "gold" Democrats. The feeling in his favor was not based alone on his personal popularity, but upon the fact that he had shown remarkable aptitude as a legislator.

During this second term he appears to have participated more frequently in debate. Long dissertations were not infre-

quent on the lack of prudence shown by the Committee on Appropriations in granting excess funds to various Departments of the Government, and real results were accomplished in keeping appropriations down to reasonable amounts. But he made his greatest mark during the Alaskan Boundary dispute, where he showed himself a close student of the matter in hand and a statesman of ability and capacity whose final judgment was to be relied upon. So distinct was the impression that Mr. Pitney made in the House by his thorough and exhaustive knowledge of the whole subject, that he was selected to manage the passage of the Committee's report after its presentation to the House.

As his last effort in the House, on the 1st and 3rd days of February, 1899, he commended the character and ability of former Governor John W. Griggs, whose nomination for Attorney General of the United States was under discussion.[5] This event shows clearly Mr. Pitney's warmth of personality and his desire to assist those he admired and trusted. It is no wonder that his casual acquaintance with Joseph G. Cannon and Speaker Thomas B. Reed ripened into friendship.

Toward the end of his second term in Congress both Mr. and Mrs. Pitney longed to return to Morristown and their friends. It is not meant that Mr. Pitney no longer wished to represent his District in Congress, but rather that he desired to keep more closely in touch with the needs and wishes of his community. He resigned from the House on January 5, 1899.

During Mr. Pitney's two terms in the House, a gradual change had been taking place in the old political order of New Jersey, which had usually been dominated by the Democrats. Much restlessness also prevailed among the voters in New Jersey because of the long continued domination of both parties by corporations. The opposing party leaders had much the same platforms. James Smith, Democrat, who strongly urged Woodrow Wilson for Governor in 1910, during his seventeen years in the United States Senate, had been closely allied with railroad, public utility, banking, and other corporations interested in manipulating government. The Republican Party was attempting to accomplish much the same purpose, save that the corporations usually preferred to deal with the Republicans, as they felt them to be politically more stable.

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5 Congressional Record for 54th and 55th Congress.



Mahlon Pitney.

Until the death of William J. Sewall, party boss, Republican candidates for Governor or any other position of importance, in order to confer with Sewall, were obliged to make pilgrimages to Sewall's headquarters in a railroad office in Camden, New Jersey. "He was an unusually clever Irishman, who dominated his party like a czar. Starting as a very humble workman in the railroad yards, he had come up through the years to be both master in railroad and in political circles."[6]

It is interesting to note that Mr. Pitney made a similar pilgrimage, seeking to become candidate for Governor on the Republican ticket in 1899, and Sewall, though he recognized Pitney as a powerful political factor in the northern part of the State, insisted that Foster M. Voorhees be the party candidate; so Pitney had to forego this aspiration and, instead, was elected by a plurality of 831 votes to the New Jersey State Senate, and took his seat in the Senate in the early part of 1899. From the moment of assuming this position he was regarded as the Republican minority leader.

The year following the Republicans had a majority control, and Mr. Pitney was chosen president of the Senate. This was a great honor, which indicates his eminence in his party.

During his two years in the State Legislature his thorough and exhaustive study of the proposed Morris Canal Abandonment scheme resulted in disclosure to the Senate of a plan which was shown to be exclusively in the interest of the Lehigh Valley Railroad, the canal lessee. This discovery, in addition to many brilliant speeches in defense of the interests of his community, made with an eye to justice, brought Pitney reputation and renown, thereby qualifying him for Governor.

The Democrats feared Mr. Pitney, and rightfully so. He had represented the old Fourth District, the most powerful in the State, very creditably in the United States Congress, and Morris County in the State Senate. He was a strong candidate and a likely winner in the gubernatorial contest of 1901. Mr. Voorhees, then Governor of the State, realized the situation.

Then came an unusual occurrence. Whether we consider it unfortunate or not is a matter of opinion. For Mr. Pitney's future rise to prominence in the judicial world it was a happy circumstance. No one can say how high he would have gone in politics had he not taken the judicial opportunity.

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[6] Political Education of Woodrow Wilson, by Kerney, p. 58.

Chapter III

Judicial Career in New Jersey

IN THE early part of the year 1901 David A. Depew, Chief Justice of the Supreme Court of New Jersey, a greatly respected personage, resigned from the Bench. Governor Voorhees named Associate Justice William S. Gummere to succeed him. This left a vacancy, and Mr. Pitney was nominated to fill this position on February 5, 1901, his forty-third birthday, and was immediately confirmed by the Senate. He was sworn in on February 19th for a term of seven years, and took his position on the Bench on November 16th.

The appointment of Mr. Pitney as an Associate Justice of the New Jersey Supreme Court was an obvious method of reducing the opposition to Franklin Murphy whom Governor Voorhees hoped would succeed himself as Governor.

Mr. Pitney's enthusiastic acceptance of the Associate Justiceship showed the fundamental trend of Pitney's mind toward a judicial rather than a political career. He was wrapped up in the law, though he found struggling with this inherent fascination a powerful desire to give his efforts and abilities to the people, to be a political public servant. He chose a judicial career, and during twenty-one years Mr. Pitney proved himself a worthy and inspiring judge.

His definite retirement from the field of politics caused a great deal of comment from those with whom he was on intimate terms and from a disgruntled group of Republicans. The former delighted in seeing him finally choose the field for which they considered him most fitted, but the latter were definitely opposed to his action, as illustrated by an item published in one of the Newark papers on February 5, 1901, the day he was nominated, which stated: "The Morris County Republicans desired Mr. Pitney to make way for someone else on the Republican State Committee. Those who expressed this desire are said to feel piqued because the Senator betook himself out of the gubernatorial race after they had been counting on landing the prize for him."[7]

[7] Newark Evening News, February 5, 1901.

Bitter, annoyed, disgusted, like a ship without a rudder, might better express their feelings than "piqued". If this is not a tribute to Mr. Pitney and an indication of the esteem in which he was held, tribute is a meaningless word.

Mr. Pitney was now launched on his judicial carrer, being an Associate Justice of the Supreme Court of New Jersey from November 16, 1901 to January 22, 1908, a period of seven years. Early in 1908 William J. Magie retired from the Chancellorship, leaving the position to be filled at the discretion of the Governor. Governor Fort, immediate predecessor to Woodrow Wilson, appointed Pitney Chancellor of New Jersey on January 22nd of the same year, which position he held until his appointment to the United States Supreme Court in 1912.

An interesting situation existed at this time in that the father of Chancellor Pitney, Henry C. Pitney, who ranked high in the judicial system of the State as Vice Chancellor, although he had resigned in the previous year, nevertheless continued his duties for some months after the appointment of his son.

After Pitney's father retired to resume the practice of law in Morristown, he always anticipated the frequent visits of his son, Mahlon, on each of which occasions, being interested in the work before the Court, asked his son what was happening in Trenton. The comradeship of the father and son was unique, and in 1908 they travelled the thirty-five miles from Morristown to their old university to celebrate the elder Pitney's sixtieth class reunion, and at the same time the honorary degree of L.L.D. was conferred on Mahlon.

A review of the decisions of Associate Justice Pitney, rendered while he was an Associate Justice of the New Jersey Supreme Court, show that he handed down about 167 opinions on a wide variety of legal problems, both civil and criminal, which appear to have been followed in many other decisions, and that he was reversed by the Court of Errors and Appeals in only four instances.[8]

When Pitney took up the duties of Chancellor, which lasted for a period of four years and two months, aside from rendering decisions as Chancellor, he was required to devote much time in coordinating the chancery. Under the system followed in New Jersey each Vice Chancellor was allotted a certain district of

[8] A reference to these cases with the subject matter of the same appears in the Appendix.

the State and his duties required him to report on the affairs of that district. Pitney, as Chancellor, inaugurated meetings of the Vice Chancellors two or three times a year in order to discuss the various problems of each district. These meetings were often held at the old Princeton Inn, in Princeton, New Jersey.

As Chancellor, Pitney occupied the highest judicial office in the State, being the head of both the law and equity branches of the Appellate Court, and presiding over both. As Chancellor, it appears that he rendered about 47 decisions on the law side of the Court, and approximately 11 decisions on the equity side of the Court.[9]

A careful review of the decisions which were rendered by Justice Pitney, both in the Supreme Court and as Chancellor, shows the breadth of his legal training and his able and sound reasoning on problems arising in connection with corporate matters, taxation, contracts, torts, insurance, criminal subjects and questions affecting the State Constitution, master and servant, bills and notes and a wide variety of legal controversies that were on appeal before his Court. He was an indefatigable worker.

The one decision which stands out among his others is Jonas Glass Co. *v.* Glass Bottle Blowers Association,[10] which was decided in 1908 and involved a controversy between employer and employee. This opinion was the basis of much of the opposition to his appointment to the United States Supreme Court Bench in 1912, and a résumé of the decision is given in a later chapter.

A discussion of Pitney's decisions in New Jersey might seem more apt under this chapter, but, inasmuch as his supreme efforts were concentrated on his decisions in the United States Supreme Court, involving issues much broader than would appear in a State Court, such cases as he decided in New Jersey, which were at all analogous to the questions brought before him in the Supreme Court, are discussed more appropriately and co-related with the decisions of the Supreme Court on the same general subjects.

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9 See table of cases with subject matter in the Appendix.

10 77 N. J. Eq. 219.

Chapter IV

Appointment to Supreme Court of the United States

IN 1912 Mahlon Pitney was 54 years of age, of fine, well proportioned stature, engaging manners and appearance. On February 7th of this year he received a letter from ex-Governor Franklin Murphy of New Jersey inviting him to attend a luncheon and reception at his home in Newark on Lincoln's Birthday, February 12th, given in honor of President William H. Taft. The Chancellor accepted. He had only casually met the President once before while playing on the golf links at Chevy Chase. He motored to Princeton and from there took the train to Newark. He was wholly unconscious that this was to be the most important day of his life.

In a short conversation before luncheon with Governor Murphy, a very close friend of Pitney, Murphy mentioned to Pitney the fact that President Taft might be considering the Chancellor's name for the vacancy on the United States Supreme Court Bench occasioned by the death of Mr. Justice John Marshall Harlan. Mr. Pitney gave little weight to this remark, believing that if anyone was to be appointed from New Jersey, Associate Justice Francis J. Swayze would be selected. In fact, Chancellor Pitney had endorsed his friend, Justice Swayze, for the appointment. Chancellor Pitney was seated on the right of the President at luncheon, due to his position as head of the judiciary of New Jersey. They had a very interesting and enjoyable conversation, but it was about golf and not law or politics. Mr. Taft was greatly impressed with the Chancellor's geniality. After luncheon was over and the President and Governor were returning to New York City, following a rather long silence, the President said in effect that he liked the Chancellor very much and that he thought he would appoint him to the Supreme Court Bench.

But the President's mind was not made up solely from outward appearances. On returning to Washington late that afternoon, February 12th, he retired to his study in the White House and spent that evening and part of the next day in reading most of the important decisions which Mr. Pitney had rendered as a Judge of the Supreme Court and as Chancellor of New Jersey.

There was a good deal of mystery about the whole affair. In the first place, we might consider briefly how Mr. Taft happened to choose New Jersey as the State from which the appointee was to be chosen.

Throughout the history of our country presidents have endeavored to make the United States Supreme Court as representative a body as possible by appointing members to that body from different states in the Union. Since the adoption of the Constitution, no native born citizen of New Jersey had received the honor of such an appointment as a Representative from New Jersey.

William Patterson was appointed by President Washington from New Jersey in 1793 at the age of forty-eight and served until his death in 1806, but he was born at sea, the son of Irish immigrants. Another instance was that of the appointment by President Grant in 1870 of Joseph P. Bradley, who, although appointed from New Jersey, was born in New York.*

So New Jersey had never directly had a man of her own on the Supreme Court of the United States, and therefore President Taft's problem would seem to have been less difficult than one would imagine, for the choice was narrowed down to one of the outstanding jurists of that State. During the two or three weeks previous to the time that President Taft had met Mahlon Pitney at the luncheon, in his attempt to find a successor to Justice Harlan he looked beyond the Mississippi. Judge William C. Hook, of the United States Circuit Court, seemed a very powerful nominee, but his name met with vigorous opposition

* As evidence of the strong public sentiment in regard to the representation of the various circuits, an interesting editorial appeared after Mr. Pitney's appointment, which reads as follows:

"The confirmation of the new Justice will restore the Third Judicial Circuit to representation in the Supreme Court. That circuit including New Jersey, Pennsylvania and Delaware has furnished many eminent associate justices, but since the retirement of Mr. Shires in 1903, it has been without a justice of its own. Through Mr. Pitney's appoinment the representation of the various circuits will become a little more evenly balanced. Had Judge Hook or Mr. Nagel been selected, the existing status of inequality would have been maintained and three of the nine circuits would still have been left unrecognized. Justice Harlan's death has reduced the number of justices appointed from the sixth district from three to two—Messrs. Day and Lurton remaining. There are two justices from the Fifth Circuit—Messrs. White and Lamar. Every other circuit will hereafter be represented by one justice except the Fourth and the Seventh. The Fourth composed of the States of Maryland, Virginia, West Virginia, North Carolina, and South Carolina, has had no Justice since Roger B. Taney died in 1864.

"A President is right in trying always to pick the best available man for a vacancy in the Supreme Court regardless of his place of residence. But, other things being equal, it is gratifying to the people of a circuit to feel that they have a justice chosen from among them and New Jersey, Pennsylvania and Delaware are to be congratulated on again achieving equitable recognition among the circuits."[11]

[11] New York Tribune, February 20, 1912, Editorial.

from A. L. Urick, president of the Iowa Federation of Labor, who cited as the basis of his contention two of his Oklahoma decisions; the first involving a two cent fare law, and the second the "Jim Crow" car law, the latter case in which Judge Hook decided in favor of the railroads and against the contention of the negroes affected. A further objection was made on the ground of the Sanborn decision with reference to rights of states to regulate interstate rights.[12] These are said to have been the causes of the President's turning from Judge Hook.

Abandoning vigorous and open advocacy of Judge Hook, the President then turned to Charles Nagel, Secretary of the Department of Commerce and Labor, who was suggested by Attorney General George W. Wickersham. Mr. Nagel had been lenient in enforcing immigration laws. This fact was the basis of an attack of labor organizations. Furthermore, the objections were raised that he had been an attorney for the Standard Oil interests. The temperance forces also raised objections that he had had too close relations with the brewery interests in St. Louis.

Though both Judge Hook and Mr. Nagel were kept in mind, President Taft finally looked to New Jersey for worthy juristic material, and discovered four likely candidates: Chief Justice William J. Gummere of the Supreme Court, Associate Justice Francis J. Swayze, Vice Chancellor Frederic W. Stevens, and Chancellor Mahlon Pitney.

The luncheon at the house of Governor Murphy followed the President's decision to make his selection from New Jersey talent.

United States Senator Frank O. Briggs, then Republican State Chairman, had urged President Taft to name Justice Swayze. It must be remembered that the Roosevelt hammering had already begun to tell on the Taft forces in New Jersey, and it was the idea of Briggs that it would be helpful to Taft if the State were given some signal recognition. This was an added fact which undoubtedly played on Taft's mind. Swayze was an outstanding jurist of profound legal learning, and on more than one occasion had been mentioned for the Supreme Court. At the age of eighteen he was graduated from Harvard with high honors, and was one of the Overseers of that University. Never much of a politician, he had served most of his life on the Bench. Taft, in his amiable way, doubtless with an eye to

[12] New York Globe, February 19, 1912.

cultivating better political conditions in New Jersey, consented then to be present at the Murphy luncheon. Swayze, "reticent almost to the point of bashfulness, and conscious of the fact that he was under inspection, was little calculated to show to advantage to the affable Taft."[13] Pitney, on the other hand, possessed great personality and charm. He was quite free from restraint, little imagining that he was even being considered.

The Chief Executive's private opinion was slowly turning toward Mahlon Pitney. "His position as one of the country's leading jurists was regarded among New Jersey people as well earned. As Chancellor of the State, in which nearly all of the country's largest industrial trusts were incorporated, he had an opportunity of becoming thoroughly familiar with the legal aspects of the trust question and it was certain that this had considerable influence with President Taft in making up his mind."[14]

Pitney's attractive personality, which caused President Taft late in the afternoon of February 12th to drop a confidential remark to Governor Murphy to the effect that he liked the Chancellor, did not, however, bring Taft to announce publicly that he had come to any decision. He kept the workings of his mind a complete secret. On the afternoon of February 18th, President Taft received in his study a group of New Jerseyites, the former Attorney General John W. Griggs, and other prominent figures. The interview lasted for about an hour, and from what the press could gather from the somewhat evasive remarks of the delegation and of President Taft, Mr. Pitney's name was decided upon. The next morning the President handed to the Senate for confirmation the name of Mahlon Pitney. It was a complete surprise.

Mr. Pitney had passed through some extremely difficult months previous to the middle of February, 1912. As Chancellor, a great many cases were heard and decided by him. The duties which his position involved kept him busy most of the time. A short rest with a little golf was due. On Friday, the 17th, he determined to leave for Atlantic City with Vice Chancellor Stevens, a very close friend. Two days passed without event, but on the morning of Monday, February 19th, Mr. Pitney arose and on going down to breakfast found in the New York

13 Political Education of Woodrow Wilson, by James Kerney.
14 New York Evening Post, February 19, 1912.

and Philadelphia papers pictures of himself and an account which stated that his appointment as Associate Justice of the United States Supreme Court was anticipated. It was an unexpected honor, but it did not impede his golf game. He and Mr. Stevens made their way to the Northfield Golf Links and engaged themselves in a foursome which was interrupted along toward noon by one of the Club attendants who came running out to notify Mr. Pitney that a telephone communication had just been received from Stonier, his secretary, to the effect that Governor Murphy had wired that President Taft would send his name to the Senate that day. At this more authentic news the Chancellor was greatly pleased, but he did not want to interrupt the golf game and continued to play until finishing the round at half past one.

After luncheon he talked to Mrs. Pitney on the long distance telephone and learned that a telegram had arrived from President Taft saying, "I have just sent in your name to be Associate Justice of the United States Supreme Court to fill the vacancy caused by the death of Justice Harlan. I sincerely hope you will accept. William H. Taft."[15]

Unable to discuss the matter thoroughly with Mrs. Pitney on the telephone, he determined to finish the day of golf, return to Trenton for Court business on Tuesday morning, and see and talk with her in the evening at their home in Morristown. On the following day he wrote a letter of thanks to the President, without committing himself about acceptance. Two days later Pitney wrote that he would accept if the nomination was confirmed by the Senate. The opposition that had arisen to the candidates whose names the public were led to believe were being considered by the President, caused him to adopt an independent appointive policy, as a result of which the announcement of Justice Pitney's appointment came as a surprise. The New York Evening Post commented on it as follows in an editorial:[16]

"President Taft has been a regrettably long time in nominating a successor to Judge Harlan, but his final appointment seems to be unexceptionable. Chancellor Pitney of New Jersey has had large contact with public affairs and his judicial experience has been extensive in both branches of the law. His principal

15 Telegram to Pitney.
16 Evening Post, New York, February 20, 1912.

service has been as an equity judge. The Court of Chancery is highly important under the New Jersey system—and his decisions and opinions have been notable for their vigor and clearness. Judge Pitney enjoys the highest esteem of both Bench and Bar in New Jersey and the general opinion of him is expressed by Governor Wilson who speaks of the President's appointment as one eminently fit and predicts that Judge Pitney will enrich the Supreme Court. In naming him, Mr. Taft has apparently learned wisdom from the unfortunate methods which he pursued in the case of Judge Hook and others. He did not hang up Judge Pitney's name in the newspapers, to be made a target of for days and weeks, but quietly satisfied himself of the Judge's fitness and then promptly sent his nomination to the Senate. This is obviously the way in which Presidents should always do the thing."

Then came the struggle for confirmation. Almost simultaneously with the appointment there developed a violent opposition because of harsh rulings against labor that Pitney was charged with having made in New Jersey. Mr. A. L. Urick addressed Senators Cummins and Kenyon of Iowa, protesting the nomination, citing as the basis of his protest a New Jersey decision in the case of Frank A. Dungan *v.* Harold, indicating that the Chancellor was irrevocably pledged to property rights against human rights. But this criticism was offset by words of praise from Assemblyman Ford of Hudson County, New Jersey, President of the New Jersey State Federation of Labor. When informed of the action of the President of the Iowa Federation of Labor, Mr. Ford said, "I think Mr. Urick must have acted under a misapprehension of the identity of the Chancellor; he was probably confused owing to the similarity of names and positions." (Referring to Pitney and his father, the latter having rendered the opinion in question.) However, he goes on to say, "I can easily imagine how he could confuse the two, being so far away from this State and being probably unacquainted with the constitution of the Courts. I do not recall at this time any special case in which Chancellor Mahlon Pitney rendered a decision that bore heavily against labor interests."[17]

While this appointment was held up, Governor Woodrow Wilson publicly commended the appointment with the words: "I have known Chancellor Pitney since we were young men

17 Newark Evening News, February 20, 1912.

together in college, and I feel that both in character and attainments he is singularly fitted for the Court position for which the President has chosen him. I think New Jersey is to be congratulated upon this choice of a representative and that the Court will find itself enriched by his presence."[18]

The feeling between President Taft and the Progressives in the Senate was anything but good, and some Democrats joined with LaFollette in blocking the confirmation temporarily. Mr. Pitney was known as one of the "straight goods Republicans," a follower and confirmed backer of the President. Roosevelt with his Progressive ideas had stirred up and divided the Senate so that there was a strong line of demarcation between the group who were in favor of Taft and those who were either hostile or indifferent.

However, certain Democrats in New Jersey were ardent supporters of Pitney. Governor Woodrow Wilson not only publicly commended the nomination, but used his influence, together with other prominent Democrats, James E. Martine, Martin P. Devlin, and Joseph P. Tumulty, in obtaining support for the confirmation. Governor Wilson even went so far as to communicate with Senator Culberson of Texas, the leader of the opposition.

On March 14, 1912 the Senate went into executive session shortly after noon. There was apparently no division on party lines, though much opposition came from the Democrats. Senator Culberson of Texas led the attack and in his speech the New Jersey jurist was assailed in bitter language, which was even extended to questioning his general fitness for the Bench. Senator James A. O'Gorman of New York, who was at first inclined to favor the nomination, was in the forefront of those opposing it on the floor of the Chamber. Senators Reed of Missouri, Bacon of Georgia, Shrively and Kern of Indiana, Bailey and Smith of Michigan, and Cummins of Iowa, were also arrayed against Mr. Pitney's confirmation.

The regular Republicans unsuccessfully sought to have the nomination pressed to a vote, contending that the protracted discussion was unnecessarily agitating labor interests. The discussion lasted for three long hours. It turned to the interpretation of Chancellor Pitney's views on organized labor as expressed in his opinion in the case of Jonas Glass Co. *v.* Glass Bottle Blowers Association decided in 1908.[19] The defendants

18 Newark Star, February 21, 1912 and Morris County Press, February 22, 1912.
19 77 N. J. Eq. 219.

were the Association, its officers and former employees of the Company. In 1901 the Association instituted a boycott of the Company's wares. Later a strike was called, possibly not instigated by the Association but certainly supervised by it. An injunction had been decreed by the lower Court and was under review by the Appellate Court. The majority opinion was written by Pitney. He held in his opinion:

"It is clear beyond dispute that the complainant has suffered grievously in its property and business through acts of the defendants, whose continuance is thus prohibited. That the injury to the complainant is irreparable by action at law is likewise clear."

"The conduct of defendants in using coercion in some cases and persuasion in others in order to bring about breach of the contracts of personal service * * * was unlawful and actionable upon well settled principles.

"And the same is true of conduct whose object and purpose were to bring about a termination of the relation of master and servant * * * in cases where there was no binding contract of service * * *."

Pitney further states:

"The defendants were not competitors in the labor market. Their interference had for its immediate object the crippling of the complainant's business.

"The rights of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness, are declared by our constitution to be inalienable."

From the conclusions reached in the opinion of Chancellor Pitney, although correct, there would naturally be created a feeling among the unionists that he was absolutely opposed to a method of this kind to settle such questions between capital and labor. But from statements which he made he never intended to decide general principles of social intercourse through any particular decision.

No objection was made to the decision itself which was evidently regarded as a proper one even by the Democrats. Senator O'Gorman attacked certain general expressions in the opinion, among which was Mr. Pitney's view that the New Jersey

statute did not authorize peaceable persuasion by strikers to induce workmen to quit the service of an employer if this persuasion had for its object the crippling of the employer's business.

Senator Borah, in defending Chancellor Pitney, said that the conditions of the strike were such that it was impossible to draw a line between peaceable persuasion and interference by threats, and no one of the opposing Senators attempted to combat this view but relied rather on statements in the opinion apart from the facts of the case as their ground of opposing the confirmation.

The supporters of Pitney made indirect reference to the fact that Governor Woodrow Wilson favored the nomination. While the fight was waging and at this critical point, Senator Martine submitted pro-Pitney telegrams from Justice Samuel Kalisch of the Supreme Court of New Jersey, Martin P. Devlin, Robert D. Foote, and others, and had them circulated throughout the Chamber. The Republicans pressed for a vote. It was taken. Pitney was confirmed by a vote of 50 to 26, and as it was said, "Princeton '79, golf, and Martine all played their part in making an Associate Justice of the Supreme Court of the United States."[20]

Mr. Pitney journeyed to the Capitol in the middle of March where he again saw the President and was entertained by many of his future associates. On the 18th, at noon, he was sworn into his new office; "every step of Justice Pitney's elevation to the Supreme Court was marked with dignity and old time customs. Meeting with the other Justices in the robing room, the New Jersey Chancellor took his statutory oath of office, administered by Chief Justice White." At noon, "attired in a long somber robe of office, he joined the procession of Judges as they marched across the corridor to take up their duties of the day. Once the eight members of the Bench had taken their seats, Chief Justice White announced the appointment of Mr. Pitney," to his associates and the large group of persons standing bareheaded in the courtroom. "A word of official welcome was extended and the Chief Justice directed the clerk to administer a second oath. This time Justice Pitney took the 'Judicial Oath.' " It was "on the same Bible Justices had used for a century." He "was then conducted to his seat at the extreme left," and the business of the Court commenced.[21]

[20] Political Education of Woodrow Wilson, by Kerney.
[21] N. J. Law Journal, Volume 35, p. 98.

The new Associate Justice had now attained the peak of his career. He was given a cordial greeting by everyone he knew. From the pile of letters and telegrams of congratulations which he received, he took special pride in showing a communication from Governor Wilson reading: "My warmest congratulations. A better choice could not have been made."[22]

To repay Wilson for his energetic backing during the wearing days of March 1912, Mr. Pitney signed orders and continued the Chancellor's duties in New Jersey up to the time of his oath of office on the 18th. Four decisions were rendered by Chancellor Pitney on March 5, 1912.[23] Through this effort on his part he kept the Court of Chancery functioning as usual until a successor was provided.

In both branches of the Legislature of the State of New Jersey resolutions were unanimously adopted:

> "In the Senate, of which Chancellor Pitney was a member for three years, the resolution passed extended congratulations to President Taft 'on the splendid compliment he had paid this commonwealth.' Continuing the resolution reads:
>
> 'Chancellor Pitney has reflected credit on the jurisprudence of this State, noted for the ability and character of its judges. Learned in the law, possessed of that keen intuition as to the merits of a legal proposition, which stamps him fit successor to that great jurist, John M. Harlan, of Kentucky, recently deceased, the selection will add luster to a Bench famous for the illustrious men who have adorned it since Chief Justice Marshall's day.
>
> 'The Senate of New Jersey is proud of the fact that Chancellor Pitney was a member of the Senate during the sessions of 1899, 1900, 1901, and it is a source of gratification to know that it was in this body that he largely gave evidence to our people of his eminent fitness for legislative and judicial honors.' "[24]

On April 16, 1912 a reception was given by ex-Governor Franklin Murphy of New Jersey at his home in Newark for Mr. Justice Pitney.[25] Twelve days later the New Jersey Bench &

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22 New York World, March 21, 1912.

23 Bobbink *v.* Erie R. R. Co., 82 N. J. L. 547; Delaney *v.* Public Service Ry. Co., 82 N. J. L. 551; Jordon *v.* Moore, 82 N. J. S. 552; Murphy *v.* W. H. & F. W. Cone, Inc., 82 N. J. L. 557.

24 Newark Evening News, February 20, 1912.

25 Chronicle, April 16, 1912.



Bar honored the new Justice at a large dinner at the Waldorf-Astoria in New York City. The former Attorney General Robert H. McCarter presided. Mr. Justice Charles E. Hughes, Chancellor Edwin Walker of New Jersey, and Chief Justice William S. Gummere addressed this eminent gathering.[26]

In February 1913 it appears from a letter written by President Taft that he desired to announce publicly that his own initiative brought about the appointment of Justice Pitney.[27]

THE WHITE HOUSE
WASHINGTON

February 28, 1913.

My dear Mr. Justice Pitney:

You have shown me something in an advertisement of a book to be published on New Jersey politics in which one subject matter is said to be the influences that put Pitney on the bench of the Supreme Court of the United States as the late Justice Harlan's successor. I do not know, of course, to what this advertiser refers. I only know the facts with respect to your appointment. I did consider with a good deal of care the question of appointing another lawyer from New Jersey and did conclude that it was not well. He had been recommended by everybody and I did not hear your name (except incidentally as the Chancellor of the State), in connection with the position by anyone who pressed it—doubtless due to the loyalty prevailing in a State, which for the purpose of a successful presentation limits the candidates to one. After I had decided not to give it to New Jersey, I met you at a dinner which Governor Murphy gave to the leading lawyers of the State on Lincoln's birthday and sat next to you during the entire dinner. That led me to make further investigation and I satisfied myself that you were the man I needed and that your appointment would reflect credit upon the bench.

No one influenced me to appoint you. It was in a sense on my own initiation, but of course after I began making inquiry I found that the selection met universal approval in your State.

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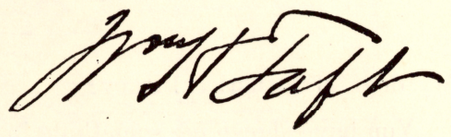
26 Newark Sunday Paper, April 28, 1912.
27 See Illustration of Letter.

You have entire liberty to use this if you desire, but whether you use it or not I am glad to put it on record for the satisfaction of yourself and Mrs. Pitney and any others who may be interested.

I am glad to say to you that in looking over my administration there is nothing I take more pride in than I do in my appointments on the Supreme Court, from the Chief Justice to the last appointee, and anyone who seeks to impeach the motives of the appointments or any one of them or the character of the appointee, is engaged in a work to which he can be prompted only by bad motives and with no foundation in fact.

Sincerely yours,



Hon. MAHLON PITNEY,
Associate Justice,
United States Supreme Court.

March 7, 1913.

My Dear Judge Taft:

Your very kind and thoughtful letter of February 28th would have been acknowledged sooner but for the confusion inseparable from the events of the past week.

I very much appreciate your consideration in so fully explaining, and so willingly putting in writing, the events and causes that led to my appointment by you to the Supreme Court. And although I was at first a little embarrassed about mentioning to you the prospectus of the book you refer to—the second volume of Sackett's "Modern Battles of Trenton"—that promised to treat as a supposedly sensational topic the "influences" that put me upon the bench of this Court, I am very glad I did so, since it evoked so prompt and frank a response from you.

Your letter will not only be a source of satisfaction to myself and to my wife and children,—it is and will be most highly prized as a testimonial of your esteem. As I told you when I thanked you for the appointment—now nearly a year ago—I value the honor especially for the distinction implied in being chosen for so high a judicial station by a "Judge of Judges."

Mrs. Pitney joins me in wishing for you and Mrs. Taft continued health, success, and happiness. We shall often think of you, and shall hope to see you frequently in Washington.

I have written to David Ogilvie, reminding him that he is to make some golf clubs for you, and directing him to do the same for Mrs. Taft. I trust you may have good weather and many a good game during your stay at Augusta.

With renewed expressions of esteem, I remain,

Yours very sincerely,

MAHLON PITNEY.

Hon. WILLIAM H. TAFT,
Augusta, Ga.

Chapter V

Collective Bargaining

(Relation between Employer and Employee)

DURING Mr. Justice Pitney's tenure of office as member of the United States Supreme Court, he rendered over 250 decisions. In analyzing his opinions one appreciates his clear, definite and sound legal conclusions. It has afforded the writer the greatest pleasure to review all these decisions and there have been selected the most important and far-reaching groups of cases dealing with subjects of vital significance, such as the relation between employer and employee, the taxation of stock dividends, the conflict between State Workmen's Compensation Laws and Federal Liability Acts, and others, which are exhaustively treated in this and succeeding chapters.

In 1907 there came before the Supreme Court of the United States the case of Adair *v.* United States.[28] An Act of Congress was then in force prohibiting interstate carriers from discharging an employee because of his membership in a labor union.[29] William Adair had discharged a fireman on an interstate carrier because of the latter's membership in a labor union. The majority opinion annulling the Act, written by the famous Justice John Marshall Harlan, whose place on the bench Mr. Justice Pitney later assumed, is based on the view that the case involves the common law rights of man between man, and men should be allowed full freedom to bargain with each other at will. Mr. Justice Holmes, however, points out in a dissenting opinion that though the freedom of contract on the part of both employer and employee is interfered with by the limitations set on it by the Act of Congress, yet the bargaining power is in no way impaired by the statute.

"It does not forbid them to refuse to employ anyone, for any reason they deem good, even where the notion of a choice of persons is a fiction and wholesale employment is necessary upon general principles that it might be proper to control. The section simply prohibits the more powerful party to exact certain

[28] 208 U. S. 161.
[29] June 11, 1888; 30 Stat. 424, 428, c. 370.

undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed.[30]

The Adair case, holding that an Act of Congress interfering with freedom of contract between employer and employee was unconstitutional, is of significance because it laid down a precedent which was much discussed in Mr. Justice Pitney's first decision on this subject, Coppage *v.* Kansas.[31]

In the case of Coppage *v.* Kansas, Mr. Justice Pitney, writing the majority opinion, based his argument and decision on the reasoning used and conclusion reached in Adair *v.* United States.[32] The suit in question arose under a Kansas statute,[33] declaring in effect that any person, agent, officer or employer of any company known to coerce, require, demand any person or persons to enter into any agreement, written or verbal, not to join or become a member of a labor union or organization, is guilty of a misdemeanor. Mr. T. B. Coppage, superintendent of the Frisco Lines, required Hedges, a switchman employed by the Railroad, to sign an agreement requiring him to resign from the Switchmen's Union, or lose his position. Hedges refused to sign this and also refused to withdraw from the labor organization. Coppage thereupon discharged him from the service of the Company. In the Adair decision it is said:

"While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the persons offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was

[30] 208 U. S. 161, 191.
[31] 236 U. S. 1.
[32] *Ibid.*28
[33] §4674, Gen. Stat. Kansas, 1909.

the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage,* because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.[34]

It was not the intent of the Court to overrule this case, which so clearly defines the law on this subject. And thus, from the reasoning above, he comes to the conclusion that:

"If Congress is prevented from arbitrary interference with the liberty of contract because of the 'due process' provision of the Fifth Amendment, it is too clear for argument that the States are prevented from the like interference by virtue of the corresponding clause of the Fourteenth Amendment; and hence if it be unconstitutional for Congress to deprive an employer of liberty or property for threatening an employee with loss of employment or discriminating against him because of his membership in a labor organization, it is unconstitutional for a State to similarly punish an employer for requiring his employee, as a condition of securing or retaining employment, to agree not to become or remain a member of such an organization while so employed."[35]

But why are the States, as Mr. Justice Pitney says, prevented from the like interference by virtue of the Fourteenth Amendment?[36] How is the action of Coppage in dismissing Hedges, because he would not sign the pledge or resign from the union, defended by Mr. Justice Pitney?

Mr. Justice Pitney states that any contract is an obligation on the part of the contractors, by which they forego rights or privileges, and if the terms or conditions of the contract upon which the obligation is based are fulfilled it is a constitutional right of any employer to dismiss an employee. Thus he says:

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* Coppage in the Adair case was a different person from the Coppage in the Kansas case.

34 208 U. S. 161, 174.

35 236 U. S. 1, 11.

36 *Ibid.*35

"And does not the ordinary contract of employment include an insistence by the employer that the employee shall agree, as a condition of the employment, that he will not be idle and will not work for whom he pleases but will serve his present employer, and him only, so long as the relation between them shall continue? Can the right of making contracts be enjoyed at all, except by parties coming together in an agreement that requires each party to forego during the time and for the purpose covered by the agreement, any inconsistent exercise of his constitutional rights?"[37]

Is not also the relation between employer and employee a voluntary one which, though it does not include "* * * the liberty of making contracts * * * from an unwilling employer, or without a fair understanding,"[38] yet actually allows the dismissal of an employee providing the provisions of employment are not carried out?

The doctrine governing this situation is "fundamental and vital",[39] and as Mr. Justice Pitney says:

"Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money."[40]

This interference with liberty is very serious indeed, as it uproots the equality of bargaining power which should exist between employer and employee, and this is unsustainable as a legitimate exercise of the state police power.

"But when a party appeals to this court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the State; * * *"[41]

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37 236 U. S. 1, 13.

38 236 U. S. 1, 20.

39 236 U. S. 1, 14.

40 *Ibid.*39

41 236 U. S. 1, 15.

There is also to be found in the opinion, a justification of the Court's action in declaring the police power of the State of Kansas an insufficient basis on which to maintain the statute. The police power may be used to prohibit the exertion of coercion, duress or undue influence. It is argued by the defenders of the Act that, in requiring employees to submit to certain conditions of employment, the employer makes use of coercion, and to prohibit this the Act was passed. Mr. Justice Pitney, however, dispenses with this argument in a brief statement:

"It is equally clear, we think, that to punish an employer or his agent for simply proposing certain terms of employment, under circumstances devoid of coercion, duress, or undue influence, has no reasonable relation to a declared purpose of repressing coercion, duress and undue influence."[42]

The police power may also be exerted in defense of the public health, safety, morals or general welfare. It is the contention that the Act affords an opportunity to the employee, since it restricts the employer, to establish himself on a more equal basis with the employee in bargaining power, and thus favors the combining of employees in labor organizations. (This opinion is expressed by Mr. Justice Holmes in his dissent.)[43] Mr. Justice Pitney, however, maintains that the Act has no relation to the protection accorded under the police powers. He says:

"The Act, as the construction given to it by the State Court shows, is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power."[44]

Further, he points out that the inequalities which exist between employee and employer with regard to bargaining and wealth are natural, and may be upheld only at the same time by recognizing freedom of contract and the right of private property.

In his last attack on the unauthorized employment of the police power by the State of Kansas, he says:

42 236 U. S. 1, 16.
43 Referred to later.
44 *Ibid.*42

"And since a State may not strike them down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities without other objects in view."[45]

And later:

"In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare."[46]

Mr. Justice Pitney thus annuls the Kansas statute, deeming that the employer must remain free to discharge an employee for any reason that seems to him good, providing that he first announce under what conditions discharge will take effect.

"Granted the equal freedom of both parties to the contract of employment, has not each party the right to stipulate upon what terms only he will consent to the inception, or to the continuance, of that relationship?"[47]

It is evident that the agreement, which must be signed by an employee at the time he is hired, is a weapon used by the employer to avoid the pressure of collective bargaining. In fact, the major issue in the two cases discussed and appearing prominently in the Hitchman case below[48] is whether the legislature may aid the laborers in their efforts to secure collective bargaining. On this question it is well worth our while to note that Mr. Justice Holmes in a characteristically brilliant dissenting opinion disagrees entirely with the position taken by the majority, maintaining that the statute is constitutional because it promotes the liberty and equality of the individual.

"In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. * * * If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins. Whether in the long run it is wise for the workingmen to enact

45 236 U. S. 1, 17.
46 236 U. S. 1, 18.
47 236 U. S. 1, 12.
48 245 U. S. 229.

legislation of this sort is not my concern, but I am strongly of opinion that there is nothing in the Constitution of the United States to prevent it."[49]

What liberty and equality means seem to be the chief points wherein the majority and minority disagree. To the minority they are something concrete. As Mr. Justice Day says:

"I think that the act now under consideration, and kindred ones, are intended to promote the same liberty of action for the employee as the employer confessedly enjoys."[50]

The act also prohibits any coercive attempts on the part of employers in offering a choice to the employee between his union or his job. Justice Day says, at the same time rebutting the statement of the majority, that no coercion was present in pointing out that the choice legally open to the employee is not actually open to him, because it is impossible for him to enjoy his legal right to become or remain a member of a union if he is hampered thereby in making a living in the occupation for which he is best suited.[51] To this reasoning the majority reply that:

"Constitutional freedom of contract does not mean that a party is to be as free after making a contract as before; * * * [52]

And, further, having made a contract, an employee thereby gives up to the privilege to exercise his legal right to use the time as he pleases.

"Freedom of contract, from the very nature of the thing, can be enjoyed only by being exercised; and each particular exercise of it involves making an engagement which, if fulfilled, prevents for the time any inconsistent course of conduct."[53]

Though a man has a legal right to join a union, the Court maintains that he still has no inherent right to continue to work for a man who is running a non-union railroad. The equality which exists between employer and employee is not that of approximate evenness of bargaining power. It exists only when they are both left entirely alone by the legislature. It is not, as Mr. Justice Holmes says, "the equality of position between the parties in which freedom of contract begins."[54]

In the last analysis, the answer as to whether the State of Kansas statute is constitutional or not hinges on the interpre-

49 236 U. S. 1, 26-27.
50 236 U. S. 1, 40.
51 236 U. S. 1, 27 *et seq.*
52 236 U. S. 1, 21.
53 *Ibid.*52
54 236 U. S. 1, 27.

tation of the words "general welfare". It is not an exaggeration to say that both sides admit that if the Act promotes general welfare it is constitutional. The majority see in the statute only that it abrogates the common law relations between employer and employee and therefore is unconstitutional. The minority, from a more far-reaching point of view, see that though common law rights are annulled by the Act, it makes for a more equal bargaining power between employer and employee which is in the end a good thing leading to many advantages, among which is the freedom from economic pressure.

In the same year (1917) that the Coppage case[55] was decided, the Supreme Court was faced with the decision of the famous Hitchman case,[56] which had been under consideration since 1916, having arisen in the Federal District Court on October 24, 1907.

In 1913 a final decree was entered by that Court[57] granting a perpetual injunction forbidding members of the union from urging secretly those in the employ of the Hitchman Company to become union members, and keeping secret the names of those who had consented to join the union.

This decree was reversed by the Circuit Court of Appeals in 1914.[58] Afterwards a writ of certiorari was granted.[59] Upon final hearing the decree of the Circuit Court of Appeals was reversed and the decree of the Federal District Court modified and affirmed as modified.

This sustained by a 6 to 3 vote the injunction in its final form against the officers of the labor union, restraining them from seeking to induce employees to violate a so-called "yellow-dog" contract by agreeing to become members of the union and keeping the agreement secret until the union organizers were ready to inform the employers.

It is necessary in a discussion of the Hitchman case for our more clear understanding, to state as briefly as possible the facts upon which the suit was brought, which are as follows:

"Mr. Pickett, the Mine Superintendent, had charge of employing men * * *. To each one who applied for employment he explained the conditions which were that while the Company paid the wages demanded by the union and as much as anybody else, the mine was run non-union and would continue to run so;

55 *Ibid.*31
56 245 U. S. 229.
57 202 Fed. 512.
58 214 Fed. 685.
59 241 U. S. 644.

that the Company would not recognize the United Mine Workers of America; that if a man wanted to become a member of that union he was at liberty to do so; but he could not be a member of it and remain in the employ of the Hitchman Company; that if he worked for the Company he would have to work as a non-union man. To this each man employed gave his assent understanding that while he worked for the Company he must keep out of the union.''[60]

When the case came up before the Supreme Court on March 2nd and 3rd, 1916, the writing of the majority opinion was assigned to Mr. Justice Pitney.

It has been attempted here to summarize in brief form the main features of his decision, in order more readily to pass on to the discussion and inevitable effects.

Mr. Justice Pitney lays down certain fundamental principles concerning the rights of the plaintiff, which are as follows:

1. Plaintiff is as free to make non-membership in a union a condition of employment as the workingman is free to join the union, but this is only a part of the constitutional right of personal liberty and private property.

2. Plaintiff is entitled to protection in his status as employer, created by the agreement, even if the agreement is terminable at the will of either party.

3. Plaintiff may justly attempt to keep the good-will of its employees, for the value of this relationship lies in the ability not only to retain those who are in its employ but also to secure others as needed.

4. The right of action for persuading an employee to leave his employer is universally recognized and rests upon fundamental principles of general application.

When Mr. Justice Pitney comes to consider the justification of defendants' actions he states:

(a) That there is no question involved regarding the rights of employees, for even if the attempt to create a strike in a business concern is justifiable, the defendants have no right to instigate a strike, since they are not agents of the employees.

(b) That while the defendants and other workmen undoubtedly have the right to form unions and invite other workingmen

[60] 245 U. S. 229, 239.

to join, the right is not absolute but must be exercised with reasonable regard to the conflicting rights of others.

(c) That the defendants' efforts were not bona fide to enlarge the membership of the union, but were essentially for the purpose of requiring either (a) the plaintiff's business to close, or (b) to compel the plaintiff to change its methods of operation.

(d) That the means used by the defendants to coerce plaintiff were illegal in that, though peaceable essentially, it was a combination to procure concerted breaches of known contracts, intentionally and maliciously designed to require unnecessary readjustments on the part of the plaintiff, and thereby making it practically impossible for the plaintiff to run his mine as a non-union business.

(e) Further, that it was not a case of defendants withholding from plaintiff its supply of labor until it should assent to be governed by union regulations, since it is acknowledged and stated in the facts that plaintiff used the requisites required by the union in the paying of employees.

(f) Lastly, that the defendants were not even justified in their actions on grounds of competition, for they were not competitors of plaintiff, and even if they had been, the methods employed were unjust since their action amounts to no more or less than inducing employees of plaintiff to leave their employ *en masse* at a critical moment in order to cripple plaintiff's business.

From the above principles, Justice Pitney concludes that an injunction should issue against the officers of a labor union from securing secret promises to join the union from employees who had agreed to relinquish their employment in case they became members.

It is said by Mr. Justice Brandeis in the minority opinion that:

''Until an employee actually joined the Union he was not, under the contract, called upon to leave plaintiff's employ. There consequently would be no breach of contract until the employee both joined the Union and failed to withdraw from plaintiff's employ. There was no evidence that any employee was persuaded to do that or that such a course was contemplated.''[61]

Mr. Justice Pitney answers this statement by pointing out that in a court of equity, to induce men to agree to join a union

is but a mode of inducing them to join, for it is evident that those who agree to join are for all practical purposes, and therefore in the sight of equity, already members of the union, and it needs no formal ritual or the taking of an oath to constitute them as such.[62] And thus from this reasoning he comes to the conclusion that the contract of employment is broken by the employee, though he gives a legally unenforceable promise to join a union.

Mr. Justice Brandeis also points out with regard to the question of unionizing mines (which was brought up and discussed at length by Mr. Justice Pitney), that there exists a decided distinction between unionizing a mine and unionizing the employees of a mine. The former involves inducing the employer to enter into a collective agreement with the union "(1) To employ only members of the union; (2) to negotiate with union officers instead of with employees individually the scale of wages and the hours of work; (3) to treat with the duly constituted representatives of the union to settle disputes concerning the discharge of men and other controversies arising out of employment";[63] while the latter is only a question of persuading employees to join the union. "Each of these is legal," he continues, "to attain any or all of them men may lawfully strive or even strike."[64] In answer to this reasoning Mr. Justice Pitney is very brief, stating that:

"If there be any practical distinction between organizing the miners and organizing the mine, it has no application to this case. Unionizing the miners is but a step in the process of unionizing the mine, followed by the latter almost as a matter of course. Plaintiff is as much entitled to prevent the first step as the second, so far as its own employees are concerned, and to be protected against irreparable injury resulting from either."[65]

Mr. Justice Pitney here concedes that if the defendants had required the employees of the Hitchman Company to notify the plaintiff of their having agreed to join a union and immediately quit work, then there would be, simply speaking, an ending of employment at the compulsion of the employer. The intention here, however, was obviously to bring about a strike, and thus

61 245 U. S. 229, 272.
62 245 U. S. 229.
63 245 U. S. 229, 271.
64 *Ibid.*63
65 245 U. S. 229, 248.

there existed an enticement to a breach of contract which rendered their conduct subject to be enjoined. In summing up his conclusions, the Justice says:

"Upon all the facts, we are constrained to hold that the purpose entertained by the defendants to bring about a strike at plaintiff's mine in order to compel plaintiff, through fear of financial loss, to consent to the unionization of the mine as the lesser evil, was an unlawful purpose, and that the methods resorted to by Hughes—the inducing of employees to unite with the union in an effort to subvert the system of employment at the mine by concerted breaches of the contracts of employment known to be in force there, not to mention misrepresentation, deceptive statements, and threats of pecuniary loss communicated by Hughes to the men—were unlawful and malicious methods, and not to be justified as a fair exercise of the right to increase the membership of the union."[66]

The fact that Hughes forbade those employed in the Hitchman mine to make known the fact they had agreed to become members of the union seems to be the crux of the attack by the majority of the Court. This element of secrecy makes it possible for Mr. Justice Pitney to declare that a justification of the acts of the defendants is impossible. He says:

"There is no reason to doubt that if defendants had been actuated by a genuine desire to increase the membership of the union without unnecessary injury to the known rights of the plaintiff, they would have permitted their proselytes to withdraw from plaintiff's employ when and as they became affiliated with the union,—as their contract of employment required them to do,—and that in this event plaintiff would have been able to secure an adequate supply of non-union men to take their places."[67]

There is a clear implication here that there were other acts of the defendants which might have been a fair exercise of the right to increase the membership in the union. Mr. Justice Pitney refers earlier in the opinion to the right of the workingman to form unions and to enlarge their membership by inviting others to join, saying, "This right is freely conceded, provided the objects of the union be proper and legitimate, which we assume to be true in a general sense, with respect to the union

66 245 U. S. 229, 259.
67 245 U. S. 229, 257

here in question.''[68] But then he adds, ''The cardinal error of defendant's position lies in the assumption that the right is so absolute that it may be exercised under any circumstance and without any qualification; * * * it must always be exercised with reasonable regard for the conflicting rights of others.''[69] Thus, Mr. Justice Pitney recognizes that the rights of the employer and those of the laborer are in conflict. The right of employers to run their mines non-union interferes with the rights of members of the union to increase their membership. Both rights exist and are entitled to equality of protection under the law. Therefore, it seems that justification is lacking for the Court's interference with the rights of the defendants only because the defendants were interfering with the rights of the plaintiff.

Mr. Justice Pitney concluded that the defendants' actions ''cannot be treated as a bona fide effort to enlarge the membership of the union.''[70] It was, he says in substance, an attempt to do something more than merely enlarge the membership of the union. It was an attempt to unionize the mine after the union had been enlarged, which would inevitably lead to the result of requiring the organization of the mine on a union basis. There is a great deal of truth and reason in what is said, for such organization would obviously be necessary to protect the interests of men after they were in the union and to make it possible for them to remain in the union.

The recognized canons of judicial action limit the authority of the actual decision of the Hitchman case to conditions under which there is some element of either a breach of contract or a threatened strike. This limitation is also enunciated in parts of the majority opinion where it appears that union officials are permitted to secure members from men working under a non-union agreement if each man announces this new affiliation as soon as it occurs and leaves the employment as the contract under which he is working requires. Yet other parts seem to inconsistently go further, forbidding such action on the part of union officials so long as there is evidence of a plan to unionize the mine.

If, as Mr. Justice Holmes says, law is a prophecy of what the Courts will do, it seems very important to look rather at what

68 245 U. S. 229, 253.
69 *Ibid.*68
70 245 U. S. 229, 256.

the majority of the Supreme Court thought than at what they have actually set down on paper. A broader and more far-seeing view of how the Court will act in a general way is necessary, rather than a technical view of the decision at hand. It is clear from the above statements that the Court thought labor unions must take no steps to unionize a non-union mine and that if steps were taken by union men in approaching employees of a non-union business, the employees must notify the employer of each step of their progress toward becoming union members. If the progress of resignation of employees who join unions is sufficiently rapid, the employer may find himself in a position where he may prefer to ask the men to come back even though they remain in the union. Then there arises a new situation which the Hitchman case does not cover. Again, a situation may arise in which union officials may attempt to unionize a mine only after it has ceased to be a closed non-union mine and has become an open one. And again, it would seem that the decision does not cover that situation. But it is very likely that the majority of the Court sitting in 1917 would maintain that the approach of any union members to the employees of a non-union mine closed or open, especially that of the union concerned in the Hitchman case, the United Mine Workers of America, was an attempt to unionize the mine, and therefore unjust. Any employee who wishes to affiliate himself with a union must do so on his own initiative, it is concluded. And yet this initiative is checked by the type of non-union agreement appearing in Eagle Glass & Mfg. Co. *v.* Rowe.[71] By this, each employee is required to promise that ''if at any time while so employed he desired to become connected with a union he would withdraw from the employ of the company, and that while in its employ he would not make any effort amongst its employees to bring about the unionizing of the plant against the company's wish.''[72] For by such an agreement the employees would be prohibited from in any way regarding the activities of a union in a hopeful way with a desire to get the mine unionized. Yet Mr. Justice Pitney held that to require such a promise was legal and equitable.

It appears, thus, from the ideas expressed in the cases discussed in this chapter, that the equal liberty of the employer and employee is personal and individual. Each laborer is free from legal restraint, when unemployed, to bargain as he pleases. The

71 245 U. S. 276.
72 245 U. S. 277.

employer is equally unrestrained. But after the bargain is made, this freedom is entirely dependent on the terms of the bargain. Thus, freedom has abridged freedom. But in this case the curtailment of freedom does not apply to the individual contractors, the employer or employee, for by the very agreement which leaves the employee free to leave the employment at will, he solemnly declares not to let others persuade him to leave or seek to dissolve the status, that of a closed non-union shop, which he has been a part in creating. As much as the employees may desire to improve their condition, they, who have agreed to leave the employment if they desire to join a union, may not be approached by unionists.

It has been declared that the inadequacy of justification for the acts of the defendants does not establish the fact that they were lawless in acting as they did.[73] Mr. Justice Pitney however asserts that the defendants' purpose and justification is inadequate and contrary to principle and theory because it interferes with the plaintiff's rights. But it must be noted that the acts of the defendants were in exercise of their conflicting rights. Why should one right prevail over another? The question is clearly one of policy. Mr. Justice Day's dissenting opinion in the Coppage case[74] points out that previously Congress and the legislatures of at least fourteen states have prohibited such agreements. Here the United States Supreme Court declared that such agreements may not be prohibited. It may be remarked in concluding that this policy does not seem to have greatly delayed the progress of collective bargaining.

The views expressed in the Supreme Court by Mr. Justice Pitney are but reiterations and amplifications of the views enunciated by him in Jonas Glass Company *v.* The Glass Blowers' Association[75] previously discussed,[76] and his other New Jersey decisions concerning labor.[77] It thus appears that, viewed retrospectively, the fears of those who were opposed to Mr. Pitney's confirmation to the United States Supreme Court seem to have been founded on a real understanding of his views on organized labor. But we must realize that all these decisions involving questions of policy rest in the sound discretion of the whole Court whose opinion Justice Pitney was but expressing.

73 Privileges of Labor Unions in the Struggle for Life, 27 Yale L. Journal, 779.
74 236 U. S. 1, 29.
75 77 N. J. Eq. 219.
76 Page 34.
77 Brennan *v.* United Hatters, 73 N. J. L. 729.

Chapter VI

Injunctions in Labor Disputes

IN ANOTHER phase of the labor problems of the country it became Mr. Justice Pitney's lot to play an important part. While enunciating his views on collective bargaining, he dealt likewise with the question of the use of the injunction in labor disputes. In the Hitchman case[78] it will be remembered that the Court sustained the issuance of an injunction against the officers of a labor union, restraining them from seeking to induce employees to violate so-called "yellow dog" contracts by agreeing to become members of a labor union and keeping such agreement secret until the union leaders were ready to inform the employer.

The power of the injunction in labor disputes was becoming very great, especially since the injunctions were issued by the Federal District Judges and an appeal would of necessity have to be taken to the Supreme Court of the United States before any final adjudication could be reached.

Certain legislation was passed in this connection. The Clayton Act became a law on October 15, 1914.[79] It authorized the issuance of injunctions at the suit of private persons subject to restrictions in cases between employers and employees. This was a move to curb equity jurisdiction of the Courts, and for about four years after the passage of the Sherman Anti-trust Act had engaged the attention of practically every Congressional Session. This continued effort to evolve this measure reveals a deliberate purpose to be rid of the abuses arising from the flagrant issuing of injunction in labor disputes.

In 1917 Paine Lumber Co. *v.* Neal[80] was decided. It held that the Sherman Law did not authorize injured private persons to enjoin a boycott in restraint of trade where union men refused to work on materials made by plaintiff in his non-union shop. Mr. Justice Pitney dissented. A majority of the Court denied relief in this case on the ground that an injunction was not issuable because the Sherman Act allowed only the Government, and not

78 245 U. S. 229.
79 38 Stat. 738, §20 (29 U. S. C., §52).
80 244 U. S. 459.

private suitors, to obtain injunctions. It further went on to say that the Clayton Act, although it granted such authority, was not applicable as the case had arisen prior to its passage.

While disagreeing with a majority of the Court that the Clayton Act was inapplicable, because the litigation antedated it, Mr. Justice Pitney argued that it did not require legislation to authorize the granting of an injunction where the Court had jurisdiction, as here, under the Sherman Law, saying:

"I dissent from the view that complainants cannot maintain a suit for an injunction, and I do so not because of any express provision in the Act authorizing such a suit, but because, in the absence of some provision to the contrary, the right to relief by injunction, where irreparable injury is threatened through a violation of property rights, and there is no adequate remedy at law, rests upon settled principles of equity that were recognized in the constitutional grant of jurisdiction to the Courts of the United States."[81]

"By section 2 of article 3 of the Constitution, the judicial power is made to extend to 'all cases, in law and equity, arising under this Constitution, the laws of the United States,' etc. This had the effect of adopting equitable remedies in all cases arising under the Constitution and laws of the United States where such remedies are appropriate. The Federal Courts, in exercising their jurisdiction, are not limited to the remedies existing in the Courts of the respective states, but are to grant relief in equity according to the principles and practice of equity jurisdiction as established in England."[82]

Mr. Justice Pitney continues, in his dissenting opinion, to point out that the section of the Clayton Act does not apply, because there was no relation of employer to employee between the parties to the case and because there was no dispute between them as to conditions of employment. He further states that the section only sanctioned lawful measures, "that is, of course, measures that were lawful before the act."[83] Justice Pitney seems, in this opinion, to have foreshadowed the Court's construction of the Act in his later decision in Duplex *v.* Deering.[84]

81 244 U. S. 459, 473.
82 244 U. S. 459, 475, 476.
83 244 U. S. 459, 485.
84 254 U. S. 443.

It was not until 1921, in the case of Duplex *v.* Deering[85], that the United States Supreme Court passed upon the validity and construction of the Clayton Act. In that case, an injunction was sought to restrain the machinists and other affiliated unions from interfering with plaintiff's business by inducing their members not to work for the Deering Company or its customers in connection with hauling, installation and repair of printing pressses made by the company.[86] Strikes were threatened by the union officials in New York against those who bought, used or handled the products of the Duplex Company, a Michigan concern. The question in the case hinged around whether the boycott which was laid by the union had been legalized by the Clayton Act, as had been held by the District Court and Circuit Court of Appeals. Mr. Justice Pitney, in writing the majority opinion, decided that neither the dispute nor the parties came within the restrictive provisions of the Clayton Act and that an injunction should issue.

The reasoning adopted by Mr. Justice Pitney reflects in many points the opinion expressed in his dissent in Paine Lumber Company.[87] In summary, Mr. Justice Pitney's decision states that the irreparable injury "to property or to a property right"[88] includes injury to the employer's business. He pointed out that the privileges of Section 20 of the Clayton Act do not extend to defendants who have never been in the relationship of employee to the plaintiff or who have never sought employment with him, because it did not apply "beyond the parties affected in a proximate or substantial, and not merely a sentimental or sympathetic cause of the dispute."[89] In further discussing the specific exemption invoked—"ceasing to patronize * * * or persuading others by peaceful and lawful means so to do"—Mr. Justice Pitney observes that[90] "the subject of the boycott is dealt with specifically in the 'ceasing to patronize' provision" of the Act, and concludes that the instigation of a strike against an employer who was at peace with his own employees only for the purpose of compelling such employer to withdraw his patronage from the plaintiff with whom there was no dispute, "cannot be deemed 'peaceful and lawful' persuasion."[91]

85 *Ibid.*84
86 Fuller details of the conduct of the union are found in 247 Fed. 192.
87 244 U. S. 459.
88 254 U. S. 443, 472.
89 254 U. S. 443, 472.
90 38 Stat. 738.
91 254 U. S. 443, 473, 474.

It is interesting to note that, in the dissenting opinion of Mr. Justice Brandeis, with whom Justices Holmes and Clark concurred, the scope of the exemptions allowed by Section 20 is declared to be larger and more far-reaching than the area in which Mr. Justice Pitney confines it, covering only the legal relationship between a specific employer and his employees. They base this reasoning on the wording of the statute and on the fact that "the very Act to which it (the statute) applies severs the continuity of the legal relationship."[92] It is apparent that the minority believed that the economic relationship between the parties in this dispute brought them under Section 20 of the Clayton Act. In concluding, Mr. Justice Brandeis summarizes the economic justification for the conduct which the majority held subject to injunction: "* * * in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself."[93]

It is clear from the majority opinion in the Duplex case that Mr. Justice Pitney believed that the changes in the law laid down in interpreting the Sherman Act were not to be inferred. Mr. Justice Brandeis thought, however, that the Clayton Act was designed essentially to substitute certain tests of legality for the previous differing views as to the requirements of the Sherman Law. Mr. Justice Pitney's belief that Congress did not intend anything additional by the Act, is indicated by his statement that "Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the Courts of the United States, and upon the general operation of the Anti-Trust Laws,—a restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public."[94]

The Supreme Court of the United States not only controls the law of injunctions in the Federal Court, but scrutinizes carefully the state legislation in this respect by means of the Fourteenth Amendment. The case of Truax *v.* Corrigan was decided in December 1921.[95] An Arizona statute forbade an injunction against peaceful picketing. This statute was almost identical in

92 254 U. S. 443, 487, 488.
93 254 U. S. 443, 471.
94 254 U. S. 443, 471.
95 257 U. S. 312.

wording to the Clayton Act. The State Court assumed that the statute legalized peaceful picketing. Plaintiff sought to enjoin a secondary boycott which had been declared on his restaurant by the defendants, former employees and union members, due to a dispute between them regarding the terms of employment. Chief Justice Taft wrote the opinion and held that if the statute did render the kind of picketing involved immune from injunction the statute was unconstitutional. It must be admitted that from a legalistic standpoint peaceful picketing can be as coercive and as intimidating as any other kind. This seems to be the opinion of the majority who considered the action of the boycotters as "moral coercion by illegal annoyance and obstruction * * * plainly a conspiracy."[96]

The basis upon which the Supreme Court declared the statute unconstitutional was that it denied due process and equal protection of the laws guaranteed by the Fourteenth Amendment. The due process clause, though it was not thought to encompass the right to resort to equity to secure an injunction against picketing or boycotting, was associated with the equal protection clause in that "the due process clause requires * * * that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society," and therefore "* * * tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, * * *"

The equal protection clause opened to the plaintiffs the same protection that was available to all other persons similarly circumstanced. Mr. Justice Taft points out that there should be an equality between these plaintiffs and all other potential plaintiffs. But under the law, an inequality existed against these plaintiffs because they were conducting a suit against their former employees. Thus the employers were found to be without equal protection of the law because they had fewer remedies against one class of tort feasors than against other classes.

The minority could not accept this reasoning. In a powerful dissenting opinion, Mr. Justice Pitney points out that the effect of the majority opinion was "to transform the provisions of the Fourteenth Amendment from a guarantee of the 'protection of equal laws' into an insistence upon laws complete, per-

96 257 U. S. 312, 328.

fect, symmetrical.''[97] He seems to realize the absurdity of such a ground of decision, going on to say:

''Examination shows that it does not discriminate against the class to which plaintiffs belong in favor of any other class * * *.

''It is said that because, under other provisions of the Arizona statute law, plaintiffs would have been entitled to an injunction against such a campaign as that conducted by defendants had it been in a controversy other than a dispute between employer and former employees—for instance, had competing restaurant keepers been the offenders—refusal of relief in the particular case by force of section 1464 is undue favoritism to the class of which defendants are members. But I submit with deference that this is not a matter of which plaintiffs are entitled to complain under the 'equal protection' clause. There is no discrimination against them; others situated like them are accorded no greater right to an injunction than is accorded to them * * *. Cases arising under this clause of the Fourteenth Amendment pre-eminently call for the application of the settled rule that before one may be heard to oppose state legislation upon the ground of its repugnance to the Federal Constitution, he must bring himself within the class affected by the alleged unconstitutional feature * * *.

''A disregard of the rule in the present case has resulted, as it seems to me, in treating as a discrimination what, so far as plaintiffs are concerned, is no more than a failure to include in the statute a case which, in consistency, ought, it is said, to have been covered—an omission immaterial to plaintiffs.''[98]

It is apparent from this convincing dissenting opinion that the result arrived at by the majority must have induced mental gymnastics of many kinds and a sincere intellectual strain. To be sure, the position is tenable but it opens the door to many judicial difficulties in the future, allowing the Supreme Court to declare that any statute which limits injunctive relief is unconstitutional unless it completely abolishes equity jurisdiction.

Labor organizations were necessities of the times, it is believed, and are justified on these grounds. It is clear that the concrete remedy by which this justification was to be realized,

97 257 U. S. 312, 351.
98 257 U. S. 312, 351.

namely, the injunction, was met with unfriendly feeling on the part of the Court. But it is hardly conceivable that the decisions would have been any different even if the Court had adopted the policy as a conscious guide that though there may be unions, they must not be strong. Thus Mr. Justice Pitney's determination to prohibit collective bargaining and allow the equity jurisdiction of the Court in issuing injunctions, is readily justifiable in that it had little effect in hampering the inevitable growth of union rule. This group of cases again falls within the good discretion of the Justices of the Supreme Court of the United States. It is a choice of competing policies as a starting point for reasoning, thus reaching the result their individual sound judgment dictates.

Chapter VII

Taxation

IN THIS chapter it is our purpose to consider the several fields of this important and perplexing problem, in which Mr. Justice Pitney took a decided part, namely: I—the jurisdiction of States to tax; II—State taxation as a burden on interstate commerce; III—the meaning of the word "income" in the Sixteenth Amendment.

In regard to the jurisdiction which may be taken by the state bureaus of taxation of property, tangible and intangible, Mr. Justice Pitney wrote the opinion of the Court in three outstanding cases: Travis *v.* Yale & Towne Mfg. Co.;[99] Shaffer *v.* Carter;[100] and Citizens National Bank *v.* Durr;[101] and dissented in one, Union Tank Line Co. *v.* Wright.[102]

I

The Travis *v.* Yale & Towne Mfg. Co. case[103] arises under the New York State income tax law, which provided for the taxing of the net income of all residents and the income of all non-residents derived from all their property or business or occupation in the State, granted certain exemptions to resident taxpayers only. Here the Court recognized that the State of New York might tax the salaries of non-residents earned in New York, whether the salaries were paid in New York or elsewhere, and held that there had been an unjust discrimination against the non-resident because he was not allowed the same exemption as a resident.

Again, in Shaffer *v.* Carter,[104] an Oklahoma statute provided that every person in that State should be liable for an annual tax on his entire net income coming from all sources, and that a like tax be levied upon the entire net income from all property owned and from every business carried on in the State by non-

99 252 U. S. 60.
100 252 U. S. 33.
101 257 U. S. 99.
102 249 U. S. 275.
103 252 U. S. 60, in which case Mr. Justice Pitney's great friend, John W. Griggs, filed a brief as *amicus curiae*.
104 *Ibid.*[100]

residents. Further, the Act permitted residents to deduct from their gross income losses sustained in and outside the State. Non-residents could deduct only their losses incurred in the State. The Court, faced with this case, held that the State of Oklahoma could tax the income received from Oklahoma oil wells by a resident and citizen of Illinois, and that there was no discrimination against the non-resident by reason of his not being allowed to deduct losses sustained outside the State. The principle on which the decision of the Court is based, asserted Mr. Justice Pitney in the opinion, was that "just as a State may impose general income taxes on its own citizens, * * * it may, as a necessary consequence, levy a duty of like character, and not more onerous, in its effect upon incomes accruing to non-residents from their property or business within the State, or their occupations carried on therein."[105]

The Justice said that the fact that a State "may tax the land but not the crop, the tree but not the fruit and the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible."[106] The contents of this statement apparently recede from the former position taken by the Court in the Pollack case,[107] that a tax on the income derived from property was the legal equivalent of a direct tax on the property from which the income was derived. Shaffer *v.* Carter,[108] however, recognizes that income taxation is directed at the privilege of creating and enjoying income, and further that in the final analysis the power of a government to levy a tax is based on the protection it gives the person enjoying an income from any source, or in the conducting of the business which creates the income. Further, since this type of taxation, under which a non-resident enjoys the protection of the levying State, has been upheld in the forms of inheritance and occupational taxes, there seems to be no reason why the type of taxation under consideration should not also be just and valid.[109] Thus Mr. Justice Pitney is consistent with precedent, for the case holds that the State could tax the fruit of the tree when the tree is within its power and thus taxable.

105 252 U. S. 33, 52.
106 U. S. Glue Co. *v.* Oak Creek (1918), 247 U. S. 321, 329, 252 U. S. 50, 51.
107 Pollack *v.* Farmers L. & T. (1895), 157 U. S. 429.
108 *Ibid.*[100]
109 29 Yale Law Journal, 799.

It is also contended in both the Shaffer[110] and Travis *v.* Yale & Towne[111] cases, by the opponents of the New York and Oklahoma laws, that an income tax is in its nature a personal tax on a "subjective tax imposing a personal liability,"[112] and that the State has no jurisdiction to impose such a liability upon a non-resident. "But this argument," Mr. Justice Pitney says, "upon analysis resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution. For where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form construction or definition, but upon the practical operation and effect of the tax imposed."[113]

Questions may also arise as to whether the income really issues from the State which seeks to tax it. It was Mr. Shaffer's thought that his Illinois intelligence was a factor in getting a return from the Oklahoma oil wells and thus, the two elements being inseparable, Oklahoma must forego its entire tax. Mr. Justice Pitney, however, answers this by the statement: "The personal element cannot, by any fiction, oust the jurisdiction of the State within which the income actually arises and whose authority over it operates *in rem.* At most, there might be a question of whether the value of the service of management rendered from without the State ought not to be allowed as an expense incurred in producing the income; but no such question is raised in the present case, hence we express no opinion on it."[114]

Having decided that such taxation was proper, the State, however, must not discriminate against the non-resident. It is quite obvious that if the expenses of management were not deducted, discrimination would result in favor of residents against non-residents. But residents may deduct the value of their time and intelligence. Is it not reasonable to allow non-residents to do the same? For example, a New York lawyer may not allocate a part of his fee to earlier study in the Harvard Law School. This is parallel to the case where property or business in a State

110 *Ibid.*100
111 *Ibid.*99
112 252 U. S. 33, 54.
113 For this position Mr. Justice Pitney cites four cases in which he wrote the opinions: St. Louis Southern Ry. Co. *v.* Arkansas, 235 U. S. 350, 362; Mountain Timber Co. *v.* Wash., 243 U. S. 219, 227; Crew Levick Co. *v.* Pa., 245 U. S. 292, 294; Am. Mfg. Co. *v.* St. Louis, 250 U. S. 459, 463.
114 252 U. S. 32, 55.

is a part of a larger unit which extends outside the State, the unit rule of assessment being adopted, then such deduction from income being part of the fruit of extra-territorial toil, is just. But where this is not so and the State assesses domestic business and property separately, then this deduction from income for losses in other States should not be allowed. This was decided in the Shaffer case. Thus, it was held that non-residents were not discriminated against in favor of residents, because residents were taxed on extra-State income, while non-residents were not. "The difference," Justice Pitney says, "is only such as arises naturally from the extent of jurisdiction in the two classes of cases" and "therefore cannot be regarded as an unfriendly or unreasonable discrimination."[115]

In the Travis case, under Article 12, Section 2 of the Constitution,[116] it was held that the New York State Act, granting to non-residents none of the personal or family exemptions extended to residents, was decidedly unfriendly and unreasonable. The Court maintained that though it was claimed in justification of the discrimination that non-residents received income from extra-New York sources which equalled the exemption enjoyed by New Yorkers, it could not assume that non-residents in general received such income, pointing out that non-residents even compete with residents for work in New York. "Whether they must pay a tax upon the first $1,000 or $2,000 of income, while their associates or competitors who reside in New York do not, makes a substantial difference."[117]

What the Court has done in these two cases seems very just. It is hardly to be contended that New York might tax non-residents on the full value of their real estate while exempting partially or wholly that of residents, while on the other hand it may be as reasonably said that Oklahoma may tax the oil and gas of an Illinois producer whose wells and mines are in Oklahoma.

To conclude, in Shaffer *v.* Carter the Court receded from its former position that a tax on income derived from property was the legal equivalent of a direct tax on the property from which the income was derived.[118] It correctly recognizes that income taxation is directed at the privilege of creating and enjoying income; that the power to levy the tax is based on the protection

115 252 U. S. 33, 57.
116 "The citizens of each state shall be entitled to all Privileges and Immunities of citizens in the several states."
117 252 U. S. 60, 80.
118 Pollack *v.* Farmers Loan & Trust Co., 157 U. S. 429.

which the person receives, in his enjoyment of it or in the conduct of his business which helps create it. This power has been extended to non-residents in inheritance and occupational taxes and also into income taxes. Yet no heavier burden can be levied on non-residents than residents for the privilege of holding and enjoying property.

The New York statute in the Travis case was held unconstitutional because it resulted in undue discrimination against non-residents.

The third case written by Mr. Justice Pitney, Citizens National Bank v. Durr,[119] regarding the jurisdiction of a state to tax, involved a property tax which was imposed by Ohio upon the plaintiff, a resident of that State, on a seat which he owned in the New York Stock Exchange. Here the majority opinion explains that the rule of law in connection with intangible property is that such property is taxable at the domicile of the owner if it has not a fixed situs elsewhere,[120] and holds that the membership in the New York Stock Exchange is taxable by Ohio. In holding this, Mr. Justice Pitney points out[121] that a membership in the New York Stock Exchange involves many privileges which may be utilized without entrance into the Stock Exchange Building. Mr. Justice Holmes takes issue on this point,[122] maintaining that the plaintiff's principal privilege is localized in New York and all others are incidental thereto.

However, it seems perfectly clear that all rights are not located in New York; that the member could solicit business in Ohio as such; that he had the contractual right that the business of the Exchange be conducted properly; that the commissions be determined by definite rules; that he also had an interest in the capital stock; and, therefore, that by calling these rights and privileges incidental to the right to do business in the Exchange Building itself, cannot deprive Ohio of a tax on the privileges and rights it protects, as domicile of the owner. It therefore seems that Mr. Justice Pitney is thoroughly justified in the conclusion he reaches. He adds one further interpretation to the law on this subject.

The only other case as to jurisdiction of the State to tax in which Mr. Justice Pitney expressed any decided opinion, was

119 257 U. S. 99.
120 257 U. S. 99, 108.
121 257 U. S. 106, *et seq.*
122 257 U. S. 110-111.

Union Tank Line Co. v. Wright.[123] In that case Georgia taxed the Tank Line by reason of the habitual use and employment of its stock in that State on the proportional value of the system of cars that the Georgia rail mileage bore to the total mileage.[124] The Supreme Court, per Mr. Justice McReynolds, decided that where it appeared, as in this case, that by the use of the unit rule, the assessed value (approximately $300,000) was greatly in excess of the actual amount of taxable property of the Company in the State (approximately $50,000), its application, therefore, was unjust and unconstitutional. Mr. Justice Pitney dissents,[125] adhering to the principle of the Pullman Palace Car Co. case[126] as a method more definite and easier to apply.

II.

As to the question that the State, by its taxing power, is imposing a burden on interstate commerce, Mr. Justice Pitney wrote several important opinions, the first of which was the Ohio Tax Case[127] in 1914. The Supreme Court held that a tax could be collected by the State of Ohio on a domestic corporation for the privilege of conducting business in the State, measured by the entire gross earnings from business done in the State.

The main argument against the validity of the tax was that it was a burden on interstate commerce and hence invalid. Mr. Justice Pitney, writing the opinion of the Court, apparently saw no weight in this contention but, without stating why it is not a burden on interstate commerce, however, takes the negative attitude that "in the absence of a construction by the State Court of last resort to the effect that the receipts from foreign commerce are to be included and without any attempt on the part of the taxing authorities to include them," as a part of the taxable property, "the Federal Courts ought not to place a construction upon the Act that would render it unconstitutional."[128] Thus it was recognized by Mr. Justice Pitney that an excise tax on the gross receipts from intrastate business of an interstate railroad for the privilege of doing intrastate business, was valid.

123 249 U. S. 275.
124 This was the unit rule laid down in Pullman Palace Car Co. *v.* Pa., 141 U. S. 118.
125 249 U. S. 275, 287.
126 141 U. S. 118.
127 232 U. S. 576.
128 232 U. S. 576, 591.

The next case which Mr. Justice Pitney decided on this point, St. Louis Southwestern Railway Company *v.* Arkansas,[129] came to the Supreme Court a year later. The Railway Company appealed from a decision rendered in favor of the Attorney General of Arkansas, who sought to collect an annual franchise tax levied pursuant to a State statute[130] "on corporations doing business in the State of Arkansas," measured upon the proportion of the outstanding capital stock represented by property owned and used in business transacted in the State. The obvious intent was to obtain revenue from corporations doing business in the State.

Not only citing a part of Mr. Chief Justice Fuller's opinion in the Postal Tel. Cable Co. *v.* Adams,[131] where it says "property in a State belonging to a corporation, foreign or domestic, engaged in foreign or interstate commerce, may be taxed * * *"; Mr. Justice Pitney likewise quotes that a corporation may be taxed "for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State * * *, and if the payment be not made a condition precedent to the right to carry on business, * * *." Thus it is with little difficulty that the Justice sustains the tax in question "as a legitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intrastate business in corporate form, the tax being based upon the amount and value of its property in the State."[132]

Here, then, a franchise tax, for the privilege of doing intrastate business, based on the amount and value of property in Arkansas, is upheld, though levied on a corporation doing interstate and intrastate business, providing the State does not make the tax a condition upon which interstate commerce is regulated. This is a decided addition to the principle set forth in the previous case.

The next case, Crew Levick Company *v.* Pennsylvania,[133] was discussed very briefly by Mr. Justice Pitney, relying a great deal in his opinion upon precedent.

129 235 U. S. 350.
130 Acts of Arkansas, 1911, p. 69.
131 155 U. S. 688, 695.
132 235 U. S. 350, 364.
133 245 U. S. 292.

Under the Pennsylvania Act of 1899,[134] a mercantile license tax was levied upon the Crew Levick Company on its gross annual receipts from both interstate and intrastate business. The Supreme Court of Pennsylvania sustained the tax, maintaining that it was not, as contended, a regulation of foreign commerce and an impost or duty on exports levied without the consent of Congress and contrary to §§8 and 10 of Article 1 of the Federal Constitution.

Mr. Justice Pitney says the "imposition of a percentage upon each dollar of gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of it, * * *" as well as in effect "an impost or duty upon exports."[135] The tax in question, he continues "operates to lay a *direct burden* upon every transaction in commerce, by withholding, for the use of the State, a part of every dollar received by such transactions."[136]

We note that a tax on *gross receipts* from intrastate and foreign commerce is invalid. A point of distinction with regard to this principle was made by Mr. Justice Pitney in the same term of the Court, and is therefore interesting. In the United States Glue Company case,[137] a tax was levied by the State of Wisconsin pursuant to a statute,[138] on a domestic corporation, on the *net income* attributable to both intrastate and interstate business. The Glue Company sought to recover the part of the tax paid on interstate commerce, as being contrary to §§8 and 10 of the United States Constitution and a direct burden on interstate commerce.

A tax on gross receipts is invalid,[139] Mr. Justice Pitney points out, but one measured by net income is entirely different, affording "a convenient and workable[140] basis of distinction between a direct and immediate burden upon the business affected, and a charge that is only indirect and incidental." A tax on gross receipts, Mr. Justice Pitney points out, "affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to

134 Act of May 2, 1899, p. 184.
135 245 U. S. 292, 296.
136 245 U. S. 292, 297.
137 U. S. Glue Co. *v.* Oak Creek, 247 U. S. 321.
138 Laws 1911, c. 658.
139 Crew Levick *v.* Pa., 245 U. S. 292.
140 The wording Mr. Justice Pitney uses here suggests the dissenting opinion in the Union Tank Line Co. case previously discussed, where he upholds a tax measure by the unit rule on the property of a railroad in a State because it is the most convenient and workable way to levy such a tax.

make a difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. (Underscoring ours.) A tax on net profits has not this deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large.''[141] Thus the Wisconsin income tax law imposing a tax on net proceeds of intrastate and interstate business, is upheld, not being ''so direct a burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the States.''[142]

A still further addition was made to this principle by Mr. Justice Pitney in Shaffer *v.* Carter,[143] where it was held that a tax levied by Oklahoma on the proceeds of a non-resident corporation derived from the gross receipts from property in the State, is valid, though the Company be also engaged in interstate commerce.

With regard to the taxation by a State of sales in interstate commerce, Mr. Justice Pitney wrote the opinion in several cases of importance.

Wagner *v.* City of Covington[144] involved the taxation of a peddler's goods by the State of Kentucky, in accordance with certain ordinances of the City of Covington. The goods had been manufactured in Ohio and were brought across the State line into Kentucky by means of vehicles to be peddled throughout the State to various soft drink dealers. Mr. Justice Pitney, relying on well established precedent in St. Louis Southwestern Ry. Co. *v.* Arkansas,[145] and Robbins *v.* Shelby Taxing District,[146] and maintained that though ''the transportation of plaintiff's goods across the State line is of itself interstate commerce; * * * it is not this that is taxed by the City of Covington, nor is such commerce a part of the business that is taxed, or anything more than a preparation for it. So far as the itinerant vending is concerned, the goods might just as well have been manufactured within the State of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and this being so, they can

141 247 U. S. 321, 328-329.
142 247 U. S. 312, 329.
143 252 U. S. 33.
144 251 U. S. 95.
145 235 U. S. 350, 362.
146 120 U. S. 489.

claim no immunity from local regulation, whether the goods remain in original packages or not.''[147]

The second case, Texas Co. *v.* Brown,[148] was decided by Mr. Justice Pitney in 1921. The appellant shipped in tank cars oil and gasoline into Georgia, where it was stored in tanks and from them sold to the public or shipped in cars to various purchasers. The State of Georgia, pursuant to a law[149] levied an inspection fee on the oil and gasoline as it entered the State. This fee was greatly in excess of the cost of inspection and amounted to a tax. Mr. Justice Pitney held that such a tax was constitutional, only where it applied to oil inspected after the interstate journey had ended. And further, the State could, with the consent of the oil company, inspect the oil before it was removed from the tank cars.

It seems that Mr. Justice Pitney had ample opportunity to pass upon the power of a State to impose burden through its taxing power upon interstate commerce, in violation of the commerce clause of the Constitution. He maintains throughout the very justifiable theory that a State may tax certain receipts from interstate commerce in order to receive some remuneration for the privileges and protection which it gives, providing that the burden is such that it does not directly interfere with the power to regulate interstate commerce delegated to the Federal Government by the Constitution. Mr. Justice Pitney is not concerned with those incidental burdens on interstate commerce but only the direct ones as shown in the difference between the U. S. Glue Co. case[150] and Crew Levick *v.* Pa.[151]

III.

We have thus far discussed Mr. Justice Pitney's opinions as to jurisdiction of State taxation and taxes imposing burdens on interstate commerce. We now turn to those cases of Mr. Justice Pitney's involving Federal income taxation and the Sixteenth Amendment.

The most important decisions on the interpretation of the word ''income'' in the Sixteenth Amendment were written by Mr. Justice Pitney. The most outstanding of them was Eisner

147 251 U. S. 95, 103.
148 258 U. S. 466.
149 Laws of Georgia, 1920, No. 800.
150 247 U. S. 321.
151 245 U. S. 292.

v. Macomber.[152] Resulting from this decision much speculation and criticism was aroused due to the effect which it had, not only in reducing to a large extent the revenue which the Government might collect, but also on general business conditions throughout the country as exemplified in the stock market flurry at that time.[153] The decision in Eisner *v.* Macomber, in simple terms, held that dividends of a corporation declared payable in its own stock are not taxable income, within the meaning of the Sixteenth Amendment, until sold by the stockholder.

In order to adequately understand Mr. Justice Pitney's decision, attention must first be given to the status of the law on this subject in 1920. In Springer *v.* United States,[154] the Supreme Court held that a tax on income was an indirect tax and that "direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate."[155] This decision was, however, voided by Pollack *v.* Farmers' Loan and Trust Company (1895),[156] which definitely declared that a tax on income was in substance the same as a tax on the source thereof; that a tax on personal property was as direct as a tax on land and consequently that a tax on income from either was a direct tax. Thus, from this reasoning the conclusion is reached that a tax on income is a direct tax and must be apportioned according to population.

So clearly was this decision in conflict with the Springer case that criticism was launched from all sides. Especially was Mr. Justice White, future Chief Justice, vehement in his dissenting opinion when he made it clear that if previous decisions were to be repudiated, such should be done by Constitutional Amendment.[157] Thus followed the movement for the Sixteenth Amendment which resulted in its adoption on February 25, 1913; "the Congress shall have power to lay and collect taxes on incomes from whatever source derived and without apportionment among the several states and without regard to any census and enumeration."

In Eisner *v.* Macomber,[158] Mr. Justice Pitney was faced with the question whether, by virtue of the Sixteenth Amendment, Congress had the power to tax as income of the stockholder, a

152 252 U. S. 189.
153 Stock Market Flurry, 1920.
154 102 U. S. 586.
155 102 U. S. 586, 602.
156 158 U. S. 601.
157 158 U. S. 601, 715.
158 252 U. S. 189.

stock dividend made lawfully and in good faith against profits accumulated by the corporation since March 1, 1913. One previous decision of the Supreme Court gave him some aid. In 1918 the case of Towne *v.* Eisner[159] was decided by Mr. Justice Holmes, in which decision Mr. Justice Pitney concurred. The suit was brought by Towne, who had paid, under protest, a tax upon a stock dividend to Eisner, the United States Collector of Internal Revenue for the Third District of New York State. The Tax Collector alleged in his answer that a stock dividend was income within the meaning of the Income Tax Act of 1913. The Court decided that under the terms of the Act a stock dividend was not income, on the grounds stated in Gibbons *v.* Mahon (1889),[160] which held that a stock dividend was capital as between the life tenant and remainderman. The following quotation from the Towne case sums up the point at issue:

"'* * * a stock dividend really takes nothing from the property of the corporation and adds nothing to the interest of the shareholders. Its property is not diminished and their interests are not increased, * * *. The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones.'

"* * * The corporation is no poorer and the stockholder no richer, than they were before."[161]

In Towne *v.* Eisner, however, the Supreme Court passed only upon the construction of the Tax Act of October 13, 1913, and not its constitutionality. It was the decision of Eisner v. Macomber that determined its constitutionality.

The argument of the case of Eisner *v.* Macomber[162] consumed a great deal of time and was presented by the most brilliant lawyers of the country. For the Government appeared Assistant Attorney General Frierson, while the counsel for the defendant in error was the Honorable Charles Evans Hughes, and associated with him was George W. Murray. George W. Wickersham and Charles Robinson Smith filed briefs as *amici curiae.*

159 245 U. S. 418.
160 136 U. S. 549.
161 Inside quote from Gibbons *v.* Mahon, 136 U. S. 549, 560. Whole quote, 245 U. S. 418.
162 252 U. S. 189.

The case was very carefully considered by the Court. Mr. Justice Pitney maintained that a stock dividend was not taxable as income within the meaning of the Sixteenth Amendment, and held that the Revenue Act of 1916,[163] in so far as it imposed a tax upon the stockholder because of such dividends, contravenes the provision of Act I, Sec. 2, Cl. 3 and Act I, Sec. 9, Cl. 4 of the Constitution, and to that extent was invalid, notwithstanding the Sixteenth Amendment.

Mr. Justice Pitney's decision was well thought out and carefully prepared. He first enunciated the point that the whole question was controlled by the cases of Towne and Eisner, restating the Court's argument above quoted from the same case, and continuing:

"* * * for the reasons thus expressed, if such a dividend is not to be regarded as 'income' within the meaning of the Act of 1913,[164] we are unable to see how it can be brought within the meaning of 'income' in the Sixteenth Amendment; it being very clear that Congress intended in that Act to exert its powers to the extent permitted by the Amendment. In Towne *v.* Eisner it was not contended that any construction of the statutes could make it narrower than the constitutional grant; rather the contrary."[165]

The fact that in Towne *v.* Eisner the dividend was charged against profits earned before the Act of 1913 and before amendment was not ruled on or alluded to in that case. Nevertheless, a true stock dividend would have been held taxable although based on profits accrued before the amendment, as seen in Lynch *v.* Hornby,[166] where an extraordinary cash dividend from profits accrued before the Act, and as in Peabody *v.* Eisner,[167] where the dividend of another corporation of similar profits was held to be income.[168] Mr. Justice Pitney wrote the opinions in both of the above decisions on behalf of a unanimous Court. It is only important to consider the time when a stockholder's interest in the surplus of a corporation comes to fruition in the form of dividends. The time of segregation is the essential point.

163 38 Stat. 114, 166.

164 245 U. S. 418 (Towne *v.* Eisner).

165 252 U. S. 189, 203.

166 247 U. S. 339.

167 247 U. S. 347.

168 In Southern Pacific Co. *v.* Lowe, 247 U. S. 330, decided by Mr. Justice Pitney, resting upon its peculiar facts, where two corporations were closely intertwined, one being a stockholder in the other, it was held that accumulations accruing to a corporation through surplus earnings or appreciation in property value prior to the Sixteenth Amendment, was capital and not income.

When alayzed, the nature of a stock dividend becomes apparent. A corporation runs its business for a year and makes a profit. That profit is credited to the surplus or undivided profits account. The stockholders have no claim on this money until declared to them as dividends. If the directors decide to transfer some surplus to the capital account and issue stock to the present stockholders representing the amount transferred, the surplus has become capitalized. The stockholder has received a stock dividend, but the corporation has parted with no asset. The money is still subject to the risks of the business and the shareholder has realized nothing.

"This, however, is merely bookkeeping that does not affect the aggregate assets of the corporation or its outstanding liabilities; it affects only the form, not the essence, of the 'liability' acknowledged by the corporation to its own shareholders, and this through a readjustment of accounts on one side of the balance sheet only, increasing 'capital stock' at the expense of 'surplus'; it does not alter the preexisting proportionate interest of any stockholder or increase the intrinsic value of his holding or of the aggregate holdings of the other stockholders as they stood before. The new certificates simply increase the number of the shares, with consequent dilution of the value of each share."[169]

This situation, says Mr. Justice Pitney, does not fall within the meaning of the word "income" as "gain derived from capital."[170] He freely admits that if the stock dividend was sold and a profit derived, this would be income.[171] Further, it might be necessary for the recipient of the stock dividend to sell some of the dividends to pay the tax, thereby reducing his interest in the capital assets of the company. In that event, the stockholder, instead of getting anything, is really losing some percentage of the interest which he had in the corporation.

Two cases were cited to support the tax,[172] although they are analogous on their facts, yet Mr. Justice Pitney felt bound by

169 252 U. S. 189, 210-11.

170 252 U. S. 189, 207-8.

171 252 U. S. 189, 212.

172 Swan Brewery Co., Ltd. *v.* Rex (1914), A. C. 231; Tax Commissioner *v.* Putman (1917), 227 Mass. 522.

the Constitution, which did not bind the Courts which decided them.

On the second argument, the Government declared that even if a stock dividend did not increase the interest of a stockholder or otherwise enrich him at least under a true construction of the Act of 1916, the tax was imposed not essentially upon the dividend itself, but rather upon the stockholder's share of the undivided profits previously accumulated by the corporation and levied only as a matter of convenience, at the time such profits became manifest through a stock dividend.

Here, Mr. Justice Pitney ingeniously replies that it is, of course, agreed that Congress has the power to tax shareholders upon their property interest in this stock of a corporation, but this sort of taxation is laid on property because of ownership and must therefore be apportioned under the provisions of the Constitution and the Pollack decision. This decision, the Government further maintains, was overruled by the Sixteenth Amendment, thus basing their contention upon Collector *v.* Hubbard (1870),[173] which upheld the right of Congress, without apportionment, to tax a shareholder's share in accumulated earnings prior to dividends declared. Mr. Justice Pitney points out, however, that this was overruled by the Pollack case, but even granting the Hubbard case is the authority by which Congress levies a tax on the stockholder's share in the accumulated profits of a corporation before division by the declaration of a dividend of any kind, the amendment applies only to *income* and not to the stockholder's share in the accumulated profits of a corporation, which is *capital.*

Thus, Mr. Justice Pitney is maintaining that: 1. To constitute income something must be realized by the evident separation of income from principal; 2. Separation must be narrowly defined, existing only in case something is paid out of the corporation treasury in the form of a bond, preferred stock to the preferred stockholder, or preferred stock to the common stockholder, to the enrichment of the stockholder; and 3. Corporate fiction or entity must not be ignored as was the case in Collector *v.* Hubbard,[174] where the Court was led to the conclusion that stock dividends were not taxable as income.

Mr. Justice Holmes, in a short dissenting opinion, points out that he thinks Justice Pitney is wrong in maintaining that

[173] 12 Wall. 1.
[174] 12 Wall. 1.

the word "income", as construed in the statute of 1913,[175] is no different from the construction which may be laid to the word in the Sixteenth Amendment. "Income" should be understood and interpreted, he says, in "a sense the most obvious to the common understanding"[176] of most people, not lawyers, who suppose that the question as to what direct taxes are, was settled by the Amendment. Those "nice questions" should not be brought up again. Mr. Justice Day concurred.[177]

Justice Brandeis, however, wrote a rather long dissent, pointing out six reasons why he fails to agree with Justice Pitney. For his first reason, he says cash dividends with an option to buy, are the same as stock dividends, merely a matter of financial adjustment. He points out that since it is admitted by Justice Pitney that cash dividends and dividends representing profits are taxable, why then are not dividends paid in securities also taxable? Justice Pitney answers this by stating:

"An actual cash dividend, with a real option to the stockholder either to keep the money for his own or to reinvest it in new shares, would be as far removed as possible from a true stock dividend, such as the one we have under consideration, where nothing of value is taken from the company's assets and transferred to the individual ownership of the several stockholders and thereby subjected to their disposal."[178]

In the former, he maintains and to my mind very reasonably, that something is removed from the company's assets and transferred to the individual ownership of the several stockholders and thereby subject to their disposal, while this does not occur in the latter.[179]

Secondly, Justice Brandeis says that since dividends in bonds and preferred stock are taxable, common stock dividends should also be taxed. Mr. Justice Pitney replies by citing the difference between bonds and stocks.

Thirdly, he maintains that there is no reason why we should not disregard the corporate fiction in taxing stockholders, seeing this is done in partnerships, each partner being taxed on the

[175] Towne *v.* Eisner, 245 U. S. 418.
[176] 252 U. S. 189, 219-220.
[177] 252 U. S. 189, 220.
[178] 252 U. S. 189, 214-215.
[179] In this connection, it is interesting to note that Justice Pitney held constitutional the complex formula for the taxation of rights to subscribe to stock of a corporation. In Miles *v.* Safe Deposit & Trust Co. of Baltimore, 259 U. S. 247, he further held that such a right became income only when sold.

undivided profits. However, no corporate fiction surrounds a partnership as it is not considered an individual. The corporation is separate and distinct from its stockholders, Mr. Justice Pitney points out. "We must treat the corporatoin", he says, "as a substantial entity separate from the stockholder, not only because such is a practical fact, but because it is only by recognizing such separateness that any dividend * * * can be regarded as income to the stockholders. Did we regard corporation and stockholders as altogether identical, there would be no income except as the corporation acquired it."[180]

Fourthly, the purpose of the Act was to prevent accumulation of undivided profits. If stock dividends were taxable, the purpose of the Act is carried out, because the corporation will not capitalize its undivided profits, but if the stock dividend is untaxable it encourages capitalization of surplus and defeats the purpose of the Act. Mr. Justice Pitney does not answer this contention in his opinion, for it appears that he is concerned there only with the question of whether or not, under the facts of this case, stock dividends are income within the meaning of that word as used in the Sixteenth Amendment, and not with one of the remote purposes of the Act.

Fifthly, we must construe the Sixteenth Amendment liberally and not strictly. In criticizing Justice Pitney's argument, Justice Brandeis points out that Towne *v.* Eisner was no binding authority because it only involves statutory construction, not constitutional interpretation. Gibbons *v.* Mahon,[181] likewise only involves the interpretation of the testator's will as governed by fixed rules of construction.

Justice Brandeis continues by saying that there are no decisions of the United States Supreme Court which show that Congress is exceeding its powers in taxing stock dividends. We may see, however, that not only[182] the purpose of the Revenue Act of 1916 may be interpreted in different ways, but also opinions may differ regarding the construction liberally or strictly of a constitutional amendment.

Lastly, Mr. Justice Brandeis argues that the *plain people investors* and *financiers,* all in adopting the Sixteenth Amendment empowering Congress "to lay and collect taxes on incomes for whatever source derived", intended to include therein every-

180 252 U. S. 189, 214.
181 136 U. S. 549.
182 See Brandeis' Point 4.

thing which by reasonable understanding could be regarded as income.[183]

From the foregoing it appears that Justice Brandeis maintains the legal conception of the taxing power of Congress while the economic conception was advocated by Mr. Justice Pitney, along with the majority of the Court. The former starts with a realistic picture of the methods of corporative financing which shows the essential similarity of the ways of "cutting melons"; the stock dividend and the extraordinary cash dividend with an option to purchase stock. Since the second is taxable to the stockholder as income, the first also should be. His premise is then one of legal income which is not genuine economic income. We must note here that the concept of the separate individuality of the corporation and its stockholders is necessary to make any dividend per se income to the stockholder. On this main point Mr. Justice Pitney entirely disagrees with Justice Brandeis, maintaining that the legal concept is only effective when the corporation parts with something which makes it poorer. Mr. Justice Brandeis then countered by calling the stock dividend a delayed pass of what is intended genuine economic income. His colleague then retorts that on the assumption of the identity of the corporation and its stockholders, the pass of profits is only from pocket to pocket. If the corporation is only the ghost of the stockholders, it cannot be a source of income, and thus the only tax which could be possibly levied is one on the stockholder on his share of the income of the corporation as it accrues. This type is not imposed by the statute in question.[184]

"So far as Eisner *v.* Macomber turns on economic issues, the majority has much the better of the argument. So far as it is a game of legal concepts, the best that the minority can get is a stalemate. Mr. Justice Holmes has found the solider grounds for dissent. He cannot be dislodged by argument. He can be met only by contradiction. Whether you take him or his opponent depends upon which you prefer. Is 'incomes' to be construed according to the vulgar or as a word of art? As Marshall bids us remember, it is a constitution we are expounding. Must every word be restricted to its nicest meaning, or shall Congress be allowed reasonable latitude to pick one of the several connotations which the word might convey to those who supported or voted for the Constitutional clause in which it appears? The

183 252 U. S. 189, 219-222.
184 Revenue Act of 1916.

Sixteenth Amendment was passed to unshackle Congress from chains riveted by a much criticized five to four judicial decision[185] refusing to follow a prior unanimous decision[186] which held that no such chains were in the Constitution. It can hardly be doubted that Mr. Justice Holmes is right when he says that 'the known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes.''[187] The issues in Eisner *v.* Macomber seem to be whether this known purpose or the particular phraseology shall be picked as controlling; and if the latter, whether the word may be given only its best meaning, or may have in the Constitution any of the alternative uses to which plain folks may put it. No answer to these questions may be given by philologists or economists. The answer which the Supreme Court should give depends upon its conception of its function. The members of the Court do not agree in their conceptions. In this, they do not differ from other members of the body politic.''[188]

Not long after this momentous decision two other tax cases came before the Court, United States *v.* Phellis[189] and Rockefeller *v.* United States[190]. They are interesting, first, in showing that Mr. Justice Pitney's decision of Eisner *v.* Macomber was approved by the Court, and secondly, because they follow out in logical sequence its general principles.

In United States *v.* Phellis, corporation A, a New Jersey concern, with the consent of a sufficient number of the stockholders, organized another corporation in Delaware, to which it transferred all its assets and goodwill and surplus at a valuation of $120,000,000 and all its obligations except its capital stock and funded debt for which it received debenture stock of the new corporation B, to the same value. The debenture stock of the new corporation was issued by the old company to its common stockholders, two shares of the new for every share of the old, in the form of a dividend. After this transaction the New Jersey corporation (A) existed only for the purpose of redeeming the outstanding bonds, exchanging the debenture stock of the new corporation for its preferred stock, and holding the debenture stock to an amount equivalent to its own outstanding common stock and collecting and disposing of dividends thereon. It was not, however, in the process of liquidation.

185 Pollack *v.* Farmers Loan & Trust Co., 158 U. S. 601.
186 Springer *v.* U. S., 102 U. S. 586.
187 40 Sup. Ct. at p. 204.
188 T. R. Powell, 20 Col. Law Review, 549.
189 257 U. S. 156.
190 257 U. S. 176.

In short: Has the recipient of the new dividend shares, a stockholder in the old company, received any gain, profit or income from the transaction? If so, then dividend shares are taxable. Was the transacting which the old company carried out merely a financial reorganization of the business as it stood before, without diminution of the aggregate assets or change in the general corporate objects and purposes without change of personnel either in officers or stockholders or change in the proportionate interest of any individual stockholder? Yes, in one sense, says Mr. Justice Pitney, but it is not material. Justice McReynolds maintains that the reorganization took place in good faith and the statute concerned ''was not intended to put an embargo upon legitimate reorganizations when deemed essential for carrying on important enterprises.''[191] And since the business produced no gain, profit nor income the dividends are not taxable.[192] But it is pointed out by Mr. Justice Pitney that the stockholders of the old company did receive something in the way of gain, profit or income. There was a sale, a regular transaction between the former and the latter making the new corporation a substantial corporate body entirely separate from the old. The identity of the stockholders and officers is but a temporary condition subject to change at any moment at the option of any individual or a group. Most important, however, the liability of a stockholder to pay an individual income tax is tested by the effect of the transaction upon the individual. The stockholders agree to this transaction, in the course of which new and substantial property rights in a new corporation were transferred to each individual. In the distribution of the dividend the several stockholders receive ''new individual property rights which they severally were entitled to retain and enjoy, or to sell and transfer, with precisely the same substantial benefit to each as if the old company had acquired the stock by purchase from strangers.'' Under the plan of reorganization there was nothing to ''prevent the stockholder from selling it'';[193] and he could part with ''his entire portion or any of it without reducing his capital interests in the parent company, or affecting his proportionate relation to the interests of other

193 257 U. S. 156, 175.
191 257 U. S. 156, 176.
192 Eisner *v.* Macomber, 252 U. S. 189.

stockholders.''[194] It appears from Mr. Justice Pitney's reasoning that there was a gain or profit derived from the dividend. For it is evident that there was received by the stockholder something of exchangeable value produced by and proceeding from an investment in the old company which was severed from this investment and drawn for the stockholders' separate use. Hence, on these grounds, the dividend ''constitutes individual income in the meaning of''[195] income in the Sixteenth Amendment, and is taxable.

When the stock dividend is declared, there is no actual distribution of assets of the company to stockholders. The transaction is merely one of bookkeeping in which a certain amount of money is transferred from the surplus side of the balance sheet to the capital account, and dividends issued in stock to the amount of this transfer; while in reorganization there is actual partial liquidation and distribution and a diminution of assets.

In Eisner *v.* Macomber the stockholders did not receive an added interest in the business in which they held stock, but only additional certificates which still represented the same proportionate interest in the business. In the latter case they received a substantial benefit in the shares of a new company. The same issue arose in Rockefeller *v.* The United States,[196] in which a practically parallel situation existed.

Mr. Justice Pitney had a clear and well formed idea of what income was. In summing up, it may be to the advancement of conciseness to point out that taxable ''income,'' as Mr. Justice Pitney and the Supreme Court interpreted it, is derived (1) from a cash dividend,[197] (2) from a cash dividend with an accompanying option to buy more stock,[198] and (3) from a stock dividend of another corporation,[199] but not from a stock dividend of the same corporation. ''Income may be defined as the gain derived from capital, from labor, or from both combined.''[200] One most interesting fact may be noted here, namely, that the writing of the Court opinion in many of the now

194 *Ibid.*193
195 *Ibid.*193
196 257 U. S. 176.
197 Eisner *v.* Macomber, 252 U. S. 189.
198 Lynch *v.* Hornby, 247 U. S. 339.
199 Peabody *v.* Eisner, 247 U. S. 347; U. S. *v.* Phellis, 257 U. S. 156; Rockefeller *v.* U. S., 257 U. S. 176—the principle having been laid down in the first of the three and the conditions from which this principle should follow have been proved to exist in the latter two.
200 Eisner *v.* Macomber, 252 U. S. 189, 207.

important and difficult cases regarding the interpretation of the Sixteenth Amendment was given to Mr. Justice Pitney. He seemed to be most careful and meticulous in the determination of his position and most clear and concise in its explanation.

Mr. Justice Pitney's interpretation of the Amendment in the Phellis and Rockefeller cases was never revised by the Court, but its effect has been annulled by the Income Tax Act of 1924, Sec. 203, Paragraph (C), which provides:

''If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized.''

The adoption of Section 203, Paragraph (C) shows that the legislature regards an Act as necessary to relieve or improve the varied conditions of all those who are affected—either by its operation or non-operation, as the case may be. The situation just prior to 1924, and growing more severe as the year approached, was such that business men were unable to sit down with pencil and paper and reorganize a concern with financial benefit unincurred, without placing themselves under the liability of paying a tax to the Government. Mr. Justice Pitney's decision was removed from further effectiveness as long as the Act of 1924 remains in force.

This brings us closer to the subject of this record. Mr. Justice Pitney declared in 1912, as we have hitherto mentioned, that upon being faced with a decision of an action, he took into consideration only the immediate facts surrounding the case, not in the least intending the decision to be given a broader and more sweeping meaning than simply as a settlement of the issue between the parties involved.

This statement was made by Mr. Justice Pitney before he had had any experience on the Bench of the Supreme Court of the United States. Issues are presented in the Supreme Court, the scope of which exceed the bounds of party litigants and affect many and varied interests throughout the country. Principles of constitutional law are established in regard to such issues as the relation between the State police power and the commerce clause; as to the interpretation of the due process

clause of the Fifth and the Fourteenth Amendments; as to the equal protection of the laws; as to the obligation of contracts. The decisions of such issues, based as they are upon the interpretation of the Constitution of the United States, are necessarily decided upon principles of policy as to whether that Constitution should be strictly or liberally construed, as to whether a particular Act is too great a burden on interstate commerce, or as to the reasonableness[201] or unreasonableness of certain conduct and the like, all of which are questions of discretion and policy affecting all the citizens of the Nation alike. Mr. Justice Pitney, himself, in his decisions while on the Bench, shows that he has adopted this attitude. This can be clearly seen from his decisions on collective bargaining and injunctions in labor disputes. These cases on taxation show again his desire for intellectual honesty.

201 Ownbey *v.* Morgan, 256 U. S. 94.

Chapter VIII

Conflict Between Federal Employers' Liability Acts and State Workmen's Compensation Laws

THE questions discussed in this chapter are not those of policy concerning the relations between employer and employee, but those more fundamental concerning constitutional law in the aspect of Federal versus State legislation, such as we find in the realm of conflict between the State police power and the commerce clause, or the determination of the fine line between direct and indirect restraint on interstate commerce as shown in Coe *v.* Errol,[202] or the Brattleboro case.[203]

It has always been a rule of constitutional law that in the allotted field of legislation, where Congress has acted, the States cannot so legislate as to directly or indirectly encroach on that field and we shall here consider the relation between Federal Employers' Liability and Workmen's Compensation.[204]

Up to this time the relation between employer and employee was governed by common law principles.[205] When suing for damages for personal injuries sustained during the course of employment, the employee must not only prove the employer negligent, but in addition must overcome the three defenses of contributory negligence, assumption of risk, and the fellow servant doctrine. Due to changing conditions in industrial life which forced an employee into hazardous employment if he wished to subsist, the common law governing this relationship became inadequate. The necessity arose for changing or modifying the harsh common law rules and doctrines by legislation.[206] This was undertaken in the First Employers' Liability Act passed on June 11, 1906.[207] This Act applied to all railroad employees of interstate railroads, whether or not employed in interstate or intrastate commerce at the time of the injury.

202 116 U. S. 506.
203 260 U. S. 366.
During this discussion we will as much as possible restrict ourselves to the cases in which Mr. Justice Pitney took a decided part, though it will be necessary to mention other cases in order to get a clear picture of the Court's action in this field.
204 Seaboard Air Line *v.* Horton, 233 U. S. 492, 499.
205 Smith *v.* Erie R. R. Co., 67 N. J. L. 636.
206 N. Y. C. *v.* White, 243 U. S. 188, 197.
207 34 Stat. L. 232, ch. 3073.

It was, however, about a year later held unconstitutional by the United States Supreme Court in a decision of five to four.[208]

The majority opinion in that case by Mr. Justice White took the position that while Congress has power under the Commerce Clause of the Federal Constitution to legislate on the subject of liability of interstate carriers to their employees engaged in interstate commerce, the Act under consideration was void as attempting to include within its operation all employees of interstate carriers engaged in interstate or intrastate traffic; and that also the subjects within and those not within the constitutional powers of Congress were so interblended by this Act that they were incapable of separation, thus rendering the whole statute unenforceable.

As a result of this, Congress still being eager to assist the employee, passed on April 22, 1908,[209] a Second Employers' Liability Act, which was unanimously held constitutional by the Second Employers' Liability cases,[210] where Mr. Justice Van Devanter overruled the following objections:

"(1) Because the abrogation of the fellow servant rule, the extension of the carrier's liability to cases of death, and the restriction of the defenses of contributory negligence and assumption of risk have no tendency to promote the safety of employees, or to advance the commerce in which they are engaged; (2) because the liability imposed for injuries sustained by one employee through the negligence of another, although confined to instances where the injured employee is engaged in interstate commerce, is not confined to instances where both employees are so engaged; and (3) because the Act offends against the Fifth Amendment to the Constitution, (a) by unwarrantably interfering with the liberty of contract, and (b) by arbitrarily placing all employers engaged in interstate commerce by railroads in a disfavored class, and all employees engaged in such commerce in a favored class."[211]

The purpose and general effect of the Act was to abolish the defense embodied in the so-called fellow servant doctrine, of contributory negligence, and assumption of risk in all cases where the injury was caused by the negligence of the common carrier, and in all other cases to establish the doctrine of comparative negligence so that the contributory negligence of the employee will not bar a recovery but merely diminish the damages recoverable.

208 207 U. S. 463, Employers' Liability Cases.
209 C. 149, §1, 35 Stat. 65.
210 223 U. S. 1.
211 223 U. S. 1, 49.

Mr. Justice Pitney did much toward clarifying and interpreting this Act. The abolition of contributory negligence and assumption of risk was first discussed by Mr. Justice Pitney in the Wagner case.[212] That case involved the interpretation of the Safety Appliances Act, and pointed out that the "Employers' Liability Act clearly recognizes that rights of action may arise out of the violation of the Safety Appliances Act" on the part of the employer, basing this statement on the opinion in Texas & Pacific R. R. *v.* Rigsby,[213] where Mr. Justice Pitney says: "A disregard of the command of the statute (Safety Appliances Act) is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied."[214]

Thus, where the Employers' Liability Act refers to "any defect or insufficiency due to its negligence in its cars, engines, appliances * * *",[215] it is clearly the intent of the Legislature to treat a violation of the Safety Appliances Act as negligence per se, and falling within the Federal Employer's Liability.

It is in Mr. Justice Pitney's decision as to the Safety Appliances Act that he discusses the abolition of the doctrine of contributory negligence and assumption of risk.[216] While the Federal Employers' Liability Act provides, as has been noted,[217] that contributory negligence shall not bar recovery by employees of interstate railroads, railroad companies can prove contributory negligence in diminution of damages. Where, however, the company has been guilty of breach of a statutory duty imposed by the Safety Appliances Act, it cannot rely upon contributory negligence for any purpose.[218] Thus, the old doctrine of comparative negligence is re-established.

The general trend of the opinion then turns to the doctrine of assumption of risk. It is ordinarily supposed that a man assumes risk when he takes employment, incident to the class of

212 San Antonio R. R. *v.* Wagner, 241 U. S. 476, 481.
213 241 U. S. 33, 39; this opinion was also written by Mr. Justice Pitney.
214 *Ibid.*213
215 35 Stat. 65, Sec. 1, C. 149.
216 Seaboard Air Line *v.* Horton, 233 U. S. 492, cited as a basis for this argument. Mr. Justice Pitney also wrote this opinion.
217 *Ibid.*209
218 233 U. S. 492.

work which he has to perform. "But risks of another sort not naturally incident to the occupation may arise out of the failure of the employer to exercise due care with respect to providing a safe place for work and suitable and safe appliances for the work."[219]

"These, the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless such defect and risk are so obvious that the ordinarily prudent person under the circumstances would have observed and appreciated them."[220] It would seem, therefore, that a great part of the assumption of risk theory is wiped out by this statement, which Mr. Justice Pitney goes on to enlarge, quoting the Statute of 1908, where it says: "The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee."[221]

Regarding the fellow servant doctrine, Mr. Justice Pitney points out in the Chesapeake & Ohio case,[222] under the Liability Acts, by making the carrier liable for the employee's injury "resulting in whole or in part from the negligence of any of the officers, agents or employees"[223] of the carrier, the negligence of the co-employee is placed quite readily on the same basis as the negligence of the employer, thus making the employer responsible for injury caused by a carrier or one of his employees to another employee.[224]

In the final analysis, we must make the observation that a great number of perplexing problems have arisen from the

219 Seaboard Air Line *v.* Horton, 233 U. S. 492, 504.
220 *Ibid.*219
221 *Ibid.*220 In Section 4 of the Act the employee is required not to have assumed risk in order that the statute be binding, though he may at will assume it if he wishes. (Horton case, 233 U. S. 432, and Chesapeake & Ohio R. R. Co. *v.* DeAtley, 241 U. S. 310, and the Southern Railroad Co. *v.* Crockett, 234 U. S. 725 and Kanawha R. R. Co. *v.* Kerse, 239 U. S. 536, all of which opinions were written by Justice Pitney,) thus abolishing the defense in all these cases except where the negligence of the carrier is in violation of a statute enacted for the safety of the employees.
222 241 U. S. 310.
223 35 Stat. 65, Sec. 1, C. 149.
224 Other cases in which Mr. Justice Pitney wrote the opinions regarding the points above mentioned are Missouri, Kansas & Texas R. R. Co. *v.* Wolf, 226 U. S. 570; North Carolina Railroad Co. *v.* Zachary, 232 U. S. 248; Arizona & New Mexico R. R. *v.* Clark, 235 U. S. 669; Spokane & I. E. R. R. Co. *v.* Campbell, 241 U. S. 497; San Antonio & A. P. R. R. *v.* Wagner, 241 U. S. 476; Chesapeake & Ohio R. R. *v.* Profitt, 241 U. S. 462; Chesapeake & Ohio R. R. *v.* Kelly, 241 U. S. 485; Erie R. R. *v.* Welsh, 242 U. S. 303; Southern Railroad *v.* Plunkett, 244 U. S. 571; Hull *v.* Philadelphia & Reading R. R., 252 U. S. 475; Erie R. R. *v.* Collins, 253 U. S. 77; and Erie R. R. *v.* Szary, 253 U. S. 86 (the last two cases, in which he did not write the opinion, dissented).

passage of the Second Employers' Liability Act and the burden of solving these questions has been placed on the shoulders of those in the United States Supreme Court. After all, since the Act explicitly says an employee must be engaged in interstate commerce at the time of the injury in order to receive the compensation for injury under the Acts, the question first must be decided as to when a person is in interstate commerce, one of mere fact and not law. This difficulty is clearly shown by Mr. Justice McKenna, who wrote the opinion in the Davis case.[225] At this time the Federal Employers' Liability Act allowed a damage suit to be brought either in a State or Federal Court, but prohibiting a transfer from the former to the latter if the suit was started in the State Court. To begin an action in the Federal Courts led to the advantages (1) that the Judge could comment to the jury on the weight of evidence; (2) that the progress of the case was rapid, going from a lower Federal Court to the Circuit Court of Appeals and then to the United States Supreme Court. But it must be noted on the other hand that a Federal Court was very often a great distance away from the residence of the complainant or defendant, while State Courts were right at hand. In 1914 all cases could go to the United States Supreme Court as a matter of right, and the calendar became noticeably much too overcrowded with cases regarding the question of whether or not a person could recover under the Federal Employers' Liability Act. Besides, a decision as to whether or not a person was in interstate commerce at the time of the injury could in no way assist in laying down a rule which the lower courts could follow, because it was purely a question of fact in each individual case. Thus in 1916, and again in 1925, the right to appeal to the Supreme Court was cut down so that at present the only means of having this particular question reviewed by the Supreme Court is by a writ of certiorari granted by the Court itself.[226] The rule laid down in the first Employers' Liability Act would seem to be infinitely easier to apply and would save much litigation, and the minority opinion in the First Employers' Liability cases,[227] sound in its legal reasoning, would seem supported by policy, for then the only question which would be necessary to determine, in order to find whether the Federal Employers' Liability Act applied to a par-

225 Industrial Commission *v.* Davis, 259 U. S. 182.
226 39 Stat. 736.
227 207 U. S. 463.

ticular case, would be whether the individual was an employee of an interstate railroad.

Absolutely independent of this whole problem of employers' liability, there were passed in several states around 1911 and 1912 Workmen's Compensation Laws providing for a classification of positions and injuries and an automatic payment by the employer to the injured workmen of damages either in a lump sum or by instalments out of an insurance fund, the premiums of which were particularly contributed by employers.

The period from 1911 to the end of 1915 seems to be the time of sudden transition from the system established in the Second Employers' Liability Act, under which the liability of the employer to his employee for occupational injuries was based on the idea of fault on the part of the employer, to a system based on the idea of absolute liability of the employer to the employee for all occupational injuries not caused by the employer's negligence. This state legislation, in addition to abolishing the common law defenses of the employer, went one step further and dispensed with the necessity of proving negligence on the part of the employer. At first, these state laws were held unconstitutional by the State Courts. In Ives *v.* South Buffalo R. R. Co.,[228] the Court of Appeals held invalid a compulsory compensation law applicable to a limited number of especially hazardous employments because it was in conflict with the due process of law provisions of the State Constitution and of the Fourteenth Amendment. Thereafter in 1913 New York adopted a Constitutional Amendment which permitted compensation legislation.[229] In 1914 such legislation was repassed.[230] On February 29, 1916 the Supreme Court was for the first time required to pass upon the constitutionality of State Workmen's Compensation Laws, and it was the New York legislation above referred to which was brought in question. The task of the writing of the majority opinion was given to Mr. Justice Pitney.[231]

At the very beginning of the opinion Mr. Justice Pitney remarks on the complexity and extreme importance of the question by saying: "The scheme of the Act is so wide a departure from the common law standards respecting the responsibility

228 201 N. Y. 271.
229 Art. 1, Sec. 19, Constitution of New York.
230 Laws 1914, C. 41.
231 The case arose from disputes established in New York dealing with the validity of the statutes. Ives *v.* The South Buffalo R. R. Co., 201 N. Y. 271, is a clear example of the early reception given the laws. It declared them impolitic and invalid.

of employer to employee that doubts naturally have been raised respecting the constitutional validity,"[232] but there seems to be a growing feeling that there was a good deal of wisdom in the Acts,[233] and though an original departure from the established judicial methods, the statutes were in the majority of cases upheld as being an avoidance of the expense and delays and uncertainties of actions at law.[234] Indeed, it seems in tracing the discussions of the constitutionality of the Act as nearly as possible, that the decision frequently consisted in weighing the social and economic advantages of the Act with an emphasis on the fact pointed out in the White case by Mr. Justice Pitney, that it accomplishes "natural justice."[235]

Mr. Justice Pitney played a very important part in the development of Workmen's Compensation legislation. He not only upheld the New York legislation in New York Central *v.* White,[236] but also upheld similar legislation in Iowa,[237] Washington,[238] and Arizona,[239] and it is in these four cases that we find the justification for such legislation.

First of all, we will consider whether the police power is a warrant for the enactments. It was argued in the White case by the attorneys for the New York Central Railroad Company, Mr. Frank V. Whiting and Mr. Robert E. Whalen, that there was no warrant for the compensation acts to be found in the police power of the State, basing their contention on the fact that the statutes in no way concerned themselves with a measure of preventive nature, as is usual where the police power is exercised. But on the other hand, it may be said that though the Compensation Act imposes no rule of conduct upon the employer with respect to the conditions of labor in the various industries embraced within its terms, it prescribes no duties with regard to where the workmen shall work, the character of the machinery, tools, appliances, rules or regulations to be established, or the safety devices to be maintained, the interests of the public at present are not confined to positive measures for the protection of life and limb. Mr. Justice Pitney finally settles this point of dispute in the White case, where he says, "One of the

232 243 U. S. 188, 196.
233 Ives *v.* South Buffalo R. R., 211 N. F. 271.
234 Mountain Timber Co. *v.* State of Washington, 243 U. S. 219.
235 243 U. S. 188, 202.
236 243 U. S. 188.
237 Hawkins *v.* Bleakly, 243 U. S. 210.
238 Mountain Timber Co. *v.* Washington, 243 U. S. 219.
239 Arizona Employers' Liability Cases, 250 U. S. 400.

grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism with its concomitants of vice and crime, and in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations.''[240] The idea was clearly phrased in the opinion of the lower court in the Washington case,[241] which was appealed to the Supreme Court and decided there, by Mr. Justice Pitney. ''The police power is to the public what the law of necessity is to the individual. It is comprehended in the maxim, 'Salus populi suprema lex.' It is not a rule; it is an evolution.''[242]

Again, in upholding this legislation, Mr. Pitney acknowledges the fact that the statutes are divisible into two distinct groups: (1) those which are optional and afford an opportunity to the parties to elect whether or not they will be bound by them;[243] (2) those which are compulsory, allow no election, and require the employer to subscribe to state insurance funds[244] in order to pay the compensation.[245] He remarks that the validity of the first is obvious and readily established, the emphasis being laid on the fact that the statute is elective.[246] With regard to the second, in the Mountain Timber case, he says that ''* * * if * * * the State is at liberty, notwithstanding the Fourteenth Amendment, to disregard questions of fault in arranging a system of compensation for such injuries, we are unable to discern any ground in natural justice or fundamental right that prevents the State from imposing the entire burden upon the industries that occasion the losses. The Act, in effect, puts these hazardous groups in the category of dangerous agencies, and requires that the losses shall be reckoned as a part of the cost of the industry, just like the pay-roll, the repair account, or any other item of cost. The plan of assessment insurance is closely

240 243 U. S. 188, 207.
241 State *v.* Mountain Timber Co., 75 Washington 581.
242 75 Washington 581.
243 Such a law exists in Iowa and was held constitutional in Hawkins *v.* Bleakly, 243 U. S. 210 (1917), which was decided by Mr. Justice Pitney.
244 Mountain Timber Co. *v.* Washington, 243 U. S. 219, held that state insurance laws adopted in Washington to supply a fund out of which compensation could be paid was not contrary to the due process clause of the Fourteenth Amendment—opinion written by Justice Pitney.
245 New York Central *v.* White, 243 U. S. 188.
246 Hawkins *v.* Bleakly, 243 U. S. 210, 212.

followed, and none more just has been suggested as a means of distributing the risk and burden of losses that inevitably must occur, in spite of any care that may be taken to prevent them.''[247]

There were particular constitutional objections launched against the Workmen's Compensation Acts, namely, (1) they deny trial by jury; (2) they abrogate due process of law; (3) they do not give equal protection of the law and are obnoxious to the provisions against class legislation commonly found in State Constitutions; and (4) they strike at the freedom of contract. We will take these objections up in order and try to show how Mr. Justice Pitney disposes of these questions.[248]

The view that the Act denies trial by jury is very easy to rebut, for he remarks in passing over the question in a sentence, ''this is not embraced in the rights secured by the Fourteenth Amendment.''[249, 250]

Does Workmen's Compensation legislation deny due process of law? The weapon principally used to attack has been the Fourteenth Amendment, which guarantees this. In Ives *v.* South Buffalo,[251] the Acts were invalidated on these grounds. If this provision of the Constitution is operative inasmuch as the employer is subjected to a liability for compensation without regard to any neglect or default on his part, or on the part of any other person for whom he is responsible, the employer is hereby deprived of his property without due process of low. Mr. Justice Pitney refers to the reasoning of Judge Nathan L. Miller in the Jensen case,[252] where Judge Miller says: ''Granted, the employers are compelled to insure and that there is in that sense a taking. They insure themselves and their employees from loss, not others. The payment of the required premiums exempts them from further liability. The theoretical taking no doubt disappears from practical experience. As a matter of fact, every industrial concern, except the large ones who insure themselves, have for some time been forced by conditions, not by law, to carry accident indemnity insurance. A relatively small part of the sums thus paid actually reached the workmen

247 243 U. S. 219, 243.
248 New York Central *v.* White, 243 U. S. 188; Mountain Timber Co. *v.* Washington, 243 U. S. 219; Hawkins *v.* Bleakly, 243 U. S. 210.
249 243 U. S. 210, 216.
250 Mr. Justice Pitney cites cases confirming this view, in both of which he also wrote the majority opinion, Frank *v.* Mangum, 237 U. S. 309, 340; and New York Central *v.* White, 243 U. S. 188.
251 201 N. Y. 271.
252 Jensen *v.* Southern Pacific R. R. Co., 215 N. Y. 514

or their dependents. With the economic saving of the present scheme, insurance in the long run should certainly be as cheap as under the old wasteful plan, and the families of the injured workmen, not a part only, will receive compensation for the loss of earning power of the wage earner. We should consider practical experience as well as theory in deciding whether a given plan in fact constitutes the taking of property in violation of the Constitution.''[253] And, thus, in sustaining the Acts, the Supreme Court, in the Mountain Timber Company case, said: ''To the criticism that carefully managed plants are in effect required to contribute to make good the losses arising through the negligence of their competitors, it is sufficient to say that the Act recognizes that no management, however careful, can accord immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of responsibility of the employer or of the industry. Taking the fact that accidental injuries are inevitable in connection with the impossibility of foreseeing when or in what particular plant or industry they will occur, we deem that the State acted within its powers in declaring that no employer could conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and dependents of those killed, irrespective of the particular plant in which the accident might happen to occur. In short, it cannot be deemed arbitrary or unreasonable for the State, instead of imposing upon a particular employer entire responsibility for losses occuring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation.''[254]

Mr. Justice Pitney, in his famous decision, New York Central R. R. Co. *v.* White, points out that this legislation, making the employer liable without fault, does not set aside all common law rules without providing a reasonable substitute. As to the employer he says:

''* * * if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the desig-

253 215 N. Y. 514, 525.
254 243 U. S. 219, 244.

nated beneficiary. And just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale.''[255]

And as to the employee:

''Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which in all ordinary cases of accidental injury he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case but in all cases assuming any loss beyond the prescribed scale.''[256]

Besides, the Justice says, in effect, that the laws do not entirely render the employer liable, as the employee is required to contribute to a reasonable amount by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of negligence, instead of leaving the *entire* loss to rest where it may chance to fall—that is, upon the injured employee or his dependents.

Workmen's Compensation Acts imposing liability without fault are similar to the Safety Appliances Act. In the latter, definite rules are established, the violation of which establishes liability as if negligence existed. In the former, there are no definite rules which are violated, yet liability is assumed without fault. The latter was held constitutional, why not the former?

Mr. Justice Pitney says in New York Central *v.* White:[257]

''The common law bases the employers' liability for the injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and the extent of the duty may be modified by legislation with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences

255 243 U. S. 188, 201-202.
256 243 U. S. 188, 204.
257 243 U. S. 188, 198.

of a failure to comply with the statutory duty irrespective of negligence in the ordinary sense; the Safety Appliances Act being a familiar instance.''[258]

The basis of the attacks on the grounds that the statutes do not grant equal protection of the laws and are obnoxious to the provisions in many State Constitutions against class legislation, has met with as uniform unsuccess as the others. The criticism is mainly centered around the frequent provision of the law that it shall not apply to employers having less than five employees or to domestic servants, farm laborers, casual employees or persons earning more than a certain sum per annum. Mr. Justice Pitney wrote in the White opinion:[259] ''The only apparent basis for'' the objection ''is in exclusion of farm laborers and domestic servants from the scheme. But manifestly this cannot be judicially declared to be an arbitrary classification, since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple and familiar.''[260]

Again, it is stated that the Acts strike at the fundamental right of freedom of contract, and the holders of this opinion cite the decision in the Coppage case,[261] and Truax *v.* Raich,[262] where it is established that the ''right to work for a living in the commoner occupations of the community is the very essence of freedom and opportunity, that it was the purpose of the Fourteenth Amendment to secure.''[263] But the Justice maintains that though it is in no way the intent of the Court to weaken these former doctrines, ''the subject matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting common welfare. 'The whole is no greater than the sum of all of its parts, and when the individual health, safety and welfare are sacrificed and neglected the State must suffer'.''[264]

258 Mr. Justice Pitney also cites for this his opinion in Texas & Pacific R. R. *v.* Rigsby, 241 U. S. 39, 43.

259 243 U. S. 188, 203, citing Missouri, Kansas & Texas R. R. Co. *v.* Cade, 233 U. S. 642, 650, to support the statement. This opinion he also wrote.

260 This statement is referred to by Mr. Justice Pitney in the case of Ward & Gow *v.* Krinsky, 259 U. S. 503, the opinion of which he wrote. It is interesting to note that this is the last opinion he wrote in the Supreme Court.

261 236 U. S. 1.

262 239 U. S. 33.

263 239 U. S. 33, 41.

264 The whole quotation comes from the White case, page 206. The inner quotation is from Holden *v.* Hardy, 169 U. S. 366, 397. Thus, in other words, Mr. Justice Pitney supports the Acts on the grounds that they are ''a reasonable exercise of the police power of the State.'' 243 U. S. 188, 206.

Mr. Justice Pitney next turns his attention to the justification for the abolition by the Workmen's Compensation Law of the doctrines of assumption of risk, fellow servant and contributory negligence. As we have already noted, these defenses have been declared invalid in the Second Employers' Liability Act. No new problem is presented here.[265] All three defenses, he says, ''are based on fictions and are inapplicable to modern conditions of employment.''[266] This is a justified declaration of the legislature of the public policy of the State in that regard, and further it is recognized that the fundamental rights of liberty and property are in close relation to the Acts ''but those rules laid down in the Acts as guides of conduct are not beyond alteration by legislation in the public interest. No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.''[267]

Thus, Mr. Justice Pitney, writing in behalf of the majority of the Court, adopted an extremely liberal construction of the Constitution in order to allow the States to keep abreast of the times and afford to its citizens adequate legal remedies for the protection of their health and welfare. New rules and regulations were passed and held constitutional to take the place of antiquated and inadequate common law doctrines. Such new rules were eminently fair and reasonable, and economically speaking, they would prejudice neither the employer nor the employee nor interfere with the freedom of contract, for all would be readjusted in the wage scale.

The attitude taken by Mr. Justice Pitney in New York Central *v.* White seems quite opposed to his legalistic thinking and presentation in Eisner *v.* Macomber,[268] and United States *v.* Phellis,[269] where he seemed to discard the questions of policy, rather basing his decision on the facts presented. This can doubtless be explained by the fact that Mr. Justice Pitney was for so many years an equity judge in New Jersey and had had experience with labor problems.

The question of deciding under which, Employers' Liability or Workmen's Compensation Acts, an employee is entitled to

265 243 U. S. 188, 200.

266 243 U. S. 188, 197.

267 243 U. S. 188, 198. For this point are also cited Munn *v.* Illinois, 194 U. S. 134; Hurtado *v.* California, 110 U. S. 532; the Second Employers' Liability Act, 233 U. S. 50; and the Chicago Alton R. R. *v.* Tranbarger, 238 U. S. 76, the latter opinion written by Mr. Justice Pitney.

268 252 U. S. 189.

269 257 U. S. 156.

recover, is not one of policy or law requiring the ultimate determination of the Supreme Court, but only one of fact, boiling down to the problem of whether the employee is in interstate commerce at the time of the injury or not.[270] It was held in New York Central *v.* Winfield,[271] that an employee of an interstate railroad engaged in interstate commerce when injured could not recover under Workmen's Compensation Laws of the State of New York.

This decision raised the question of whether Congress, in adopting the Federal Employers' Liability Act, has so legislated as to preclude the States from concurrent jurisdiction, and that the conflict between Employers' Liability and Workmen's Compensation Acts is not one essentially between employer and employee as might seem true from a casual glance at the cases on the subject, it being fairly evident that disputes do not seem to center around the relations between employer and employee, but seem to involve the jurisdiction of the State versus the jurisdiction of the Federal Government.

We gather on this very important question of State versus Federal Jurisdiction that Justice Pitney's point of view was first expressed in the Jensen case.[272] The question there was, could a stevedore recover for damages under the Workmen's Compensation Act of the State of New York, or do constitutional rules,[273] placing all seamen under the admiralty jurisdiction of the Federal Court, still apply? Though the Court here held that the stevedore in question could not recover, because under Article III, Section 2, of the Constitution "the judicial Power shall extend to * * * all Cases of admiralty and maritime Jurisdiction," and under Article I, Section 8, Congress may make necessary and proper laws for carrying out granted powers, and "in the absence of some controlling statute the general maritime law as accepted by the Federal Courts constitutes part of our national law applicable to the matters within the admiralty and maritime jurisdiction";[274] and also that "Congress has paramount power to fix and determine the maritime law throughout the country,"[275] and thus when applied to mari-

[270] If the answer is in the affirmative, the employee may sue under the Employers' Liability Act, and if in the negative he may only sue under the Workmen's Compensation Act for damages for injury.
[271] 244 U. S. 147.
[272] Southern Pacific R. R. Co. *v.* Jensen, 244 U. S. 205.
[273] *c. f.* Judiciary Act 1789, 1 Stat. 73.
[274] 244 U. S. 205, 215.
[275] 244 U. S. 205, 215.

time injuries, the New York Workmen's Compensation Law conflicts with the rules adopted by the Constitution and to that extent is invalid. Mr. Justice Pitney, in a dissenting opinion, holds that just because of the very absence of definite legislation on the subject by Congress, the States are not excluded from jurisdiction over this type of suit, considering even that the National Government may regulate interstate commerce because there exists no conflict between State and Federal jurisdiction.[276]

On October 6, 1917, Congress tried to meet the effect of the former decision by adding to the Judicial Act of 1789[277] the clause, "and to claimants the rights and remedies under the Workmen's Compensation Law of any State." In the Knickerbocker Ice Company case (decided May 17, 1920), Mr. Justice Pitney, along with Messrs. Justice Holmes, Brandeis and Clark, again upholds the validity of the Workmen's Compensation Acts against the majority of the Court who held this Amendment invalid.

However, in the Winfield case,[278] Mr. Justice Pitney concurs with the majority, who base their decision on the grounds that since the Federal Government has legislated by the Federal Employer's Liability Act to require interstate carriers to make compensation for personal injuries suffered by their employees while engaged in interstate commerce, this legislation is both inclusive and exclusive and allows no room for state legislation under the Workmen's Compensation Act, even in respect to injuries not attributable to negligence of the employer, as to which the Federal Government provides no remedy.

Thus, we see that Mr. Justice Pitney, throughout these cases of State and Federal jurisdiction, has sustained a certain principle, concurring and dissenting, accordingly.

We are here inclined to disagree with Mr. Justice Pitney, not on the point that the State regulation is entirely void when the Federal Government has acted, for that is a well known principle of constitutional law, but basing our ideas to some extent on Justice Brandeis' dissenting opinion in the Winfield case,[279] that there exists no conflict between Federal Employers' Liability Acts and Workmen's Compensation Laws.

[276] 244 U. S. 205, 223.
[277] C. 20, 1 Stat. 73, 76, 77.
[278] 244 U. S. 147.
[279] 244 U. S. 147, 154.

In the interpretation of the Federal Employers' Liability Act it is held by the majority of the Court that the National Government intended, by it, to occupy the whole field involved in the term "interstate commerce." The Court, however, seems to forget in holding this, that the injuries compensated for by the payment of damages under the Federal Act are only those which may be attributed to the negligence of the employer, no remedy being provided for injuries occurring without fault, but cited cases to support the former proposition that the Federal Government intends to occupy the whole field employed by the term "interstate commerce," involving only the negligence of the employer. If the reasoning, therefore, of the Court on this point were brought to its logical conclusion, the Federal Government would be supreme only where the employer is negligent.

There is clearly another field of possible regulation wherein the employer is not negligent and wherein the Federal Government has not acted. The Federal Employers' Liability and Workmen's Compensation Acts do not, to us, seem to be in conflict. They are complementary, as Mr. Justice Brandeis says. If Congress also intended to exclude the States from the field in which the employer was not negligent, there was no reason why they should not have said so.

Let us look into the intent of Congress, and in so doing we can only regard what Congress did and the surrounding conditions. As we mentioned, in 1906, in the First Employers' Liability Act, seeing there were no Workmen's Compensation Acts, Congress was certainly not aiming at them, but rather at abolishing the employers' three common law defenses, assumption of risk, contributory negligence, and the fellow servant doctrine. Further, in 1908, in the Second Employers' Liability Act, Congress was seeking to secure for a railroad employee compensation for an injury when the injury was occasioned by the carrier's negligence. In neither did Congress refer to Workmen's Compensation Acts or to the field in which injuries occur, not attributable to the fault of the employer. Thus, we conclude that Congress left this field open to State Legislation.

We have previously remarked that Mr. Justice Pitney was very liberal in holding constitutional the Workmen's Compensation Acts. However, when the Winfield case, involving both the Federal Employers' Liability Act and the Workmen's Compensation Laws, and thus involving a question regarding the realm in which the Federal and State Governments shall act,

came before the Court, he voted with the majority. Thus, his interpretation here is not liberal but strict, for he allows no possible remedy for the employee of an interstate railroad who cannot prove the employer's negligence, seeing such employee is unable to sue under the Workmen's Compensation Acts.[280]

The Justice's concurrence here seems to be inconsistent. In the Jensen[281] and the Knickerbocker Ice[282] cases, he demonstrated by his dissent that where the Federal Government had not excluded the State, the latter might act. Mr. Justice Brandeis' dissent in the Winfield case demonstrated clearly that there was no conflict between Workmen's Compensation and Employer's Liability Acts, and where no conflict existed, the State might legislate. Thus, Mr. Justice Pitney and Mr. Justice Brandeis' views are the same. Other considerations must be determinative of why one is with the majority and the other, the minority. Why did not Mr. Justice Pitney also dissent in the Winfield case? The obvious answer to this seems to be a practical, not a legal reason. If he had dissented, he would have been maintaining that both Acts were concurrent, and thus would allow employees of interstate railroads to recover compensation under State Acts where it was not necessary to prove the negligence of the employer. The employees would avail themselves of his method frequently. State Compensation Bureaus would then be awarding damages to Federal Agents and handling Federal business. To remedy this, Congress would have to pass Workmen's Compensation Acts. Mr. Justice Pitney thus shows that he is enthusiastic about Workmen's Compensation Laws, to allow the States to pass them freely, but is not enthusiastic enough to put the Federal Government in a position where it would be necessary to pass them.

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280 New York Central R. R. *v.* Winfield, 244 U. S. 154.
281 244 U. S. 205, 223.
282 253 U. S. 149.

Chapter IX

Miscellaneous Decisions

IT HAS been attempted so far to discuss the main fields of the law in which Mr. Justice Pitney took a leading part in directing the course of adjudication and interpretation, namely, the relation between employer and employee, the issuance of injunctions in labor disputes, taxation, and lastly, Federal Employers' Liability and Workmen's Compensation legislation.

In conclusion, one should not fail to mention several interesting cases in which Mr. Justice Pitney wrote the opinion of the Court.

Nearly the last opinion which Mr. Justice Pitney wrote, while a member of the United States Supreme Court, was in the Prudential Insurance Company case.[283] The case arose due to the contention of the plaintiff that the defendant company was required to give him a letter of recommendation upon his resignation from the employ of the defendant company, which letter had been withheld. Mr. Justice Pitney saw no reason why a letter should not be granted, setting forth the nature and character of the services rendered and for what cause, if any, plaintiff left the service of the defendant company.[284] He says that legislation requiring the issuance of such letter "* * * does not prevent the corporation from employing whom it pleases on any terms that may be agreed upon. So far as construed and applied in this case it does not debar a corporation from dismissing an employee without cause, if such would be its right otherwise, nor from stating that he is dismissed without cause if such be the fact. It does not require that it give a commendatory letter. There is nothing to interfere, even directly, with the liberty of the corporation in dealing with its employee, beyond giving him, instead of what formerly was called a 'reference' or 'character,' a brief statement of his service with the company according to the truth, a word of introduction to be his credentials where otherwise the opportunity of future employment easily might be barred or impeded."[285]

283 Prudential Insurance Co. *v.* Cheek, 259 U. S. 530.
284 259 U. S. 530, 537.
285 59 U. S. 530, 537.

Characteristically, here, Mr. Justice Pitney sees the necessity of granting some kind of a letter which may be given to the future employer as an introduction, and yet agrees that a complimentary letter of recommendation need not be granted. He sees the justice of the matter and, therefore, steers a middle course half way between the demands of the plaintiff for a customary letter of reference and a denial to the plaintiff of any letter whatsoever.

It is very interesting to note, in order to demonstrate the liberal view of the Constitution which Mr. Justice Pitney entertained, the case of Newberry *v.* United States,[286] which involved the interpretation of part of Section 4 of Article I of the Constitution of the United States, which allowed Congress at any time to make or alter state regulations regarding the time and manner of holding elections.

The Federal Corrupt Practice Act,[287] passed pursuant to this Article, making the spending of more money than was allowed under the state law to procure the nomination or election of any person to the Senate of the United States, a crime. Newberry was indicted and convicted under this Act and appealed, questioning its constitutionality. The opinion of the Court was written by Mr. Justice McReynolds, who maintained a strict construction of the Constitution, believing that unless the power was specifically given to Congress to regulate primary elections, it had no right to do so, and thus declared the Act unconstitutional on the grounds that inasmuch as primary elections had not existed at the time when the Constitution was framed, the power to regulate them was obviously not included within the Federal Corrupt Practice Act. Mr. Justice McReynolds seems to fear that the broadening of this power would make the Federal Government too strong as opposed to the States.

Mr. Justice Pitney was diametrically opposed to Justice McReynolds on this constitutional principle but concurred with the decision of the majority on the ground that prejudicial error had been committed at the trial. Mr. Justice Pitney demonstrates his liberal attitude toward the construction of the Constitution of the United States and shows his desire to strengthen the Federal Government in those instances in which he deems it necessary for its own preservation.[288] Mr. Justice Pitney re-

286 256 U. S. 232.
287 36 Stat. 822.
288 256 U. S. 232, 283.

marks: "Why should this provision of the Constitution—so vital to the very structure of the Government—be so narrowly construed?"[289] He continues: "If * * * the power to regulate primary elections could be deemed to have been reserved by the States to the exclusion of Congress, the result would be to leave the general Government destitute of the means to insure its own preservation without governmental aid from the States, which they might either grant or withhold according to their own will. This would render the Government of the United States something less than supreme in the exercise of its own appropriate powers; a doctrine supposed to have been laid at rest forever by the decision of this court in McCulloch *v.* Maryland, 4 Wheat. 316, 405, *et seq.;* Cohens *v.* Virginia, 6 Wheat. 264, 381, 387, 414; and many other decisions in the time of Chief Justice Marshall and since."[290]

Lastly, Mr. Justice Pitney, in upholding the liberal view of the Constitution, quotes a famous passage from Chief Justice Marshall's opinion in McCulloch *v.* Maryland:[291]

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."[292]

Mr. Justice Pitney seems to desire the expansion of the powers of the National Government over the objects which it touches, or we might say, the full expression of those powers which are either expressly granted or directly implied in the Constitution of the United States. This intellectual liberalness seems to be tempered through all his decisions by a strain of conservatism, which made Mr. Justice Pitney one of the most influential Justices of the Supreme Court. Throughout all his decisions his reasoning seems to be based upon those equitable principles of justice and fairness which he had so amply cultivated through his wide experiences in the past as a Judge and Chancellor of New Jersey, and his intimate political and social acquaintances during the years previous to his judicial career.

In this thesis, we have dealt solely with those decisions rendered by Mr. Justice Pitney on constitutional questions, but it

289 256 U. S. 232, 282.
290 256 U. S. 232, 281.
291 4 Wheat. 316, 321.
292 256 U. S. 232, 288.

must be remembered that he rendered numerous other decisions involving many and varied branches of the law.

Most significant of all, Mr. Justice Pitney wrote the opinion in the case of International News Service against Associated Press,[293] involving equitable relief in instances of unfair competition. In that case, the Associated Press collected throughout the world news items and distributed same to its members. The International News Service had taken from the bulletin board of one of the members of the Associated Press news items and distributed to its subscribers. The Associated Press, suing in behalf of all of its members, sought an injunction against this conduct on the part of International News Service. Mr. Justice Pitney held in the majority opinion that the plaintiff is entitled to injunctive relief; that the conduct of the defendant was unfair, for it was inequitable for one concern to collect news for distribution and for the defendants to reap the benefits of the plaintiff's work. Mr. Justice Holmes and Mr. Justice Brandeis wrote dissenting opinions. The significance of this case lies in the fact that it was to Mr. Justice Pitney that the Court allotted the writing of the decision involving such important equitable doctrines, and it is Mr. Justice Pitney's opinion which consists in extending the relief granted in similar cases of unfair competition beyond that which had previously been granted.

Mr. Justice Pitney was a member of the United States Supreme Court for ten years, nine months and twelve days. He rendered 244 majority opinions,[294] 19 dissenting opinions,[295] and 5 concurring opinions,[296] making 268 in all.

His great independence and decisiveness of mind is clearly shown by the fact that he ranks fourth in the number of dissenting opinions written,[297] being excelled only by Messrs. Justice Brandeis, Clarke and Holmes, and also by the fact that he ranks first in the number of dissenting votes—86 in all,[298] followed by Mr. Justice McKenna 79, Mr. Justice Clarke 76 and Mr. Justice McReynolds 62.

293 248 U. S. 215.
294 Appendix D.
295 Appendix E.
296 Appendix F.
297 Appendix E.
298 Appendix G.

Likewise, not only to indicate the principles of intellectual honesty which he is said[299] to have adopted throughout his life, but also to demonstrate the critical nature of his mind, which though agreeing with the results reached, disagrees with the reasoning adopted in the majority opinion, he wrote 5 concurring opinions[300] and registered 23 concurring votes.[301]

Mr. Justice Pitney was very seldom absent from the Bench, participating in all of the 2,412 decisions rendered during the period of his membership, with the exception of 19,[302] 7 of which occurred due to the illness which finally forced him to tender his resignation to take effect on December 31, 1922.

299 Interview with Mr. John R. Hardin.
300 Appendix F.
301 Appendix H.
302 Appendix I.

Chapter X

Traits of Character and Interests

FIRST of all Mahlon Pitney was a lawyer. The most wonderful thing about him was his extraordinary knowledge of the law and of all things pertaining to it. He had lived law, talked law and thought law ever since he was a boy. He was thorough and conscientious in all things, and these qualifications merit full reward. He was not self-centered and was interested in many things.

In an interview which Chancellor Walker of New Jersey graciously gave me, he remarked in effect that, at one time several years after Pitney had been appointed to the United States Supreme Court, while in Washington on business he was walking along the street when he saw Justice Pitney driving in an automobile. Mr. Walker hailed him and in the ensuing conversation it was learned that Justice Pitney had been up the night before until four o'clock writing a dissenting opinion.

As Mr. Faucett of the New Jersey State Library in Trenton once remarked to me in speaking of Justice Pitney, "He frequently used to come to the Library in his evening clothes and work to put in very careful order a case which he was to try the following day, or to look up some points of law regarding a case before him." From his childhood, he never started anything that he did not finish. As the story came to me, Mrs. Henry Cooper Pitney, Mahlon's mother, one day had given him his first and, needless to say, very playful writing lesson. He was then a child of only three or four years. Mahlon, however, made up his mind that he was going to learn how to write. He looked around until he found a piece of a charcoal pencil, and concealing it under his nightshirt when it was time to go to bed, followed his mother obediently to the room where the lights were turned out. The next morning the wall next to his bed was found covered with black marks. Though he did not learn how to write overnight, the marks of his future perseverance and thoroughness were there.

Again, when Mahlon was a young lawyer, before 1882 when he went to Dover to practice, he and Henry C. Pitney, Jr., his brother, were vehemently exhorted by their father to complete

some papers relating to a case with an iron company, which had been lying around the office for some time unfinished. The two brothers started after lunch and worked all the afternoon and night. At three in the morning Mr. Henry Pitney, Jr., determined to rest, pleading with Mahlon to go home, get a little sleep and return to finish the work the next morning. Mahlon would not be moved, but his brother went home. The next morning Mr. Pitney, Sr., arrived at the office early and was surprised to find Mahlon up and working at such an early hour. Little did he know that his son had not left the office since the night before. Mahlon, aroused from his concentration, having completed the task, went home, took a shower, changed his clothes and returned to the office for another long day's work.

Justice Pitney in his later days on the Supreme Court Bench took his work even more seriously. We are told that very often at night he would place beside his bed certain volumes of the United States Supreme Court Reports and other books in which he was interested and bearing on the solution of a case before the Court. He was a poor sleeper, so during his wakeful hours in the night, instead of vainly trying to doze off as many do, he would turn on his bedlamp and ponder over intricate points of law. He is said to have been the only Justice of the Supreme Court who had a private office in the Capitol. Usually Court members work and receive callers at home, but Justice Pitney found the books to which he so constantly referred could not be housed at home.

Mr. Justice Pitney was versed in many subjects and always had a good story or joke to tell. He was not only the honored guest at dinners almost nightly after his confirmation to the Bench, but was the life of the party in his unassuming, unostentatious yet dignified way. At the dinner given by the Lotos Club on April 30, 1912, at the Waldorf-Astoria, New York City, he remarked in opening: "It is indeed a pleasure at times to get away from the haunts of the habeas corpus and the certiorari and indulge in Long Island squab and other delightful dissipations." Also he commented that New York had very few claims on him unless "the fact that his name was on the credit list of nearly every merchant on Fifth Avenue, could be called a claim."[303] If we think of Justice Pitney as being fond of parties and one who enjoyed a good time, we can much more easily understand and appreciate the genial side of his character.

303 Newark Sunday Call, April 31, 1912.

The Justice had five dominant interests. One has been mentioned—the law. The other four were chess, shooting, yachting and golf. His ability as a chess expert is little known, but should be fully realized to see the logical character and force of his mind. He was a brilliant player, one of those who announce checkmate thirty-eight moves ahead, when everything looks serene. The fact that he drew two games with Lasker, the world's champion, gives evidence of his brilliance. Mr. Elmore Cropley, clerk of the Supreme Court, remarked that the Justice, after discussing cases tried before the Court in the Capitol Conference room, often came out to find a chess game by the clerks in progress. He would almost invariably linger, giving advice to each side on the ways to checkmate or improve methods of play.

Justice Pitney was not a remarkable shot, but a great deal of his vacation time was spent in North Carolina and Virginia following the dogs. He owned his own pack of bird dogs and found great joy in the exercise of this sport.

Yachting was a great fad with Justice Pitney. "Some of the most enjoyable times I have had with father," says Mr. Shelton Pitney, a member of the firm of Pitney, Hardin & Skinner, of Newark, founded by John O. H. Pitney, the brother of the Justice, "occurred while we were sailing together." From 1894 to 1907 every summer was spent at Watch Hill, Rhode Island, and after this for three years the family sojourned during the warm months in Dark or York Harbor, Maine, where the sailing was excellent.

His chief relexation was golf, however. On March 16, 1912, he remarked, "Until a few years ago I didn't know anything about it. Then I became ill and my doctor ordered me to go to Hot Springs, Virginia, to play golf. I've been a lover of the game ever since."[304] At the time of his nomination to the Supreme Court of the United States he was passing, as we have mentioned, a few days in Atlantic City. When news of the appointment came from his secretary, he remarked, "We stopped for a few moments, of course, to talk it over, and then continued. I had just made a peach of a drive, one of the best in my golfing career." "Peach of a drive" were the Justice's words and they reveal a certain phase of the man's nature—the power he had to throw aside weighty and important matters and enter into the game wholeheartedly. It is this which made

304 Philadelphia Record, March 17, 1912.

the Justice stand out as different from and more likeable than those whose dignity runs to ponderousness and whose importance weighs down their very souls. This trait recalls to me the words of a modern philosopher which are directly applicable to the character of Justice Pitney—"A man may shake up a continent by his energy and build kingdoms by his brains, but so far as his personal life is concerned, he has been a failure if he has not learned to play."

After 1909 Justice Pitney used to play golf not infrequently with his oldest son Shelton, who was then a student in Princeton. It was on one of these occasions that he first saw and met President Taft. They weren't entirely strangers then at Governor Murphy's dinner in 1912; having seen each other once before on the golf links, the conversation quite naturally turned to golf.

Mr. E. W. Katzenbach, formerly Attorney General of New Jersey, relates that one day in the early part of 1902, while still a young lawyer employed in Trenton, he was given an order which had to be signed immediately by a member of the Supreme Court of New Jersey. Mr. Justice Pitney was on the golf links at Princeton. Although Mr. Katzenbach was rather hesitant about going out to interrupt the game, he did, and the Justice walked all the way to the club house to find a pen, continuing the game later.

A humorous event occurred in Justice Pitney's early career. Counsel in a suit between Mr. and Mrs. Duke, which had been heard before Mr. Pitney, demanded rather large fees. Upon hearing the amounts applied for, the future Justice spoke up, saying that it reminded him of this story: The King of England, traveling incognito in his own land, was one of a hunting party. They stopped at a wayside inn and ordered tea and eggs. The innkeeper's wife presented a check for a guinea for each member of the party. The King was surprised at the amount of the check and inquired: "My good woman, are hens so scarce about here?" She replied: "No, sire," for she had recognized His Majesty, "but Kings are." And then turning to counsel, Justice Pitney added: "And I suppose that is the way you gentlemen feel about Dukes."[305]

Justice Pitney, for four years and two months, had held one of the most responsible positions in American Jurisprudence. New Jersey, it must be remembered, maintained the English

[305] Interview with friend of family.

Chancellor's ancient jurisdiction. Since numerous industrial corporations had been created and organized under New Jersey laws, the Chancellor was called on to pass on many cases affecting the powers, responsibilities and limitations under their charters.[306] This experience equipped the Justice for cases in equity, both principles and procedure, brought before the Supreme Court as to industrial corporations and the interpretation of the Sherman Anti-Trust Act, and gave him a wider knowledge of equity jurisdiction than most, if not all, of his associates on the Bench.

One day his son asked him, "Father, what is equity?"[307] The only example he could think of which would be understood by a boy of ten or eleven years old was very simple, yet illustrating with unusual clearness the difference between justice and law. "A blacksmith was working over his rather subdued fire in the latter part of the afternoon one day when a man walked in leading his horse—'how much will it cost to shoe this horse?' he asked. The other thought for a moment and replied 'I'll charge you one cent for the first nail, two cents for the second, four for the third and so on.' The man left his horse there, thinking nothing of it, and returned the next morning. He was presented with a bill amounting to some $10,000." Then Justice Pitney continued—"do you think it was fair just to charge the man that tremendous sum for shoeing his horse, no matter how foolish he was in making the agreement?" "No," Shelton Pitney answered. "Well, that's just what the equity courts are there for—to soften the rigour of the law which would have held this contract valid and to act where the law is silent."

Finally, we may make a few observations on Mr. Justice Pitney as he sat with the other Justices of the Supreme Court for ten years and nine months. Fundamentally, he was a very hard and meticulous worker, as we have mentioned. When a case came before the Court, Mr. Justice Pitney was foremost in questioning the counsel from the Bench.

After a session of the Court when the Justices filed into the conference room to discuss the cases heard and to receive assignments for the writing of the opinions (this last by the Chief Justice), Justice Pitney, according to the statements of some of his associates, showed himself a great logician, opinionated, but

[306] Literary Digest, February 11, 1912.
[307] Interview with Mr. Shelton Pitney.

open-minded, not stubborn but persistent and always frank, sincere and earnest.

His life's history is clearly divided into two periods. During his political career from 1894-1901 the motto "public good before party good" was always evident in his actions, and during his terms on the Bench from 1901 to 1923 we see that the motto "general welfare before personal aggrandizement" was always his aim. In the examination of briefs or of verbal argument of counsel before him, he looked for what he termed intellectual honestly in order to assist in determining the decision he would render. No greater tribute could be given to a man, as a Justice of the Supreme Court of the United States, than that which was expressed to the writer by Mr. Justice Van Devanter, a colleague, and still Associate Justice of the Supreme Court of the United States:

"If *anyone* was desirous of doing justice, he was."[308]

[308] Interview with Mr. Justice Van Devanter.

Chapter XI

Epilogue

JUSTICE PITNEY labored conscientiously and meticulously on the Bench. Work was foremost in his mind. As a general rule his summer holidays were spent in Morristown, and when the Court was in session he resided in Washington. Euthusiastic and tireless in devotion to duty, he instinctively drew on his reserve strength until a seemingly sound and vigorous constitution was undermined, and his collapse came without warning to his associates on the Bench or to the public generally.[309]

Illness first came upon him in the early part of 1921, when he was visiting Philadelphia to attend, with Justice Taft, and others of the Supreme Court, in the re-dedication of the room in Independence Hall where the Court had held its first session. The doctors pronounced his affliction a blood clot on the brain, but with prompt attention he was enabled to return to Washington and continue his work. By means of careful watching, he remained on the Bench through the remainder of the term, few suspecting his real condition.

He rendered but three opinions after this, which are recorded in 259 U. S. Supreme Court Reports, at pages 531, 548 and 553. His husky voice and thick enunciation were attributed to temporary bronchial trouble.

In August, 1922, he suffered a stroke. Speculation as to the extent of the illness was widespread among his friends in Washington and Morristown, who frequently called to see him in Dr. Clifford Mills' private hospital in Morristown. Hopes of recovery were completely abandoned however on publication of Dr. Hardin's letter in which he said: "Mental deterioration having now lasted for a period of eight months, it is incumbent upon me to assert with positiveness that Mr. Pitney cannot become mentally competent in the future to undertake responsible duties either on or off the Bench."[310]

Justice Pitney recognized the fact that he would no longer be able to take part in the proceedings of the Supreme Court and

[309] New Jersey State Journal, Vol. 48, p. 31.
[310] Trenton Times, December 5, 1922, and Congressional Record.

so reluctantly tendered his resignation to take effect on December 31, 1922.

In final praise of Justice Pitney we may bring up those events occurring soon after his resignation, which go to show the deeply favorable impression he had left with all those with whom he had been associated in his work. First, when he was thinking of resigning because of ill health, he consulted the records and discovered that Justices below the age of seventy years are not legally permitted to resign. Knowing of his physical inability, nevertheless, he tendered his resignation and by a special Act of Congress[311] was retired. After his resignation, those who knew Justice Pitney realized that due to his unfortunate incapacity he would not longer be able to earn his living. Thus, by a special Act of Congress, through the efforts of Senator Nelson, Justice Pitney received full salary until his death. Upon his retirement, the Bench, composed of members, most of whom he had sat with for ten years, sent him the following affectionate letter:[312]

"Washington, D. C., February 24, 1923.

"Dear Brother Pitney:

"We write to assure you of our sincere appreciation of you as a colleague and to express our deep regret that failing health has compelled you to give up the work which you love, and in which you have rendered signal service to our Country.

"After four years in the Federal Congress and three years in the New Jersey Senate, whose presiding officer you were, you became a Justice of the Supreme Court of the State, and ultimately the Chancellor. Your father's distinguished career on the same equity bench gave you a high standard to follow. With this seven years of legislative training and eleven years of judicial experience, you were called to our Court, fully equipped for its responsible duties.

"For ten years you have given unremitting labor to the work of the Court—the consideration of cases, the preparation of your own opinions, and the most careful examination and criticism of the opinions of your colleagues. You have spared yourself in nothing. We cannot but think that you have sacrificed your health in the earnest effort to do everything possible to further the work of the Court. Your opinions in thirty-four volumes—225 to 259—show a splendid sense of responsibility, accurate learning, thorough research, able reasoning, nice sense of justice, and careful preparation.

"We shall miss your kindly companionship, your genial courtesy, your loyalty, and your high sense of judicial duty. Our love follows you in retirement. May the years to come give you well-earned repose and happiness.

"With affectionate regard, we are

"Sincerely yours,

WILLIAM H. TAFT
JOSEPH MCKENNA
OLIVER WENDELL HOLMES
WILLIS VAN DEVANTER
JAMES CLARK MCREYNOLDS
LOUIS DEMBITZ BRANDEIS"

Mahlon Pitney died at his home in Washington on December 9, 1924. He was buried in Evergreen Cemetery, Morristown, New Jersey.

311 Act December 11, 1922.
312 261 U. S. V, VI.

BIBLIOGRAPHY

AND

APPENDICES

BIBLIOGRAPHY

In the preparation of this thesis, it has been found very difficult to gather information regarding the life of Mr. Justice Mahlon Pitney. Nothing has been written about him that we know of, with the exception of the few articles cited below.

1. 35 New Jersey Law Journal, 98, 450.
2. James Kerney, The Political Education of Woodrow Wilson.
3. The National Cyclopedia of American Biography, pp. 61, 62.
4. 34 New Jersey Law Journal—Editorial Notes.
5. Courts and Lawyers of New Jersey, Vol. 1, pp. 1-9.
6. Morris County, New Jersey, Vol. 1, pp. 128, 129.
7. New Jersey State Journal, Vol. 48, pp. 29-32.
8. New Jersey Law Journal, Vol. 34, pp. 60-62, Vol. 41, pp. 139-144.
9. The Green Bag, Vol. 24, pp. 211-212.

Besides these, the author has had recourse to newspaper files of most of the morning and evening papers in Morristown and Trenton, New Jersey; Washington, D. C.; and New York City. References to the more valuable newspaper articles are made in the text.

Regarding the legal aspect of Mr. Justice Pitney's career, a close examination of the opinions which he rendered as a member of the Supreme Court of New Jersey has been made, and references are found in the text and appendix. The opinions of Mr. Justice Pitney, rendered in the United States Supreme Court, have been abstracted and will be submitted upon request. We are not including the abstracts here because of their length (20,000 words), and because they are but ground work used in the preparation of this article.

Certain law review articles have also been read regarding the subject matter of each chapter. They are as follows:

COLLECTIVE BARGAINING

1. 29 Yale Law Journal, 578, 779.
2. 31 Harvard Law Review, 648, 657.
3. 3 Cornell Law Quarterly, 317.
4. 18 Columbia Law Review, 252.
5. 86 Century Law Journal, 39.

INJUNCTIONS.

1. 27 West Virginia Law Quarterly.
2. 28 West Virginia Law Quarterly.
3. 26 Law Notes.
4. 92 Century Law Journal, 41, 169.
5. 94 Century Law Journal, 327, 89, 106.
6. 6 Minnesota Law Review, 123—Thomas Reed Powell.
7. 23 South Atlantic Quarterly.
8. J. P. Chamberlain, 11 A. B. A. J. 815.

TAXATION.

1. Thomas Reed Powell, 19 Michigan Law Review, 117.
2. Thomas Reed Powell, 20 Michigan Law Review, 1, 260.
3. 41 Harvard Law Review, 227.
4. W. S. Holdsworth, 34 Harvard Law Review, 96.
5. 31 Yale Law Review, 429.
6. 20 Columbia Law Review, 457.
7. 22 Yale Law Journal, 789.
8. Charles E. Clark, 29 Yale Law Journal, 799.
9. Carl C. Plehm, 6 California Law Review, 317.

COMPENSATION AND EMPLOYERS' LIABILITY.

1. 11 Maine Law Review, 35-55.
2. 25 Yale Law Journal, 548, *et seq.*
3. 34 Yale Law Journal, 685, *et seq.*
4. 63 Pennsylvania Law Review, 900, *et seq.*
5. 95 Century Law Journal, 118, *et seq.*
6. 6 Illinois Law Review, 432, *et seq.*
7. Thomas Reed Powell, 21 Columbia Law Review, 737.
8. Thomas Reed Powell, 19 Michigan Law Review, 117.
9. Thomas Reed Powell, 20 Michigan Law Review, 1, 260.
10. 6 Minnesota Law Review, 1, 194.

Appendix A

OPINIONS OF MAHLON PITNEY AS ASSOCIATE JUSTICE OF SUPREME COURT OF NEW JERSEY.

Subject	*Name of Case*	*Report*	*Date*
Tort	Jenkins *v.* Pennsylvania Railroad Co.	67 N. J. L. 331	1901
Injury to Invitees	Ryerson *v.* Bathgate	67 N. J. L. 337	"
Appointed or Elected	Reid *v.* Gorsuch	67 N. J. L. 396	"
Borough Act	Armstrong *v.* Whitehead	67 N. J. L. 405	"
Contract	Styles *v.* Long Co.	67 N. J. L. 413	"
Condition Precedent	Ammouretta Vail *v.* Penna Fire Ins. Co.	67 N. J. L. 422	"
C. L. relation of Master & Servant	Smith *v.* Erie R. R. Co.	67 N. J. L. 636	"
Fellow servant	Knutter *v.* N. Y. & N. J. Tel. Co.	67 N. J. L. 646	"
Township Act	Mason *v.* Cranbury	68 N. J. L. 149	"
Consignor & Consignee	Central R. R. Co. *v.* MacCartney	68 N. J. L. 165	"
Lien Law	Taylor *v.* Reed	68 N. J. L. 178	"
Appeal	Deacon *v.* Parry	68 N. J. L. 186	"
Sunday Law	Newbury *v.* Luke	68 N. J. L. 189	"
Negligence	Fielders *v.* North Jersey St. Ry. Co.	68 N. J. L. 343	"
Insurance policy construction	Griffing Iron Co. *v.* Liverpool &c. Ins. Co.	68 N. J. L. 368	"
Deed	Mitchell *v.* D'Olier	68 N. J. L. 375	1902
Removal of Official	Bowlby *v.* Dover	68 N. J. L. 416 (dissent)	"

Subject	*Name of Case*	*Report*	*Date*
Fish	Albright *v.* Sussex Co. Lake & Park Com.	68 N. J. L. 523	1902
Assignment	Sullivan *v.* Visconti	68 N. J. L. 543	"
Ordinance as to voting	Bachman *v.* Town of Phillipsburg	68 N. J. L. 552	"
Tax	Coe, Collector *v.* Englewood	68 N. J. L. 559	"
Foreign attachment	Guarantee Trust Co. *v.* Nebeker	68 N. J. L. 561	"
Statute of Frauds	Lobsenz *v.* Burton	68 N. J. L. 566	"
Contract Engel	Equitable Mfg. Co. *v.* Engelke	68 N. J. L. 567	"
Public Officer	Stewart *v.* Riverside	68 N. J. L. 571	"
Evidence	Wallace *v.* Hendee	68 N. J. L. 574	"
Tax	Cooper Hospital *v.* Camden	68 N. J. L. 691	1903
Fellow servant doctrine	Hopwood *v.* Atha & Illingsworth Co.	68 N. J. L. 707	"
Challenge jurors	Leary *v.* North Jersey St. Ry. Co.	69 N. J. L. 67	"
Quo warranto	Holloway *v.* Dickinson	69 N. J. L. 72	"
Pleading	Jackson *v.* Penna R. R. Co.	69 N. J. L. 79	"
Pleading	Shelmerdine *v.* Lippincott	69 N. J. L. 82	"
Law not before jury	Sensfelder *v.* Stokes	69 N. J. L. 86	"
Deceit	Northwestern Life Ins. Co. *v.* Breautigan	69 N. J. L. 89	"
Erroneous charge	Felt *v.* Steigler	69 N. J. L. 92	"
Promissory note	Lowry *v.* Tivy	69 N. J. L. 94	"
Negligence	Corkhill *v.* Camden & Suburban Ry. Co.	69 N. J. L. 97	"
Tort feasor	Callaghan *v.* Lake Hopatcong Ice Co.	69 N. J. L. 100	"
Lien Law	Smith *v.* Colloty	69 N. J. L. 365	"
Insurance	Dimick *v.* Metropolitan Life Insurance Co.	69 N. J. L. 384	"
Evidence	Gansevoort Bank *v.* Carragan	69 N. J. L. 404	"
Lien Law	Titus *v.* Gunn	69 N. J. L. 410	"
Pleading tort	Karnuff *v.* Kelch	69 N. J. L. 499	"

Subject	*Name of Case*	*Report*	*Date*
Nuisance	Ryerson *v.* Morris Canal and Banking Co.	69 N. J. L. 505	1903
Conditional Sale	Hirsch *v.* Leatherbee Lbr. Co.	69 N. J. L. 509	"
Criminal law	State *v.* MacQueen	69 N. J. L. 522	"
Contract of broker	Kent *v.* Phenix Art Metal Co.	69 N. J. L. 532	"
Negligence	Zeliff *v.* North Jersey St. Ry. Co.	69 N. J. L. 541	"
Evidence	Johnston *v.* Bowers	69 N. J. L. 544	"
School law unconstitutional eliminated	Riccio *v.* Hoboken	69 N. J. L. 649	"
Negligence	Gill *v.* National Storage Co.	70 N. J. L. 53	"
Contributory negligence	Beeg *v.* Susquehanna & W. R. R. Co.	70 N. J. L. 56	"
Condemnation	Paterson and State Line Traction Co. *v.* De Gray	70 N. J. L. 59	"
Damage	Cook, Adm'r. *v.* American &c. Gunpowder Co.	70 N. J. L. 65	"
Corporation Law	Breslin *v.* Fries Breslin Co.	70 N. J. L. 274	1904
Evidence	Riley *v.* Camden and Trenton Ry. Co.	70 N. J. L. 289	"
Trespass	Powell *v.* Erie Railroad Co.	70 N. J. L. 290	"
Corporation	Stratford *v.* Mallory	70 N. J. L. 294	"
Contract	O'Neill *v.* Supreme Council, American Legion of Honor	70 N. J. L. 410	"
Master and Servant	Diehl *v.* Standard Oil Co.	70 N. J. L. 424	"
Opinion Evidence	State *v.* Arthur	70 N. J. L. 425	"
Pilots	Dexter v. Com. of Pilotage of N. J.	70 N. J. L. 429	"
Ordinance Review	Schwarz *v.* Dover	70 N. J. L. 502	"
Act Taxes Constitutional	Vreeland *v.* Pierson	70 N. J. L. 508	"
Quo Warranto	Tillyer *v.* Mindermann	70 N. J. L. 512	"
Quo Warranto	Clark *v.* Searing	70 N. J. L. 517	"

Subject	*Name of Case*	*Report*	*Date*
Municipal Procedure	MacFall *v.* Dover	70 N. J. L. 518	1904
Lease	Gribbie *v.* Toms	70 N. J. L. 522	"
Execution	White *v.* Koehler	70 N. J. L. 526	"
Practice	Hotel Registry Corp. *v.* Stafford	70 N. J. L. 528	"
Construction for contract rates & fares	Raritan River R. R. Co. *v.* Traction Co.	70 N. J. L. 732	"
Master and servant	Burns *v.* Del. & Atl. Telegraph Co.	70 N. J. L. 745	"
Bills & Notes	National Bank of N. J. *v.* Berrall	70 N. J. L. 757	"
Election Law	Brown *v.* Street Lighting District	70 N. J. L. 762	"
Statutory Construction	Murray *v.* Pfeiffer	70 N. J. L. 768	"
Contract & Tort	Conklin *v.* Steats	70 N. J. L. 771	"
Constitutionality or Assessment	VanCleve *v.* Passaic Valley Sewerage Commissioners	71 N. J. L. 183	"
Certiorari Resolutions	Allen *v.* Freeholders of Hunterden	71 N. J. L. 247	"
Certiorari Indictment	State *v.* Price	71 N. J. L. 249	"
Landlord & Tenant	Story *v.* Walker	71 N. J. L. 256	"
Common Carrier	Burr *v.* Adams Express Co.	71 N. J. L. 263	"
Ejectment-Wills	Tuerk *v.* Schueler	71 N. J. L. 331	"
Habeas Corpus	Ames *v.* Kirby	71 N. J. L. 442	"
Charter of Newark	Newark *v.* Weeks and Knecht	71 N. J. L. 458	"
Violation of Ordinance	East Orange v. Richardson	71 N. J. L. 458	"
Real Estate	Friedman *v.* Snare & Triest Co.	71 N. J. L. 605	1905

Subject	*Name of Case*	*Report*	*Date*
Malicious Prosecution	McFadden *v.* Lane	71 N. J. L. 624	1905
Liability of Municipality	Jersey City Supply Co. *v.* Jersey City	71 N. J. L. 631	"
Criminal	North Plainfield *v.* Goodwin	72 N. J. L. 146	"
Evidence	Hollingsead *v.* Camden & Suburban Ry. Co.	72 N. J. L. 154	"
Taxes	Howe *v.* Board of Education	72 N. J. L. 158	"
Taxes	Cooper *v.* Cape May Point	72 N. J. L. 164	"
Mechanics Lien	Gardner & Meeks Co. *v.* N. Y. Cent. R. R. Co.	72 N. J. L. 257	"
Landlord & Tenant	Siggins *v.* McGill	72 N. J. L. 263	"
Personal Injuries	Ryan *v.* D., L. & W. R. R. Co.	72 N. J. L. 266	"
Criminal Law	State *v.* Terry	72 N. J. L. 375	"
City Ordinances	Jersey City *v.* North Jersey St. Ry. Co.	72 N. J. L. 383	"
Contract	Courter *v.* Pierson	72 N. J. L. 393	"
Damages to Property	Perrine *v.* Penn. R. R. Co.	72 N. J. L. 398	"
Contracts	Shreve *v.* Crosby	72 N. J. L. 491	"
Taxes	Woolley *v.* Hendrickson	73 N. J. L. 14	"
Married Woman Act	Peoples National Bank *v.* Schepflin	73 N. J. L. 39	"
Deed	Miller *v.* Barber	73 N. J. L. 38	"
Indictment	State *v.* O'Hagan	73 N. J. L. 209	1906
Criminal Law	Watkins *v.* Freeholders of Atlantic	73 N. J. L. 213	"
Mortgage	Ruppert *v.* Long	73 N. J. L. 216	"
Ultra vires	Rebutt *v.* East Newark and Jersey City	73 N. J. L. 220	"
Ordinance	Rutherford *v.* Hudson River Traction Co.	73 N. J. L. 227	"
Ordinance	Wiesenthal *v.* Atlantic City, *et al.*	73 N. J. L. 245	"
Obligation of Contract	Cortelyou *v.* Anderson	73 N. J. L. 427	"

Subject	*Name of Case*	*Report*	*Date*
Contract	Peoples Bank and Trust Co. *v.* Weidinger	73 N. J. L. 433	1906
Duty to open roads	Kinmouth *v.* Township of Wall	73 N. J. L. 440	"
Lessee Covenant	Williams *v.* Beach Pirates Chemical Engine Co.	73 N. J. L. 446	"
Fraud	Kofka *v.* Grant	73 N. J. L. 451	"
Tax Assessment	Burnett *v.* Boonton	73 N. J. L. 453	"
Pleadings	Stautter *v.* Metropolitan Life Ins. Co.	73 N. J. L. 455	"
Tax	Flaherty *v.* Atlantic City	73 N. J. L. 458	"
Tax	Croker *v.* Camden Board of Excise	73 N. J. L. 460	"
Highways	Reeger *v.* Wall	73 N. J. L. 465	"
Appeal	Almindie *v.* Camden Board of Excise	73 N. J. L. 464	"
Construction Law	Rutten *v.* Patterson	73 N. J. L. 467	"
Construction of Inst.	Empire Mfg. Co. *v.* Morris	73 N. J. L. 602	"
Salary of Officers	Tico *v.* New Brunswick	73 N. J. L. 615	"
Trade Union	Brennan *v.* United Hatters	73 N. J. L. 729	"
Ejectment	Mt. Pleasant Cemetery Co. *v.* Erie R. R. Co.	74 N. J. L. 100	"
Procedure Contract	Williams *v.* Connolly Cont. Co.	74 N. J. L. 105	"
Landlord	Richardson *v.* Smith	74 N. J. L. 111	"
Municipal	Rahway *v.* Hunt	74 N. J. L. 116	"
Negligence	Burns *v.* Lehigh Valley R. R. Co.	74 N. J. L. 120	"
Revocation of License	Vanaman *v.* Adams	74 N. J. L. 125	"
Taxes	Perth Amboy *v.* Barker	74 N. J. L. 127	"
Appeals	Katzin *v.* Jenny	74 N. J. L. 131	"
Corporation	Dunster *v.* Bernards Land & Sand Co.	74 N. J. L. 132	"
Evidence	Hill *v.* Adams Express Co.	74 N. J. L. 338	1907

Subject	*Name of Case*	*Report*	*Date*
Action on Bond	City of Elizabeth *v.* Mitchell	74 N. J. L. 342	1907
Appeal	Nissel *v.* Swinley	74 N. J. L. 344	"
Contract City Work	Miller *v.* Atlantic City	74 N. J. L. 345	"
Criminal	Eckerson *v.* Mitchell	74 N. J. L. 347	"
Trust Deed	Armour *v.* Murray	74 N. J. L. 351	"
Real Estate	Brown *v.* Honiss	74 N. J. L. 501	"
Will	State *v.* Monich	74 N. J. L. 522	1906
Deeds	Jason *v.* Johnson	74 N. J. L. 529	1907
Personal Injuries	Meyer *v.* Benton	74 N. J. L. 533	"
Common Carrier	Hayes *v.* Adams Express Co.	74 N. J. L. 537	"
Negotiable Instrument	Wilson *v.* Hendee	74 N. J. L. 640	1906
Evidence	Addis *v.* Rushmore	74 N. J. L. 649	1907
Parol Evidence	Crossley *v.* St. Philip Neri	74 N. J. L. 653	"
Taxes	Bergen & Dundee R. R. Co. *v.* State Board of Assessors	74 N. J. L. 742	"
Taxes	Jersey City *v.* Board of Equalization of Taxes	74 N. J. L. 753	"
Taxes	North Jersey St. Ry. Co. *v.* Jersey City	74 N. J. L. 761	"
Life Ins.	Owen *v.* Metropolitan Life Insurance Co.	74 N. J. L. 770	"
Construction Law	Central R. R. Co. of New Jersey *v.* State Board of Assessors	75 N. J. L. 120	"
Tax	Tuckerton R. R. Co. *v.* State Board Assessors	75 N. J. L. 157	"
Pay in Advance	Brockhurst *v.* Kaiser Sheriff	75 N. J. L. 162	"
Mandamus	Hughes *v.* North Clinton Baptist Church	75 N. J. L. 167	"

Subject	*Name of Case*	*Report*	*Date*
Bills and Notes	Gibbs *v.* Guaraglia	75 N. J. L. 168	1907
Construction	Eckert *v.* Wallace	75 N. J. L. 171	"
Trade Union	Levin *v.* Cosgrove	75 N. J. L. 344	"
Ordinance Police Power	North Jersey Street Ry. Co. *v.* Jersey City	75 N. J. L. 349	"
Evidence sufficient	Hughes Sons Co. *v.* Bergen &c. Automobile Co.	75 N. J. L. 355	"
Criminal procedure	State *v.* Zeilman	75 N. J. L. 357	"
Constitutional jurisdiction	Lighthipe *v.* Orange	75 N. J. L. 365	"
"	Essex County Park Com. *v.* West Orange	75 N. J. L. 376	"
Double Taxation	*In re* Belvidere-Delaware Railroad Co.	75 N. J. L. 381	"
Tax	*In re* United N. J. Railroad and Canal Co.	75 N. J. L. 385	"
Tax	*In re* New York Bay Railroad Co.	75 N. J. L. 389	"
Lien Law	Vreland Bldg. Co. *v.* Knickerbocker Sugar Co.	75 N. J. L. 551	"

Appendix B

Opinions of Mahlon Pitney as Chancellor of New Jersey

(A) In Law

Subject	*Name of Case*	*Report*	*Date*
Liquor Bishops Law	Meehan *v.* Excise Com'rs.	75 N. J. L. 557	1908
Libel	Neafie *v.* Hoboken Printing & Publishing Co.	75 N. J. L. 564	1907
Evidence	Rogers *v.* West Jersey R. R. Co.	75 N. J. L. 568	"
Taxation	Jersey City *v.* State Board of Assessors	75 N. J. L. 571	1908
Criminal	State *v.* Tomassi	75 N. J. L. 739	"
Evidence	Tomlinson *v.* Armour & Co.	75 N. J. L. 748	"
Tort	Bathgate *v.* North Jersey Street Ry. Co.	75 N. J. L. 763	"
Estoppel	Masters *v.* Champion	75 N. J. L. 768	"
Crimes Aiding	State *v.* Flynn	76 N. J. L. 473	1909
Procedure	State *v.* Brown	76 N. J. L. 479	1908
"	Defiance Fruit Co. *v.* Fox	76 N. J. L. 482	"
Contract for benefit of third party	Holt *v.* United Security Life Insurance Co.	76 N. J. L. 585	1909
Domestic Relation	Carter *v.* West Jersey & Seashore R. R. Co.	76 N. J. L. 602	1908
Evidence	Cooke *v.* Independent Tel. Const. Co.	77 N. J. L. 454	"
Corporations	State *v.* Atlantic City & Shore R. R. Co.	77 N. J. L. 465	1909
Criminal	State *v.* Brand	77 N. J. L. 486	"
Statutes	Frelinghuysen *v.* Morristown	77 N. J. L. 493	"
Criminal	State *v.* Zeller	77 N. J. L. 619	"

Subject	*Name of Case*	*Report*	*Date*
Water Rights	Meeker *v.* East Orange	77 N. J. L. 623	1909
Evidence	Goodman *v.* Lehigh Valley R. R. Co.	78 N. J. L. 317	"
Exception to instruction of jury	Beuret *v.* Koehler Sporting Goods Co.	78 N. J. L. 563	1910
Trial	Edwards *v.* Currie	78 N. J. L. 566	"
Negligence	Jones *v.* Pennsylvania R. R. Co.	78 N. J. L. 571	"
Negligence	Opdycke *v.* Public Service Ry. Co.	78 N. J. L. 576	"
Rate of Wages	Stagg *v.* Barrett	78 N. J. L. 588	"
Personal Injuries	Higgins *v.* Public Service Ry. Co.	79 N. J. L. 471	"
Judgment Creditor	McAdams *v.* Mundy	79 N. J. L. 480	"
Criminal	State *v.* Silverio	79 N. J. L. 482	"
Lands	Fishblatt *v.* Atlantic City	80 N. J. L. 269	"
Mortgage	Kiernan *v.* Jersey City	80 N. J. L. 273	"
R. R. Police	Taylor *v.* N. Y. &c. R. R. Co.	80 N. J. L. 282	"
Construction	U. & G. Rubber Mfg. Co. *v.* Conard	80 N. J. L. 286	"
Evidence Action on Judgment	Blessing *v.* McLinden	81 N. J. L. 379	1911
Appeal & Error	Chambers *v.* Philadelphia Pickling Co.	81 N. J. L. 388	"
Contributory Negligence	Peterpolo *v.* Public Ser. Ry. Co.	81 N. J. L. 390	"
Negligence	Wise *v.* D., J. & W. R. R. Co.	81 N. J. L. 397	"
Negotiable Instrument	Mackintosh *v.* Gibbs	81 N. J. L. 577	"
Tax Charities	Mountainside *v.* Board of Equalization	81 N. J. L. 583	"
Personal Injuries	Owens *v.* Associated Realties Corporation	81 N. J. L. 586	"
Appeal	Pratt *v.* Union Nat'l Bank	81 N. J. L. 588	"
Conversion	State *v.* Geyer	81 N. J. L. 591	"
Appeal & Error	Allgair *v.* Hickman	82 N. J. L. 369	"

Subject	*Name of Case*	*Report*	*Date*
Common Carrier	Hill *v.* Adams Express Co.	82 N. J. L. 373	1911
Act to relieve creditors of heir	McCarthy *v.* Mullen	82 N. J. L. 379	"
Appeal and Error	Negley *v.* New York Life Insurance Co.	82 N. J. L. 390	1908
Corporation	N. J. & Hudson River Ry. Co. *v.* Am. Elec. Wks.	82 N. J. L. 391	1911
Carrier	*Bobbink *v.* Erie Railroad Co.	82 N. J. L. 547	1912
Negligence	*Delaney *v.* Public Service Railway Co.	82 N. J. L. 551	"
Attachment	*Jordan *v.* Moore	82 N. J. L. 552	"
Corporation	*Murphy *v.* W. H. & F. W. Cane, Inc.	82 N. J. L. 557	"

* Decided March 5, 1912.

(B) In Equity

Name of Case	*Report*	*Date*
Marr *v.* Marr, *et al.*	73 N. J. Eq. 643	1908
Northeastern Tel. & Tel. Co. *v.* Hepburn	73 N. J. Eq. 657	"
Delanos' Case	74 N. J. Eq. 365	"
Bigelow *v.* Old Dominion Copper Mining Co.	74 N. J. Eq. 457	"
Barnum *v.* Morton	74 N. J. Eq. 797	"
Colgate *v.* U. S. Leather Co.	75 N. J. Eq. 229	"
Jonas Glass Co. *v.* Glass Bottle Blowers Association	77 N. J. Eq. 219	"
The Trustees of Princeton University *v.* Wilson	78 N. J. Eq. 1	1910
In the Matter of Estate of Mary Jane Grattan	78 N. J. Eq. 225	1911
Ludy *v.* Larsen	78 N. J. Eq. 237	"
Woolsey *v.* Woolsey	78 N. J. Eq. 517	1910

Appendix C

Opinions of Mahlon Pitney as Justice of United States Supreme Court

(a) *Cases arising either under the Constitution of the United States or its Amendments*

Subject	*Name of Case*	*Report*	*Date*
Testimony and Evidence Clause, 5th Amendment; Criminal Prosecutions Clause, 6th Amendment	Will D. Ensign *v.* Commonwealth of Pennsylvania; Charles A. Ensign *v.* Commonwealth of Pennsylvania	227 U. S. 592	1913
Trial by Jury Clause, 7th Amendment	Dill *v.* Ebey	229 U. S. 199	"
Due Process Clause, 14th Amendment	Tem Woon *v.* State of Oregon	229 U. S. 587	"
Property; Compensation; 14th Amendment	Ochoa *v.* Hernandez y Morales	230 U. S. 139	"
Commerce Clause, Art. 1, Sec. 8, Cl. 3	United States Fidelity & Guaranty Company *v.* Commonwealth of Kentucky	231 U. S. 394	"
Tax Apportionment	Stratton's Independence *v.* Howbert	231 U. S. 399	"
Due Process Clause; 14th Amendment	Plymouth Coal Company *v.* Commonwealth of Pennsylvania	232 U. S. 531	1914
Due Process Clause: 14th Amendment	Atlantic Coast Lines *v.* Goldsboro	232 U. S. 548	"

Subject	*Name of Case*	*Report*	*Date*
Commerce Clause Art. 1, Sec. 8, Cl. 3	Wilson *v.* United States	232 U. S. 563	1914
Tax Construction	Ohio Tax Cases	232 U. S. 576	"
Commerce Clause, Art. 1, Sec. 8, Cl. 3	Singer Sewing Machine Company *v.* Brickell	233 U. S. 304	"
Property; Compensation; 5th Amendment	Richards *v.* Washington Terminal Company	233 U. S. 546	"
Commerce Clause, Due Process; Equal Protection; 14th Amendment	Missouri, Kansas & Texas Railroad Company *v.* Cade	233 U. S. 642	"
Due Process; 14th Amendment	Gramis *v.* Ordeau	234 U. S. 385	"
Full Faith and Credit	Roller *v.* Murray	234 U. S. 738	"
Full Faith and Credit	Western Life Indemnity Company *v.* Rupp	235 U. S. 261	"
Commerce Clause	St. Louis Southwestern Railroad Company *v.* Arkansas	235 U. S. 350	"
11th Amendment	Louisville & Nashville Railroad Company *v.* Finn	235 U. S. 601	1915
Due Process; 5th and 14th Amendments	Coppage *v.* Kansas	236 U. S. 1	"
Commerce Clause	Joplin Mercantile Company *v.* United States	236 U. S. 531	"
Commerce Clause	Michigan Central Railroad Company *v.* Michigan Railroad Commission	236 U. S. 615	"

Subject	*Name of Case*	*Report*	*Date*
Due Process; 14th Amendment	Reinman *v.* Little Rock	237 U. S. 171	1915
Bill of Attainder and Ex Post Facto Law	Frank *v.* Mangum	237 U. S. 309	"
Due Process; 14th Amendment	Coe *v.* Armour Fertilizer Works	237 U. S. 413	"
Due Process; 14th Amendment	Collins *v.* Johnson	237 U. S. 502	"
Due Process; 14th Amendment	Mallinckroot Works *v.* St. Louis	238 U. S. 41	"
Equal Protection Clause; 14th Amendment	Atchison, Topeka & Santa Fe Railroad Company *v.* Vosburg	238 U. S. 56	"
Commerce Clause	Rossi *v.* Commonwealth of Pennsylvania	238 U. S. 62	"
Contract Clause; Due Process; 14th Amendment	Chicago & Alton Railroad Company *v.* Traubarger	238 U. S. 67	"
Commerce Clause	Illinois Central Railroad Company *v.* Mulberry Coal Company	238 U. S. 275	"
Due Process; 5th Amendment	Anderson *v.* Forty-Two Broadway Company	239 U. S. 69	"
Due Process; 14th Amendment	Phoenix Railroad Company *v.* Geary	239 U. S. 277	"
Due Process; 14th Amendment	Interstate Amusement Company *v.* Albert	239 U. S. 580	1916

Subject	*Name of Case*	*Report*	*Date*
Due Process; 5th Amendment	O'Keefe *v.* United States & Interstate Commerce Commission	240 U. S. 294	1916
Commerce Clause, Article 1, Sec. 8, Clause 3	Texas & Pacific Railroad *v.* Rigsby	241 U. S. 33	"
7th Amendment	Chesapeake & Ohio Railroad Company *v.* Kelly (Administratrix of Kelly)	241 U. S. 485	"
7th Amendment	Chesapeake & Ohio Railroad Company *v.* Gainey (Administratrix of Dwyer)	241 U. S. 494	"
Due Process; 14th Amendment	Lake Shore & Michigan Southern Railroad Company *v.* Clough	242 U. S. 375	1917
Due Process; 14th Amendment	Bawer (widow) *v.* Baker Eccles & Company	242 U. S. 394	"
Due Process; 14th Amendment	Newark Natural Gas & Fuel Company *v.* Newark, Ohio	242 U. S. 405	"
Due Process; 5th Amendment	Louisville Bridge Company *v.* United States	242 U. S. 409	"
Due Process; Equal Protection—14th Amendment	New York Central Railroad Company *v.* White	243 U. S. 188	"
Due Process; 14th Amendment	Hawkins *v.* Bleakly	243 U. S. 210	"
Trial by Jury—7th Amendment; Due Process—14th Amendment	Mountain Timber Company *v.* State of Washington	243 U. S. 219	"

Subject	*Name of Case*	*Report*	*Date*
Due Process; 14th Amendment	Grays Harbor Logging Company *v.* Coats Fordney Logging Company	243 U. S. 251	1917
Property Compensation; 5th Amendment	United States *v.* Cress; United States *v.* Kelly	243 U. S. 316	"
Equal Protection Clause; 15th Amendment	Greene, Auditor *v.* Louisville & Interurban Railroad Company	244 U. S. 499	"
Due Process; 14th Amendment	Louisville & Interurban Railroad Company *v.* Greene	244 U. S. 522	"
Due Process; 14th Amendment	Illinois Central Railroad Company *v.* Greene	244 U. S. 555	"
Due Process; 14th Amendment	Darnell *v.* Edwards	244 U. S. 565	"
Due Process; 14th Amendment	Puget Sound Traction, Light & Power Company *v.* Reynolds	244 U. S. 575	"
Due Process; 14th Amendment	1. Schneider Granite Co. *v.* Cast Realty & Investment Co.; 2. *Vice Versa*	245 U. S. 288	"
Commerce Clause, Art. 1, Sec. 8, Cl. 3	Crew Levick Company *v.* Pennsylvania	245 U. S. 292	"
Due Process; 14th Amendment	Denver *v.* Denver Union Water Company	246 U. S. 178	1918

Subject	*Name of Case*	*Report*	*Date*
Commerce Clause, Art. 1, Sec. 8	United States Glue Company *v.* Oak Creek (Town)	247 U. S. 321	1918
Income Tax—16th Amendment	Lynch *v.* Hornby	247 U. S. 339	"
Income Tax—16th Amendment	Peabody *v.* Eisner	247 U. S. 347	"
Equal Protection Clause—14th Amendment	Postal Telegraph Company *v.* Newport	247 U. S. 464	"
Due Process—14th Amendment	Leary *v.* Mayor and Aldermen of Jersey City	248 U. S. 328	"
Jurisdiction of Supreme Court Art. 3, Sec. 2	Northern Pacific Steamship Company *v.* Hall Bros. Co.	249 U. S. 119	1919
Commerce Clause, Art. 1, Sec. 8	Arkaldelphia Milling Company *v.* St. Louis Southwestern Railroad Company	249 U. S. 134	"
Due Process—14th Amendment	Middleton *v.* Texas Power & Light Company	249 U. S. 152	"
Commerce Clause, Art. 1, Sec. 8	Corn Products Refining Company *v.* Gody, *et al.*	249 U. S. 427	"
Commerce Clause, Art. 1, Sec. 8	Mackay Telegraph Company *v.* Little Rock	250 U. S. 94	"

Subject	*Name of Case*	*Report*	*Date*
Due Process—14th Amendment	Lincoln Gas & Electric Company *v.* The City of Lincoln	250 U. S. 256	1919
Criminal Prosecution Clause—6th Amendment	Blair *v.* United States	250 U. S. 273	"
Due Process—14th Amendment	Arizona Employers' Liability Cases	250 U. S. 400	"
Due Process—14th Amendment	Hancock *v.* City of Muskogee	250 U. S. 454	"
Due Process—14th Amendment	American Manufacturing Co. *v.* St. Louis	250 U. S. 459	"
Due Process—14th Amendment	New York Central Railroad Company *v.* Bianc	250 U. S. 596	"
Commerce Clause, Art. 1, Sec. 8	Wagner *v.* City of Covington	251 U. S. 95	"
Contracts—Art. 1, Sec. 10, Clause 1	Hays *v.* Port of Seattle	251 U. S. 233	1920
Commerce Clause, Art. 1, Sec. 8	Shaffer *v.* Carter, State Auditor	252 U. S. 37	"
Due Process—14th Amendment	Travis *v.* Yale & Towne Manufacturing Company	252 U. S. 60	"
Income Taxes—16th Amendment	Eisner *v.* Macomber	252 U. S. 189	"
Conspiracy	Pierce *v.* United States	252 U. S. 239	"
Due Process—14th Amendment	Royster Guano Company *v.* Commonwealth of Virginia	253 U. S. 412	"

Subject	*Name of Case*	*Report*	*Date*
Sherman Act—Clayton Act	Duplex Company *v.* Deering	254 U. S. 443	1921
Due Process—14th Amendment	St. Louis, Iron Mountain & Southern Railroad Company *v.* Hasty & Sons	255 U. S. 252	"
Due Process—5th Amendment	Winton, Administratrix of Winton *v.* Amos, *et al.*	255 U. S. 373	"
Due Process—14th Amendment	Ownbey *v.* Morgan	256 U. S. 94	"
Equal Protection Clause—14th Amendment	LaBelle Iron Works *v.* U. S.	256 U. S. 377	"
Jurisdiction—11th & 18th Amendments	*Ex parte* New York No. 1, Petitioners	256 U. S. 491	"
Commerce Clause, Art. 1, Sec. 8	United States *v.* Hutto	256 U. S. 524	"
Commerce Clause Art. 1, Sec. 8	Bowman *v.* Continental Oil Company	256 U. S. 642	"
Commerce Clause Art. 1, Sec. 8	Citizens National Bank *v.* Durr	257 U. S. 99	"
Income Tax—16th Amendment	United States *v.* Phellis	257 U. S. 156	"
Due Process—14th Amendment	Essanay Film Company *v.* Kane	258 U. S. 358	1922
Due Process—14th Amendment	Texas Company *v.* Brown	258 U. S. 466	"
Income Tax—16th Amendment	Miles, Collector of Internal Revenue *v.* Safe Deposit Company of Baltimore	259 U. S. 247	"

Subject	*Name of Case*	*Report*	*Date*
Due Process—14th Amendment	Ward & Gow *v.* Krinsky	259 U. S. 503	1922
Due Process—14th Amendment	Prudential Insurance Company *v.* Creek	259 U. S. 530	"
Due Process—14th Amendment	Chicago, Rock Island & Pacific Ry. Co. *v.* Perry	259 U. S. 548	"

(b) *Cases dealing with the Construction of Congressional Statutes.*

Bill of Lading Clause	The Jason	225 U. S. 32	1912
Immigration Act 1906-07	Johannessen *v.* United States	225 U. S. 227	"
Libel	Pickford *v.* Talbot	225 U. S. 651	"
Commerce Clause	Ex Parte Charley Webb, Petitioner	225 U. S. 663	"
Implied Contract	Beach *v.* United States	226 U. S. 243	"
Bill of Attainder	Rosenthal *v.* People of New York State	226 U. S. 260	"
Criminal Prosecution Clause	Zakonaite *v.* Wolf	226 U. S. 272	"
Contract	National Surety Company *v.* Architectural Decorating Company	226 U. S. 276	"
Full Faith and Credit Clause	Thompson *v.* Thompson	226 U. S. 551	1913
Department of Interior	Evans *v.* United States	226 U. S. 567	"
Federal Employers' Liability Act	Missouri, Kansas & Texas Railroad *v.* Wolf	226 U. S. 571	"
Breach of Contract	El Paso & Southwestern Railroad Company *v.* Eichel & Weikel	226 U. S. 591	"
Jurisdiction	Rosaly, widow of Rabainne *v.* Graham Y. Frazer	227 U. S. 584	"

Subject	*Name of Case*	*Report*	*Date*
Liability of Carrier	Southern Pacific *v.* Schuyler	227 U. S. 601	1913
Title to Lands	Starr *v.* Long Jim	227 U. S. 613	"
Bankruptcy	Tavela *v.* Reeves	227 U. S. 626	"
Negligence	Sweeney *v.* Erving	228 U. S. 233	"
Federal Domain	Donnelly *v.* United States	228 U. S. 243	"
Jurisdiction	McLaughlin *v.* Hallowell	228 U. S. 278	"
Tax Refund	McCoach *v.* Minehill R. R. Company	228 U. S. 295	"
Injunction	Lewis Publishing Company *v.* Wyman	228 U. S. 610	"
Rehearing	Donnelly *v.* United States	228 U. S. 708	"
Federal Jurisdiction	Morse *v.* United States	229 U. S. 208	"
Contract	Citizens Bank *v.* Davisson	229 U. S. 213	"
Liquor	U. S. *v.* Wright	229 U. S. 226	"
Tariff Tax	United States *v.* Shelley	229 U. S. 239	"
Equity	Camp *v.* Boyd	229 U. S. 530	"
Vested Property Interest	Campbell *v.* Northwest Eckington Improvement Co.	229 U. S. 561	"
Contract	Wilkinson *v.* McKimmie	229 U. S. 590	"
Responsibility of Auditor	District of Columbia *v.* Petty	229 U. S. 593	"
Conspiracy	Nalle *v.* Oyster	230 U. S. 165	"
Tax Construction	United States *v.* Whitridge	231 U. S. 144	"
Due Process Clause of 5th Amendment	Kansas City Southern Railroad *v.* United States	231 U. S. 423	"
Immigration Act	Lapina *v.* Williams	232 U. S. 78	1914
Employers' Liability	Gila Valley, Globe & Northern Railroad Co. *v.* Hall	232 U. S. 94	"
Lien Law Construction	Bank of Arizona *v.* Thomas Haverty Company	232 U. S. 106	"

Subject	*Name of Case*	*Report*	*Date*
Indian Law	Ross *v.* Day	232 U. S. 110	1914
Employers' Liability	Northern Car Railroad Company *v.* Zachary	232 U. S. 248	"
Contract	Farmers Bank *v.* Minnesota	232 U. S. 516	"
Trespass	Weinman *v.* de Palma	232 U. S. 571	"
Contract	Levis *v.* Ryan	233 U. S. 273	"
Immigration Act	Lewis *v.* Teick	233 U. S. 291	"
Employers' Liability	Seaboard Air Line Railway Co. *v.* Horton	233 U. S. 492	"
Double Jeopardy	Ocampo *v.* United States	234 U. S. 91	"
State Rights	Carlson *v.* Curtiss	234 U. S. 103	"
Patent Cancellation	Gilson *v.* United States	234 U. S. 380	"
Rights in Bankruptcy	Sale *v.* Pattison	234 U. S. 399	"
Commerce Clause	Missouri, Kansas & Texas Railroad Co. *v.* Harris	234 U. S. 413	"
Prohibition Law—Indians	Johnson *v.* Geralds	234 U. S. 423	"
Surety Bond	Equitable Surety Company *v.* United States	234 U. S. 449	"
Bankruptcy	Bull *v.* Hall	234 U. S. 712	"
Employers' Liability	Southern Railroad Company *v.* Crockett	234 U. S. 725	"
Construction of Foraker Act	Porto Rico *v.* Emmanuel	235 U. S. 251	"
Alaskan Indictment	United States *v.* Wigger	235 U. S. 276	"
Meat Inspection Law	United States *v.* Lewis	235 U. S. 282	"
State Court Jurisdiction	Arizona & New Mexico Railroad Company *v.* Clark	235 U. S. 669	1915

Subject	*Name of Case*	*Report*	*Date*
Surety Bond	United States *v.* United States Fidelity Company	236 U. S. 512	1915
Land Grant	Knapp *v.* Alexander-Edgar Lumber Company	237 U. S. 162	"
Contract	McGowan *v.* Parish	237 U. S. 285	"
Conspiracy	United States *v.* Rabinowich	238 U. S. 78	"
Creek Laws	Woodward *v.* DeGraffenried	238 U. S. 284	"
Employers' Liability	Texas & Pacific Railroad Company *v.* Murphy	238 U. S. 320	"
Land Claims	United States *v.* Hiawassee Lumber Co.	238 U. S. 553	"
Trust Beneficiary	Chater *v.* Carter, Executor of Hartwell	238 U. S. 572	"
False Personification	United States *v.* Barnow	239 U. S. 74	"
Abatement	Glenwood Light Company *v.* Mutual Light Company	239 U. S. 121	"
Land Title	Elzaburn *v.* Chaves	239 U. S. 283	"
Bankrupt Accounts	Home Bond Company *v.* McChesney	239 U. S. 568	1916
Employers' Liability	Kanawha & Michigan Railroad Company & Kerse, Administrator of Barry	239 U. S. 576	"
Hepburn Act (1906)	New York Central & Hudson River Railroad Company *v.* Gray	239 U. S. 583	"
Freight Claim	Cleveland & St. Louis Railroad Co. *v.* Settleback	239 U. S. 588	"
Contributory Negligence	Seaboard Air Line Railroad Company *v.* Horton	239 U. S. 595	"
Trademark	Hamilton Brown Shoe Company *v.* Wolf Brothers & Company	240 U. S. 251	"
Breach of Contract	Guerini Stone Company *v.* P. S. Carlin Construction Company	240 U. S. 264	"
After-Acquired Property	Union Naval Stores *v.* United States	240 U. S. 284	"

Subject	*Name of Case*	*Report*	*Date*
Trademark Registration	Hanover Star Milling Company *v.* Metcalf	240 U. S. 403	1916
Employers' Liability	Great Northern Railroad Company *v.* Knapp	240 U. S. 467	"
Breach of Contract—Bankrupt	Central Trust Company (Scott Transfer Company Trust) *v.* Chicago Auditorium Association	240 U. S. 581	"
Jurisdiction—Estate Contest	Pinel *v.* Pinel	240 U. S. 594	"
Succession Tax	Uterhard (Trustee of Stein) *v.* United States	240 U. S. 598	"
Interstate Commerce	United States *v.* Union Manufacturing Company	240 U. S. 605	"
Chattel Mortgage	Fairbanks Steam Shovel Company *v.* Willis (Trustee in Bankruptcy for Federal Contracting Company)	240 U. S. 642	"
Rules of Evidence	Merriam *v.* Scofield	241 U. S. 22	"
Employers' Liability	Chesapeake & Ohio Railroad Company *v.* DeAtley	241 U. S. 310	"
Equity	Montelibano y Ramos *v.* La Compania General de Tabacos de Filipinas	241 U. S. 455	"
Employers' Liability	Chesapeake & Ohio Railroad *v.* Profitt	241 U. S. 462	"
Employers' Liability	Chicago, Northwestern Railroad Company *v.* Bower	241 U. S. 470	"
Employers' Liability	San Antonio & Aransas Pass Railroad Company *v.* Wagner	241 U. S. 476	"
Employers' Liability	Spokane & Inland Empire Railroad Company *v.* Campbell	241 U. S. 497	"
Extradition	Bingham *v.* Bradley, U. S. Marshal for Northern District of Illinois	241 U. S. 511	"

Subject	*Name of Case*	*Report*	*Date*
Subornation of Perjury	Abbott *v.* Brown, U. S. Marshal of Southern District of Florida	241 U. S. 606	1916
State Jurisdiction	Stewart *v.* Ramsey	242 U. S. 128	"
State Police Power	Vandalia R. R. *v.* Public Service Commission of Indiana	242 U. S. 255	"
Employers' Liability	Erie Railroad Company *v.* Welsh	242 U. S. 303	"
Land Title	Harnage *v.* Martin	242 U. S. 386	1917
Habeas Corpus—Constitutional Question	Horn *v.* Mitchell, U. S. Marshal for District of Massachusetts	243 U. S. 247	"
Interstate Commerce	Southern Railroad Company *v.* Puckett	244 U. S. 571	"
Indian Allotment	Lanham, Administrator for Lanham *v.* McKeel	244 U. S. 583	"
Income Tax Liability	McCoach, Collector of Internal Revenue *v.* Insurance Company of North America (in Pennsylvania)	244 U. S. 585	"
Injunction; labor dispute	Hitchman Coal and Coke Company *v.* Mitchell	245 U. S. 229	"
Injunction; labor dispute	Eagle Glass Co. *v.* Rowe	245 U. S. 275	"
Interstate Boundary	Arkansas *v.* Tennessee	246 U. S. 158	1918
Federal Rights; Citizenship Diversity	Sutton *v.* English	246 U. S. 199	"
Land Ownership	Cissna *v.* Tennessee	246 U. S. 289	"
Government Ownership	Wells *v.* Roper	246 U. S. 335	"

Subject	*Name of Case*	*Report*	*Date*
Claim for Interest	Sheckels, Executrix of Scheckels *v.* District of Columbia	246 U. S. 338	1918
Q. C. C. Finding valid	Mfg'ers. Ry. Co. & St. Louis Southwestern Ry. Co. *v.* United States	246 U. S. 457	"
Income Tax	Doyle, Collector of Internal Revenue *v.* Mitchell Bros. Company	247 U. S. 179	"
Income Tax	Hays *v.* Ganley Mountain Coal Company	247 U. S. 189	"
Income Tax	United States *v.* Cleveland, Cincinnati, Chicago & St. Louis Railroad Company	247 U. S. 195	"
Federal Jurisdiction	Hartranf *v.* Mulrowney, Judge of Police Court	247 U. S. 295	"
Writ of Error	San Petro Railroad Company *v.* United States	247 U. S. 307	"
Land Patents	United States *v.* St. Paul M. & M. Railroad Company	247 U. S. 310	"
Income Tax	Southern Pacific Company *v.* Lowe, U. S. Collector of Internal Revenue	247 U. S. 330	"
Trademark	United Drug Company *v.* Theodore Rectanus Company	248 U. S. 90	"
Patents and Copyrights—Art. 1, Sec. 8	International News Service *v.* Associated Press	248 U. S. 215	"
Breach of Contract	Guierini Stone Co. *v.* Carlin Construction Company	248 U. S. 334	1919
Criminal Appeals Act	United States *v.* Comgus	248 U. S. 349	"
Patent Infringement	Week, *et al. v.* Parker, *et al.*	249 U. S. 130	"
Jurisdiction	Chicago Great Western R. R. Co. *v.* Basham	249 U. S. 164	"
Rights to property	Union Oil Co. of California *v.* Smith	249 U. S. 337	"
Public Domain	United States *v.* Laughlin	249 U. S. 440	"

Subject	*Name of Case*	*Report*	*Date*
State Boundary	Rust Land & Lumber Company *v.* Jackson, *et al.*	250 U. S. 71	1919
Employers' Liability	Telleppon *v.* Albion Slate Company	250 U. S. 76	"
Bill of Lading	New York Central Railroad Company *v.* Goldberg	250 U. S. 85	"
Patent Refringement	Brothers *v.* United States	250 U. S. 88	"
Employers' Liability	Philadelphia, Baltimore & Washington Railroad Company *v.* Smith	250 U. S. 101	"
Land Allotment	United States *v.* Reynolds	250 U. S. 104	"
Admiralty	The Lake Monroe	250 U. S. 246	"
Admiralty	The Scow "6-S"	250 U. S. 269	"
Court cannot review Commission finding	Rumely *v.* McCarthy	250 U. S. 283	"
Land Allotment Indian	Mullens *v.* Pickens	250 U. S. 590	"
Bankruptcy	Corsicano National Bank *v.* Johnson	251 U. S. 68	"
Bankruptcy	Hull *v.* Philadelphia, *et al.*, Trustees in Bankruptcy	251 U. S. 239	1920
Conspiracy—Espionage Act	Houston *v.* Ormes	252 U. S. 249	"
Congress Appropriation—Treasury Funds	Hull *v.* Philadelphia, Reading Railroad Company	252 U. S. 475	"
Interstate Commerce	Spiller *v.* Atchison, Topeka & Santa Fe Railroad Company	253 U. S. 117	"
Bankruptcy	Weidhorn *v.* Levy	253 U. S. 268	"
Indian Treaty	United States *v.* Omaha Tribe of Indians	253 U. S. 275	"
Medical License	Jur Tuey Moy *v.* United States	254 U. S. 189	"

Subject	*Name of Case*	*Report*	*Date*
Tax on Property	Chicago, Milwaukee & St. Paul Railroad Company *v.* Des Moines Union Railroad Company	254 U. S. 196	1920
Postal Laws	The Journal & Tribune Company *v.* United States	254 U. S. 581	1921
Inheritance Tax	United States *v.* Field, Executor for Field	255 U. S. 257	"
State Boundary	Oklahoma *v.* Texas (United States intervened)	256 U. S. 70	"
Navigable River	Economy Light & Power Company *v.* United States	256 U. S. 113	"
Insurance Contract	Frederick *v.* Fidelity Insurance Company	256 U. S. 395	"
Admiralty	Ex Parte New York No. 2	256 U. S. 503	"
Gas Rates	Ex Parte Lincoln Gas Co.	256 U. S. 512	"
Title to Lease	Anchor Oil Company *v.* Gray	256 U. S. 519	"
Moneyed Capital	Merchants' National Bank of Richmond, Va. *v.* City of Richmond	256 U. S. 635	"
Jurisdiction	Simmons Company *v.* Grier Brothers Company	258 U. S. 82	1922

Appendix D

The Supreme Court of the United States

Opinions of the Court

Written	1912	1913	1914	1915	1916	1917	1918	1919	1920	1921	1922	Totals
White	27	39	45	40	37	29	26	21	23	31	....	290
Taft	....	....	....	....	....	....	....	....	....	6[2]	40	46
McKenna	15	43	32	33	28	26	21	22	24	21	26	291
Holmes	23	48	49	41	38	28	28	30	28	25	34	372
Day	15	38	34	23	9	26	26	28	23	21	6	251
Lurton	16	22	4[3]	....	....	....	....	....	....	....	....	42
Hughes	19	18	30	28	19[4]	....	....	....	....	....	....	114
VanDevanter	13	30	30	10	24	18	14	19	16	22	6	203
Lamar	13	25	24	13[5]	....	....	....	....	....	....	....	75
Pitney	8[6]	31	33	27	33	22	21	29	14	19	7[7]	244
McReynolds	....	....	10[8]	31	22	23	21	27	23	19	20	195
Brandeis	....	....	....	....	1[9]	25	24	25	30	17	26	148
Clarke	....	....	....	....	8[10]	22	20	24	20	18	17	129
Sutherland	....	....	....	....	....	....	....	....	....	....	12[11]	12
Totals	149	294	291	248	219	219	201	225	203	171	194	2412

1 White—Died May 19, 1921
2 Taft—Appointed—took seat upon the Bench opening term October, 1921
3 Lurton—Died during vacation on July 12, 1914
4 Hughes—Resigned June 10, 1916
5 Lamar—Died January 2, 1916
6 Pitney—Appointed—took seat upon the Bench on March 18, 1912
7 Pitney—Retired December 31, 1922
8 McReynolds—Appointed—took seat upon the Bench opening term October, 1914
9 Brandeis —Appointed—took seat upon the Bench June 5, 1916
10 Clarke —Appointed—took seat upon the Bench opening term October, 1916
11 Sutherland —Appointed—took seat upon the Bench on October 2, 1922

Appendix E

The Supreme Court of the United States

Dissenting Opinions

Written	1912	1913	1914	1915	1916	1917	1918	1919	1920	1921	1922	Totals
White	0	0	1	1	0	0	0	0	0	0[1]	....	2
Taft	....	....	....	....	....	....	....	....	....	0[2]	1	1
McKenna	0	2	1	1	2	0	2	1	1	3	3	16
Holmes	2	0	1	1	0	3	2	4	2	4	2	21
Day	0	2	3	2	0	1	2	1	3	0	0	14
Lurton	2	0	0[3]	....	....	....	....	....	....	....	....	2
Hughes	1	0	1	2	1[4]	....	....	....	....	....	....	5
VanDevanter	0	0	0	0	0	1	0	0	0	0	0	1
Lamar	0	3	0	2[5]	....	....	....	....	....	....	....	5
Pitney	1[6]	1	4	1	4	2	1	3	0	2	0[7]	19
McReynolds	....	....	0[8]	2	0	1	1	4	2	5	1	16
Brandeis	....	....	....	....	2[9]	2	2	3	6	6	5	26
Clarke	....	....	....	....	2[10]	3	5	4	5	2	2	23
Sutherland	....	....	....	....	....	....	....	....	....	....	0[11]	0
Totals	6	8	11	12	11	13	15	20	19	22	14	151

1 White—Died May 19, 1921
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3 Lurton—Died during vacation on July 12, 1914
4 Hughes—Resigned June 10, 1916
5 Lamar—Died January 2, 1916
6 Pitney—Appointed—took seat upon the Bench on March 18, 1912
7 Pitney—Retired December 31, 1922
8 McReynolds—Appointed—took seat upon the Bench opening term October, 1914
9 Brandeis —Appointed—took seat upon the Bench June 5, 1916
10 Clarke —Appointed—took seat upon the Bench opening term October, 1916
11 Sutherland —Appointed—took seat upon the Bench on October 2, 1922

Appendix F

The Supreme Court of the United States

Concurring Opinions

Written	1912	1913	1914	1915	1916	1917	1918	1919	1920	1921	1922	Totals
White	0	1	1	0	0	0	0	0	2	1[1]	....	5
Taft	....	....	....	....	....	....	....	....	....	0[2]	0	0
McKenna	0	1	1	0	0	1	0	0	0	0	0	3
Holmes	0	0	2	1	0	0	1	1	0	0	0	5
Day	0	0	0	0	0	0	0	0	0	0	0	0
Lurton	0	0	0[3]	....	....	....	....	....	....	....	....	0
Hughes	0	0	0	0	0[4]	....	....	....	....	....	....	0
VanDevanter	0	0	0	0	0	0	0	0	0	0	0	0
Lamar	0	0	0	0[5]	....	....	....	....	....	....	....	0
Pitney	0[6]	2	0	0	0	0	0	0	3	0	0[7]	5
McReynolds	....	....	0[8]	0	0	0	0	0	2	0	0	2
Brandeis	....	....	....	....	0[9]	0	0	0	1	0	1	2
Clarke	....	....	....	....	0[10]	0	0	0	0	0	0	0
Sutherland	....	....	....	....	....	....	....	....	....	....	0[11]	0
Totals	0	4	4	1	0	1	1	1	8	1	1	22

1 White—Died May 19, 1921
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3 Lurton—Died during vacation on July 12, 1914
4 Hughes—Resigned June 10, 1916
5 Lamar—Died January 2, 1916
6 Pitney—Appointed—took seat upon the Bench on March 18, 1912
7 Pitney—Retired December 31, 1922
8 McReynolds—Appointed—took seat upon the Bench opening term October, 1914
9 Brandeis —Appointed—took seat upon the Bench June 5, 1916
10 Clarke —Appointed—took seat upon the Bench opening term October, 1916
11 Sutherland —Appointed—took seat upon the Bench on October 2, 1922

Appendix G

The Supreme Court of the United States

Dissenting Votes

Given by:	1912	1913	1914	1915	1916	1917	1918	1919	1920	1921	1922	Totals
White	3	5	0	5	1	12	2	8	7	2[1]	....	45
Taft	....	....	....	....	....	....	....	....	....	1[2]	5	6
McKenna	2	4	3	12	12	10	10	12	6	5	3	79
Holmes	3	3	4	4	3	9	3	17	4	4	2	56
Day	0	1	6	2	4	1	3	5	7	3	3	35
Lurton	3	4	2[3]	3	....	....	....	....	....	....	....	12
Hughes	4	6	2	2	1[4]	....	....	....	....	....	....	15
VanDevanter	2	5	4	4	5	11	2	8	13	6	4	64
Lamar	0	4	4	3[5]	....	....	....	....	....	....	....	11
Pitney	6[6]	8	8	12	4	5	8	12	18	3	2[7]	86
McReynolds	....	....	1[8]	6	5	10	3	10	15	5	7	62
Brandeis	....	....	....	....	3[9]	11	11	15	3	6	4	53
Clarke	....	....	....	....	3[10]	12	12	14	16	15	4	76
Sutherland	....	....	....	....	....	....	....	....	....	....	1[11]	1
Totals	23	40	34	53	41	81	54	101	89	50	35	601

1 White—Died May 19, 1921
2 Taft—Appointed—took seat upon the Bench opening term October, 1921
3 Lurton—Died during vacation on July 12, 1914
4 Hughes—Resigned June 10, 1916
5 Lamar—Died January 2, 1916
6 Pitney—Appointed—took seat upon the Bench on March 18, 1912
7 Pitney—Retired December 31, 1922
8 McReynolds—Appointed—took seat upon the Bench opening term October, 1914
9 Brandeis —Appointed—took seat upon the Bench June 5, 1916
10 Clarke —Appointed—took seat upon the Bench opening term October, 1916
11 Sutherland —Appointed—took seat upon the Bench on October 2, 1922

Appendix H

The Supreme Court of the United States

Concurring Votes

	1912	1913	1914	1915	1916	1917	1918	1919	1920	1921	1922	Totals
White	0	0	2	0	0	0	1	1	0	0[1]	....	4
Taft	....	....	....	....	....	....	....	....	....	0[2]	0	0
McKenna	1	0	0	0	1	1	0	0	0	0	0	3
Holmes	2	1	1	0	1	2	1	1	1	0	1	11
Day	1	2	0	1	0	0	0	1	1	0	0	6
Lurton	0	0	0[3]	....	....	....	....	....	....	....	....	0
Hughes	0	2	0	1	0[4]	....	....	....	....	....	....	3
VanDevanter	1	0	0	0	0	0	0	0	1	0	0	2
Lamar	1	0	1	0[5]	....	....	....	....	....	....	....	2
Pitney	0[6]	5	0	1	1	1	0	1	10	3	1[7]	23
McReynolds	....	....	1[8]	0	1	1	0	1	2	2	1	9
Brandeis	....	....	....	....	0[9]	3	1	4	8	0	0	16
Clarke	....	....	....	....	0[10]	2	1	0	3	5	2	13
Sutherland	....	....	....	....	....	....	....	....	....	....	0[11]	0
	6	10	5	3	4	10	4	9	26	10	5	92

1 White—Died May 19, 1921
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6 Pitney—Appointed—took seat upon the Bench on March 18, 1912
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8 McReynolds—Appointed—took seat upon the Bench opening term October, 1914
9 Brandeis —Appointed—took seat upon the Bench June 5, 1916
10 Clarke —Appointed—took seat upon the Bench opening term October, 1916
11 Sutherland —Appointed—took seat upon the Bench on October 2, 1922

Appendix I

The Supreme Court of the United States

Not Participating

	1912	1913	1914	1915	1916	1917	1918	1919	1920	1921	1922	Totals
White	0	3	1	0	0	1	1	1	2	1[1]	....	10
Taft	....	....	....	....	....	....	....	....	....	0[2]	0	0
McKenna	0	0	0	0	0	0	0	0	0	0	0	0
Holmes	0	6	2	1	0	2	1	0	2	0	0	14
Day	0	1	3	0	0	5	3	2	13	2	1	30
Lurton	0	2	0[3]	....	....	....	....	....	....	....	....	2
Hughes	0	1	1	0	0[4]	....	....	....	....	....	....	2
VanDevanter	2	1	0	0	0	0	0	0	2	0	0	5
Lamar	0	1	0	2[5]	....	....	....	....	....	....	....	3
Pitney	5[6]	4	1	0	1	0	0	0	1	0	7[7]	19
McReynolds	....	....	16[8]	47	22	13	8	8	7	3	1	125
Brandeis	....	....	....	....	0[9]	2	1	1	3	1	4	12
Clarke	....	....	....	....	1[10]	1	5	1	2	5	9	24
Sutherland	....	....	....	....	....	....	....	....	....	....	1[11]	1
Totals	7	19	24	50	24	24	19	13	32	12	23	247

1 White—Died May 19, 1921
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3 Lurton—Died during vacation on July 12, 1914
4 Hughes—Resigned June 10, 1916
5 Lamar—Died January 2, 1916
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9 Brandeis —Appointed—took seat upon the Bench June 5, 1916
10 Clarke —Appointed—took seat upon the Bench opening term October, 1916
11 Sutherland —Appointed—took seat upon the Bench on October 2, 1922