

ORIGINAL

In the

Supreme Court of the United States

WEBB'S FABULOUS PHARMACIES, INC.,)
ET AL.,)

APPELLANTS,)

v.)

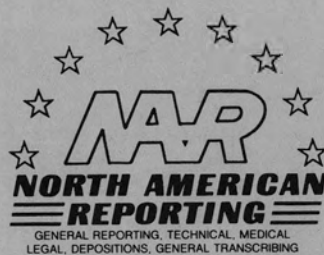
ARTHUR H. BECKWITH, JR., CLERK OF)
THE CIRCUIT COURT, ETC.,)

APPELLEES.)

No. 79-1033

Washington, D.C.
October 14-15, 1980

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - :
3 WEBB'S FABULOUS PHARMACIES, INC., :
4 ET AL., :

5 Appellants, :

6 v. :

No. 79-1033

7 ARTHUR H. BECKWITH, JR., CLERK :
8 OF THE CIRCUIT COURT, ETC., :

9 Appellees. :
10 - - - - - :

11 Washington, D. C.

12 Tuesday-Wednesday, October 14-15,
13 1980

14 The above-entitled matter came on for oral argument
15 at 2:22 o'clock p.m., Tuesday, October 14.

16 BEFORE:

- 17 HON. WARREN E. BURGER, Chief Justice of the United States
- 18 HON. WILLIAM J. BRENNAN, JR., Associate Justice
- 19 HON. POTTER STEWART, Associate Justice
- 20 HON. BYRON R. WHITE, Associate Justice
- 21 HON. THURGOOD MARSHALL, Associate Justice
- 22 HON. HARRY A. BLACKMUN, Associate Justice
- 23 HON. LEWIS F. POWELL, JR., Associate Justice
- 24 HON. WILLIAM H. REHNQUIST, Associate Justice
- 25 HON. JOHN PAUL STEVENS, Associate Justice

26 APPEARANCES:

27 HARVEY M. ALPER, ESQ., Massey & Alper, P.A., 165 Whooping
28 Loop, Altamonte Springs, Florida 32701; on behalf of
29 the Appellants.

30 HARRY A. STEWART, ESQ., 201 Southeast Sixth Street, Fort
31 Lauderdale, Florida 33301; on behalf of the Appellees.

C O N T E N T S

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MILLERS FALLS
EZERASE
COTTON CONTENT

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: We'll hear arguments next
3 in Webb's Fabulous Pharmacies v. Beckwith.

4 I think you may proceed now whenever you're ready,
5 Mr. Alper.

6 ORAL ARGUMENT OF HARVEY M. ALPER

7 ON BEHALF OF THE APPELLANTS

8 MR. ALPER: Mr. Chief Justice, and may it please the
9 Court:

10 The question presented on this appeal is whether or
11 not a state statute which purports to make all interest earned
12 on certain court registry monies, public monies in an ultimate
13 sense, violates the Fifth and Fourteenth Amendments to the
14 Constitution of the United States as well as Article IV,
15 Section 4, thereof.

16 QUESTION: We have a very narrow question, then, here
17 today and, from your point of view, a very simple one.

18 MR. ALPER: Yes, sir, I think so. I think this is a
19 basic property question which could be boiled down in a very
20 few words, Mr. Chief Justice, to a question as follows:

21 is interest earned on monies held by a court property in a con-
22 stitutionally protected sense within the parameters of the
23 Federal Constitution?

24 QUESTION: Well, haven't we held for a long time
25 that the republican form of government version in the

1 Constitution is a political one and not capable of judicial
2 enforcement?

3 MR. ALPER: Mr. Justice Rehnquist, this Court has so
4 held for a long time. I don't believe that this case will
5 either rise or fall on that particular question, but insofar
6 as Article IV, Section 4 is pertinent to this case, we would
7 ask the Court to consider receding from its position that the
8 Article IV, Section 4 provision is political and give it some
9 judicial life in situations where it may be merited.

10 QUESTION: Was the constitutional issue raised in
11 the trial court?

12 MR. ALPER: We believe it was and we believe that the
13 record will so reflect. There were due process and equal pro-
14 tection arguments made. There was a claim that this statute
15 created a taking without due process of law. Mr. Justice
16 Blackmun?

17 QUESTION: All the Court speaks of is just plain
18 constitutionality, and -- as I read your appendix and jurisdic-
19 tional statement. But in any event, it was raised in the
20 Supreme Court of Florida, was it not?

21 MR. ALPER: Yes, Mr. Justice Blackmun, indeed it was.
22 The facts of the case, if I may deal with them for a moment,
23 are these.

24 Approximately four years ago a pharmaceutical firm
25 in Seminole County, Florida, which is just north of Orlando,

1 found itself in grave financial difficulties. That firm was
2 Webb's Fabulous Pharmacies. Webb's attempted to find a way out
3 other than bankruptcy and towards such end it entered into an
4 agreement with Eckerd's of College Park, a larger, hopefully
5 more solvent firm, for the purchase of the assets of Webb's
6 Fabulous Pharmacies by Eckerd's.

7 That step, that sale, was to be effective pursuant to
8 provisions of the Uniform Commercial Code and in particular
9 Chapter 676.6106, the bulk sales provision of the Uniform
10 Commercial Code. The bulk sales provision as adopted in
11 Florida contains certain optional language, and that optional
12 language as adopted in Florida provides that in the event of a
13 bulk sale, if the claims of creditors appear to exceed the
14 purchase price -- which was in fact the case here -- the pur-
15 chaser may interplead, pay into court the purchase price, and
16 in so doing, if an interpleader action is taken and if inter-
17 pleader is permitted, the statute provides the bulk sales
18 statute.

19 QUESTION: But would it make any difference what kind
20 of a lawsuit was involved if there's a deposit in the registry
21 of the court?

22 MR. ALPER: I think not, but as to this particular
23 case, I think it makes the Appellant's case stronger, because
24 the Uniform Commercial Code, Mr. Chief Justice, provides that
25 if an interpleader is taken, the money "shall be paid into the

1 registry of the court" on court order. Chapter 28, and in
2 particular the statute which we seek here to have held uncon-
3 stitutional, Florida Statute 28.33, directs that the clerk of
4 the court may hold the money at interest. But interestingly
5 enough in the case before the Court today, prior to the time
6 that the money was paid into the registry of the court, as is
7 clearly revealed in the appendix, the trial court was aware of
8 the fact that the Clerk was asserting a claim to the interest
9 which would be earned, sizeable in light of the principal sum
10 being \$1.8 million, and consequently the trial judge specifi-
11 cally directed before the money was paid into the registry of
12 the court that he was reserving ruling on the question of whe-
13 ther or not the Clerk would be entitled to this interest.

14 We add, additionally, that in Florida, pursuant to
15 another statute, 28.24, the clerk received a fee of over
16 \$9,200 for holding this money.

17 QUESTION: You're not complaining about that?

18 MR. ALPER: We're not complaining about that, but we
19 believe that that leads to an incongruous result which is that
20 the Uniform Commercial Code which provides in its substance
21 that it exists for the protection of trade, and the Bulk Sales
22 Act, which provides that it exists for the protection of
23 creditors, creates a situation here where, when taken in con-
24 jundtion with Florida Statute 28.33, the creditors are actually
25 receiving less back from the court than was paid in, despite

1 the fact that in the year's time that the Clerk of the court
2 held this money prior to my appointment as Receiver, there was
3 approximately \$93,000 of interest earned on this money.

4 QUESTION: Could they have complied with this statute
5 by depositing in kind the equivalent amount in high yield
6 Government bonds?

7 MR. ALPER: Mr. Chief Justice, I believe that that
8 raises an extremely interesting question to which I don't know
9 the answer. Certainly if what had been paid into court were
10 something other than cash, it would seem that logic and good
11 sense would dictate that the accretions would follow the prin-
12 cipal.

13 In other words, if for some reason the court were
14 holding breeding livestock, if the court were holding coupon
15 bonds, something of that nature, it would seem inequitable for
16 the Clerk of the court to clip the bonds and go and collect
17 the interest and keep them for the account of the court.

18 We also believe that, even more egregious, the fact
19 of the matter is that ultimately this money is returned to the
20 general fund of the County. That isn't the matter in dispute.
21 That was conceded in the brief to the Supreme Court of Florida.

22 QUESTION: Well, you're getting something, though,
23 for this money that's being held, that is being taken by the
24 Clerk. You're getting a depositary that is probably absolutely
25 liable in the event of theft or negligent loss. At least I've

1 looked at a Florida case that would suggest that.

2 MR. ALPER: But, Mr. Justice Rehnquist, I would respect-
3 fully disagree with that conclusion. Florida has considered
4 that matter in three cases, Fitz v. Watson, Mordt v. Robinson,
5 and another which escapes me at this moment. And in those
6 three cases the court ruled, where in fact money had been
7 paid into the registry of the court and where in fact the
8 banks failed, that the loss of the principal as well as the
9 interest lay on the shoulders of those persons ultimately found
10 entitled to the principal sum.

11 QUESTION: And not on the County or the --

12 MR. ALPER: -- or the party paying the money in.
13 It's a law of Florida and as I understand it, it is the general
14 rule, Mr. Justice Blackmun, that when money is paid into court
15 as a matter of equity title passes at the time of payment from
16 the party paying money into the registry of the court, if he
17 asserts no claim thereto, automatically to the person ulti-
18 mately entitled to that fund even if that person cannot at the
19 time of payment be ascertained with certainty.

20 QUESTION: I won't burden you with any case citations
21 because I don't claim to be an authority on Florida law, but
22 the paragraph which I have found in Florida Jurisprudence, 2d,
23 says, "Court clerks are generally required by statute to
24 account for all money received by them as public officers.
25 It would appear therefore that such clerks are unconditionally

1 liable as insurers for the loss of money that comes into their
2 hands because the statutory duty to account is an absolute
3 one. Thus, an action may be brought against a court clerk
4 by a county in the event that a clerk unlawfully withholds
5 funds from it."

6 MR. ALPER: Mr. Justice Rehnquist, I am not familiar
7 with that citation from Florida Jurisprudence, but I have
8 cited in my brief three Florida Supreme Court decisions. They
9 are, Masser v. London Operating Company, Mordt v. Robinson,
10 and Fitz v. Watson.

11 QUESTION: Are they in your briefs?

12 MR. ALPER: Yes, sir.

13 QUESTION: Well, I don't know that you're so
14 much different. Those cases deal with loss, not by
15 the clerk but by somebody else. The bank failed.
16 He put them in the bank, but I would suppose
17 that if he himself lost it he would still be
18 absolutely liable.

19 MR. ALPER: I suppose, Mr. Justice White, that's
20 correct. But I am thinking that in a sense while
21 the money reposes in the court it is constructively
22 in the hands of the clerk. He is the one who is
23 responsible for those funds.

24 QUESTION: Well, what if the law didn't require an
25 investment of funds in the court's hands and the court didn't

1 invest?

2 MR. ALPER: I think that in that situation there
3 would be no claim to interest because none would have been
4 created.

5 QUESTION: What if the law didn't require an invest-
6 ment but the clerk did invest and earned interest? Then you
7 would be here making the same claim, would you not?

8 MR. ALPER: I believe that the argument could be
9 made, Mr. Justice, that if the investment were made in the
10 discretion of the clerk pursuant to a statute which provided
11 that the money be invested, there might be a slightly different
12 way of looking at the problem than we have here, where the
13 clerk was acting under court order, and we're saying that the
14 court's order would have to take precedence over the statute.

15 But more important than that is what we believe is
16 the ultimate issue, which is whether or not this interest con-
17 stitutes property in a federally protected sense.

18 QUESTION: Well, would you say that if an order
19 requires investment and he does invest, that you are not only
20 entitled to the interest but to the best interest the clerk
21 could have gotten?

22 MR. ALPER: I believe that the rules governing any
23 fiduciary relationship would apply to a clerk of the court.

24 QUESTION: Sort of a prudent man rule??

25 MR. ALTER: Yes, Mr. Justice.

1 QUESTION: So that if he went into high yield
2 governments, he'd be on pretty safe--

3 MR. ALPER: Well, Mr. Chief Justice, in Florida the
4 fact of the matter is that there are rules in other statutes which
5 have not been cited to the Court which govern the investment of
6 public money. And that is one of the problems in this case,
7 because the Florida Supreme Court declared that this was
8 "public money." The Florida Supreme Court declared, "There is
9 no unconstitutional taking because interest earned on the
10 Clerk of the Court's registry account is not private property."
11 It premised this on the fact, I believe, in my reading of the
12 decisions, that while the money was held by the government,
13 while it was held by the clerk as a representative of Florida
14 government, the character of that money changed from private
15 money to public money.

16 But it should be urged, I believe, that the individ-
17 ual claimants to this fund who at the time numbered somewhere
18 between 200 and 300, had no way of actually going down to the
19 courthouse and applying for their money and getting it promptly.
20 This was so because the validity of the claims was in dispute
21 as were the amounts of the claims. And ultimately there were
22 certain adversary actions taken -- this is outside the scope
23 of the record and I'll limit myself, except to say that it was
24 not possible for the claimants to then go to the courthouse
25 and get that which the stakeholder had said was theirs.

1 It also appears from the record that when the stake-
2 holder paid the money into court, Eckerd's of College Park, it
3 paid the money into court with interest, although it was not
4 required so to do.

5 If I may continue with my argument, this Court has
6 long ago stated a principle of basic equity law which we be-
7 lieve is totally applicable here. It was stated through
8 Mr. Justice Johnson in a case styled Himely v. Rose, where he
9 said that interest is to principal as fruit is to the tree.
10 And insofar as the federal courts have reviewed this particular
11 question, we believe that the preponderance of authority is
12 supportive of the position taken by the Receiver, and on behalf
13 of the creditors of Webb's Fabulous Pharmacies.

14 QUESTION: Well, there is a federal interpleader act.
15 Does that require that the money paid into court, that interest
16 be paid on it?

17 MR. ALPER: Mr. Justice Rehnquist, according to my
18 reading of it, it does not require it, but in at least three
19 circuits it has been held that it is altogether proper for
20 interest to be earned upon this money and if and when earned
21 the money should be paid over to the ultimate recipient of
22 the fund. And the authorities that I would cite to the Court
23 for that are, in the 5th Circuit, which is our circuit in
24 Florida, the case of Talcott v. Allahabad Bank, which was a
25 complex piece of federal litigation heard in Savannah, Georgia,

1 by a judge of the Court of Appeals. His decision, which in
2 part awarded interest -- although that was not the only issue
3 -- was subsequently appealed to the 5th Circuit. The 5th
4 Circuit affirmed saying that the award of interest was proper.

5 In another case styled Murphy v. Travelers Insurance
6 Company, the 5th Circuit applied the Texas rule because it was
7 subject to the laws of Texas and awarded interest. Those are
8 both cases from the early 1970s.

9 The 7th Circuit in a case styled Brooks v. Woodington
10 said that it was proper to award interest. And the 8th Circuit
11 did so in the case of Baxter v. United Forest Products. There
12 are also decisions cited in our briefs from many lower courts,
13 one out of the, I believe, the Western District of Missouri,
14 where the award of interest has been upheld.

15 QUESTION: Where the clerk has in fact invested --

16 MR. ALPER: -- and, Mr. Justice Rehnquist, where he
17 has done so because as in our case the court ordered that the
18 money be held at interest.

19 QUESTION: Well, but what if under a particular stat-
20 ute there was no requirement that the court or clerk invest it
21 and all you got back was the principal, would you make your
22 same constitutional arguments?

23 MR. ALPER: I don't think you'd have a claim for the
24 simple reason that no interest would have been created. I'm
25 not arguing here today that the rules applicable to

1 interpleader, the common law equity rules and the rules
2 governing the registry of the courts require that money be
3 invested at interest, but rather that when interest is earned,
4 that interest becomes the property of the ultimate owner of the
5 principal, it being a rule of equity and I believe a rule fol-
6 lowed by both the federal courts and the majority of state
7 courts that the interest follows the principal as a matter of
8 natural right as well as as a matter of law.

9 QUESTION: Well, is this a new rule in Florida?

10 MR. ALPER: I don't believe I understand the question,
11 Mr. Justice.

12 QUESTION: Well, had the Florida courts held to this
13 effect before?

14 MR. ALPER: There is no contrary case law that I can
15 find in the State of Florida. I believe that in effect this
16 was a case of first impression insofar as it related to inter-
17 est on private monies held in the court registry.

18 QUESTION: Well, who initiated the case and put the
19 money in the court?

20 MR. ALPER: The case was initiated by the purchaser
21 of the assets of Webb's Fabulous Pharmacies, Eckerd's of
22 College Park, which was a stakeholder. They paid the purchase
23 price into the registry of the court and then --

24 QUESTION: How did they know to do that? Had the
25 creditors --

1 MR. ALPER: Because the Uniform Commercial Code at
2 676.6106 provides for that procedure with specificity.

3 QUESTION: But how, under that Section -- is it per-
4 fectly clear to everybody -- the law doesn't require anybody to
5 go through this procedure, does it?

6 MR. ALPER: This is one way that a purchaser of busi-
7 ness assets, where the business, in effect, owes more than
8 it's receiving for its assets, one way where the purchaser can
9 obtain clear title.

10 QUESTION: It's one way also where the creditors can
11 be protected.

12 MR. ALPER: Yes, the purpose of the Bulk Sales Act
13 is to see the creditors get notice. A further purpose of --

14 QUESTION: Suppose this case -- suppose this decision
15 had been made by the Florida courts ten years ago, that it was
16 perfectly clear what the Florida law was. Receiver's monies
17 that earn money, or that earn interest, the interest belongs
18 to the public, belongs to the court. Suppose that had been the
19 question ruled before this case was ever started?

20 MR. ALPER: I would argue, Mr. Justice, that it is a
21 taking of property, to take interest, and if interest --

22 QUESTION: The statute does provide exactly what
23 Mr. Justice White suggests in his question, and how long has
24 the statute been on the books?

25 MR. ALPER: This statute was adopted in Florida

1 approximately in 1972 or '73.

2 QUESTION: So, for seven or eight years, this has
3 been the law of Florida, so far as the statutory law goes.

4 MR. ALPER: Yes, Mr. Justice. One of the things that
5 this statute says is that the clerk "may" deposit money in
6 interest-bearing accounts. The court has said --

7 QUESTION: But it further says that "all interest
8 accruing from monies deposited shall be deemed income of the
9 Office of the Clerk."

10 MR. ALPER: That's correct. But it says earlier on,
11 "Monies deposited in the registry of the Court shall be depos-
12 ited in interest-bearing certificates at the discretion of the
13 Clerk." In this case we believe --

14 QUESTION: Then it says, if he does do that, the
15 income shall be his, the court's, or the property of the County.

16 MR. ALPER: That's correct. In this case the court
17 acted even before the Clerk had an opportunity, telling the
18 Clerk in advance of receiving the first dollar, as the appen-
19 dix will reveal, a day before, that this money was going to be
20 held at interest and the court would determine later on whether
21 or not this interest would accrue to the benefit of the Clerk
22 or to the benefit of the court, and --

23 QUESTION: Was there some other device to accomplish
24 this protection for the purchaser and the protection of the
25 creditors?

1 MR. ALPER: Mr. Justice White, the County will be
2 arguing, I'm sure, in just a few moments that the other device
3 is me. I was appointed as receiver to hold this money for the
4 court and to obtain interest for the court as well as to make
5 distribution to the creditors. However, we think that that is
6 a little -- it strains reason, that the court can --

7 QUESTION: I know, but if you have two ways of doing,
8 performing, reaching some end, and one of them requires sacri-
9 ficing the interest and the other one doesn't, then you choose
10 the former. Are you going to say that the State is committing
11 a constitutional violation?

12 MR. ALPER: I believe that the State commits a consti-
13 tutional violation, and we are arguing in this case that the
14 State commits a constitutional violation where in the event
15 there is a crucial --

16 QUESTION: It says "will provide" -- and will pro-
17 vide this mechanism to perform this distribution, but the only
18 thing is that we're going to keep the interest.

19 MR. ALPER: In that situation we say that there is
20 an unconstitutional taking of property.

21 QUESTION: Even though you could have gone to a
22 title company or a bank and deposited the money with them? You
23 didn't have to deposit it in the registry of the Court in order
24 to --

25 QUESTION: It could even have been in federal

1 bankruptcy, I suppose.

2 MR. ALPER: Mr. Justice Rehnquist, Mr. Justice White,
3 the Uniform Commercial Code says, "the Court shall require the
4 consideration to be deposited into the registry of the Court,"
5 and that's at 676.106, Subsection 4.

6 QUESTION: If what? If what?

7 QUESTION: It's optional, isn't it?

8 MR. ALPER: That is an option with the interpleader who
9 is seeking to be discharged from the proceedings, a person,
10 the stakeholder, who has no further claim. But at this point
11 the identity of the claimants to the fund may or may not be
12 ascertained with certainty. They certainly are not in the
13 position to protect themselves.

14 QUESTION: So they didn't make any election? The
15 claimants didn't?

16 MR. ALPER: That's correct. The state courts, which
17 have considered this problem, have for the most part, we be-
18 lieve, found a constitutional problem to exist, a due process
19 problem, a problem of taking without compensation, a taxation
20 on the courts. The Texas case of Sellers v. Harris County
21 involved \$1 million being interpleaded into the local court in
22 Texas. There was a statute similar to the statute in Florida.
23 The Texas court said that the taking of interest was uncon-
24 scionable, that the County would profit enormously and unfairly
25 if the litigation lasted for more than a short period of time

1 -- half as much money being involved in Texas as was involved
2 in the case here -- and as a consequence of that, citing
3 Myles Salt, found there to be a Fourteenth Amendment violation.

4 In a similar case, McMillan v. Robeson County, the
5 North Carolina Supreme Court said that there were constitu-
6 tional problems, due process problems, where interest earned
7 on registry monies became property of the state without an
8 effort to give notice to the ultimate owners of those funds
9 that the money was there so that they could come into court
10 and "fortify themselves" with constitutional safeguards.

11 QUESTION: Well, doesn't your argument spill over
12 very largely into the probate field too, where there are fre-
13 quently funds temporarily held in the custody of the court?
14 Wouldn't it require radical revision of some of the probate
15 procedures in the various states?

16 MR. ALPER: I don't personally see it that way,
17 Mr. Justice Rehnquist. There may be great wisdom to what
18 you're saying. It reminds me, though, of a case which we've
19 cited in our brief, Malin v. LaMoure County, where the
20 probate fees in North Dakota were set to depend on how much
21 money was involved in the estate. And a constitutional argu-
22 ment was made that since the fees charged became very, very
23 large as the size of an estate went up, that this was a tax
24 upon access to the courts rather than a fee. And I think
25 that's what we have here. If you have a million dollars at

1 registry earning 10 percent, the tax could be \$100,000 a year;
2 \$2 million, it could be \$200,000 a year without any regard to
3 the benefit which the fund had received. And this is on top
4 of the fact that the Clerk has already received a fee under
5 28.24 for his services.

6 QUESTION: Now suppose that fee were not on the
7 statute, would your case be different?

8 MR. ALPER: I would still make the same argument.
9 If that fee were not in the statute, we would have a case
10 essentially on all fours with the Sellers case in Texas.
11 In Sellers there was no fee, and the appellate court, the
12 Supreme Court of Texas determined that the proper fashion in
13 which to avoid the constitutional issue, avoid a violation
14 of the Constitution and still treat the clerk fairly, was
15 merely to award the clerk a fair sum of money in consideration of
16 his efforts.

17 We would wish to reserve the balance of our time
18 for purposes of rebuttal, if we may.

19 QUESTION: Could I just ask you, do you think this --
20 a creditor could have put this seller into involuntary bank-
21 ruptcy?

22 MR. ALPER: This seller did go into involuntary
23 bankruptcy and through an arrangement with the Bankruptcy
24 Court which I don't entirely understand, there were essentially
25 two proceedings, one in the state court, one in the federal

1 court. We distributed the assets --

2 QUESTION: Well, how come the property then --
3 I thought that the Bankruptcy Court inherited the bankrupt's
4 property.

5 MR. ALPER: I did too, but there was an election made
6 in this case prior to my appointment to permit the state court
7 proceedings to continue to their conclusion.

8 QUESTION: Because if the trustee in bankruptcy took
9 over, then the bankruptcy rules would apply.

10 MR. ALPER: I would agree with you but that did not,
11 in fact, happen. There was a bankruptcy proceeding --

12 QUESTION: Did any creditor try to protect himself
13 from this Florida statute?

14 MR. ALPER: The creditors were the ones who origi-
15 nally raised this issue.

16 QUESTION: I know. I would think they would, but
17 they didn't attempt to avoid the application of this Texas
18 provision by precipitating a bankruptcy proceeding?

19 MR. ALPER: No. The bankruptcy proceeding, I believe,
20 was precipitated for different reasons with which I am not
21 familiar. Thank you.

22 MR. CHIEF JUSTICE BURGER: Mr. Stewart.

23 ORAL ARGUMENT OF HARRY A. STEWART

24 ON BEHALF OF THE APPELLEES

25 MR. STEWART: Mr. Chief Justice, and may it please
the Court:

1 The decision of the Florida Supreme
2 Court in this case basically did two things. The first thing
3 it did was it authorized the Clerk of the circuit court to
4 deposit monies that were deposited in the registry of the
5 court in interest-bearing accounts. The second thing --

6 QUESTION: Wouldn't it have satisfied the statute if
7 they had deposited the equivalent amount in high yield govern-
8 ment, United States Government bonds?

9 MR. STEWART: Florida law authorizes that; yes.

10 QUESTION: Then what would the Clerk be doing to
11 earn all this interest for himself?

12 MR. STEWART: I don't understand the question.

13 QUESTION: Well, the Clerk gets quite a large fee
14 under this Florida Supreme Court decision, or he gets a yield,
15 a return for holding this money. Now, if they had deposited
16 that amount in government bonds, all he would have had to do
17 was put it in a safe deposit box in the best bank and once in a
18 while go down and cut coupons. Isn't that right?

19 MR. STEWART: That's correct. However, this is not
20 money that necessarily goes to the Clerk, according to the --

21 QUESTION: No, not to the Clerk, but it goes to --
22 it doesn't go to the creditors or the principals involved in
23 the transaction, does it?

24 MR. STEWART: No, sir, it does not. And the Florida
25 Supreme Court specifically found the second part of the statute

1 that created the interest, that gave the Clerk the authority,
2 which he did not have before and could not invest without such
3 authority, once they gave him that authority, the second part
4 of that statute dictated the disposition of the funds, the
5 interest that was earned.

6 That, and as I will point out later on, is another
7 rule applied in this Court in the Arnett decision which is
8 cited in the brief, which says that one cannot challenge the
9 constitutionality of an important part of the act while claim-
10 ing rights and benefits under the same act. And that's exactly
11 what's being done here.

12 The appellant in this case is asking that the Clerk
13 be allowed to put the interest in, just like the Act says
14 and without the Act he couldn't put it in. But he is saying
15 that the disposition that the Florida Legislature made of the
16 funds when they authorized such deposit is unconstitutional.
17 But the Court noted that it was the statute itself that created
18 the authority and it also outlined the method of disposition.

19 The Court found as a matter of law in Florida that
20 these funds are considered public funds and they are not pri-
21 vate funds.

22 QUESTION: Well, that's the issue in the case, isn't
23 it?

24 MR. STEWART: That's precisely the issue.

25 QUESTION: This is -- by giving it a name the Court

1 can't make it so, can it?

2 MR. STEWART: No, sir.

3 QUESTION: Well, suppose the statute said that in a
4 proceeding of this type the money held shall be deemed to be
5 held by the individual, shall be deemed to be public money and
6 the interest shall be paid to the County? Would that be your
7 idea of due process?

8 MR. STEWART: Mr. Justice Marshall, I believe that
9 the due process as you are outlining it is going to have to
10 have some property attached to it before you can apply the
11 Fifth and the Fourteenth Amendments, and what I'm suggesting
12 is that the Receiver and Appellant in this case is begging the
13 question. He is saying, first, I have property and I've been
14 deprived of it --

15 QUESTION: Well, may I say you are begging the ques-
16 tion in answering my question.

17 MR. STEWART: I'm suggesting, Your Honor, that you
18 have got to come to the conclusion that it is property to begin
19 with, and that's what this statute says, that it is not private
20 property.

21 QUESTION: Well, I think \$1.8 million could be con-
22 sidered property. Don't you agree?

23 MR. STEWART: Yes, sir, I certainly do.

24 QUESTION: That's what I'm talking about, that in a
25 proceeding of this type the holder of the \$1.8 million shall be

1 from this moment on holding government money, public money,
2 the interest of which shall be paid to the government. Would
3 that be due process?

4 MR. STEWART: Yes, sir, I believe it would, because you
5 are creating the very --

6 QUESTION: If that's due process, then you win.

7 MR. STEWART: You are creating the property which you
8 are ultimately disposing of. The \$1.8 million is not in ques-
9 tion, it's the interest earned on that property. The \$1.8
10 million was paid back out. In fact, it's important to note
11 that the statutory scheme in Florida was that the money be
12 deposited in the registry of the court, the Clerk would earn
13 interest on those monies, those monies became public monies --
14 the interest only.

15 The court, after one year, when it went in, the
16 court knew of the Clerk's claim. After one year that money
17 came out of the registry of the court and went into the hands
18 of the Receiver and was invested wherever he invested it.

19 QUESTION: How does the interest become public money?

20 MR. STEWART: Because Florida law --

21 QUESTION: Oh, because Florida law says so.

22 MR. STEWART: -- defines property. And you've got to
23 look to some manifestation of enactment of a state legislature
24 to determine what your property rights are. Florida law said,
25 when you turn money over to the clerk of the circuit court,

1 he is ultimately responsible for that money. That money be-
2 comes public money. They authorize interest to earned on that
3 money and the interest accrues to the benefit of all the people
4 of Florida. That's Florida law.

5 QUESTION: What if they said that the principal also
6 accrues to the benefit of all the people of Florida? Would
7 that be consistent with the Takings Clause?

8 MR. STEWART: No. That would -- well --

9 QUESTION: You said it was property.

10 MR. STEWART: I don't think there's any question that
11 the money going in is property; it is something that the person
12 has a right to, they're turning it over to the court. They
13 have a right to get it back, but they have no right, no uni-
14 lateral expectation to earn interest. There's no common law
15 right to earn interest on monies, otherwise every lawyer in the
16 United States would have a very serious problem with his trust
17 fund, if his client came in and demanded interest. There's no
18 statutory requirement that they pay interest on trust fund
19 monies. There's no authority for the clerk to invest those
20 monies and earn interest in the State of Florida unless he has
21 ~~has~~ statutory authority, which the statute gives him and
22 at the same time says where the interest goes, and character-
23 izes that interest as public monies.

24 QUESTION: Let me pursue that, then. If a client
25 deposits some money with a lawyer and he puts it in an account,

1 a savings account, instead of just a non-interest checking
2 account, whose property is the interest on that account?
3 Does it belong to the lawyer or the client?

4 MR. STEWART: Those monies -- under Florida law
5 you may not do that. He has misappropriated that money and
6 can be held liable.

7 QUESTION: If he puts it in the savings account
8 as a trust account?

9 MR. STEWART: Unless he pays the interest of that
10 money.

11 QUESTION: To whom?

12 MR. STEWART: To the owner of the principal.

13 QUESTION: Yes. Well, then -- but you don't apply
14 that proposition of law here?

15 MR. STEWART: But there is no statutory authority for
16 him to invest those funds. In fact, he's precluded from doing
17 so. But if he does, he has misappropriated that money unless
18 that money, the interest earned, goes to the owner of the
19 principal. But that's under Florida law. I want to point out,
20 again, that it's very important that you've got to look to the
21 enactment of the state legislature to define what property is
22 here. And the Florida Legislature has said that interest
23 earned on monies in the registry of the Court is not private
24 monies but public monies. This --

25 QUESTION: Did Florida law require that this money be

1 paid into the registry of the court in order for the sale
2 which the parties contemplated to be completed? Or could they
3 have gone about it another way?

4 MR. STEWART: They not only could have gone about it
5 another way, after one year they did go about it another way.
6 They took the money out of the registry of the court and turned
7 it over to the Receiver who invested the money, at the direc-
8 tion of the court, and the interest earned for the next several
9 years became property of the ultimate owners of the principal.
10 But if the Court utilizes the statutory vehicle which is pro-
11 vided to earn interest on that money through the clerk of the
12 court, then they've got to use the statutory vehicle that that
13 same statute requires for the disposition of the interest
14 earned.

15 QUESTION: But you also want the other fee too?

16 MR. STEWART: Excuse me?

17 QUESTION: You also want the \$9,500 fee too? \$9,200?

18 MR. STEWART: Yes, sir, that's an entirely different
19 fee for the setting up of the account and for the disposition
20 of the case itself. That's a separate fee. In this case, as
21 I pointed out, the Clerk is absolutely liable for mishandling
22 of the funds. The greater the amount of the funds that he han-
23 dles, the more liability he incurs.

24 QUESTION: Well, the greater the amount of the funds
25 he handles, the greater the amount of the other statutory fee

1 also.

2 MR. STEWART: That's correct. That's under Florida
3 law.

4 MR. CHIEF JUSTICE BURGER: We will resume there at
5 10 o'clock tomorrow morning, counsel.

6 (Whereupon the case was recessed until October 15, 1980.)

7 MR. CHIEF JUSTICE BURGER: We will resume arguments
8 in No. 79-1033, Webb's Fabulous Pharmacies v. Beckwith.

9 You may proceed whenever you are ready, counsel.

10 MR. STEWART: Mr. Chief Justice, and may it please
11 the Court:

12 The case before this Court that we started yesterday
13 presents a very simple question. That question, is interest
14 earned on money in the registry of the court in the State of
15 Florida private property which can be afforded the protections
16 of the Fifth and Fourteenth Amendments to the United States
17 Constitution?

18 Construing Florida law, the Florida Supreme Court
19 said, no, that it is not private property, that it is in fact
20 public monies, referring to the interest. There is no common
21 law right to earn interest on monies. If you earn interest on
22 money, you've got to look to a statutory right or a contractual
23 right. The general rule is that if interest is earned, it will
24 follow the principal unless otherwise provided. Florida pro-
25 vides otherwise.

1 The statutory scheme in Florida says that the
2 government will benefit from that interest and it will go to
3 the benefit of all the people. That statutory scheme does not
4 interfere with the judiciary in any way. It does not present
5 any anti-republican problems for this Court to be considering.

6 In the jurisdictional brief that I presented to this
7 Court, I represented that that particular argument raised by
8 appellant, that it violates the separation of powers, was not
9 properly raised before the Florida Supreme Court. The question
10 must be specifically raised and stated with specificity.

11 The question before the Florida Supreme Court and the one that
12 they answered in paragraph 5 of their opinion stated that the
13 separation of powers doctrine was not violated as it applied
14 to the Florida Constitution.

15 The allegations made were that the separation of
16 powers was violated according to the Florida Constitution and
17 other similar provisions. That does not meet the rule for
18 bringing to this Court a question of whether or not it violates
19 the United States Constitution.

20 The cases in that area, however, all talk about one
21 branch of government usurping or invading the powers of
22 another branch. That's not what happened in this case. The
23 law in this case says that the money is in the registry of
24 the court, it earns interest, and that interest goes to the
25 County.

1 The court in that case attempted to utilize that
2 statutory provision by picking and choosing those parts that
3 it liked and ignoring the parts that it didn't like. If there
4 were any usurpation here, it was by the judiciary and not by
5 the legislature. The court finally exercised its inherent
6 power, took the money out of the registry of the court, put
7 it in the hands of the Receiver, where then the interest on
8 the money, on the principal that was put into the registry of
9 the court in this interpleader action, went to those people
10 who were ultimately decided to be the owners of the principal.

11 QUESTION: I think I put a question to either you or
12 your friend yesterday. I'd like to go back to that. Suppose
13 they had put, deposited physically high yield government bonds
14 paying 8, 9, 10 percent and there were no services that needed
15 to be performed, no investment of the property, just a matter
16 of keeping them in a secure place, the Florida statute would
17 operate on the coupons that were clipped?

18 MR. STEWART: No, sir, it would not. It applies only
19 to monies, and it specifically says, monies. If it were held
20 in custody, simply the bonds, the physical bonds themselves,
21 whatever coupons would accrue or interest would accrue would go
22 with the bonds. But if money is deposited and the statute
23 specifically speaks to money, then interest earned on that
24 money must go to the County, or accrue to the benefit of the
25 clerk and pass it through to the county.

1 QUESTION: Mr. Stewart, your opponent here sues here
2 on behalf of the Receiver for the creditors, does he not?

3 MR. STEWART: Yes, sir, Mr. Justice Rehnquist.
4 In fact, my opponent here is the Receiver.

5 QUESTION: He is the Receiver. And under Florida
6 law does his fee for services as Receiver come off the top, so
7 to speak, regardless of whether the creditors are paid in full
8 or not?

9 MR. STEWART: That's my understanding of the law;
10 yes, sir. The problem in this case was, as I pointed out, the
11 court attempted to utilize a statutory vehicle selectively.
12 The court had the power, the inherent power all the time to
13 put the money with the Receiver and earn interest for the
14 benefit of the creditors. If equity demands it -- and in this
15 case it probably did, but it was the judge who didn't take
16 action until one year after the monies had been in the registry
17 of the court -- if equity demanded that interest be earned on
18 as huge a sum of money as this was, \$1.8 million, that judge
19 should have at that time not left the money in the registry of
20 the court but ordered that money in the hands of a receiver to
21 earn interest for the beneficiaries, for the creditors.

22 The question basically is, what constitutes property
23 rights? This Court in 1945 in the case of United States v.
24 Willow River Power Corporation indicated that not all economic
25 interests are property rights. Only those economic advantages

1 are rights which are backed by law. The case most often cited
2 for the rationale for determining property rights which are
3 properly protected by the Fifth and the Fourteenth Amendments
4 is the case of Board of Regents v. Roth. This Court said that
5 property interests are not created by the Constitution, rather
6 they are created and their dimensions are defined by existing
7 rules or understandings that stem from an independent source,
8 such as state law.

9 In this regard I would suggest that appellants'
10 brief and the argument before this Court is more important for
11 what it does not say than for what it does say.

12 QUESTION: Do you think a state may simply define
13 property in any way it wants to free of any inhibitions of the
14 Federal Constitution?

15 MR. STEWART: No, sir, I don't believe that's the
16 case. But I believe in a case where you have absolutely no
17 common law rights, where you must look to a statutory right,
18 or a contractual right, that that would be the case. Unless
19 there was a common law right to property that you can show,
20 then you must look to the statutory rights which would be
21 created by the state legislature or some contractual right.

22 Receiver does not say that there was a common law
23 right to interest because there is no common law right to
24 interest. He does not point to a federal statute which allows
25 him interest or gives him a right to interest, because there

1 is no such statute.

2 QUESTION: No, but here there was interest, that's
3 the point.

4 MR. STEWART: Yes, sir. Yes, there certainly was.

5 QUESTION: There was in fact interest even though he --
6 perhaps the Clerk of the court was not under any duty to invest
7 the monies in a way that would create interest, but here he
8 did.

9 MR. STEWART: Yes, sir, he did.

10 QUESTION: So we're really talking about to whom does
11 that interest constitutionally belong, when in fact there was
12 interest.

13 MR. STEWART: Yes, sir, there was. \$92,000 worth.
14 That sum now is in excess of \$100,000 because the interest --

15 QUESTION: In state law, the state legislature can't
16 just by calling something public money take private property
17 without compensation for it. He couldn't just take somebody's
18 house in Florida and say, hereafter John Jones' house will be
19 public property. He's just got to pay John Jones if he wants
20 to take it, under the Constitution.

21 MR. STEWART: Mr. Justice Stewart, I agree with that
22 wholly, that they may not do that. In this case they did not
23 do that.

24 QUESTION: No, but it doesn't really answer the
25 problem here to say, well, this is public property, does it?

1 Under federal law?

2 MR. STEWART: What we're looking for is a definition
3 of property and we're going to have to go to the cases where
4 this Court has construed that definition of property.
5 If I own a home, I have a common law right. There
6 is a right.

7 QUESTION: Well, if I own money I have a common law
8 right to keep it.

9 MR. STEWART: That's correct. You have no common
10 law right to earn interest on that money, to have interest
11 paid on that money. You have a statutory right and a contrac-
12 tual right.

13 QUESTION: But don't I have a common law right to
14 keep that money if I get it?

15 MR. STEWART: Yes, sir, you do; yes, sir.

16 QUESTION: Well, here he didn't get the money.

17 MR. STEWART: Well, that's not the question here. The
18 question is, did the person that had the money --

19 QUESTION: Didn't you say yesterday that the state
20 can say that that whole \$1.8 million, the state can take that
21 if they want it?

22 MR. STEWART: No, sir, I did not say that.

23 QUESTION: Well, you said it was public property.

24 MR. STEWART: I said that the state could not take
25 that without paying just compensation for it because that is --

1 QUESTION: Well, how could he take the interest?

2 MR. STEWART: Because there is no right to earn
3 interest. The statute created the interest.

4 QUESTION: The statute created the interest?

5 MR. STEWART: The statute created the vehicle through
6 which the interest was earned. Without the statute --

7 QUESTION: And the vehicle was the taking of the
8 property, the \$1.8 million.

9 MR. STEWART: No, sir, that was an alternative that
10 was exercised --

11 QUESTION: Who owned that \$1.8 million during the
12 time?

13 MR. STEWART: Eckerd of College Park, who was pur-
14 chasing Webb's Fabulous Pharmacies.

15 QUESTION: And when it was put in the registry of
16 the bank, it became state property.

17 MR. STEWART: That was an option that they had, to put
18 it in the registry of the court in interpleader, which they did.

19 QUESTION: My question was, it became state property?

20 MR. STEWART: Yes, sir, according to Florida Statute
21 that became --

22 QUESTION: Could the state take it?

23 MR. STEWART: No, sir, not without just compensation.

24 QUESTION: Well, what other state property can the
25 state not take?

1 MR. STEWART: Real property, sir. Any property in
2 which you have a statutory right, any real property or any
3 property defined by Congress.

4 QUESTION: Well, but then it's not really the state's
5 property to do what it wants with it, is it? Is it?

6 MR. STEWART: The question here -- no, sir.

7 QUESTION: But it can do one thing, it can take the
8 interest.

9 MR. STEWART: It can invest that money. The Clerk
10 could not invest that money without statutory authority. We're
11 talking about interest that was earned that may not otherwise
12 be earned.

13 QUESTION: Well, could the state have said that you
14 could do it? That you could collect the interest on that
15 property and keep it?

16 MR. STEWART: That I could do it?

17 QUESTION: Yes, sir.

18 MR. STEWART: Well, the state doesn't say that. It
19 says that if you are using the registry of the court, if you
20 are using a public official, when you give that public official
21 money, then you are utilizing that state public official and
22 that that money becomes public money and he is responsible for
23 that money.

24 QUESTION: And you paid \$9,000 for that.

25 MR. STEWART: That's not necessarily so.

1 QUESTION: No?

2 MR. STEWART: That is a fee that you must pay, yes.

3 QUESTION: That's right. And in addition to that
4 you -- I hate to use the word -- confiscate the interest.

5 MR. STEWART: Absolutely not. That's not a proper
6 word at all.

7 QUESTION: Well, what do, is "cheat"?

8 MR. STEWART: No, sir, that's not a proper charac-
9 terization either. A proper characterization is --

10 QUESTION: Well, "take." Is "take" a good word?

11 MR. STEWART: The property was not taken.

12 QUESTION: The interest wasn't taken?

13 MR. STEWART: The interest was decided by the
14 Florida Supreme Court to be public money.

15 QUESTION: Wasn't the interest taken?

16 MR. STEWART: The money was put into the registry of
17 the Court, Justice Marshall, by Eckerd Pharmacy. That was an
18 option they had. The money could have been handled by the
19 Bankruptcy Court; the money could have been handled by the
20 Receiver initially, in which the rules of the court would
21 apply -- in the former the rules of bankruptcy would apply.
22 They opted for this particular remedy and when they do they
23 must follow the statutory requirements in order to exercise
24 their right under that remedy.

25 QUESTION: May I ask you a question about the

1 statutory requirements?

2 MR. STEWART: Yes, sir.

3 QUESTION: As I understand it, it's the statute in
4 Appendix B to your opponent's brief, Investment Accounting
5 Funds - 28.33, which provides that the clerk shall make an
6 estimate of his projected financial needs and shall invest
7 funds in designated depositories. Now, as I understand it,
8 the funds described in that statute include those funds that
9 a private party deposits with the Clerk. Does it therefore
10 mean that the Clerk could use those funds for the general
11 purposes of the County? Because they come within the statu-
12 tory description of all funds subject to his control, which
13 are to be invested in a particular way?

14 MR. STEWART: No sir, he may not.

15 QUESTION: Why not? What's to prohibit that?

16 MR. STEWART: The funds are put in, into the regis-
17 try the court has.

18 QUESTION: More specifically, could he commingle
19 those funds with county funds? And if not, why not?

20 MR. STEWART: He cannot commingle them with county
21 funds which may be spent for general county purposes --

22 QUESTION: Why not?

23 MR. STEWART: -- because the statute specifically
24 requires that these be kept in a separate fund, but that they
25 be invested. Then, at the end of every year, at the end of

1 every calendar year --

2 QUESTION: This statute doesn't require separate
3 accounting for deposited funds.

4 MR. STEWART: No. Others do.

5 QUESTION: So there are more statutes that control
6 this case than the one in the --

7 MR. STEWART: Yes, sir.

8 QUESTION: I see. Could the Clerk make any use of
9 the money that's deposited with him, other than to earn
10 interest by it, by its deposit?

11 MR. STEWART: No, sir.

12 QUESTION: Could he pledge it or anything like that?

13 MR. STEWART: No, sir.

14 QUESTION: But he can make one use of the private
15 parties' funds?

16 MR. STEWART: That's correct. I'd like to point out
17 to the Court that a number of cases have been cited for the
18 proposition that interest should go to the successful litigant.
19 I would suggest to this Court that they fall into two cate-
20 gories. One is that there is no state or federal statute in-
21 volved, and in that case, and in every case cited where they
22 fall into that category, the courts followed the general rule,
23 that is the interest followed the principal. That's in the
24 absence of a state or federal statute.

25 And in all of the other cases, every case

1 cited, the state statutory scheme was followed. That was
2 the other category; it was where the cases fall where there is
3 a statutory scheme. For instance, in the case of Sellers v.
4 Harris cited by Appellant, the Supreme Court in that case
5 looked at two articles in the State of Texas. One was a
6 general -- characterized and I quote, "General Statute on
7 Public Monies." The other was a comprehensive -- I quote
8 again -- characterized by the court as a "comprehensive statute"
9 for handling trust funds. The court in that case decided
10 that these monies are trust funds and applied the proper
11 statutory scheme to them.

12 In the other cases -- and, for instance, Metropolitan
13 Water District of Southern California v. Adams, in that case
14 the interest didn't go to the successful litigant. The in-
15 terest went to the depositor of the original funds. That case
16 -- if that case were followed, the person, the proper party to
17 get the interest would be Eckerd's, not the Receiver. Because
18 what happened there, it was a condemnation case. The Water
19 District put money into the registry. The successful litigants
20 were those people whose properties were taken; they took their
21 money out. While it was there it earned interest. It didn't
22 go to the property owners. It went back to the Water District.
23 That was the court's version in Metropolitan Water District.

24 And the other cases are the same. The court found
25 a statutory scheme to follow and they followed such a scheme.

1 Appellant has shown what the federal courts have
2 done in the absence of a general statute. He has cited various
3 states to show how the states handle the same problem. It be-
4 comes painfully obvious that state statutory schemes vary
5 quite broadly, just as property rights vary from state to state.
6 Water right, for instance, in Texas, are -- almost --

7 QUESTION: Counsel, do you happen to know, because
8 I don't find in the briefs, the citation of the Florida
9 statute that requires the clerk to keep these funds separate?

10 MR. STEWART: No, sir, right off hand I do not.

11 QUESTION: It's not cited in the briefs or the
12 opinion of the court.

13 MR. STEWART: No, sir. At the time that was really
14 not a question. The question was --that we have addressed, I
15 believe, exhaustively -- is whether it is property or not,
16 to make that determination. I believe that's the key here.

17 But again, property rights in the various states vary
18 widely. For instance, as I pointed out, water rights in Texas
19 are almost diametrically opposed to the same right in Florida.

20 Appellant wasn't in a Texas court, he wasn't in a
21 California court, he wasn't in an Oregon court, he was in the
22 Supreme Court of Florida, and that court characterized the
23 money under Florida law as public money.

24 QUESTION: But if he had had a million dollars, in
25 whatever of the 50 states he was, a state court couldn't

1 conclusively characterize it as public money, could it?

2 MR. STEWART: No, sir.

3 QUESTION: There comes a point at which it is pro-
4 perty whether the state court says it's property or not.

5 MR. STEWART: The problem with this case is that
6 this is pre-judgment. There's no determination as yet by the
7 court as to who owns the money. So the money when its goes
8 into the registry of the court in that instance is pre-judgment.
9 All of the cases that say that interest goes to the owner
10 of the fund, they are post-judgments, where the principal has
11 been determined and the court is holding it for the owner.

12 In those cases interest --

13 QUESTION: The one thing that's clear is that it's
14 not owned by the Clerk of the court, isn't it? That much
15 is clear.

16 MR. STEWART: I'm sorry, I didn't hear.

17 QUESTION: The one thing that is clear is the money
18 is not owned by the County.

19 MR. STEWART: That's correct. I would suggest that
20 this Court has said what constitutes property for purposes of
21 the Fifth and Fourteenth Amendments and the Court has said
22 that it's a matter for the states to determine. Florida has
23 characterized the money in question here as public and not
24 private, and therefore found no taking. This Court should
25 respect the right of the Florida Legislature and the Florida

1 Supreme Court to say what is property in Florida. Florida
2 law creates the property, the U.S. Constitution protects the
3 property, not vice versa. Thank you.

4 QUESTION: Mr. Stewart, before you sit down, I have
5 one little trouble with your statute. This is a sentence from
6 28.33: "Monies deposited in the registry of the court shall
7 be deposited in interest-bearing certificates." Now, if it
8 stopped there, there would be compulsion to make it productive.
9 But it goes on to say, "at the discretion of the clerk."

10 I think there were remarks made yesterday that there
11 was no obligation on the part of the Clerk to invest. What
12 do the words, "at the discretion of the clerk," modify?
13 I would have thought on first reading that it meant that he
14 had discretion in the investments he selected and not in the
15 duty, whether to invest or not.

16 MR. STEWART: Mr. Justice Blackmun, that is my inter-
17 pretation and I believe the court's, the Supreme Court of
18 Florida's interpretation of that statute, that he shall invest
19 the money. The discretion is where he invests it. There are
20 a number of things under Florida law that allows him to invest
21 it in different types of securities, in bonds or --

22 QUESTION: In other words, there is a mandate to
23 invest and --

24 MR. STEWART: Yes, sir.

25 QUESTION: -- the discretion is as to the selection

1 of the investment?

2 MR. STEWART: Yes, sir. The modification --

3 QUESTION: I think there were remarks made yesterday,
4 perhaps by your opponent, that there was no duty to invest.

5 MR. STEWART: I believe you're correct.

6 QUESTION: Well, you told us that this morning.
7 You've told us that this morning, have you not, that there is
8 no duty on the Clerk to invest the monies that are paid into
9 the registry of the Court?

10 MR. STEWART: No, sir, I don't believe so.

11 QUESTION: Well, I misunderstood you, then.

12 QUESTION: But in any event your position now is
13 that he must invest?

14 MR. STEWART: The statute says he shall, and then
15 it's modified, with the modification I believe as to the clause
16 that follows, and that is where the monies get invested.

17 QUESTION: Okay. Maybe Mr. Alper will have something
18 else to say on that.

19 MR. CHIEF JUSTICE BURGER: Mr. Alper.

20 ORAL ARGUMENT OF HARVEY M. ALPER

21 ON BEHALF OF THE APPELLANTS -- REBUTTAL

22 MR. ALPER: Mr. Justice Blackmun, to respond to that
23 for a moment, looking at the decision of the Supreme Court of
24 Florida, the Florida Supreme Court said, "It is the statute
25 itself which gives the authority to the Clerk and outlines the

1 method of disposition." So I believe, insofar as the question
2 of whether there was a requirement or an option to investment,
3 that helps. I believe that the statute by plain reading
4 indicates that the Clerk may invest at interest but is not so
5 required. As far as the characterization --

6 QUESTION: I take it then, you are in disagreement
7 on this. Maybe it isn't very important, but I take it there
8 is no authoritative Florida decision?

9 MR. ALPER: To our knowledge, Mr. Justice Blackmun,
10 that is correct. I would also suggest to the Court that
11 special consideration be given to this statement by the Florida
12 Supreme Court: "These funds are considered 'public money'
13 from the time they are deposited in the general registry of
14 the court to the time they leave the account." I would point
15 out as well, that in condemnation cases in Florida,
16 Florida follows the rule set out in the case of Sarasota v.
17 Burch, that interest on condemnation monies follows the prin-
18 cipal.

19 QUESTION: Let me ask at this point, suppose these
20 were clearly county funds, wholly apart from Eckerd's and
21 Webb's and so forth. And the county had an excess of funds,
22 \$1 million. Must the clerk invest it? or not?

23 MR. ALPER: Mr. Justice Blackmun, I don't know, and
24 I have never been asked that question before. I would suggest
25 to the Court in closing that the situation here is analogous

1 to love and marriage. You can't have one without the other.
2 You can't have principal without interest, you can't have love
3 without marriage. It's true that you can have physical love
4 without the benefit of marriage and that you could have princi-
5 pal without benefit of interest, but if there's going to be a
6 marriage one has to have love to sustain it, and if there is
7 going to be interest one must own the principal to receive it.

8 QUESTION: Well, Mr. Alper, in your receivership
9 presumably there are monies invested with banks or in securi-
10 ties that will eventually bring some return over and above the
11 principal they started out with. Now, in the final account-
12 ing of the receivership, won't the accountant and the receiver
13 and the attorney be paid right off the top to the frequent,
14 not necessarily detriment, but so that the creditors may not
15 even receive their entire principal?

16 MR. ALPER: Mr. Justice Rehnquist, I have already
17 distributed to the creditors the bulk of the estate. My fee
18 was a small portion of the amount of interest which was earned
19 on it during the time that I held it, so that the creditors
20 benefited from the money being held outside the court in that
21 they received a portion of interest.

22 QUESTION: Isn't it possible, though, under Florida
23 receivership statutes or any other receivership statutes, that
24 a receiver, accountant, lawyer, anyone else who aids in the
25 costs of administration of a bankrupt estate or receivership

1 estate will get paid first so that the creditors get only a
2 portion of the principal and no interest, even though there
3 may have been interest earned?

4 MR. ALPER: Mr. Justice Rehnquist, that is possible.
5 I don't know that it is applicable to this particular case,
6 but it is indeed possible. Thank you.

7 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
8 The case is submitted.

9 (Whereupon, at 10:28 o'clock a.m., October 15, 1980,
10 the case in the above-entitled matter was submitted.)

MILLERS FALLS
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North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1033

Webb's Fabulous Pharmacies, Inc., et al

v

Arthur H. Beckwith, Jr., Clerk of
the Circuit Court, Etc.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: W. J. Wilson
William J. Wilson

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