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VOLUME 282

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1930

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TO AND INCLUDING FEBRUARY 25, 1931

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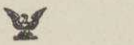

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

CHARLES EVANS HUGHES, Chief Justice.
OLIVER WENDELL HOLMES, Associate Justice.
WILLIS VAN DEVANTER, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.
PIERCE BUTLER, Associate Justice.
HARLAN FISKE STONE, Associate Justice.
OWEN J. ROBERTS, Associate Justice.

WILLIAM D. MITCHELL, Attorney General.
THOMAS D. THACHER, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
FRANK KEY GREEN, Marshal.

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

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

For the First Circuit, Oliver Wendell Holmes, Associate Justice.

For the Second Circuit, Harlan Fiske Stone, Associate Justice.

For the Third Circuit, Owen J. Roberts, Associate Justice.

For the Fourth Circuit, Charles Evans Hughes, Chief Justice.

For the Fifth Circuit, Louis Dembitz Brandeis, Associate Justice.

For the Sixth Circuit, James C. McReynolds, Associate Justice.

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

For the Eighth Circuit, Pierce Butler, Associate Justice.

For the Ninth Circuit, George Sutherland, Associate Justice.

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

June 2, 1930.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1930.

BEIDLER ET AL., EXECUTORS, *v.* SOUTH CAROLINA TAX COMMISSION.

ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 2. Argued October 22, 1928. Reargued October 23, 24, 1930.—Decided November 24, 1930.

1. A resident of Illinois died in that State owning a majority of the shares of a South Carolina corporation and also debts owed him by the corporation on unsecured open account partly for advances made by him to the corporation and partly for dividends previously declared on his shares. South Carolina, besides taxing the transfer of the shares, undertook to tax the transfer of the indebtedness, claiming this jurisdiction because of the local domicile of the debtor corporation and upon the ground that the indebtedness had acquired a "business situs" in South Carolina. *Held* that the South Carolina tax on the transfer of the indebtedness was void under the due process clause of the Fourteenth Amendment. Pp. 7 *et seq.*
2. It is now established that the mere fact that the debtor is domiciled within the State gives it no jurisdiction to impose an inheritance or succession tax upon the transfer of the debt from a decedent who is domiciled in another State. P. 7.
3. Open accounts fall within this principle. P. 8.
4. A conclusion that debts have acquired a situs for taxation other than at the domicile of their owner must have evidence to support

it, and it is the province of the Court to inquire whether there is such evidence when the inquiry is essential to the enforcement of a right suitably asserted under the Federal Constitution. P. 8.

5. The evidence in this case affords no adequate basis for a finding that the indebtedness had a business situs in South Carolina. It proves the existence of the debts and the facts that the decedent creditor was largely interested in the affairs of the corporation, but it shows nothing which derogates from the existence of the corporation as such, transacting its business as such, with corresponding rights and liabilities. P. 9.

6. The interests of a corporation in its property and of a shareholder of the corporation in his shares are distinct property interests. *Id.*

Reversed.

ERROR to a judgment of the Supreme Court of South Carolina, which sustained on appeal a transfer tax levied by the South Carolina Tax Commission on the transfer of credits belonging to a decedent's estate. The plaintiffs in error were the executors of the will.

Mr. P. F. Henderson, with whom *Mr. Arthur B. Schaffner* was on the brief, for plaintiffs in error.

The Supreme Court of South Carolina relied implicitly upon *Blackstone* v. *Miller,* 188 U. S. 189. But, since the date of the decision below, this Court, in a series of notable cases, has overruled *Blackstone* v. *Miller,* and established a new general rule. *Blodgett* v. *Silberman,* 277 U. S. 1; *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586.

Under the rule of *Blackstone* v. *Miller,* double inheritance taxation upon an intangible was possible in certain circumstances. Under the new rule, but one inheritance tax may be levied upon an intangible, and that only at the domicile of its owner.

We have here a mere open book account—the plainest type of intangible. There is not even a note, or a bond, or a security deed or mortgage, which might be kept in a third State to complicate the matter. Mr. Beidler kept

a complete set of books in Chicago, which alone were the controlling evidence of the debt.

The only taxable situs of the debt was in Illinois, in which State, the record shows, a large inheritance tax was levied and paid. To allow South Carolina now to levy a tax would be to visit another tax upon the same transfer, which, as we understand it, is contrary to the new rule.

It may be that intangibles may acquire a business situs justifying taxation away from the domicile of their owner. See Cooley on Taxation (4th ed.) § 466; *Adams* v. *Colonial Mortgage Co.,* 82 Miss. 263; *Reat* v. *People,* 201 Ill. 469; *Jamison* v. *Commonwealth,* 120 Va. 137; *Liverpool & L. & G. Ins. Co.* v. *Board of Assessors,* 221 U. S. 346; *New Orleans* v. *Stempel,* 175 U. S. 309. But here there can be no such pretense. No business of lending existed. Mr. Beidler owned a controlling interest in the corporation and advanced it money from time to time, which it repaid in part from time to time. At most, there was a series of separate credits,—not a business. *Liverpool & L. & G. Ins. Co.* v. *Board of Assessors,* 221 U. S. 346.

Further, it is a fact that these advances had practically ceased in 1920, more than three years before Beidler's death. If lending to a single debtor, and that one a company which he controlled, could in any event constitute the doing of business by him in South Carolina, that business had ceased long before his death.

The debt was really a liability of the company (to be deducted in considering the value of its stock) and not an asset; but if, as the court below seemed to think, the fact that Beidler's money was allowed to remain with the company increased the company's efficiency, and hence the value of Beidler's stock in some indefinite and unascertained manner and amount, then this fact would be reflected in the value of the stock in his hands when he died, and in the property tax assessed by South Carolina against the company.

Mr. J. Fraser Lyon, with whom *Mr. John M. Daniel,* Attorney General of South Carolina, was on the brief, for defendant in error.

The defendant in error resubmits for consideration the brief used on the first argument and asks the Court to reaffirm the rule laid down in *Blackstone* v. *Miller,* 188 U. S. 189, for the reasons found in the dissenting opinions in *Baldwin* v. *Missouri,* 281 U. S. 586. See also, *Liverpool & L. & G. Ins. Co.* v. *Board of Assessors,* 221 U. S. 346; *Maguire* v. *Trefry,* 253 U. S. 12; *Maxwell* v. *Bugbee,* 250 U. S. 525; *Bullen* v. *Wisconsin,* 240 U. S. 625; *Metropolitan L. Ins. Co.* v. *New Orleans,* 205 U. S. 395; *Baker* v. *Baker-Eccles Co.,* 242 U. S. 394.

Remedies for the collection of the debt in other States do not affect the right of South Carolina to tax. The executors do not have title to the debts until they have complied with the laws of South Carolina. *Dial* v. *Gary,* 14 S. C. 573; *Merchants Nat. Bank* v. *Tax Commission,* 121 S. E. 142.

The debt and the dividend owed by the company to the deceased were sufficient to give this State jurisdiction to appoint an administrator, who could lawfully have taken charge of the stock upon which the tax has been paid and enforced payment of the debt and the dividend in the courts of this State.

The coming into this State of the executors appointed by the Illinois court, exercising the rights and privileges accorded them by § 20 of the South Carolina Inheritance Tax Act, was tantamount to taking out ancillary letters in this State.

It is very serious to the State to have its power to tax diminished, especially when new and greater demands are being made by the public upon its treasury. The best minds are exercised to find sources from which revenues may be raised for schools, good roads, the care of the insane and the sick, and the innumerable other demands

upon a civilized State. Standing alone, such considerations should, perhaps, have no weight in interpreting the Constitution. But when such matters are very seriously pressing and there is a substantial doubt as to the State not having power in this respect, the doubt should be resolved in favor of the State to tax. Unless there is a clear and positive inhibition to exact this tax, it is urged that such a necessary and fundamental need of the State should not be denied.

It is said in *Baldwin* v. *Missouri,* 281 U. S. 586, that the succession takes place in the State of domicile. We suggest that no succession takes place until the property is reduced to possession in the State where located,—in the State the laws of which give vitality to the contract and will compel payment of the debt—the domicile of the debtor. *Wyman* v. *United States,* 109 U. S. 654; *Frick* v. *Pennsylvania,* 268 U. S. 473, 493.

The business situs of the debt and dividends is in South Carolina. The tax may be enforced in this State, the debtor may be compelled to pay here, and the proceeds of the debt may not be distributed until local creditors are satisfied in preference to others. The statute creates a lien upon this property to secure the payment of the tax. Illinois has no jurisdiction of the thing—the debt and the dividend—until the laws of South Carolina shall have been satisfied and the debt and dividend delivered to the executors for distribution under the will, which is given force and effect in South Carolina in accordance with the law of the State. Cf. *Frick* v. *Pennsylvania,* 268 U. S. 473, 497.

It is assumed that, if a business situs had been shown in Missouri, the decision in *Baldwin* v. *Missouri* would have been in favor of the State. Assuming this, the Court is requested to scrutinize the statement of the account appearing in the record.

If either South Carolina or Illinois should be denied the right to tax in this case, we urge that it is but fair and in

accordance with natural justice that this debt and dividend held, managed and controlled, and in part earned, in South Carolina, and given vitality and the power to enforce payment by her laws, should be required to contribute to the support of the government of this State, regardless of the domicile of the owner. Cf. *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, 92.

In assailing the constitutionality of a state statute, the burden rests upon the assailant to establish that it infringes the constitutional guarantee which he invokes. *Toombs* v. *Citizens Bank,* 281 U. S. 643; *Corporation Commission* v. *Lowe,* 281 U. S. 431.

Messrs. Seth T. Cole and *William Dale O'Brien,* by special leave of Court, filed a brief on behalf of the Tax Commission of the State of New York, as *amicus curiae.*

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

On March 4, 1924, Francis Beidler, a resident of Chicago, Ill., died in that State, leaving a will by which he bequeathed a portion of his personal property to his wife and children directly, and gave the residue in trust for their benefit and for charitable uses. The will was probated in Illinois, and Francis Beidler, II, and George Engelking, the appellants, qualified as executors.

At the time of the death of the testator, he owned 8,000 shares of the capital stock of Santee River Cypress Lumber Company, a corporation organized under the laws of South Carolina and doing business in that State. The remainder, 7,000 shares, were owned by the testator's wife and children. In addition, the Santee River Cypress Lumber Company was indebted to the testator in the sum of $556,864.22, for advances made by him to the company, and in the sum of $64,672 for dividends previously declared on his shares. The indebtedness was an open un-

secured account which was entered upon the books of the company kept in South Carolina. The testator also kept a complete set of personal books in Chicago upon which appear entries of the amounts due him by the company except the item of dividends.

The total amount of the indebtedness for advances and dividends, $621,536.22, was included by the Attorney General of Illinois in the computation of the value of the decedent's estate for the purpose of fixing the inheritance tax payable to that State.

The executors filed with the South Carolina Tax Commission, as required by the Inheritance Tax Law of South Carolina, an affidavit setting forth all the above-mentioned assets. The payment of the succession tax to the State of South Carolina with respect to the shares of stock owned by the testator in the Santee River Cypress Lumber Company was not contested by the executors, and by agreement the value of these shares was fixed at $204 per share, or $1,632,000. The South Carolina Tax Commission also levied a tax upon the transfer of the indebtedness, overruling the claim of the executors that the State of South Carolina had no jurisdiction to impose such a tax and that the levy of it would constitute a deprivation of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution. This contention was renewed upon the appeal of the executors to the Supreme Court of the State of South Carolina. That court sustained the action of the Tax Commission with respect to the taxability of the transfer of the indebtedness, and the executors bring this appeal to review that part of the judgment.

In reaching its conclusion as to the validity of the tax, the state court relied chiefly upon the decision of this Court in *Blackstone* v. *Miller,* 188 U. S. 189. That decision has been overruled, and it is now established that the mere fact that the debtor is domiciled within the State

does not give it jurisdiction to impose an inheritance or succession tax upon the transfer of the debt by a decedent who is domiciled in another State. *Farmers Loan & Trust Company* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586. The transfer is taxable by the State of the domicile of the deceased owner. *Blodgett* v. *Silberman,* 277 U. S. 1. Open accounts, including credits for cash deposited in bank, fall within this principle, and its application is not defeated by the mere presence of bonds or notes, or other evidences of debt, within a State other than that of the domicile of the owner. *Baldwin* v. *Missouri, supra.*

It is sought to sustain the tax by South Carolina upon the ground that the indebtedness had what is called a " business situs " in that State, and the state court adverted to this basis for the tax. In *Farmers Loan & Trust Company* v. *Minnesota, supra,* this Court reserved the question of business situs, saying: "*New Orleans* v. *Stempel,* 175 U. S. 309, *Bristol* v. *Washington County,* 177 U. S. 133, *Liverpool & L. & G. Ins. Co.* v. *Orleans Assessors,* 221 U. S. 346, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile." But a conclusion that debts have thus acquired a business situs must have evidence to support it, and it is our province to inquire whether there is such evidence when the inquiry is essential to the enforcement of a right suitably asserted under the Federal Constitution.[1]

[1] *Kansas City Southern Railway Co.* v. *Albers Commission Co.,* 223 U. S. 573, 591–593; *Creswill* v. *Knights of Pythias,* 225 U. S. 246, 261; *Northern Pacific Railway Co.* v. *North Dakota,* 236 U. S. 585, 593; *Ward* v. *Love County,* 253 U. S. 17, 22; *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Railroad Commission* v. *Eastern Texas R. R. Co.,* 264 U. S. 79,

In the present case, beyond the mere fact of stock ownership and the existence of the indebtedness, there is no evidence whatever, having any bearing upon the question, save a copy of the decedent's account with the corporation, taken from his books which were kept by him in his office at Chicago. The various items of debit and credit in this account, in the absence of any further evidence, add nothing of substance to the fact of the indebtedness as set forth in the agreed statement and afford no adequate basis for a finding that the indebtedness had a business situs in South Carolina.

That the decedent was largely interested in the affairs of the corporation is apparent; he owned a majority of its stock, but nothing is shown which derogates from its existence as a corporation, transacting its business as such, with corresponding corporate rights and liabilities. The interest of the decedent as a stockholder was a distinct interest,[2] and the estate of the decedent has been taxed by South Carolina upon the transfer of his stock according to its agreed value. With respect to the items of indebtedness of the corporation to the decedent, the latter appears upon the record simply as a creditor, with his domicile in Illinois.

For these reasons, the judgment of the state court, so far as it relates to the taxation of the transfer of the debts in question, must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

86; *New York Central R. R. Co.* v. *New York & Pennsylvania Co.* 271 U. S. 124, 126; *Ancient Egyptian Order* v. *Michaux,* 279 U. S. 737, 745.

[2] *Van Allen* v. *Assessors,* 3 Wall. 573, 584; *Hawley* v. *Malden,* 232 U. S. 1, 12; *Eisner* v. *Macomber,* 252 U. S. 189, 214; *Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 69, 83.

MR. JUSTICE HOLMES: The decisions of last term cited by the CHIEF JUSTICE seem to sustain the conclusion reached by him. Therefore MR. JUSTICE BRANDEIS and I acquiesce, without repeating reasoning that did not prevail with the Court.

STRATTON, SECRETARY OF STATE OF ILLINOIS, *v.* ST. LOUIS SOUTHWESTERN RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 6. Argued January 16, 1930. Reargued October 28, 1930.—Decided November 24, 1930.

1. A question of jurisdiction necessarily presented by the record must be decided, although not raised by the parties. P. 13.
2. Decisions of the Court require the following conclusions as to the purpose and effect of Jud. Code, § 266, as amended:

   (*a*) In its original form, the statute sought to make interference by interlocutory injunction with the enforcement of state legislation, upon the ground of unconstitutionality, a matter for the adequate hearing and full deliberation which the presence of a court of three judges, as therein provided, was likely to secure; and to minimize the delay incident to review upon appeal of orders granting or denying interlocutory injunctions in this grave class of cases. P. 14.

   (*b*) These purposes were not altered by the amendment of February 13, 1925, (43 Stat. 938), by which the provision for the presence of three judges was made to apply also to the final hearing in the District Court, and by which final decrees, granting or denying permanent injunctions in such cases, were also made appealable directly to this Court. *Id.*

   (*c*) The statute applies only where there is a substantial claim of invalidity under the Federal Constitution and where an application for an interlocutory injunction, for the purposes contemplated by the statute, is made and pressed. P. 15.

   (*d*) If an interlocutory injunction is not sought by the plaintiff, a single judge may hear and determine the case, and an appeal from the final decree will lie to the Circuit Court of Appeals under Jud. Code, § 128. *Id.*

(*e*) If an application for an interlocutory injunction is made and pressed to restrain the enforcement of a state statute, or of an administrative order made pursuant to a state statute, upon the ground that such enforcement would be in violation of the Federal Constitution, a single judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. P. 15.

(*f*) In such case, the authority of the District Judge is strictly limited to granting, upon proper cause being shown, a temporary restraining order to be effective only pending the determination of the application for an interlocutory injunction. Upon making such an order, it is his duty immediately to call two other judges, as the statute directs, to assist him in hearing and determining that application. *Id.*

(*g*) If a single judge, exceeding this jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court, or to the Circuit Court of Appeals. *Id.*

(*h*) Where a court of three judges should have been convened, and was not, this Court may issue a writ of mandamus to vacate the order or decree entered by the District Judge and directing him, or such other judge as may entertain the proceeding, to call to his aid two other judges for the hearing and determination of the application for an interlocutory injunction. P. 16.

3. In a case within Jud. Code, § 266, the District Judge, on granting a temporary restraining order, failed to call two other judges but permitted the order to operate as an interlocutory injunction for several months until he dismissed the bill on the merits, *Held:*

(*a*) That the decree dismissing the bill was without jurisdiction and that an appeal from it to the Circuit Court of Appeals was without jurisdiction. P. 16.

(*b*) Consent of the parties could give no validity to the decree or jurisdiction over the appeal. P. 18.

(*c*) Application for a mandamus to vacate the decree and to require the District Judge to call in two other judges to hear the application for preliminary injunction, need not be made, since the District Judge may proceed to take the action which the writ, if issued, would require. *Id.*

4. When it appears, on an appeal from a decree of the Circuit Court of Appeals, that the latter court has acted without jurisdiction in entertaining the appeal from the District Court, the appropriate action of this Court is to reverse the decree of the Circuit Court of

Appeals and to remand the case with directions to dismiss the appeal to that court for want of jurisdiction. P. 18.
30 F. (2d) 322, reversed.

APPEAL from a decree of the Circuit Court of Appeals, which reversed a final decree of the District Court, 27 F. (2d) 1005, dismissing the bill in a suit brought by the appellee to restrain the enforcement of an Illinois statute providing for the collection of a minimum franchise tax.

Mr. Bayard Lacey Catron, Assistant Attorney General of Illinois, with whom *Mr. Oscar E. Carlstrom,* Attorney General, was on the brief, for appellant.

Mr. Josiah Whitnel, with whom *Messrs. J. R. Turney* and *H. L. Browning* were on the brief, for appellee.

The printed arguments dealt only with the merits.

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

This suit was brought on July 21, 1927, by St. Louis Southwestern Railway Company to restrain the enforcement of a statute of the State of Illinois (General Corporation Act, § 107), providing for the payment of a minimum franchise tax, upon the ground that the statute as applied to the complainant violated the commerce clause, and the due process and equal protection clauses, of the Federal Constitution. The bill of complaint prayed for both a preliminary and a permanent injunction against the defendant, Secretary of State of Illinois, from instituting any proceedings to assess the tax or to enforce any of the prohibitions or penalties prescribed in case of refusal to pay.

On July 22, 1927, the complainant made a motion for a temporary restraining order in accordance with the prayer of the bill. On the same day, District Judge Fitzhenry entered an order enjoining the defendant from re-

voking the complainant's certificate of authority, from hindering the complainant in transacting its business in the State of Illinois, and from taking any steps for the enforcement of penalties, pending the determination of the application for an interlocutory injunction. While this order was in force, the defendant, on November 4, 1927, moved to dismiss the bill for want of equity. This motion was heard and granted by District Judge Fitzhenry, sitting alone, and on June 7, 1928, he entered a decree dismissing the bill and dissolving the restraining order. 27 F. (2d) 1005.

On an appeal by the complainant from this decree, the Circuit Court of Appeals, holding the statute, which laid the tax, to be invalid under the Federal Constitution, reversed the decree and remanded the cause with directions to enter a decree in accordance with the views expressed in its opinion. 30 F. (2d) 322. A petition for a rehearing was denied, and from the decree of the Circuit Court of Appeals the present appeal is taken.

The question is thus necessarily presented, although not raised by the parties, with respect to the validity of the decree entered in the District Court, and the jurisdiction of the Circuit Court of Appeals to entertain the appeal from that decree, in the light of § 266 of the Judicial Code, as amended (U. S. C., Tit. 28, § 380). The statute provides that no interlocutory injunction, restraining the action of any officer of a State in the enforcement of a statute of the State, or of an order made by an administrative board or commission pursuant to a state statute, shall be granted by any Justice of the Supreme Court of the United States, or by any District Court, or by any Judge thereof, or by any Circuit Judge acting as District Judge, upon the ground of the unconstitutionality of the statute, unless the application for the injunction shall be heard and determined by three judges. When the application for such an injunction is presented to a justice or

judge, he must immediately call to his assistance two other judges, as stated, but if he is of opinion that irreparable loss may otherwise result to the complainant, he may grant a temporary restraining order which is to remain in force only until the hearing and determination of the application for an interlocutory injunction upon prescribed notice. An appeal may be taken to this Court from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. By the amendment of February 13, 1925 (43 Stat. 938), the provision with respect to the presence of three judges was made to apply also to the final hearing in such suit in the District Court, and from the final decree, granting or denying a permanent injunction, a direct appeal lies to this Court.

The decisions of this Court require the following conclusions as to the purpose and effect of the statute.

First. By the statute in its original form, the Congress sought to make interference by interlocutory injunction with the enforcement of state legislation a matter for the adequate hearing and full deliberation which the presence of a court composed of three judges, as provided by the statute, was likely to secure. *Cumberland Telephone & Telegraph Company* v. *Public Service Commission,* 260 U. S. 212, 216. The gravity of this class of cases was recognized and it was sought to minimize the delay incident to a review upon appeal from an order granting or denying an interlocutory injunction. *Chicago Great Western Railway Company* v. *Kendall,* 266 U. S. 94, 97; *Moore* v. *Fidelity & Deposit Company,* 272 U. S. 317, 321; *Ex parte Collins,* 277 U. S. 565, 567. These purposes were not altered by the amendment of the statute, which was designed to end the anomalous situation in which a single judge might reconsider and decide questions already passed upon by three judges on the application for an interlocutory injunction. *Patterson* v. *Mobile Gas Com-*

pany, 271 U. S. 131, 136; *Smith* v. *Wilson,* 273 U. S. 388, 390, 391.

Second. The statute applies only where there is a substantial claim of invalidity under the Federal Constitution and where an application for an interlocutory injunction, for the purposes contemplated by the statute, is made and pressed. *Ex parte Buder,* 271 U. S. 461, 463, 467; *Ex parte Hobbs,* 280 U. S. 168, 172. The complainant has an election. If an interlocutory injunction is not sought, a single judge may hear and determine the case, and an appeal from the final decree will lie to the Circuit Court of Appeals. Judicial Code, section 128, U. S. C., Tit. 28, sec. 225; *Ex parte Buder, supra; Moore* v. *Fidelity & Deposit Company, supra; Smith* v. *Wilson, supra.*

Third. If an application for an interlocutory injunction is made and pressed to restrain the enforcement of a state statute, or of an administrative order made pursuant to a state statute, upon the ground that such enforcement would be in violation of the Federal Constitution, a single judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. He is as much without power to dismiss the bill on the merits, as he would be to grant either an interlocutory or a permanent injunction. His authority is strictly limited to granting, upon proper cause being shown, a temporary restraining order to be effective only pending the determination of the application for an interlocutory injunction. Upon making such an order, it is his duty immediately to call two other judges, as the statute directs, to assist him in hearing and determining that application. *Ex parte Northern Pacific Railway Company,* 280 U. S. 142, 144.

Fourth. If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court, as

the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement. Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court.

Accordingly, where a court of three judges should have been convened, and was not, this Court may issue a writ of mandamus to vacate the order or decree entered by the District Judge and directing him, or such other judge as may entertain the proceeding, to call to his aid two other judges for the hearing and determination of the application for an interlocutory injunction. *Ex parte Metropolitan Water Company,* 220 U. S. 539; *Ex parte Northern Pacific Railway Company, supra.** This remedy would not be available if there were a remedy by appeal. *Ex parte Harding,* 219 U. S. 363; *Ex parte Metropolitan Water Company, supra; Ex parte Park Square Automobile Station,* 244 U. S. 412, 415; *Ex parte Slater,* 246 U. S. 128; *Ex parte Tiffany,* 252 U. S. 32, 37; *Ex parte Riddle,* 255 U. S. 450; *Maryland* v. *Soper* (*No. 1*), 270 U. S. 9.

Fifth. It follows that, in the present case, no appeal lay to the Circuit Court of Appeals, and that court should have dismissed the appeal for want of jurisdiction. The

* The Act of October 22, 1913, c. 32, 38 Stat. 208, 220, U. S. C., Tit. 28, § 47, and section 266 of the Judicial Code, U. S. C., Tit. 28, § 380, are *in pari materia* (*Virginian Railway Co.* v. *United States,* 272 U. S. 658, 671, 672), and this Court may also issue a writ of mandamus to the District Judge to require the performance of the statutory duty under the former Act. *Ex parte Atlantic Coast Line R. Co.,* 279 U. S. 822.

bill prayed for a preliminary, as well as for a permanent, injunction. On filing the bill the complainant at once moved for a temporary restraining order in accordance with the prayer of the bill. The order granted by the District Judge recited that the complainant sought a temporary restraining order pending a hearing on an application for an interlocutory or preliminary injunction, and the order enjoined the enforcement of a state statute until the consideration and determination of that application. The application to restrain the enforcement of the state statute pending the suit, was manifestly not withdrawn but was continuously pressed in order to avoid the prohibitions and penalties imposed by the state law in case the tax in question was not paid. The District Judge, on granting the temporary restraining order, failed to call in two other judges to aid him in hearing and determining the application for the interlocutory injunction, and the restraining order was permitted to operate as an interlocutory injunction for several months and until the determination of the motion to dismiss the bill on the merits.

The requirement of the statute has regard to substance and not to form. It matters not whether the injunction is called preliminary or interlocutory, or is styled a temporary restraining order, if it is granted to restrain the enforcement of state legislation and is continued in force until the hearing on the merits, without such restraint pending the suit being made the subject of consideration and determination by three judges as the statute requires. The temporary restraining order which the District Judge, acting alone, could grant is only to maintain the *status quo*, on proper cause being shown, for such time as may be necessary to obtain a decision upon the application for an interlocutory injunction by a court of three judges, which is to be immediately convened.

As the proceeding in this suit fell within the provision of the statute and the District Judge had no jurisdiction to hear the motion to dismiss the bill on the merits, the consent of the parties could not give validity to the decree or confer jurisdiction upon the Circuit Court of Appeals to entertain an appeal therefrom. *United States* v. *Emholt,* 105 U. S. 414, 416; *Parker* v. *Ormsby,* 141 U. S. 81, 86; *Perez* v. *Fernandez,* 202 U. S. 80, 100; *443 Cans of Egg Product* v. *United States,* 226 U. S. 172, 184; *Exporters* v. *Butterworth-Judson Company,* 258 U. S. 365, 369.

The remedy by mandamus to vacate the decree and to require the District Judge to call to his assistance two other judges, as directed by the statute, to hear the application for an interlocutory injunction, is still available. It is not necessary, however, that formal application should be made for such a writ, as the District Judge may now proceed to take the action which the writ, if issued, would require.

When it appears, on an appeal to this Court from a decree of the Circuit Court of Appeals, that the latter court has acted without jurisdiction in entertaining the appeal from the District Court, the appropriate action of this Court is to reverse the decree of the Circuit Court of Appeals and to remand the case with directions to dismiss the appeal to that court for want of jurisdiction. *Union & Planters' Bank* v. *Memphis,* 189 U. S. 71, 73–74; *443 Cans of Egg Product* v. *United States, supra; Carolina Glass Company* v. *South Carolina,* 240 U. S. 305, 318; *City of New York* v. *Consolidated Gas Company,* 253 U. S. 219, 221; *The Carlo Poma,* 255 U. S. 219, 221.

Decree reversed and cause remanded to the Circuit Court of Appeals with directions to dismiss the appeal to that court for want of jurisdiction.

KLEIN *v.* BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

No. 11. Argued October 29, 30, 1930.—Decided November 24, 1930.

1. In Kentucky, corporate shares are not taxed to their owner if at least 75% of the total property of the corporation is taxable in Kentucky and the corporation pays the taxes thereon; but if less than 75% of the corporation's property is taxable in Kentucky, the shareholder is taxed upon the full value of his shares. *Held* that this classification is not unreasonable and does not deny the equal protection of the laws to shareholders who are taxed. P. 22.
2. The property of shareholders in their shares, and the property of the corporation, are distinct property interests. A State may tax the coporation and also tax the shareholders, but is under no constitutional obligation, taxing the one, to tax the other also. P. 23.
3. To tax a shareholder upon the full value of his shares when a part only of the corporation's property is within the State, is not to tax property outside of the jurisdiction of the State. P. 24.
4. If a corporation is a fiction, it is a fiction created by law with intent that it shall be acted on as if true. The corporation is a person, and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members. *Id.*
5. The Fourteenth Amendment does not require that land and stock in corporations be taxed at the same rate or by the same tests of value. *Id.*

230 Ky. 182, affirmed.

APPEAL from a judgment of the Court of Appeals of Kentucky which affirmed a judgment sustaining on appeal an assessment made by a county board of tax supervisors.

Mr. Edmund F. Trabue, with whom *Messrs. Junius C. Klein, John P. Haswell, Blakey Helm,* and *John S. Milliken* were on the brief, for appellant.

The State of the shareholder's domicile taxes his shares on the assumption that every share represents an aliquot

part of all the property of the corporation, wherever situate. The assumption that the shares are themselves property, and property located within the State, is the veriest and most mischievous fiction. *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83.

Upon the assumption of the State's right to tax shares of its citizens, regardless of the paternity of the corporation, or the location of its property, the State has no just right to tax the shares at a rate in excess of the ratio of property of the corporation within the State to all its property in all the States, if at all. *Bethlehem Motors Co.* v. *Flynt,* 256 U. S. 421. See *Ward Baking Co.* v. *Fernandino,* 29 F. (2d) 789; *Campbell Baking Co.* v. *City,* 19 F. (2d) 159.

The doctrine that a State has no jurisdiction to tax the property of a foreign corporation situated outside the State is now well established. Citing and discussing cases.

Upon principle, how could it ever have been supposed that taxation of the corporation's property and taxation also of the shares of its shareholders was not double taxation? It is especially in the imposition of multiple inheritance taxes that the absurdity has been most plainly exposed; but such multiple taxation has been upheld upon the ground that inheritance taxes were excises, and not property taxes, and, consequently, not protected by the Fourteenth Amendment. This doctrine was announced in *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283; *Blackstone* v. *Miller,* 188 U. S. 189, and in *Wheeler* v. *Sohmer,* 233 U. S. 434; but this Court called a halt on the extension of the doctrine in *Frick* v. *Pennsylvania,* 268 U. S. 473, and has now definitely condemned multiple taxation in inheritance tax cases in *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, overruling *Blackstone* v. *Miller, supra.*

Assuming the propriety of taxing shares and also taxing the property of the corporation, the State of the share-

holder's domicile has no right arbitrarily to select those corporations whose stockholders are to be taxed and omit to tax the stockholders of the others. *Middendorf* v. *Goodale,* 202 Ky. 118; *Louisville Gas & E. Co.* v. *Coleman,* 277 U. S. 32; *Siler* v. *Board of Supervisors,* 221 Ky. 100.

That the statute under which the complaining stockholders were taxed discriminates against them is illustrated by the history of legislation on the subject in Kentucky. The first statute exempted the shares if the corporation paid taxes on all its property in Kentucky—how much or how little the corporation might have in this State—provided the property was held for corporate purposes; the next statute taxed the shares where the corporation did not pay taxes in Kentucky on at least one-fourth of its total property, and the present statute taxes the shares except where the corporation pays taxes in Kentucky on 75% or more of its total property. Obviously, the legislature took no note of any ratio between the corporation's property in Kentucky and its property elsewhere.

While a proper classification for taxation might be reasonably based upon the ratio of net assets in the State to total net assets, no proper classification can be based upon gross assets. Gross assets mean nothing in such a problem.

Classification for taxation must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. *Stebbins* v. *Riley,* 268 U. S. 137; *Air-Way Electric Co.* v. *Day,* 266 U. S. 71; *Liggett Co.* v. *Baldridge,* 278 U. S. 105; *Macallen Co.* v. *Massachusetts,* 279 U. S. 620; *Brown* v. *Maryland,* 12 Wheat. 419; *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107; *Bekins Van Lines* v. *Riley,* 280 U. S. 80. *Louisville Gas & E. Co.* v. *Coleman,* 277 U. S. 32, and *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, are decisive of this case. Distinguishing: *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107; *New York* v.

Latrobe, 279 U. S. 421; *International Shoe Co.* v. *Shartel,* 279 U. S. 429; *White River L. Co.* v. *Arkansas,* 279 U. S. 692; *Kidd* v. *Alabama,* 188 U. S. 730; *Ohio Oil Co.* v. *Conway,* 281 U. S. 146.

Mr. M. B. Holifield, Assistant Attorney General of Kentucky, with whom *Messrs. J. W. Cammack,* Attorney General, and *Samuel B. Kirby, Jr.,* Assistant Attorney General, were on the brief, for appellee.

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Appeals of Kentucky affirming the validity of a State tax and the constitutionality of the statutes under which the tax was imposed. 230 Ky. 182.

Holders of stock in a corporation generally are required to list their shares for taxation, but it is provided that "the individual stockholders of a corporation, at least seventy-five per cent (75%) of whose total property is taxable in Kentucky, shall not be required to list their shares for taxation so long as the corporation pays taxes on all its property in Kentucky" &c. Kentucky Statutes, § 4088. Ed. Carroll, 1930. Acts 1924, c. 116, § 2, pp. 402, 406. The appellant contends that this section makes the tax contrary to the Fourteenth Amendment. The appellant owned shares in the Standard Sanitary Manufacturing Company, a New Jersey corporation, less than seventy-five per cent of whose total property was taxable in Kentucky. He was taxed as contemplated and he says that the discrimination between himself and holders of stock in a corporation paying taxes on more than seventy-five per cent of all their property is arbitrary and denies to him the equal protection of the laws.

This contention was so thoroughly disposed of by the Court of Appeals that it is not necessary to deal with the

argument for the appellees that if § 4088 is invalid the general tax law stands unaffected and unqualified and the appellant still must pay the tax. It will be enough to present an abridgment of the considerations that prevailed. There is no doubt that a State may tax a corporation and also tax the holders of its stock. *Tennessee* v. *Whitworth,* 117 U. S. 129, 136. The owners are different and, although the appellant calls it a mischievous fiction, the property is different. While no doubt the property and expectations of the corporation are the backbone of the value of the shares, yet the latter may get additional value from another source. In this case the appellant alleges that the price of shares was much enhanced by rumors of a stock dividend, which of course would have added nothing to the property of the corporation. On the other hand there is no constitutional obligation to tax both the corporation and the holders of its stock. See *Kidd* v. *Alabama,* 188 U. S. 730, 732. If the corporation having all its property in the State has paid taxes upon the whole, usually it would be just not to tax the stockholders in respect of values derived from what already has borne its share. And what would be true in the case supposed would be true when the corporation was paying for the great body of its property although some small fraction happened to be outside of the State. Thus we come to the usual question of degree and of drawing a line where no important distinction can be seen between the nearest points on the two sides, but where the distinction between the extremes is plain. *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355. Numerous illustrations are cited by the Court below, e. g., *McLean* v. *Arkansas,* 211 U. S. 539, 551. *Booth* v. *Indiana,* 237 U. S. 391, 397. *Miller* v. *Strahl,* 239 U. S. 426, 434.

We agree with the Court of Appeals that there could have been no question if the statute had said ninety per cent and that fixing seventy-five was equally plainly "a

reasonable effort to do justice to all in view of the way all our other assessments are made."

The appellant, pursuing his notion that shares of stock represent an interest in the property of the corporation, insists that if taxed at all he should be taxed only in the ratio of the property in the State to the entire property of the corporation; that to tax him for the whole value is to tax property outside of the jurisdiction of the State. But it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true. The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members. *Donnell* v. *Herring-Hall-Marvin Safe Co.*, 208 U. S. 267, 273. The stockholders in some circumstances can call on the corporation to account, but that is a very different thing from having an interest in the property by means of which the corporation is enabled to settle the account. The principle of justice that leads to the exemption that has been dealt with could not be insisted upon as a matter of constitutional right and it is reasonable for the legislature to confine it to well marked cases, rather than to press it to a logical extreme. Of course it does not matter here that in an earlier year the exemption was greater than now.

It is alleged as a distinct point of objection, though perhaps less earnestly pressed, that appellant's stock was assessed at its full selling price whereas land was taxed at seventy-five per cent of its sale value. There is nothing in the Fourteenth Amendment that requires land and stock to be taxed at the same rate or by the same tests and the Court of Appeals thinks that the Board of Tax Commissioners "judged that seventy-five per cent of the sale values represented about fairly the cash value of real estate." Whether this be so or not we see no constitutional ground for complaint.

Judgment affirmed.

SHERMAN ET AL. *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 14. Argued October 30, 1930.—Decided November 24, 1930.

1. The penalties of the Safety Appliance Acts are imposed upon the carrier only and cannot be enforced by action against the carrier's officers and agents. P. 29.
2. The State Belt Railroad, a water-front line in the City of San Francisco connecting many industrial plants and the line of the Southern Pacific Railroad with wharves belonging to the State of California and, through the wharves, with other common carriers engaged in interstate commerce by railroad, belongs to the State and is operated by it through the Board of State Harbor Commissioners, without profit, for the purpose of facilitating the commerce of the port. Charges for haulage are collected by the State and go to expense of operation and to the credit of the San Francisco Harbor Improvement Fund. In a prosecution of the individual members of the Board for alleged breaches of the Federal Safety Appliance Act, as amended, in the operation of the line, *held* that the action could not be maintained, since, assuming that the work done by the line was interstate commerce, the statute, if it applied to any one, could apply only to the State and not the defendants, who were merely its agents. It was therefore unnecessary to decide whether the statute should be construed to embrace the State. P. 30.

District Court reversed.

UPON a certificate of questions arising in the Circuit Court of Appeals upon consideration of a judgment of the District Court inflicting penalties under the Safety Appliance Act. The whole record was brought up here by certiorari.

Mr. Karl D. Loos, with whom *Messrs. Leon E. Morris* and *Edward M. Jaffa* were on the brief, for Sherman et al.

Assistant to the Attorney General O'Brian, with whom *Solicitor General Thacher, Messrs. Charles H. Weston,*

James Maxwell Fassett and *William G. Davis,* Special Assistants to Attorney General, and *Paul D. Miller* were on the brief, for the United States.

The State Belt Railroad is a common carrier engaged in interstate commerce within the meaning of the Safety Appliance Act and the supplemental Act of April 14, 1910. *Belt Ry. Co.* v. *United States,* 168 Fed. 542; *United States* v. *Union Stock Yards,* 226 U. S. 286, 305; *Western Oil Refining Co.* v. *Lipscomb,* 244 U. S. 346, 349; *South Carolina* v. *United States,* 199 U. S. 437, 454, 455; *Georgia* v. *Chattanooga,* 264 U. S. 472, 481; *Mathewes* v. *Port Utilities Comm.,* 32 F. (2d) 913; *McCallum* v. *United States,* 298 Fed. 373, certiorari denied, 266 U. S. 606.

The suit is not against the State. Appellants, as the operators of the railroad, are liable for violations of the Act. *Ex parte Young,* 209 U. S. 123, 150, 155; *Truax* v. *Raich,* 239 U. S. 33, 37; *Reagan* v. *Farmers Loan & Tr. Co.,* 154 U. S. 362, 390–391; *Johnson* v. *Lankford,* 245 U. S. 541; *Hopkins* v. *Clemson College,* 221 U. S. 636, 643; *Belknap* v. *Schild,* 161 U. S. 10, 18; *McCallum* v. *United States,* 298 Fed. 373, certiorari denied, 266 U. S. 606; *Tilden* v. *United States,* 21 F. (2d) 967. Distinguishing: *Kentucky* v. *Dennison,* 24 How. 66; *In re Ayers,* 123 U. S. 443; *Smith* v. *Reeves,* 178 U. S. 436.

Appellants are within the term "common carrier" as used in the Safety Appliance Act. *United States* v. *Nixon,* 235 U. S. 231.

There seems no valid distinction here between a receiver, who operates the property of a railroad company through appropriate agents, and appellants, who operated the property of the railroad through a superintendent appointed by them and under their supervision and control.

Appellants can be held liable for violations which occurred without their personal knowledge, against their consent and contrary to their orders and instructions.

Robertson v. *Sichel,* 127 U. S. 507, is inapplicable because the Act imposes an absolute liability upon the carrier, which is not dependent on the common law rule of reasonable care or the common law rule of liability of the principal for the acts of his agent. *St. Louis & I. M. Ry.* v. *Taylor,* 210 U. S. 281, 294; *Chicago, B. & Q. Ry.* v. *United States,* 220 U. S. 559.

The exemption of state agencies and instrumentalities from national taxation is limited to those which are strictly of a governmental character, and does not extend to those used by the State in carrying on an ordinary private business. *South Carolina* v. *United States,* 199 U. S. 437.

If the Federal Government may tax state agencies and officers who are engaged in ordinary private business, it would seem to follow that, under its commerce power, it may fine or penalize state officers when they are engaged in interstate commerce. *Mathewes* v. *Port Utilities Comm.,* 32 F. (2d) 913.

There is no evidence, and it is not suggested, that to require the railroad to comply with the Act would interfere with the appellants in performing their functions, or hinder the efficient exercise of any governmental function of the State.

There is no reason to suppose that Congress, in enacting the Safety Appliance Act, was less solicitous of the safety of employees of a common carrier owned and operated by a State than it was of the employees of a carrier privately operated, or that it intended to withhold from the former the protection which it gave the latter. *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1, 17; *Chesapeake & O. Ry. Co.* v. *United States,* 249 Fed. 805, certiorari denied, 248 U. S. 580.

Assuming that this is a suit against the State, the Act applies to the operations of the railroad and gives the United States District Court jurisdiction. Distinguish-

ing: *Guarantee Title & T. Co.* v. *Title Guaranty & S. Co.*, 224 U. S. 152; *United States* v. *Herron*, 20 Wall. 251; *In re Fowble*, 213 Fed. 677; *Sullivan* v. *School District*, 179 Wis. 502. Each of these cases involved the application of a statute against the enacting sovereign. *United States* v. *Herron, supra*, and *Dollar Savings Bank* v. *United States*, 19 Wall. 227, point out that the historical basis for the principle relied upon by appellants is to be found in the English practice, where the Crown is held to be unaffected by legislation not specifically directed against it.

The Act applies to "any common carrier" engaged in interstate commerce, and a common carrier owned and operated by a State is therefore within its express terms. No rule of statutory construction calls for a different result. Considerations of the purpose of Congress in enacting this legislation, and of the liberal construction to be given it, also lead to the conclusion that the Act applies to the operators of this railroad.

Even if the suit is against the State, the United States District Court had jurisdiction. Const., Art. III, § 2, cl. 2; *Ames* v. *Kansas*, 111 U. S. 449.

Mr. Justice Holmes delivered the opinion of the Court.

This case comes here on a certificate of questions of law from the judges of the Circuit Court of Appeals for the Ninth Circuit. Subsequently the entire record was brought up, but the facts sufficiently appear in the certificate and both they and the questions may be abbreviated here. The suit is brought by the United States against the appellants by name, described as 'constituting the Board of State Harbor Commissioners of the State of California, operating The State Belt Railroad,' to recover penalties for alleged breaches of the Safety Appliance Acts. March 2, 1893, c. 196, 27 Stat. 531; April 1, 1896, c. 87, 29 Stat. 85; March 2, 1903, c. 976, 32 Stat. 943; April 14, 1910, c.

160, 36 Stat. 298. U. S. Code, Tit. 45, §§ 1, 2, 6, 8, 11, 12, 13, 16. The penalties are imposed upon 'any common carrier engaged in interstate commerce by railroad,' and the broad question is whether the defendants are liable under the Acts.

The matters complained of occurred upon what is known as the State Belt Railroad. The road is about five miles long, within the City of San Francisco, runs nearly parallel with the water front of the harbor, and connects many industrial plants and the line of the Southern Pacific Railroad Company with wharves belonging to the State and through the wharves with other common carriers engaged in interstate commerce by railroad. It may be assumed that the work done upon the Belt Line was interstate commerce. But the line belongs to and is operated by the State; the work is done without profit for the purpose of facilitating the commerce of the port, and the funds received after paying expenses go to the Treasury of the State to the credit of the San Francisco Harbor Improvement Fund. California has not gone into business generally as a common carrier, but simply has constructed the Belt Line as an incident of its control of the harbor—a State prerogative. Cal. Political Code, § 2524. The defendants are officers of the State charged with the administration of the Harbor of San Francisco and of the State Belt Railroad in connection therewith. They had no hand in or knowledge of the alleged violations of law, the immediate supervision being the duty of an inspector appointed by them, and his subordinates being Civil Service employees of the State.

On these facts in our opinion the statute, if it applies to anyone, can apply only to the State. The suit is not to recover damages for a tort, which, if a wrong on the part of the master, is at least equally a wrong on the part of the servant who personally is guilty of the act or omission that caused the harm. Here the suit is for a penalty attached to an offence—and the only party on whom the

liability is imposed is the common carrier. The statute is not like the Hours of Service Act of March 4, 1907, c. 2939, § 3, 34 Stat. 1415; Code, Title 45, § 63; that in terms extends the liability to officers and agents. It seems to us plain that as between the Board of Harbor Commissioners and California the carrier here is the State, by which it is agreed that the Road was owned and operated, which received such pay as was required for the work that was done, and which did the work for the purpose of facilitating the commerce of its principal port. The principal and its agents cannot both be the common carriers aimed at. One is and the other is not subjected to the penalty. One is superior, the other inferior. The superior is the one that operated the road and the one whose commands the others were bound to obey.

The suit is brought against the appellants individually. This is conceded by the Government and sufficiently appears from the declaration and from the judgment against them by name, entered after they had ceased to be members of the Board. Manifestly if we are right in what we have said the judgment is wrong and we are relieved from the duty of considering whether the Safety Appliance Act should be construed to embrace the State.

An answer to other questions proposed is unnecessary because of our conclusion that the judgment against the defendants cannot be sustained.

Judgment reversed.

PARAMOUNT FAMOUS LASKY CORPORATION ET AL. *v.* UNITED STATES.

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

No. 83. Argued October 27, 1930.—Decided November 24, 1930.

Ten corporations, competitors in the business of supplying the film prints used by exhibitors of motion pictures throughout the Union and controlling 60% of that business, agreed amongst themselves to contract with exhibitors for future exhibition of pictures

only by a standard form of contract which, in connection with certain rules, required, among other things: That disputes and claims under the contract be submitted to a board of arbitration; that the award be accepted as conclusive; that, upon failure of the contracting exhibitor to submit to arbitration or to abide by an award, the distributor party to that contract, and all others having like contracts with such exhibitor, must demand security from him on each of their contracts; that those to whom he failed to pay security within a time fixed must suspend service under their contracts until he paid it or complied with the award; that when service under a contract had been so suspended ten days, the distributor party might cancel it; and that no distributor, having so suspended service, should resume it before the exhibitor furnished the security or obeyed the award. *Held:*

1. That the necessary and inevitable tendency of the agreement and combination is to produce material and unreasonable restraint of interstate commerce in violation of the Sherman Act. P. 41.

2. The fact that the standard exhibition contract and rules of arbitration were evolved after six years of discussion and experimentation does not show that they were either normal or reasonable regulations. The arrangement existing between the parties is unusual and necessarily and directly tends to destroy the kind of competition to which the public has long looked for protection. P. 43.

3. The Sherman Act seeks to protect the public against evils commonly incident to the unreasonable destruction of competition and no length of discussion or experimentation amongst parties to a combination which produces the inhibited result can give validity to their action. *Id.*

4. It may be that arbitration is well adapted to the needs of the motion picture industry; but when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition their action becomes illegal. *Id.*

5. In order to establish violation of the Sherman Act it is not necessary to show that the challenged arrangement suppresses all competition between the parties or that the parties themselves are discontented with the arrangement. The interest of the public in the preservation of competition is the primary consideration. P. 44.

6. The prohibitions of the statute cannot be evaded by good motives. *Id.*

34 F. (2d) 984, affirmed.

APPEAL from a decree of the District Court condemning an agreement and combination of appellants under the Sherman Act.

Messrs. Cornelius W. Wickersham and *John W. Davis,* with whom *Messrs. Henry W. Taft, Paxton Blair, Arthur L. Fisk, Jr.,* and *Gabriel L. Hess* were on the brief, for appellants.

The standard contract and rules of arbitration, having been evolved after six years of discussion and experimentation, are reasonable and normal regulations for the intelligent conduct of the industry; so that whatever restraint they produce falls short of unlawful coercion. *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238; *United States* v. *American Tobacco Co.,* 221 U. S. 106, 179; *Maple Flooring Assn.* v. *United States,* 268 U. S. 563, 583; *United States* v. *Addyston Pipe Co.,* 85 Fed. 271, 283, affirmed, 175 U. S. 211, 248.

That the contract was discussed at a trade practice conference and approved by the Federal Trade Commission is evidence of its reasonableness.

The impetus toward standardization came from the exhibitors themselves. A uniform contract had become a trade necessity. They were largely responsible for its terms. These aim to combat specific evils and are reasonably commensurate with the necessities of the case .

The procedure adopted and the standardization resulting are in line with a current industrial trend. Arbitration is well adapted to the needs of the motion picture industry. The necessity for the speedy termination of disputes results from the concatenation of interests in each particular film. Not only is the carrying on of litigation a costly process, involving the retention by the distributors of local counsel in scores of different towns where a dispute with an exhibitor might arise, but it is costly by reason of its slowness. For during the pendency

of a suit over a film, the distributor can do nothing to mitigate his damages, and by the end of the litigation the film may have a greatly reduced rental value or none at all. Similarly, an exhibitor at the end of a litigation may find himself forced to exhibit a picture so ancient that its exhibition would injuriously affect his good will.

Arbitration has an ethical aspect; it has stabilized the industry, improved its moral tone and eliminated causes of friction. Current public policy, as manifested in recent statutes, favors arbitration.

The manner in which the contract and rules have worked out in practice, and the significant absence of complaints, reflect their reasonable character. There has been no reduction of competition.

The enforcement methods are reasonable and have been applied fairly by the film boards of trade.

It is not at all uncommon, in the case of a credit bureau or association, for all the members of the association, either by agreement or following their individual business judgment, to refuse to deal with a customer listed as delinquent. This practice has over and over again been sanctioned by the courts and is regarded as perfectly proper. *United States* v. *Fur Dressers Assn.*, 5 F. (2d) 869; *Putnal* v. *Inman*, 76 Fla. 553; *Brewster* v. *Miller's Sons Co.*, 101 Ky. 368; *Reynolds* v. *Plumbers' Assn.*, 30 Misc. 709, 63 N. Y. Supp. 303; *Delz* v. *Winfree*, 6 Tex. Civ. App. 11; *Woodhouse* v. *Powles*, 43 Wash. 617. Cf. *Cement Mfrs. Assn.* v. *United States*, 268 U. S. 588, 604; *United States* v. *King*, 229 Fed. 275, 278.

The exhibitors have given unequivocal evidence of their endorsement of the contract and rules. The decree is inconsistent with the facts stipulated of record as well as with the court's findings of fact.

The injunction should be directed solely against the so-called "supplemental agreements."

Assistant to the Attorney General O'Brian, with whom *Attorney General Mitchell* and *Messrs. Claude R. Branch, Charles H. Weston,* and *C. Stanley Thompson,* Special Assistants to the Attorney General, were on the brief, for the United States.

The distributors of motion picture films, who together control the business of distribution, have agreed not to contract with any exhibitor for the future exhibition of films unless the exhibitor accepts the arbitration provisions of the standard exhibition contract. These provisions require the exhibitor to submit all claims or controversies arising under that contract to arbitration according to the rules of arbitration incorporated therein. These provisions and rules further permit and require enforcement of arbitration and arbitration awards by a simultaneous demand, by every distributor having a contract with an exhibitor who has not complied with an arbitration award on any contract with a distributor, for payment of security on every existing contract and, if the required security is not paid, for suspension of service on his contracts. The distributors also may cancel any contract upon which service has been so suspended for a period of ten days. This Court has frequently held that similar combinations not to deal, or to deal only on conditions imposed by the combination, constitute an illegal restraint of trade. *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600; *Anderson* v. *Shipowners Assn.,* 272 U. S. 359; *Montague & Co.* v. *Lowry,* 193 U. S. 38; *Loewe* v. *Lawlor,* 208 U. S. 274; *Binderup* v. *Pathe Exchange,* 263 U. S. 291; *Thomsen* v. *Cayser,* 243 U. S. 66; *Addyston Pipe Co.* v. *United States,* 175 U. S. 211; *Cement Mfrs. Assn.* v. *United States,* 268 U. S. 588; *Wolff Company* v. *Industrial Court,* 262 U. S. 522; *In re Debs,* 158 U. S. 564, 581; *Majestic Theatre Co.* v. *United Artists Corp.,* 43 F. (2d) 991.

The means adopted by appellants to enforce such arbitration by a concerted demand for the payment of security, to be followed by suspending service on the contract if security is not forthcoming, is also an unreasonable restraint of trade. This Court has indicated that it is illegal for members of a trade group to agree not to extend credit to customers whose accounts with any member of the group are overdue. *Cement Mfrs. Assn.* v. *United States,* 268 U. S. 588.

The arbitration provisions of the standard exhibition contract and the manner in which they have been enforced are unfair and unjust to the exhibitors. All exhibitors outside the State of New York are compelled to arbitrate under the law of a foreign jurisdiction. The situation of distributors in so arbitrating is very different, since they are large companies guided by New York counsel. Distributors can always appear in person before the arbitration boards, which sit in certain central cities where the distributors have exchange managers. Exhibitors, on the other hand, in very many cases can not afford the time or money necessary to travel to these cities to present their arbitration cases in person. The secretary of the arbitration board participates in their deliberations and frequently the secretary of the board is the secretary of the local film board, an association of the local exchange managers of the distributors. The distributor representatives on the arbitration boards are chosen by a highly organized group in constant personal contact with each other. There is no comparable organization or personal contact of the exhibitors from whom exhibitor members of the arbitration boards are selected. In addition, the general counsel of the distributors' national organization has influenced the decisions of the arbitration boards by constant interpretation, instruction, and advice to the distributor members of these boards. The records of an

arbitration board which were stipulated to be typical of the operation of other arbitration boards show that almost all claims presented by distributors were decided in their favor, although exhibitors were successful in only a little over half of the claims presented by them and also, and perhaps more important, that over ninety-four per cent. of the claims on which the board acted were filed by distributors.

The history and antecedents of the arbitration provisions of the standard contract indicate that a great majority of the exhibitors whose theaters are not owned or controlled by distributors or producers disapprove these provisions.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

By this proceeding the United States seek to prevent further violation of Section 1, Act of Congress approved July 2, 1890 (Sherman Act), c. 647, 26 Stat. 209, through an alleged combination and conspiracy to restrain interstate commerce in motion picture films.

Appellants are the Paramount Famous Lasky Corporation and nine other Corporations (Distributors), producers and distributors throughout the Union of sixty per cent of the films used for displaying motion pictures by some 25,000 theatre owners (Exhibitors); the Motion Picture Producers and Distributors of America, a corporation with class "B" membership composed of the above-mentioned Distributors; and thirty-two Film Boards of Trade, which severally function within certain defined Regions.

Each Distributor produces and then distributes films through its own exchanges maintained in thirty-two centrally located cities—Albany, Atlanta, Chicago, Los Angeles, etc. Each of these exchanges has a manager and under his supervision contracts are made for the use of

his Distributor's films within the designated territory or region and thereafter placed in the hands of the Exhibitors. Other Distributors, who with Appellants control 98% of the entire business, also have managers with like duties in the same cities. In each Region all of these managers are associated through and constitute the entire membership of the local Film Board of Trade.

Under the common practice, in the Spring, when most of the pictures are still only in contemplation, each Distributor announces its intended program of distribution for twelve months. After this announcement Exhibitors are solicited to enter into written contracts for permission to display such of the pictures as they desire. And as no Distributor can offer enough pictures to supply the average Exhibitor's full requirement, he must deal with several.

Under an agreement amongst themselves Appellant Distributors will only contract with Exhibitors according to the terms of the Standard Exhibition Contract, dated May 1, 1928. Ordinarily neither party gives security for compliance with such agreements, by cash deposit or otherwise.

This Standard Contract is an elaborate document, covering eight pages of the record. Under it the Distributor licenses the Exhibitor to display specified photo plays at a designated theatre on definite dates. Provision is made for cash payment three days in advance of any shipment, time and place of delivery, return of the prints, etc., etc. Section 18 (copied in the margin)* provides in substance that each party shall submit any controversy that may

*Eighteenth. The parties hereto agree that before either of them shall resort to any court to determine, enforce or protect the legal rights of either hereunder, each shall submit to the Board of Arbitration (established or constituted pursuant to the Rules of Arbitration filed with the American Arbitration Association, 342 Madison Avenue, New York City, bearing date May 1, 1928 and identified by the sig-

arise to a Board of Arbitration, in the city where the Distributor's Exchange is located, established under and controlled by written rules adopted May 1, 1928; accept as conclusive the findings of this Board; and forego the right to trial by jury. And further:

"In the event that the Exhibitor shall fail or refuse to consent to submit to arbitration any claim or controversy arising under this or any other Standard Exhibition Con-

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natures of the Contract Committee appointed at the 1927 Motion Picture Trade Practice Conference, a copy of which will be furnished to the Exhibitor upon request in the city wherein is situated the exchange of the Distributor from which the Exhibitor is served or if there be no such Board of Arbitration in such city then to the Board of Arbitration in the city nearest thereto (unless the parties hereto agree in writing that such submission shall be made to a Board of Arbitration located in another specified city), all claims and controversies arising hereunder for determination pursuant to the said Rules of Arbitration and the rules of procedure and practice adopted by such Board of Arbitration.

The parties hereto further agree to abide by and forthwith comply with any decision and award of such Board of Arbitration in any such arbitration proceeding, and agree and consent that any such decision or award shall be enforceable in or by any court of competent jurisdiction pursuant to the laws of such jurisdiction now or hereafter in force; and each party hereto hereby waives the right of trial by jury upon any issue arising under this contract, and agrees to accept as conclusive the findings of fact made by any such Board of Arbitration, and consents to the introduction of such findings in evidence in any judicial proceeding.

In the event that the Exhibitor shall fail or refuse to consent to submit to arbitration any claim or controversy arising under this or any other Standard Exhibition Contract which the Exhibitor may have with the Distributor or any other distributor or to abide by and forthwith comply with any decision or award of such Board of Arbitration upon any such claim or controversy so submitted, the Distributor may, at its option, demand, for its protection and as security for the performance by the Exhibitor of this and all other existing contracts between the parties hereto, payment by the Exhibitor of an additional sum not exceeding $500 under each existing contract, such sum to be retained by the Distributor until the complete performance

tract which the Exhibitor may have with the Distributor or any other distributor or to abide by and forthwith comply with any decision or award of such Board of Arbitration upon any such claim or controversy so submitted, the Distributor may, at its option, demand, for its protection and as security for the performance by the Exhibitor of this and all other existing contracts between the parties hereto, payment by the Exhibitor of an additional sum not exceeding $500 under each existing contract, such sum to

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of all such contracts and then applied, at the option of the Distributor, against any sums finally due or against any damages determined by said Board of Arbitration to be due to the Distributor, the balance if any to be returned to the Exhibitor; and in the event of the Exhibitor's failure to pay such additonal sum within seven (7) days after demand, the Distributor may by written notice to the Exhibitor suspend service hereunder until said sum shall be paid and/or terminate this contract.

In the event that the Distributor shall fail or refuse to consent to the submission to arbitration of any claim or controversy arising under this or any other Standard Exhibition Contract providing for arbitration which the Distributor may have with the Exhibitor, or to abide by and forthwith comply with any decision or award of such Board of Arbitration upon any such claim or controversy so submitted, within the number of days specified in Article Twenty-Second opposite the name of the City in which such Board of Arbitration is located, the Exhibitor may at his option terminate this and any other existing contract between the Exhibitor and the Distributor by mailing notice by registered mail within two (2) weeks after such failure or refusal, and in addition the Distributor shall not be entitled to redress from such Board of Arbitration upon any claim or claims against any exhibitor until the Distributor shall have complied with such decision, and in the meanwhile the provisions of the first paragraph of this Article Eighteenth shall not apply to any such claim or claims.

Any such termination by either party, however, shall be without prejudice to any other right or remedy which the party so terminating may have by reason of any such breach of contract by the other party.

The provisions of this contract relating to arbitration shall be construed according to the law of the State of New York.

be retained by the Distributor until the complete performance of all such contracts and then applied, at the option of the Distributor, against any sums finally due or against any damages determined by said Board of Arbitration to be due to the Distributor, the balance, if any to be returned to the Exhibitor; and in the event of the Exhibitor's failure to pay such additional sum within seven (7) days after demand, the Distributor may by written notice to the Exhibitor suspend service hereunder until said sum shall be paid and/or terminate this contract."

The Rules of Arbitration provide for a Board, three of whom shall be members of the local Film Board of Trade and three proprietors or managers of theatres in its region. This Arbitration Board shall have power to determine the controversy, make findings, direct what shall be done with respect to the dispute; "and shall fix the maximum amount" (not exceeding $500) which each Distributor may demand as security pursuant to the arbitration clause in the event of the failure of the Exhibitor to submit to arbitration or to comply with the award. The secretary of the Board of Arbitration is required to notify the secretary of the Film Board of Trade of the name and address of each Exhibitor found to have refused to arbitrate or comply with an award, and the maximum amount of security (not above $500) found by the Board. "On receipt of any such notice, each member having a contract (or representing a distributor having a contract) containing the arbitration clause with any such exhibitor shall demand payment by such exhibitor of such sum as in the judgment of such member or distributor shall be sufficient to protect such member or distributor in the performance of each contract with such exhibitor. Said sum shall not exceed the actual value of any print thereafter to be delivered under each such contract plus the maximum amount fixed by the Board of Arbitration as

aforesaid. Thereafter each distributor (represented in the membership) to whom such exhibitor shall have failed within seven (7) days to pay the amount of security so demanded by such distributor shall proceed to suspend service under each such contract until such exhibitor shall have furnished such security or complied with the decision of such Arbitration Board. If service under any such contract shall be so suspended for a period of ten days such contract, at the option of the distributor, may then be cancelled. No member or distributor having so suspended service under any such contract with such exhibitor shall thereafter resume service under any such contract unless and until such exhibitor shall have furnished said security to such member or distributor or shall have complied with the decision of the Arbitration Board. Upon the happening of either of such events service under such contract shall be promptly resumed by such member or distributor."

The record discloses that ten competitors in interstate commerce, controlling sixty per cent of the entire film business, have agreed to restrict their liberty of action by refusing to contract for display of pictures except upon a Standard Form which provides for compulsory joint action by them in respect of dealings with one who fails to observe such a contract with any Distributor, all with the manifest purpose to coerce the Exhibitor and limit the freedom of trade.

The United States maintain that the necessary and inevitable tendency of the outlined agreement and combination (described with greater detail in the opinion below) is to produce material and unreasonable restraint of interstate commerce in violation of the Sherman Act. *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600, 614; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 312. The court below accepted this view and directed an ap-

propriate injunction against future action under the unlawful plan. We agree with its conclusion and the challenged decree must be affirmed.

The Appellants claim: (1) The Standard Exhibition Contract and Rules of Arbitration dated May 1, 1928, having been evolved after six years of discussion and experimentation, are reasonable and normal regulations; so that whatever restraint follows falls short of unlawful coercion. (2) Arbitration is well adapted to the needs of the motion picture industry. (3) The manner in which the Contract and Rules have worked out in practice, and the significant absence of complaints, reflect their reasonable character. (4) The decree is inconsistent with the stipulated facts, also with the Court's findings of fact.

"Founded upon broad conceptions of public policy, the prohibitions of the statute [Sherman Act] were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute but the remedies which it provided were co-extensive with such conceptions." *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165, 174. "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade." *United States* v. *Colgate & Co.*, 250 U. S. 300, 307. "The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade." *Ramsay Co.* v. *Bill Posters Assn.*, 260 U. S. 501, 512. "The Sherman Act was in-

tended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies and those abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition—the play of the contending forces ordinarily engendered by an honest desire for gain." *United States* v. *American Oil Co.*, 262 U. S. 371, 388.

The fact that the Standard Exhibition Contract and Rules of Arbitration were evolved after six years of discussion and experimentation does not show that they were either normal or reasonable regulations. That the arrangement existing between the parties cannot be classed among "those normal and usual agreements in aid of trade and commerce" spoken of in *Eastern States Lumber Assn.* v. *United States, supra,* 612, is manifest. Certainly it is unusual and we think it necessarily and directly tends to destroy "the kind of competition to which the public has long looked for protection." *United States* v. *American Oil Co., supra,* 390.

The Sherman Act seeks to protect the public against evils commonly incident to the unreasonable destruction of competition and no length of discussion or experimentation amongst parties to a combination which produces the inhibited result can give validity to their action. Congress has so legislated "as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted." *Eastern States Lumber Assn.* v. *United States, supra,* 613.

It may be that arbitration is well adapted to the needs of the motion picture industry; but when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition their action becomes illegal.

In order to establish violation of the Sherman Act it is not necessary to show that the challenged arrangement suppresses all competition between the parties or that the parties themselves are discontented with the arrangement. The interest of the public in the preservation of competition is the primary consideration. The prohibitions of the statute cannot ". . . be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results." *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 49.

Upon examination of the record we cannot say that the decree of the court below is inconsistent with the stipulated facts or with proper regard to what that court held in respect of the facts.

The challenged decree must be

Affirmed.

UNITED STATES *v.* FIRST NATIONAL PICTURES, INCORPORATED, ET AL.

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

No. 95. Argued October 27, 28, 1930.—Decided November 24, 1930.

Ten competing corporations, which controlled 60% of the business of supplying the motion picture films used by theatres throughout the Union and had agreed amongst themselves upon a standard form of licensing contract for dealing with exhibitors (see *Paramount Corporation* v. *United States, ante,* p. 30,) thereafter combined with other distributors, who with themselves controlled 98% of the film distribution, in establishing certain rules. Under these, whenever a theatre changed hands, the credit and business arrangements of the new proprietor were inquired into, partly through an elaborate questionnaire addressed to him, special attention being given to his wiliingness and agreement to assume contracts for film service exist-

ing between his predecessor and any of the distributors; and no contract for the delivery and display of a picture, other than one for delivery in the immediate future, could be made by any distributor with any new proprietor who had not assumed such outstanding contracts, unless he furnished cash security to the distributor, fixed as provided in the rules. The effect in such cases was to prevent the exhibitor who would not assume such obligations of his predecessor, from meeting the seasonal demands of his theatre by bookings for future deliveries of film through contracts made in advance, such as were customary and necessary in this business. The rules were sought to be justified as reasonable protection against a practice of evading film service contracts by transferring the theatres to which they related. *Held* that the arrangement conflicts with the Sherman Act. P. 55.

34 F. (2d) 815, reversed.

APPEAL from a decree of the District Court refusing an injunction in a suit under the Sherman Act and dismissing the bill on the merits.

Assistant to the Attorney General O'Brian, with whom *Attorney General Mitchell* and *Messrs. Claude R. Branch* and *Charles H. Weston,* Special Assistants to the Attorney General, were on the brief, for the United States.

The distributors of motion pictures, who together have a substantial monopoly of the business of distributing motion pictures, have agreed to coerce purchasers and lessees of motion picture theaters to assume the outstanding exhibition contracts of the former owners or operators. This coercion has been exercised by agreement or concerted action by the distributors through their representatives on the local film boards, not to make exhibition contracts with the new owner of a transferred theater unless he assumes his predecessor's exhibition contracts or deposits on each new contract whatever security, up to $1,000, is listed by the credit committee composed of three members of the local film board. Although the agreement permits a new owner to obtain pictures by "spot

booking" without assuming contracts or putting up security, regular operation of a theater through "spot booking" is not practicable.

We submit that this case is governed by the numerous decisions of this Court condemning, as an illegal restraint of trade, any agreement not to deal, or even any concerted action by members of a trade having such a purpose and effect. This Court has also said that such an agreement is equally invalid where the restraint may be removed by complying with the conditions fixed by those imposing the restraint. And it is no justification of an illegal combination in restraint of trade that the primary object of the parties to the agreement is to protect themselves against trade conditions which they consider inimical. *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600; *Anderson* v. *Shipowners Assn.,* 272 U. S. 359; *Montague & Co.* v. *Lowry,* 193 U. S. 38; *Loewe* v. *Lawlor,* 208 U. S. 274, 294; *Binderup* v. *Pathe Exchange,* 263 U. S. 291.

This Court has held that exchange of information between members of a trade association, which merely permits the individual members to conduct their business more closely in accord with conditions in the trade, is not illegal provided there be no express or implied agreement to act in concert on the basis of such information. *Maple Flooring Assn.* v. *United States,* 268 U. S. 563; *Cement Mfrs. Assn.* v. *United States,* 268 U. S. 588. There is a clear intimation in these opinions that an agreement to act in concert upon the basis of the information exchanged constitutes a combination in illegal restraint of trade. We submit that, in this case, the illegality of appellees' agreement is manifested by the fact that they did not even purport to furnish their members with information which would enable them individually to carry on their business more intelligently, but simply gave them the information necessary to enforce collec-

tively the decisions of their local agencies. *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600; *American Column & Lumber Co.* v. *United States,* 257 U. S. 377. Distinguishing: *Chicago Board of Trade* v. *United States,* 246 U. S. 231; *United States* v. *Fur Dressers Assn.,* 5 F. (2d) 869.

The view of the court below was that the restraint imposed by appellees was justified by their common interest in preserving the integrity of contractual obligations. This, we submit, is a doctrine which would sweep aside all limitations upon collective action by trade groups. Such "common interest" of the individual distributors is to be found in the fact that each enters into similar contracts with exhibitors and desires to have those contracts fulfilled. But the making of similar contracts, and an interest in enforcing one's own contracts, are not conditions peculiar to the motion picture industry. Even if members of an industry can under any circumstances combine to set up extra-legal machinery for enforcing contracts, certainly such a combination should not be sanctioned, where, as in this case, monopolistic power is exerted to require third persons to assume contracts for which they are not morally or legally liable.

Messrs. Cornelius W. Wickersham and *John W. Davis,* with whom *Messrs. Henry W. Taft, Paxton Blair, Arthur L. Fisk, Jr.,* and *Gabriel L. Hess* were on the brief, for appellees.

Fraudulent transfers had become a widespread evil and were causing the distributors heavy losses annually.

The effect of the credit rules has been to diminish the number of fraudulent transfers; the rules have benefited the industry and improved its ethics. They are normal and reasonable trade regulations. *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238; *Cement Mfrs. Assn.* v. *United States,* 268 U. S. 588, 604; *United States*

v. *King,* 229 Fed. 275, 278; *United States* v. *Fur Dressers Assn.,* 5 F. (2d) 869, 873.

The credit rules are directed against transfers made for the purpose of avoiding uncompleted contracts, to persons who are almost certainly in collusion with the transferors. The transferees at whom the rules are aimed may not have defaulted on their own contracts, but they are aiders and abettors of those who have.

The principle that concerted action against delinquent debtors is not actionable and that, as a result, to include a man's name on a circulated list of such persons may not be made the basis of an action for libel if he is in fact delinquent, was sustained in the following cases: *Putnal* v. *Inman,* 76 Fla. 553, 556; *Brewster* v. *Miller's Sons Co.,* 101 Ky. 368, 381; *Reynolds* v. *Plumbers' Protective Assn.,* 30 Misc. (N. Y.) 709, 712, 63 N. Y. Supp. 303; *Delz* v. *Winfree,* 6 Tex. Civ. App. 11; *Woodhouse* v. *Powles,* 43 Wash. 617, 621.

Reasonable measures against losses by fraudulent debtors are forms of credit protection.

The ten-day period of investigation during which the new owner may "spot book" pictures prevents any unreasonable inconvenience to him.

The actual application and effect of the credit rules, and the absence of complaints, show the rules to be fair and reasonable.

The real burden of the Government's contention seems to be that the distributors should have permitted fraudulent transfers to continue unabated with consequent heavy losses to themselves. We submit that when those commonly interested are faced with financial losses due to a definite evil, they may combine to require reasonable security for their fragile and valuable property before placing it in the hands of those who have shown their willingness to be parties to a fraud.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The court below denied the relief sought by the United States. The parties are the same as those in *Paramount Famous Lasky Corporation* v. *United States,* just decided, *ante,* p. 30, and the opinion there contains sufficient description of them, their business and operations.

In 1926 the Appellee Distributors caused each of the thirty-two Film Boards of Trade to adopt written rules for establishment and operation of a local credit committee. These Committees were promptly organized and have continued to function as required. The prescribed rules provide—

That to correct abuses and unfair practices the president shall appoint a credit committee of three members to investigate and report the names of all persons who have acquired, by purchase or transfer, theatres in the territory within which the Film Board operates. The secretary of the Film Board shall be secretary of the committee and to him sales and transfers of theatres shall be promptly reported. These shall be placed upon a "Credit information list" and copies furnished to all members of the Film Board for their confidential information. Upon receipt of such list each member shall advise the secretary concerning its existing contracts for exhibition of pictures at the listed theatre and shall state whether the transfer provided that the new owner should assume and complete outstanding contracts.

That immediately upon receiving information of the transfer of a theatre the secretary shall request the new owner to furnish within five days references concerning his credit standing, etc., and to secure this information a prescribed form of questionnaire shall be sent out. The credit committee shall meet weekly to examine and report

upon the credit standing of new owners and furnish a copy of their report to members as confidential information. If a new owner fails to respond to the questionnaire, this fact shall be noted upon the credit information list. Also the credit committee shall indicate on the list every sale or transfer of a theatre which upon investigation it concludes was made by the previous owner for the purpose of avoiding or being relieved of uncompleted contracts for exhibiting pictures at such theatre. There shall also be indicated opposite the name of each theatre listed (excepting those whose new owners have agreed to assume and complete all existing contracts entered into by the prior owners, and of which agreement notice has been given to or received by the credit committee) the amount of cash security, not exceeding $1,000, which in the judgment of the committee is a reasonable sum that members shall require to be deposited as security for the full and complete performance of each contract thereafter made and entered into for the exhibition of pictures at such theatre.

That no member of the Film Board shall enter into a contract for the exhibition of pictures at any theatre listed on the credit information list for a period of ten days from the date of the first appearance of such theatre upon the list nor thereafter unless the new owner or lessee of such theatre shall have paid in cash to such member with whom such owner or lessee desires to contract for pictures the amount of security specified on the credit information list. Certain contracts for "spot-booking," that is for a picture to be delivered in the immediate future, may be made within the ten day period and prior to the committee's report. The credit committee may from time to time remove from the credit information list the name of any theatre owned or operated by a new owner and thereafter members of the Film Board may contract with him.

That members upon demand of the credit committee shall furnish desired information, permit examination of books and records with respect to any exhibitor who has sold or transferred his theatre and has failed to provide for the assumption by the new owner of existing contracts. A member of the Film Board who violates any of these rules shall be subject to suspension or expulsion.

A copy of the "Questionnaire" is printed in the margin.* It asks for many particulars concerning the new

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* Please answer each question, sign and return to—

CREDIT COMMITTEE

.....FILM BOARD OF TRADE

Address.....

1. Name of theatre.....
2. Street address..... City and State.....

Population of city..... Seating capacity.....

V Policy: Pictures ( ) Vaudeville ( ) Road Shows ( ).....

Number of days open each week..... Time of first performance.....a. m.....p. m.

What days do you have matinees..... Time of first performance .....

Telephone No. of office.....; of residence.....

Name of person, firm, or corporation, operating theatre.....

.....

If a corporation give corporate name.....

Name of president.....

Name of treasurer.....

Name of secretary.....

Name of general manager.....

Is stock of corporation or a substantial amount thereof owned or held by another corporation?.....

If so, give name of corporation and names of officers and directors....

.....

If partnership, give names of partners.....

.....

Who is authorized to enter into and sign contracts.....

.....

3. How will the contracts be signed.....
4. Is theater owned or leased.....If leased, state expiration date of lease.....

owner or transferee of the transferred theatre and especially demands specification of outstanding contracts for film service made by the previous owner and a declaration as to whether the new one has or will adopt them.

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5. Name of lessor.....If owned, state name of owner.....
6. On what date was theater taken over.....
7. Place where and date of recording bill of sale.....
8. Admission prices.....
9. Condition of projection machines.....
10. Have you or your operator inspected them, if not, do you agree to have them inspected within thirty days.....
11. Model of machines.....Year.....
12. Name theaters heretofore conducted, stating location of each.....
.....
13. If you have never been engaged in the exhibition of pictures, state previous business.....
14. Bank references.....
15. Other references.....
16. Specify contracts for film service made by previous owner:

Name of distributor	Date of contract	No. pictures unplayed
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

17. Specify contracts you have assumed.....
.....
18. If you have not assumed the previous owner's contracts, will you assume them?.....

(If your answer to this question is "yes," fill out and sign the attached agreement of assumption.)

The undersigned represents and warrants that the answers to the foregoing questions are true and are made to induce the members of the above-named film board of trade to contract with the undersigned owner or lessee for the exhibition of motion pictures at the above-named theater.

Signature.....
Owner Lessee (strike out one).

Dated.....19

The definite point of attack in this proceeding is the agreement for the creation and operation of the Credit Committees and their use under prescribed rules to restrict freedom of sales by Distributors and of purchases by Exhibitors.

Assumption of Contracts

.....19..

Know all men by these presents, that the undersigned.....
owner
lessee of the ..... Theatre, in consideration of one dollar lawful money of the United States in hand paid, the receipt of which is hereby acknowledged, and other valuable considerations, hereby agrees to assume, carry out, and fully perform each of the contracts now existing between ..... and the following
(Name of previous owner)
distributors:

.....
.....
.....
.....
.....

for the exhibition of pictures at said theatre from the above date.

Distributors	Date of contract	No. pictures unplayed	Class (features, comedies, news, other shorts)
.....			
.....			
.....			
.....			
.....			

.....
(New lessee New owner) (Strike out one)
.....Theatre
Address.....

Statement of financial condition

Statement of.....
Individual Corporation Partnership (strike out one)
Operating.....Theatre

To Credit Committee of the Film Board:

For the purpose of inducing the members of the film board of trade to contract with the undersigned owner (or lessee) for the exhibition

Ten Producers and Distributors of films, controlling 60% of the business, agreed to contract with Exhibitors only according to a Standard Form and then combined through thirty-two local Film Boards of Trade with other Distributors, who with themselves control 98% of the entire business. The Film Boards appoint Credit Committees and these operate under the Rules above outlined. The obvious purpose of the arrangement is to restrict the liberty of those who have representatives on the Film Boards and secure their concerted action for the purpose of coercing certain purchasers of theatres by excluding them from the opportunity to deal in a free and untrammeled market.

Reference to what has just been said in *Paramount Famous Lasky Corporation* v. *United States, ante,* p. 30, and to the opinions in *Eastern States Lumber Assn.* v.

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of motion pictures at the ..... Theatre, I (or we) warrant and represent that the following is a true and correct statement of my (or our) financial condition on the ..... day of ....., 19.., and agree that in case any change occurs that materially reduces my (or our) ability to pay all claims and demands against me (or us) or materially increases my (or our) liabilities or decreases my (or our) assets, I (or we) will forthwith notify you in writing to such effect.

ASSETS				LIABILITIES			
Cash on hand, and in bank				Notes payable			
Notes receivable				Money borrowed			
Real estate (how valued)				Accounts payable			
Furniture and fixtures				Mortgages—real estate			
Screen, machines, chairs				Chattel trusts			
All other assets consisting of:				Mortgages on personalty and fixtures			
				All other liabilities consisting of:			
Total				Total			

Net worth as of this date $.....

.....

Exhibitor.

United States, 234 U. S. 600, *United States* v. *American Oil Co.,* 262 U. S. 371, *Binderup* v. *Pathe Exchange,* 263 U. S. 291, and *Anderson* v. *Shipowners Assn.,* 272 U. S. 359, will suffice, we think, to show the challenged arrangement conflicts with the Sherman Act.

The court below erred in reaching a different conclusion and its decree must be reversed. The cause will be remanded for further proceedings in conformity with this opinion.

Reversed.

CROOKS, COLLECTOR OF INTERNAL REVENUE, *v.* HARRELSON ET AL.

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

No. 24. Argued October 31, 1930.—Decided November 24, 1930.

1. Section 402 of the Revenue Act of 1918 provides that the value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property "(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate." *Held* that the requirements that a property interest, to be included, shall be subject to the payment of the charges against the estate and the expenses of administration must be taken, as they are expressed, in the conjunctive; that charges against the estate and expenses of administration are different and distinct things, and that when, by the state law, an interest in real estate, though subject to the former, is not subject to the latter, it forms no part of the gross estate for the purpose of the federal estate tax. *United States* v. *Field,* 255 U. S. 257. P. 58.
2. To justify departure from the letter of an Act of Congress as leading to absurd results, the absurdity must be so gross as to shock the general moral or common sense; there must be something to make plain the intent of Congress that the letter shall

not prevail; it is not enough merely that hard and objectionable or absurd consequences, which probably were not in the contemplation of the framers, are produced by the act of legislation. P. 59.

3. Unless the Constitution be violated, Congress may select the subjects of taxation and qualify them differently as it sees fit; and if it does so in plain terms it is not within the province of the Court to modify the law by construction. P. 61.
4. The general rule requiring adherence to the letter applies with peculiar strictness to a taxing act. *Id.*
5. In Missouri the real estate of a decedent cannot be sold to pay expenses of administration, nor can its proceeds, when sold to pay debts and legacies for which the personal estate is insufficient, be used to pay expenses of administration. *Id.*

35 F. (2d) 416, affirmed.

CERTIORARI, 281 U. S. 706, to a judgment of the Circuit Court of Appeals affirming a judgment, 28 F. (2d) 510, recovered by the present respondents in an action against the Collector for money exacted as a part of an estate tax.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist, Mr. Sewall Key* and *Miss Helen R. Carloss,* Special Assistants to the Attorney General, *Messrs. Clarence M. Charest,* General Counsel, and *William T. Sabine, Jr.,* Special Attorney, Bureau of Internal Revenue, and *Mr. Erwin N. Griswold,* were on the brief, for petitioner.

Messrs. Frank S. Bright and *S. L. Swarts,* with whom *Messrs. Massey Holmes, L. C. Connally,* and *H. Stanley Hinrichs* were on the brief, for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Benjamin H. Harrelson, a resident of Missouri, died testate in 1920, leaving within the State property and assets which included real property valued at over $269,000. The Commissioner of Internal Revenue, upon

a final audit and review of the federal estate tax return of the executors made under the Revenue Act of 1918, included the real property as a part of the gross estate for the purpose of computing the tax. The executors paid $37,762.20, the amount attributable to the value of the real property, and subsequently claimed a refund thereof on the ground that the value of the decedent's real property having its situs in Missouri was not, under the law of that State and the terms of the federal statute, properly subject to an estate tax, and the amount was, therefore, illegally assessed and collected. The estate having been closed and distributed and the executors discharged, plaintiffs (respondents here), as sole beneficiaries and distributees, brought this action in a federal district court against the defendant (petitioner here) to recover the amount so paid and claimed, together with interest. Defendant demurred to the complaint on the ground that the facts stated were not sufficient to constitute a cause of action. The district court overruled the demurrer and, defendant having declined to plead further, rendered judgment against him for the sum claimed, with interest and costs. 28 F. (2d) 510. Upon appeal the circuit court of appeals affirmed the judgment. 35 F. (2d) 416.

A correct determination of the question presented requires consideration of the provisions of § 402 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097–8, the relevant portion of which follows:

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;"

The court below held—(1) that by the express provisions of the foregoing section, the value of the interest of a decedent in any property at the time of his death may not be included in the gross estate for the purpose of the tax unless there be a concurrence of the requirements there set forth, namely, (a) that the interest of the decedent be subject to the payment of the charges against his estate, (b) that such interest be subject to the expenses of administration, and (c) that such interest be subject to distribution as part of his estate; and (2) that by the law of Missouri such interest in real property is not subject to the expenses of administration, and, therefore, the requirement in that respect is not met. Both propositions are controverted by the petitioner.

First. The meaning of the provision in question, considered by itself, does not seem to us to be doubtful. The value of the interest of the decedent is not to be included unless it "is subject to the payment of the charges against his estate *and* the expenses of its administration"—not one or the other, but both. We find nothing in the context or in other provisions of the statute which warrants the conclusion that the word "and" was used otherwise than in its ordinary sense; and to construe the clause as though it said, "to the payment of charges and expenses, *or either of them,*" as petitioner seems to contend, would be to add a material element to the requirement, and thereby to create, not to expound, a provision of law. Nor will it do to say that the words, "*charges* against his estate," include expenses of administration, for plainly they are different and distinct things, generally so classified in the settlement of estates of decedents, and so regarded by Congress, as evidenced by the discriminating terms of the statute.

A similar question was presented to this court and decided in *United States* v. *Field,* 255 U. S. 257. It was there held that the interest of the decedent, Mrs. Field,

was not taxable under § 202 (a) of the Revenue Act of 1916, reënacted as clause (a) of § 402 now under review, because it was not her property at the time of her death, nor subject to distribution as part of her estate. The court said (p. 262):

"The conditions expressed in clause (a) are to the effect that the taxable estate must be (1) an interest of the decedent at the time of his death, (2) which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and (3) is subject to distribution as part of his estate. These conditions are expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively. Hence, unless the appointed interest fulfilled all three conditions, it was not taxable under this clause."

It is to be observed that the court, by combining under one head the provision in respect of charges against the estate and that in respect of expenses of administration, treated clause (a) as containing three conditions instead of four; but this does not alter the fact that, whether stated separately or in combination, the second condition contains two distinct requirements, expressed conjunctively, and may not be read as though stated disjunctively. It seems clear enough that the *Field* case is decisive of the question and requires us to hold that if the value of the interest of the decedent now being considered is not subject, under the law of Missouri, to the expenses of administration, it forms no part of the gross estate for the purpose of the federal estate tax.

It is urged, however, that if the literal meaning of the statute be as indicated above, that meaning should be rejected as leading to absurd results, and a construction adopted in harmony with what is thought to be the spirit and purpose of the act in order to give effect to the intent of Congress. The principle sought to be applied is that

followed by this court in *Holy Trinity Church* v. *United States,* 143 U. S. 457; but a consideration of what is there said will disclose that the principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. The illustrative cases cited in the opinion demonstrate that to justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense. Compare *Pirie* v. *Chicago Title and Trust Company,* 182 U. S. 438, 451-452. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail. *Treat* v. *White,* 181 U. S. 264, 268.

Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. *Monson* v. *Chester,* 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts. See *In re Alma Spinning Company,* L. R. 16 Ch. Div. 681, 686; *King* v. *Commissioners,* 5 A. & E. 804, 816; *Abley* v. *Dale,* L. J. (1851) N. S. Pt. 2, Vol. 20, 233, 235. And see generally *Chung Fook* v. *White,* 264 U. S. 443, 445; *Commr. of Immigration* v. *Gottlieb,* 265 U. S. 310, 313.

In support of the claim that a literal construction is not admissible, it is said that by other provisions of § 402 certain interests in real property, such as dower, etc., are made subject to the tax without regard to the conditions set forth in subdivision (a), and that this results in an incongruity amounting to an absurdity. But unless the Constitution be violated, Congress may select the subjects of taxation and qualify them differently as it sees fit; and if it does so in plain terms, as it has done here, it is not within the province of the court to modify the law by construction. In any event, conceding that the conditions assailed have produced the incongruous results complained of, they fall far short of that degree of absurdity contemplated by the *Holy Trinity Church* case, or by any other decision of this court.

Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness. In *United States* v. *Merriam,* 263 U. S. 179, 187–188, after saying that "in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used," we quoted with approval the words of Lord Cairns in *Partington* v. *Attorney-General,* L. R. 4 H. L. 100, 122, that "if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

Second. It is conceded by the petitioner, as it must be, that at common law real estate cannot be sold to pay expenses of administration, and that this rule of the common law is in effect in Missouri unless modified by statute.

It is further conceded that there is no statute which permits real estate to be sold merely to pay such expenses. One contention, however, is that an executor or administrator may be authorized by the proper court to sell real estate to pay debts and legacies if the personal estate is insufficient; and that upon such sale the executor or administrator is entitled to a commission on the proceeds of the sale, which takes priority over the payment of debts against the estate. As to this it is sufficient to say, as the court below said, that this commission is not an expense of administration, but an expense incidental to the sale of the lands. The Missouri Court of Appeals, in *Elstroth* v. *Young,* 94 Mo. App. 351, 355–356, held that the proceeds of the sale of lands so made could not be used to make good deficiencies in the expenses of administration.

The further contention that if the personal estate has been consumed by administration expenses and real estate is sold to pay debts and legacies, as a practical matter, real estate has been sold because of administration expenses, we put aside as inconsequential. In the case supposed it is perfectly evident that the real estate has been sold not to pay administration expenses, but to pay debts and legacies, and that fact is in no wise altered because the sale was necessitated by the consumption of the personalty for such expenses. The cause of the sale must not be confused with its purpose.

Nothing would be gained by a review of the numerous decisions of the Missouri courts. They are set forth and fully and well considered by the court below, and we entirely agree with that court's conclusion that these decisions establish "that real estate of a decedent in that state cannot be sold for the payment of expenses of administration, nor can the proceeds of land sold to pay debts be lawfully used to pay expenses of administration."

We have not failed to note the decision of the Court of Claims in *Steedman* v. *United States,* 63 C. Cls. 226, as well as the decision of the Board of Tax Appeals in *Bartlett* v. *Commissioner,* 16 B. T. A. 811, 816, but in so far as they conflict with the foregoing conclusions, they are disapproved.

Judgment affirmed.

DISTRICT OF COLUMBIA *v.* COLTS.

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

No. 96. Argued October 23, 1930.—Decided November 24, 1930.

1. Article III, § 2, cl. 3, of the Constitution, which provides that "The trial of all crimes, except in cases of impeachment, shall be by jury," must be interpreted in the light of the common law, according to which petty offenses might be proceeded against summarily before a magistrate sitting without a jury. P. 72.
2. It is settled that there may be many offenses called "petty offenses" which do not rise to the degree of "crimes" within the meaning of Article III, and in respect of which Congress may dispense with a jury trial. *Id.*
3. Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense. P. 73.
4. Driving at a forbidden rate of speed and so recklessly "as to endanger property and individuals," in violation of the District of Columbia Traffic Act, is an offense which is *malum in se* and of a serious character, amounting to a public nuisance indictable at common law, and is a "crime" within the constitutional guarantee of trial by jury. Art. III, § 2, cl. 3. *Id.*

38 F. (2d) 535, affirmed.

CERTIORARI, 281 U. S. 716, to review a judgment of the Court of Appeals of the District of Columbia, reversing a judgment of the Police Court, which had denied to the

respondent a jury trial upon an information against him charging reckless driving.

Mr. Robert E. Lynch, with whom *Messrs. Wm. W. Bride* and *Robert P. Reeder* were on the brief, for petitioner.

The respondent had no right to trial by jury in this case unless the Constitution gave him that right.

Congress may require the trial of petty offenses without a jury. *Callan* v. *Wilson,* 127 U. S. 540; *Schick* v. *United States,* 195 U. S. 65.

In *Callan* v. *Wilson,* the defendant was sentenced to pay a fine of twenty-five dollars or undergo imprisonment for thirty days; but that was not the maximum which might have been imposed. "It is what sentence can be imposed under the law, not what was imposed, that is the material consideration." *United States* v. *Moreland,* 258 U. S. 433. While no statute dealt with conspiracy directly, Rev. Stats., Dist. Col., § 92, provided that laws which were in force in Maryland on February 27, 1801, should continue in force within the District of Columbia, and conspiracy was a common-law misdemeanor in Maryland, *State* v. *Buchanan,* 5 H. & J. 317, (see Bishop, Criminal Law, 9th ed., I, 452; Russell, Crimes, 7th ed., I, p. 10,) and, therefore, in the District of Columbia. One who was convicted of that offense could not have been sentenced to the penitentiary, Rev. Stats., Dist. Col., § 1144, but he could have been sentenced to jail, Rev. Stats., Dist. Col., §§ 1049, 1054; and imprisonment for a common-law misdemeanor was at the discretion of the court and was not limited to one year. See *United States* v. *Marshall,* 17 D. C. 34; *Palmer* v. *Lenovitz,* 35 App. D. C. 303. The offense was being punished as a common-law offense, for which very serious punishment might have been imposed. The case was, therefore, unlike the present one, for here the offense, which was forbidden by statute,

cannot be punished by a larger fine than one hundred dollars or by a longer imprisonment than thirty days. The essential point of similarity, as found by the court below, is simply the fact that reckless driving was also an offense at common law.

It is true that in *Callan* v. *Wilson* the Court referred to the common law as determining whether an offense was of the class or grade which was triable by a jury at common law. It substantially said that the clauses of the Constitution which provide for trial by jury are to be read in the light of the rule of the common law, which requires trial by jury in criminal cases but exempts petty offenses from this requirement. But the Court did not take the position that all offenses must remain for all time as they were at common law. It did not deny that Congress may provide serious punishment for acts which were regarded as innocent a hundred and forty years ago, and punish lightly, or not at all, acts which were regarded as serious crimes by our ancestors. Certainly, if offenses which were once petty are to be punished severely, a trial by jury must be allowed; and it must be equally true that, if Congress decides that an offense shall be given a petty punishment, persons who are accused of such acts may be tried as for petty offenses. As said in *People* v. *Craig,* 195 N. Y. 190; "It is not the mere name of a crime but the punishment therefor that characterizes it." The decision in *Callan* v. *Wilson* does not deny the power of Congress to erect its own standards as to the seriousness of offenses at the present day, to limit the punishment accordingly, and to order the trial of an offense which it treats as petty by summary procedure.

In *Schick* v. *United States,* 195 U. S. 65, the only punishment provided for the offense was a fine of fifty dollars. The Court said that the offense was a petty one for which Congress might have required trial by the judge alone.

Its statements that the Constitution does not require jury trial of petty offenses, and that the nature of the offense and the amount of the punishment determine whether the offense is serious or petty, mark the extent of the holding, for it cannot be supposed that the Court intended to class all misdemeanors as petty offenses.

The Court has thus conceded that the Constitution does not require trial by jury in the case of petty offenses, but it has not shown precisely what offenses are to be classed as "petty."

Before the Constitution was adopted there were many offenses, both in England and America, in the trial for which no jury was allowed. These included, not only offenses which might be punished by fines, but many others in which corporal punishment or imprisonment might be imposed. Blackstone, Commentaries, IV, 280; Paley, Summary Convictions, Introduction; Webb, English Local Government: Parish and County, 419; Jenks, Short History of English Law, Eng. ed., 153, 154; Frankfurter and Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 925, 929.

In the American Colonies and States there were many instances of laws for the trial of criminal offenses which did not provide for the participation of juries except, if at all, on appeal.

Article III and the Sixth Amendment established the right to trial by jury in criminal prosecutions; but there is nothing in the terms used, or in the circumstances or discussions attending their adoption, which shows a requirement of trial by jury more comprehensive than was observed throughout the States at the time.

Decisions of many state courts support the position that an offense such as is here involved, for which the maximum punishment is a fine of one hundred dollars or imprisonment of thirty days, may be tried by summary

procedure. *State* v. *Parker,* 87 Fla. 181; *Bray* v. *State,* 140 Ala. 172; *State* v. *Broms,* 139 Minn. 402; *State* v. *Anderson,* 165 Minn. 150; *Byers* v. *Commonwealth,* 42 Pa. St. 89; *People* v. *Harding,* 189 N. Y. Supp. 657; *Duffy* v. *The People,* 6 Hill's Rep. 75; *Bell* v. *Nebraska,* 104 Neb. 203; *Latimer* v. *Wilson,* 103 N. J. L. 159; *McGear* v. *Woodruff,* 22 N. J. L. 213; *State* v. *Glenn,* 54 Md. 572.

The offense of reckless driving in the District of Columbia, as defined in the Traffic Act, is a municipal offense, notwithstanding the fact that the law was enacted by the Congress of the United States. It was not created in a criminal statute but by the Traffic Act of 1925, which deals simply with local traffic conditions. The offense is a common one. In a city of scarcely more than five hundred thousand inhabitants there are almost seventeen hundred charges of reckless driving tried before the one court in a single year. (Report of the Commissioners of the District of Columbia for the year ended June 30, 1929, p. 14.) And, as shown by the state cases herein cited, the maximum punishment for a violation of this portion of the Act is relatively light. In view of these circumstances, a charge of reckless driving may properly be tried without a jury.

The Traffic Act deals exclusively with the District of Columbia and is a statute in the nature of a municipal regulation. Congress was dealing solely with local conditions. It said that the operation of an automobile in a certain manner constituted reckless driving. There is nothing in the reports or debates prior to the enactment of the statute to indicate that Congress was attempting to revamp the common law offense of "fast" driving in a "crowded or populous street." Because the offense of reckless driving today may have one, or even more, elements similar to a common law offense, that fact does not make it a common law offense.

Assuming, without conceding, that, at the time of the adoption of the Constitution, the charge of reckless driving was triable only by jury, it is submitted that, in recent times, the offense has been merely a petty one. The determination of what punishments shall be considered infamous is affected by changes in public opinion from one age to another. *Ex parte Wilson,* 114 U. S. 417; *Mackin* v. *United States,* 117 U. S. 348; *United States* v. *Moreland,* 258 U. S. 433. It is clear from the foregoing decisions of this Court that a breach of the peace consisting of fast driving so as to endanger the lives and safety of the citizens was not an indictable offense at common law. Distinguishing *United States* v. *Hart,* 1 Pet. C. C. 390.

At the present day, all men and women travel much more rapidly than was possible in 1787. Doubtless there has been an accompanying change in the attitude of the public towards reckless driving and in the effect of conviction upon an offender's standing in the community. This change in public opinion may be an important consideration in determining whether the offense should now be regarded as a petty one. The fact that there are seventeen hundred arrests for reckless driving in the District of Columbia in a single year, shows not only the need for as expeditious a trial as is compatible with law and with justice, but that the offense is not being regarded as a major one at the present time.

The Court of Appeals seized the phrase " indictable offense at common law " as used in *United States* v. *Hart,* 1 Pet. C. C. 390, and concluded the offense of reckless driving defined in the Traffic Act was an " indictable offense " and therefore a " crime " as that term is understood in Article III, § 2, cl. 3, of the Constitution. But the offense of fast driving over a crowded and populous street at such a rate or in such manner as to endanger the safety of the inhabitants, is quite different from the of-

fense prohibited by the Traffic Act and known as reckless driving. The first can only be committed where the vehicle attains a speed which is designated fast and over a crowded or populous street. The offense of reckless driving may be committed although the operator of the vehicle is not proceeding fast, and it may be committed upon a street that is not crowded or populous, and irrespective of whether the operation of the vehicle amounts to a breach of the peace or not.

Mr. William B. O'Connell, with whom *Messrs. Harry T. Whelan* and *Louis L. Whitestone* were on the brief, for respondent.

If the offense is a criminal offense, there can be no question but that the defendant is entitled to a trial by jury. The language of the Constitution and of the Sixth Amendment is not susceptible of any other interpretation.

The offense is not so petty that it should be tried by a summary proceeding. The driving of an automobile in the manner set out in the information would have amounted to a common nuisance at common law, and would therefore have been an indictable offense, and one entitling a defendant to a trial by jury. Blackstone's Commentaries, Book IV, p. 166. See also *United States* v. *Hart,* 1 Pet. C. C. 390.

Has Congress the power to fix arbitrary limits of punishment as the test for determining the right of a defendant to a trial by jury in a criminal case? If Congress can draw a line at which jury trials begin and end, there are innumerable federal statutes punishing a great many misdemeanors, especially the National Prohibition Act, that Congress could very summarily enforce.

The nature of the offense is not the only criterion of the right to a trial by jury; there is also the punishment which may be prescribed. If this is a "petty offense," it would seem that the framers of the Constitution placed

a greater value on $20.00 than they did upon ninety days of personal liberty.

That the offense may be tried by a summary proceeding in some States is not denied; and that this was true in most of the colonies before the adoption of the Constitution, is not denied. But the limitations upon States are not those upon the federal government. It is the very purpose of the Constitution to prevent the federal government from taking undue liberties with the citizens of the States. Decisions of state courts have no bearing whatever on this case. *Barron* v. *Baltimore,* 7 Pet. 243.

If Blackstone's definition is the true test, (Blackstone's Commentaries, Book IV, p. 5), the offense charged here is certainly a crime, and it comes, therefore, within the scope of offenses referred to in the Constitution. That there are many or few of these offenses, is of no importance. No one would seriously urge that a defendant be denied a jury trial solely for the purpose of making prosecution convenient to the Government.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

An information filed in the Police Court of the District of Columbia charged the respondent, Colts, with having operated upon various streets, contrary to the statute set forth below, "a certain motor vehicle at a greater rate of speed than twenty-two miles an hour over said public highway[s] recklessly, that is to say at a greater rate of speed than was reasonable and proper, having regard to the width of said public highway[s], the use thereof, and the traffic thereon, in such manner and condition so as to endanger property and individuals." Respondent was arraigned, pleaded not guilty, and demanded a trial by jury. The demand was denied, and he was put upon trial before the judge without a jury and found guilty. Upon writ

of error the Court of Appeals of the District of Columbia reversed the judgment, holding that respondent, under the federal Constitution, was entitled to a jury trial. With that conclusion we agree.

The acts of Congress passed for the government of the District provide that prosecutions in the police court shall be on information; that where the accused would be entitled to a jury trial under the Constitution, trial shall be by jury unless waived; and that in cases where the accused would not by force of the Constitution be entitled to a trial by jury, trial shall be by the court without a jury, unless, in cases where the fine or penalty may be more than $300 or imprisonment more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury. D. C. Code (1930), Title 18, c. 4, § 165.

Section 9 of the District of Columbia Traffic Act, 1925, as amended, D. C. Code (1930), Title 6, c. 9, § 246, provides:

"(a) No vehicle shall be operated upon any public highway in the District at a speed greater than twenty-two miles per hour except in such outlying districts and upon such highways as the director may designate. . . .

"(b) No individual shall operate a motor vehicle over any public highway in the District (1) recklessly; or (2) at a rate of speed greater than is reasonable and proper, having regard to the width of the public highway, the use thereof, and the traffic thereon; or (3) so as to endanger any property or individual; or (4) so as unnecessarily or unreasonably to damage the public highway.

"(c) Any individual violating any provision of this section where the offense constitutes reckless driving shall, upon conviction for the first offense, be fined not less than $25 nor more than $100 or imprisoned not less than 10 days nor more than 30 days; and upon conviction for

the second or any subsequent offense such individual shall be fined not less than $100 nor more than $1,000, and shall be imprisoned not less than 30 days nor more than one year, and the clerk of the court shall certify forthwith such conviction to the director, who shall thereupon revoke the operator's permit of such individual.

"(d) Any individual violating any provision of this section except where the offense constitutes reckless driving, shall, upon conviction for the first offense, be fined not less than $5 nor more than $25; upon conviction for the second offense, such individual shall be fined not less than $25 nor more than $100; upon conviction for the third offense or any subsequent offense such individual shall be fined not less than $100 nor more than $500, and shall be imprisoned not less than 30 days nor more than one year, and the clerk of the court shall certify forthwith such conviction to the director, who shall thereupon revoke the operator's permit of such individual."

It will be seen that the respondent is not charged merely with the comparatively slight offense of exceeding the twenty-two mile limit of speed, subdivision (a), or merely with driving recklessly, subdivision (b) (1); but with the grave offense of having driven at the forbidden rate of speed and recklessly, "so as to endanger property and individuals."

By § 165 of the D. C. Code, outlined above, the Constitution is made the test—as, of course, it must be—to determine whether the accused be entitled to a jury trial. Article III, § 2, cl. 3, of the Constitution provides that "The trial of all crimes, except in cases of impeachment, shall be by jury." This provision is to be interpreted in the light of the common law, according to which petty offenses might be proceeded against summarily before a magistrate sitting without a jury. See *Callan* v. *Wilson,* 127 U. S. 540, 557. That there may be many offenses called "petty offenses" which do not rise to the

degree of *crimes* within the meaning of Article III, and in respect of which Congress may dispense with a jury trial, is settled. *Schick* v. *United States,* 195 U. S. 65. And see *Natal* v. *Louisiana,* 139 U. S. 621, 624; *Lawton* v. *Steele,* 152 U. S. 133, 141; *State* v. *Rodgers,* 91 N. J. L. 212, 214.

Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense. The offense here charged is not merely *malum prohibitum,* but in its very nature is *malum in se.* It was an indictable offense at common law, *United States* v. *John Hart,* 1 Pet. C. C. 390, 392, when horses, instead of gasoline, constituted the motive power. The New Jersey Court of Errors and Appeals, in *State* v. *Rodgers, supra,* has discussed the distinction between traffic offenses of a petty character, subject to summary proceedings without indictment and trial by jury, and those of a serious character, amounting to public nuisance indictable at common law; and its examination of the subject makes clear that the offense now under review is of the latter character.

An automobile is, potentially, a dangerous instrumentality, as the appalling number of fatalities brought about every day by its operation bear distressing witness. To drive such an instrumentality through the public streets of a city so recklessly "as to endanger property and individuals" is an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense. If the act of the respondent described in the information had culminated in the death of a human being, respondent would have been subject to indictment for some degree of felonious homicide. *Nash* v. *United States,* 229 U. S. 373, 377; 1 Whar. Cr. Law, §§ 343 *et seq.,* 353–356; 1 Bish. New Cr. Law, § 313 *et seq.; Story* v. *United States,* 16 F. (2d) 342, 344; *State* v.

Campbell, 82 Conn. 671, 677; *Mercer* v. *Corbin,* 117 Ind. 450; *Belk et al.* v. *People,* 125 Ill. 584, 589–590; *Kennedy* v. *Way,* Bright. (Pa.) 186, 188. Such an act properly cannot be described otherwise than as a grave offense—a crime within the meaning of the third Article of the Constitution—and as such within the constitutional guarantee of trial by jury.

Judgment affirmed.

BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY ET AL. *v.* UNITED STATES ET AL.

UNITED STATES ET AL. *v.* BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Nos. 44 and 45. Argued October 20, 1930.—Decided November 24, 1930.

1. In fixing divisions of joint rates under § 15 (6) of the Interstate Commerce Act, the facts specified in that section, and others necessarily or properly to be taken into account, are to be considered having regard to the duty of the Commission under § 15 a (2) to establish and adjust rates so that the carriers as a whole, in each rate group or territory that the Commission may designate, will, under management and expenditures such as are there specified, earn as nearly as may be a fair return upon the aggregate value of their operating property. P. 82.
2. Section 15 (6) requires the Commission to consider the condition of each carrier and to determine whether the division of each joint rate is unreasonable, or otherwise repugnant to the specified standards, and what division will for the future be just, reasonable and equitable; the Commission may not change an existing division unless it finds that division unjust or unreasonable. *Id.*
3. But the Commission need not under all circumstances take specific evidence as to each rate of every carrier. When considering divisions of numerous joint rates applicable to traffic passing through gateways between different territories, the Commission

may make the required determinations and establish the bases for divisions between groups of carriers in the respective territories upon evidence which it reasonably may deem typical and to have sufficient probative weight to justify the necessary findings and the order in respect of each rate. That is to say, such typical evidence may sufficiently disclose the facts necessary to enable the Commission duly to consider the divisions of each joint rate to be received by every carrier. P. 82.

4. Where the evidence before the Commission is sufficient to disclose, as to each carrier, all the facts specified in § 15 (6) and to furnish an adequate and reasonable basis for the proper division of each of the joint rates applicable to the traffic involved, the mere fact that carriers and divisions were dealt with on an average or group basis does not indicate that the Commission did not properly consider each carrier and rate, or that it did not duly take into account the facts specified in § 15 (6), or that it failed to obey the statute in any respect. P. 83.
5. General statements in the reports of the Commission to the effect that, in reaching its conclusions, it considered all the pertinent evidence, add nothing to the *prima facie* presumption that generally attends its determinations. P. 86.
6. In support of an order dividing joint rates as between two territorial groups of carriers on the basis of the general mean of the conditions of the several carriers constituting each group, the reports of the Commission showed that its findings as to average group conditions taken as a whole were sustained by the evidence, but there was other evidence before it showing, as between individual carriers in each group, so wide a range of rates of return that, if approximate similarity in that respect was essential to the order, its basis could not be sustained. *Held:*

   (1) The failure of the Commission specifically to report the facts and give the reasons upon which it justified the use of the average or group basis is condemned. Complete statements by the Commission showing the grounds upon which it rests its determinations in cases like this are quite as necessary as opinions of lower courts setting forth the reasons for their decisions in analogous cases; and this Court has recently emphasized their duty fully to state the ground on which they act. P. 86.

   (2) Failure in this was not excused by the fact that the carriers presented evidence on a group basis or by omission of carriers, in their petition for rehearing, to object to the use of averages. P. 87.

(3) A sound basis for a rule or formula prescribing the divisions is essential to compliance with the Act, and carriers suing to set the order aside upon the ground that the divisions are unreasonable are not estopped from assailing the averages or groups adopted. P. 87.

7. The evidence in this case leads to the opinion that, notwithstanding the wide differences in rates of return between carriers, the basis adopted will not, on that account, result in unjust and unreasonable divisions. *Id.*
8. In a suit to set aside an order of the Commission fixing divisions of joint rates, a contention that the prescribed divisions are confiscatory, in violation of the Fifth Amendment, has no foundation in the record if there is no allegation in the complaint, or evidence to show, that any division to any of the complaining carriers will not yield a sum equal to the operating expenses chargeable to the service covered by it plus a reasonable return on the property value fairly attributable to that service. P. 88.
9. Joint rates between eastern and southwestern points were subject to an established primary division at points on the Mississippi River. In a proceeding under § 15 (6), the Commission sought to make just subdivisions of revenues on transportation west of the river, assuming the validity of the joint rates and the primary divisions. *Held* that carriers which were parties to the joint rates but which participated only in the transportation and revenues east of the river, need not be made parties to the proceeding. P. 89.
10. The District Court, upon dismissing a bill by carriers to annul an order of the Interstate Commerce Commission fixing divisions of joint rates, has authority in its discretion to stay the enforcement of the prescribed divisions pending appeal; and discretion was not abused in this case. Pp. 90–92.

36 F. (2d) 780, affirmed.

APPEALS from a decree of a District Court of three judges dismissing the bill in a suit brought by carriers to set aside an order of the Interstate Commerce Commission prescribing divisions of joint rates; and from an order staying enforcement of the divisions until determination here.

Messrs. F. H. Moore and *Samuel W. Moore,* with whom *Messrs. W. E. Davis, E. T. Miller, M. G. Roberts, J. R.*

Bell, G. H. Muckley, H. H. Larimore, C. S. Burg, J. R. Turney, and *Robert Thompson* were on the brief, for the Southwestern Lines.

Mr. E. M. Reidy, with whom *Solicitor General Thacher, Assistant to the Attorney General O'Brian, Messrs. Charles H. Weston,* Special Assistant to the Attorney General, and *Daniel W. Knowlton* were on the brief, for the United States and the Interstate Commerce Commission.

Mr. Frank H. Towner, with whom *Messrs. Silas H. Strawn, P. F. Gault, K. F. Burgess, Ralph M. Shaw, J. Carter Fort, G. M. Swanstrom, A. H. Lossow, K. L. Richmond,* and *L. H. Strasser* were on the brief, for the Western Trunk Carriers.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is a suit brought in the District Court for the Western District of Missouri by appellants, carriers in southwestern territory, against the United States to annul and set aside an order of the Interstate Commerce Commission prescribing divisions of joint rates applicable to certain freight traffic between points in that territory and points in western trunk line territory or via western lines to and from points in eastern territory. The Commission and certain western trunk line carriers intervened. The case was tried before a court of three judges. 28 U. S. C., § 47. It sustained the order and dismissed the petition. 36 F. (2d) 789. The southwestern lines appealed. 28 U. S. C., § 345 (4). The court stayed the enforcement of the prescribed divisions until determination here. The United States and Interstate Commerce Commission appealed from that order.

The Commission's order complained of was made in proceedings, instituted October 8, 1923, by the Commission

on its own motion. Its report defines western trunk line territory to include Iowa, Minnesota, Wisconsin, the Upper Peninsula of Michigan, Illinois, North Dakota, South Dakota, and that part of Missouri on and north of the main line of the Missouri Pacific between Kansas City and St. Louis; it defines the southwestern territory to include Texas, Arkansas, Oklahoma, that part of Louisiana west of the Mississippi river, and so much of Missouri as is south of the above mentioned line of the Missouri Pacific.

Twelve western trunk lines and thirty-two southwestern lines were parties to this investigation. The former, carriers in that territory having little or no mileage in the southwest, demanded increases and were by the Commission called complainants; the latter, carriers in the southwest having little or no mileage in the other territory, merely sought to retain the existing divisions and were called defendants. The Santa Fe and Rock Island, named as defendants, have important lines in both territories. The former regarded itself as a southwestern carrier; the latter remained neutral. The investigation was as to the reasonableness of divisions of joint rates on freight traffic between points on lines of respondents in southwestern territory and points on lines of respondents in western trunk line territory moving through Kansas City or St. Louis in Missouri, East St. Louis, Cairo, Gale or Thebes in Illinois, and of divisions of the joint rates accruing to respondents on traffic moving through such gateways between such points in southwestern territory and points in eastern territory that lie east of the Illinois-Indiana state line.

The Commission made a report (148 I. C. C. 457) in which among other things it found (p. 477):

Existing divisions were established for the most part about 35 years ago and conform to no logical or consistent basis. They are considerably more favorable to the western trunk lines in case of oil and lumber than in case of

other traffic. Transportation conditions have changed materially since most of the divisions were established and the changes have benefited the southwestern lines more than they have those in the other group. And the trend is distinctly in favor of the former. In respect of density of traffic, transportation conditions are more favorable in western trunk line territory, but conditions vary in different parts of that territory and are considerably more favorable in Illinois than in the other States included in that region and are progressively less favorable from east to west. The difference in transportation conditions is reflected in the level of rates in the two territories. It is not possible from the record to determine just what the average difference is but it appears to be greater than the difference in average transportation conditions. This is particularly true of the class rates which are constructed upon somewhat different theories in the two territories and are in process of revision in the western trunk line territory. The cost of operation per ton mile including all expenses, charges and a fair return on investment probably does not average as much as 20 per cent higher in the southwestern territory than in the other group. On the whole the financial condition of the western trunk lines is not as good as that of the southwestern lines.

The report continues (p. 478):

"The divisions here in issue are dealt with of record on a group basis. They are, in other words, the divisions 'in the aggregate' north and south of the gateways named, and no question is raised with respect to the divisions of individual carriers. In our opinion the divisions in issue are not just, reasonable, and equitable. Many of them are unjust to complainants, and some of them are unjust to defendants. To cure their defects, they must be readjusted upon a consistent basis which will as nearly as practicable reflect, in the light of all the facts of record, the differing conditions in the two territories."

The Commission found that divisions for the future should be made as follows: The joint rates applicable to traffic moving to or from points in Illinois and Wisconsin should be divided in the proportions that the first-class rate on the southwestern scale for the length of haul south of the gateway and 80 per cent. of such rate for the length of haul north of the gateway, respectively, bear to the total of such assumed rates. Similarly, the joint rates on traffic to or from other points in western trunk line territory should be divided by taking for the northern haul 87 (instead of 80) per cent. of such assumed rate. The western trunk lines' share of joint rates applicable on the traffic to or from points in the territory east of the Illinois-Indiana line should be determined in like manner on the basis of 80 per cent. of the assumed rate for the northern haul and by deducting 10 cents from that portion. Where differentials are used in the construction of the joint rates, they should be deducted before prorating and added to the division accruing to the carriers in the region where they apply. These rules or formulas were made subject to some exceptions which need not be given.

The report states that the assumed rates are intended to reflect general differences in transportation conditions. The factor of 80 per cent. gives the southwestern carriers an advantage of 25 per cent., and the use of 87 per cent. makes a difference in their favor of about 15 per cent. The Commission found that complexity in the bases to be employed is not desirable, that the differentiation provided for would produce sufficiently accurate and reasonable results and that divisions made in the manner specified will for the future be just, reasonable and equitable.

The southwestern lines presented a petition for rehearing which was denied. But the Commission made an additional report, 156 I. C. C. 94, and modified its findings as to joint rates applicable to traffic to and from points

in Illinois and Wisconsin or in the eastern territory by changing the factor attributable to the haul north of the gateways other than Kansas City from 80 to 75 per cent. of the assumed rate, and by increasing from 10 cents to 15 cents the amount to be deducted from the western lines' proportion of joint rates applicable to and from points in eastern territory.

On the same day that it announced its second report, June 10, 1929, the Commission made the order. As to the joint rates in question, it directs that the " just, reasonable and equitable divisions in the aggregate north and south of said gateways " shall be made in accordance with the findings and formulas above mentioned. Divisions made on the bases prescribed, while decreasing the western trunk lines' shares on some shipments, will increase them on many more, and it is estimated that the order will operate to give those lines about $3,000,000 annually, over and above what would be yielded to them under existing divisions. This is much less than one per cent. of the total freight operating revenues of the southwestern carriers.

The appellants contend that the Act requires the Commission to determine the divisions of each carrier upon a consideration of its own rights and needs, and does not authorize the Commission to base its order upon group conditions or upon average conditions in the group.

Section 15 (6) provides that whenever, after full hearing, the Commission is of opinion that divisions of joint rates are or will be unjust, unreasonable, inequitable or unduly preferential or prejudicial as between parties thereto, the Commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers. " In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other

things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge." 49 U. S. C., § 15 (6).

The facts specified above and others necessarily or properly to be taken into account are to be considered having regard to the duty of the Commission, § 15a (2), to establish and adjust rates so that the carriers as a whole in each rate group or territory that the Commission may designate will, under management and expenditures such as are there specified, earn as nearly as may be a fair return upon the aggregate value of their operating property.

The Commission by § 15 (6) is required to consider the condition of each carrier and to determine whether the division of each joint rate is unreasonable or otherwise repugnant to the specified standards and what division will for the future be just, reasonable and equitable. *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 291. The Commission may not change an existing division unless it finds that division unjust or unreasonable. *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104, 115. Cf. *Interstate Commerce Commission* v. *Louisville & Nashville R. R.*, 227 U. S. 88, 92. But it need not under all circumstances take specific evidence as to each rate of every carrier. When considering divisions of numerous joint rates applicable to traffic passing through gateways between different territories the Commission may

make the required determinations and establish the bases for divisions between groups of carriers in the respective territories upon evidence which it reasonably may deem typical and to have sufficient probative weight to justify the necessary findings and the order in respect of each rate. That is to say, such typical evidence may sufficiently disclose the facts necessary to enable the Commission duly to consider the divisions of each joint rate to be received by every carrier. *New England Divisions Case,* 261 U. S. 184, 191, 196, 199. *Brimstone R. R. Co.* v. *United States, supra,* 116.

The evidence before the Commission is sufficient to disclose as to each carrier all the facts specified in § 15 (6) and to furnish an adequate and reasonable basis for the proper division of each of the joint rates applicable to the traffic here involved. The mere fact that carriers and divisions were dealt with on an average or group basis does not indicate that the Commission did not properly consider each carrier and rate or that it did not duly take into account the facts specified in § 15 (6) or that it failed to obey the statute in any respect.

Appellants assert that the order is based solely upon a comparison of average conditions of widely dissimilar carriers comprising each group and that its enforcement will bring about divisions so unjust and arbitrary as to be beyond the Commission's power. They show by the record that in each group there are carriers that earn little or no return, others that earn substantial amounts and some that make relatively high returns. They strongly emphasize that the prescribed divisions will operate in some instances to transfer substantial sums from very weak carriers in southwestern territory to prosperous ones in western territory, and insist that mere comparison of returns demonstrates that divisions on a group basis will be unjust and arbitrary. It seems to us that the table

included in the first report (p. 476), and others received in evidence [1] show as between individual carriers in each

[1] The Commission found that rates of return for individual carriers, namely, the principal Chicago-St. Louis and Chicago-Kansas City lines and the prominent southwestern lines, were as follows in 1922 to 1925, inclusive:

	1922 Per Cent	1923 Per Cent	1924 Per Cent	1925 Per Cent
Western Trunk Lines:				
Chicago & Alton	1.05	3.59	2.86	2.87
C. & E. I.	3.03	3.82	1.62	2.37
C. B. & Q.	4.52	4.29	4.80	4.60
C. G. W.	.19	1.54	1.59	1.48
C. M. & St. P.	1.90	2.81	2.57	2.27
Illinois Central	5.92	5.17	4.76	4.76
Wabash	1.77	3.84	3.85	4.84
Southwestern Lines:				
A. T. & S. F.	4.61	5.17	4.63	5.16
G. C. & S. F.	6.05	5.67	9.04	7.55
H. & T. C.	4.30	4.44	5.28	4.33
H. E. & W. T.	2.26	1.75	1.91	7.21
I. G. N.	2.87	4.98	5.63	4.52
K. C. M. & O.	Deficit	.22	Deficit	.24
K. C. M. & O. of Texas	Deficit	Deficit	2.41	.47
K. C. S.	2.88	2.60	2.85	3.49
M. K. T.	4.72	3.78	4.29	4.96
M. K. T. of Texas	1.63	1.56	5.03	3.28
Mo. Pac.	2.09	2.21	3.81	4.14
St. L. S. F.	3.99	4.72	5.05	5.23
St. L. S. W.	7.05	7.44	4.97	4.81
St. L. S. W. of Texas	Deficit	Deficit	1.33	1.46
Texas & Pacific	2.72	3.84	4.15	4.11

The appellants in their brief suggest that the record shows similar data as to other carriers who were respondents before the Commission:

	Rate of Return			
	1922 Per Cent	1923 Per Cent	1924 Per Cent	1925 Per Cent
Western trunk line respondents:				
Chicago & Northwestern Ry. Co.	3.47	3.04	3.23	4.14
Chi., St. P., Mpls. & Omaha	4.11	3.32	3.73	3.46

group so wide a range of rates of return that, if approximate similarity in that respect is essential to the order, its basis cannot be sustained.

"Average" as used in the report manifestly is not intended to refer to an arithmetical calculation, the quo-

	Rate of Return			
	1922	1923	1924	1925
Western trunk line respondents—Con.	Per	Per	Per	Per
Minneapolis & St. Louis.....	1.32	1.22	Deficit	.36
Mpls., St. P. & S. Ste. Marie.....	3.31	3.75	3.04	4.10
Q., O. & K. C. R. R.....	Deficit	Deficit	Deficit	Deficit
Southwestern respondents:				
Gulf Coast Lines.....	6.85	8.52	9.68	9.79
The Beaumont, Sour Lake & West. Ry. Co.				
New Orleans, Tex. & Mexico Ry. Co.				
St. Louis, Brownsville & Mex. Ry. Co.				
Ft. Worth & Denver City Ry. Co..	7.40	8.63	10.52	9.19
Sou. Pac. Lines in Tex. and La....	2.35	2.43	3.97	3.27
Galveston, Harrisburg & S. A. Ry. Co.				
Houston & Shreveport R. R. Co.				
Louisiana Western R. R. Co.				
Morgan's La. & Tex. R. R. & S. S. Co.				
Texas & New Orleans R. R. Co.				
*Houston & Tex. Central R. R. Co.				
*Houston East & West Tex. R. R. Co.				
Kansas, Okla. & Gulf Ry. Co.....	2.80	1.31	.17	Deficit
Louisiana Ry. & Navigation Co....	.39	Deficit	Deficit	Deficit
San Antonio & Aransas Pass Ry...	.95	3.12	2.71	**
Vicksburg, Shreveport & Pacific...	3.39	6.16	4.00	5.01

*The rates of return of the Houston & Texas Central R. R. Co. and Houston East & West Texas R. R. Co. were shown in the Commission's table, but the rates of return for the other respondents which form parts of the Southern Pacific System were excluded.

**Included as part of Southern Pacific Lines in 1925.

tient of a sum divided by the number of its terms. It is rather to be understood as an estimated general mean of the conditions of the several carriers constituting each group arrived at by the exercise of judgment upon the facts shown by the evidence. The reports satisfactorily show that the findings as to average group conditions taken as a whole are sustained by substantial and persuasive evidence. But they do not deal with the important question whether, under the evidence and having regard to the wide dissimilarities between rates of return earned by individual carriers in each territory, the use of the average or group basis is justified and whether it will produce unreasonable divisions. The general statements in the reports to the effect that the Commission in reaching its conclusions considered all the pertinent evidence add nothing to the prima facie presumption that generally attends determinations of the Commission. *Bluefield Co.* v. *Public Service Commission,* 262 U. S. 679, 688-689.

The Commission's failure specifically to report the facts and give the reasons on which it concluded that under the circumstances the use of the average or group basis is justified leaves the parties in doubt as to a matter essential to the case and imposes unnecessary work upon the courts called upon to consider the validity of the order. Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this. *Wichita R. R.* v. *Public Utilities Commission,* 260 U. S. 48, 58. And we have recently emphasized the duty of such courts fully to state the grounds upon which they act. *Virginian Ry.* v. *United States,* 272 U. S. 658, 675. *Lawrence* v. *St. Louis-San Francisco Ry.,* 274 U. S. 588, 591–592. *Arkansas Commission* v. *Chicago, R. I. & P. R. Co.,* 274 U. S. 597, 603. *Hammond* v. *Schappi Bus Line,* 275 U. S. 164, 171. *Cleveland, C., C.*

& St. L. Ry. v. *United States,* 275 U. S. 404, 414. *Baltimore & Ohio R. Co.* v. *United States,* 279 U. S. 781, 787. And the Commission is not excused by the fact that the carriers presented evidence on a group basis or by the omission of the southwestern lines in their petition for a rehearing to object to the use of averages. The proceedings before the Commission were for the determination of what divisions are and for the future will be reasonable. Here the issue is whether the Commission's amended determinations and the order based on them are valid. Appellants are not estopped from assailing the averages or groups adopted. A sound basis for the rule or formula prescribing the divisions is essential to compliance with the Act.

With this criticism of the reports, we turn to what is shown by the record. A study of the facts that may be gleaned from the latter leads to the opinion that, notwithstanding the wide differences in rates of return between carriers the basis adopted will not, at least on that account, result in unjust and unreasonable divisions. The Commission must consider the financial condition of the carriers but it is not required to make that the only test. And it did not take the average of the rates of return as the sole or principal factor for making the divisions. As to each carrier, operating and other conditions were shown and presumably considered by the Commission in deciding whether average or group conditions might appropriately be used. It is not shown that the order will require any service to be rendered at less than cost. It is impossible to make divisions that will yield the same rate of profit to each carrier or upon every commodity or shipment moved by it. The average cost of service was apparently given much weight. It is not suggested that the operating expenses of each carrier attributable to the traffic in question vary as does its rate of return on its business as a whole. Nor does it appear that the

carriers having the highest rates of return from their total business or from that in the territory in which they belong, move the traffic in question at comparatively low costs. Returns from total business of a carrier and the cost of handling the traffic covered by the joint rates are not dependent upon the same facts; the relation between them is slight and remote. For aught that appears the carriers having little or no return on their total business may move the traffic in question at low costs and realize a satisfactory percentage of profit on that part of their business.

Other things being equal, divisions made on the mileage basis will be the same as those made on the basis of relative costs. The Commission found that existing divisions give southwestern lines over 30 per cent. more than their mileage prorate and the order leaves them substantially more than would divisions on that basis. This indicates that the Commission considered the relatively high costs at which the southwestern lines, or some of them, moved the traffic in question. The fact that average conditions affecting cost of transportation in the two groups have changed and are still growing more favorable to the southwestern lines tends to justify a reduction of their existing divisions. The greater density found in western trunk line territory makes for lower costs, and that is shown to have been taken into account. Appellants have not sustained their contention.

Appellants claim that the Commission's order, if enforced, will operate to deprive them of their property without due process of law in violation of the Fifth Amendment to the Constitution.

It is well-established by the decisions of this court that, in order to invoke such constitutional protection, the facts relied upon to prevent enforcement of rates prescribed by governmental authority must be specifically alleged and from them it must clearly appear that the enforcement

of the measure complained of will necessarily deny to the utility the just compensation safeguarded to it by the Constitution. *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, 447–8, and cases cited. Here the joint rates themselves are not assailed as too low, but the claim is that the prescribed divisions are confiscatory. The same rules as to pleading and proof apply to orders prescribing divisions as to laws fixing rates. There is no allegation in the complaint, or evidence in the record to show, that any division to any of the appellants will not yield operating expenses chargeable to the service covered by it plus a reasonable return on property value fairly attributable to that service. There is no foundation in the record for the contention.

Appellants contend that the provision of the order that applies to the division of revenue derived from traffic between points in the eastern territory and points in the southwestern territory is unlawful because the eastern carriers were not before the Commission and for lack of evidence to show whether the divisions received by them are just.

Section 15 (6) empowers the Commission to determine and prescribe divisions of joint rates " as between the carriers parties thereto " and requires it when so doing to consider the condition and needs of each participating carrier. The eastern carriers are parties to the joint rates covering the whole movement. The reasonableness of such rates is not involved. Every carrier, and there may be many, participating in the haul is entitled to its just share. The record, and especially testimony given in the District Court, shows that there is and long has been a primary division of such joint rates, one part for the carriers participating in transportation east of the Mississippi river and the other part for those hauling to or from that point. Cf. *Terminal R. R. Assn.* v. *United States,* 266 U. S. 17, 30. The proceedings here under considera-

tion involve only the subdivision of that part of the revenue accruing to southwestern lines and western trunk lines for service performed west of the "breaking" point at Mississippi river crossings. The eastern carriers are not at all concerned in this subdivision. In proceedings concerning subdivisions of revenues assigned to the western part of the service, it is competent for the Commission to assume validity of the joint rates, their primary divisions and the subdivisions to cover the haul east of the river. The Act does not require all questions concerning all divisions of such joint rates to be determined in one proceeding. *United States* v. *Abilene & So. Ry. Co., supra,* 282. *New England Divisions Case, supra,* 201. There was no defect of parties.

In their brief appellants suggest other grounds on which they claim the order should be annulled. But we think them plainly insufficient to warrant reversal and that, in view of what already has been shown in this opinion, they do not merit separate discussion.

The cross appeal was taken by the United States and the Interstate Commerce Commission; the other appellees, western trunk lines, did not join therein. The investigation was pending for more than five years before the first report was announced, December 10, 1928. No order was then made. The Commission allowed the carriers 60 days within which to agree on readjustments. In the report on rehearing, June 10, 1929, the Commission characterized the issues as important and the questions raised as relatively new and difficult. The order was made on the same day to take effect August 1, 1929. Before that date this suit was commenced, and the Commission postponed the taking effect of the order until December 1, 1929. In the meantime the case was tried and decided. It is clear that the Commission did not find that any emergency existed.

The decree dismissing the case was entered November 27, petition for appeal was filed that day and allowed November 30. Appellants applied for a stay. The time elapsing between the decree and the postponed effective date of the Commission's order was not sufficient to permit the giving of notice to appellees. The court found that novel and important questions concerning which there was serious doubt were presented by the assignment of errors; that if appellants, pending the appeal, paid the prescribed divisions and the order finally should be annulled they would be in danger of not being able to recover back the amounts in excess of existing divisions because of the financial condition of some of the western trunk line carriers; that as the prescribed divisions did not apply to all joint rates between the two territories, confusion and large useless expenditures would result if the order were enforced pending the appeal and the decree should be reversed; that the public interest would not suffer in any manner by reason of the stay and that the rights of the western trunk lines could be protected by bond. The stay was granted on appellants' giving a bond for $3,000,000 for the protection of the carriers to whom the order required payments of higher divisions.

Western trunk lines applied to have the stay vacated. After hearing and consideration of the showing and arguments made by the parties, the court reaffirmed its earlier findings and conclusions and further found that since the court's decision the interested carriers including appellants had worked diligently to establish the various percentages to be used in making the new divisions and that the work could not be completed for several months. After reviewing the situation the court said that the stay if continued in force would operate to save the carriers much labor and expense whether the appeal should be successful or not.

Undoubtedly the court had authority in its discretion, upon entry of the decree dismissing the bill, to stay the enforcement of the prescribed divisions pending appeal. *Virginian Ry.* v. *United States, supra,* 669. *Omaha & C. B. St. Ry. Co.* v. *Int. Com. Comm.,* 222 U. S. 582. *Cumberland Tel. Co.* v. *Pub. Serv. Comm.,* 260 U. S. 212, 219. *Cotting* v. *Kansas City Stockyards Co.,* 82 Fed. 850, 857. The court considered, and it cannot be said without reason, that the questions raised by the assignments of error are novel and doubtful. Unlike the situation presented in *Virginian Ry.* v. *United States, supra,* postponement of the taking effect of the order would inflict no loss upon the public—producers, shippers or consumers. It would not unfavorably affect the business of the carriers and, if the western trunk lines should ultimately be held entitled to the higher divisions, they could be protected by bond. We think it clear that the court did not abuse its discretion in granting the stay.

The decrees are affirmed.

ALUMINUM CASTINGS COMPANY *v.* ROUTZAHN, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE.

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

No. 7. Argued February 25, 1930. Reargued October 28, 29, 1930.—Decided November 24, 1930.

Title III, § 12 (a) of the Revenue Act of 1916 provides that net income and profits in the case of a domestic corporation shall be ascertained by deducting from gross income expenses, interest and taxes paid, and losses sustained, during the calendar year; section 13 (b) provides that the return in every case shall state such data as are appropriate and in the opinion of the Commissioner necessary to determine the correctness of the net income

returned and to carry out the provisions of the title; and § 13 (d) that "A corporation . . . keeping accounts upon any basis other than that of actual receipts and disbursements, unless such other basis does not clearly reflect its income, may, subject to regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, make its return upon the basis upon which its accounts are kept, in which case the tax shall be computed upon its income as so returned." A Treasury ruling with respect to returns under § 12 (a) and 13 (d) contemplated that income and authorized deductions should be computed and accounted for on the same basis and that the same practice should be consistently followed year after year. The returns of a taxpayer for 1916 and 1917 stated that they were made on the basis of actual receipts and disbursements. Each return, however, included bills and accounts receivable and payable and employed the inventory basis—a practice which would have been authorized by Treasury regulations if the returns had been governed by earlier Acts which contained provisions like those of § 12 (a), *supra,* but which lacked the new provisions of §§ 13 (b) and 13 (d). A munitions tax, which accrued in 1916, and was paid in 1917, was deducted by the taxpayer under § 12 (a), in the 1917 return. *Held:*

1. That the regulations mentioned, which required the use of inventories in proper cases and permitted the deduction of accounts payable when accounts receivable were brought into the income account, were supplementary to the provisions of the earlier Acts and do not have the effect of classifying items receivable and payable as cash receipts and disbursements when the like provisions of § 12 (a) are to be construed with the new provisions, §§ 13 (d) and 13 (b), of the 1916 Act. P. 97.

2. Although by § 12 (a) taxes are required to be deducted only in the year when paid, § 13 (d), in the light of its legislative history, plainly indicates that the returns contemplated by it are to be dealt with as a separate class, distinct from those based on actual receipts and disbursements alone described by § 12 (a). *Id.*

3. The filing of a return under § 13 (d), where the taxpayer is able to comply with its requirements, is optional if he is also able to prepare a return on the basis of actual receipts and disbursements; but if true income cannot be arrived at on the latter basis, the return must be filed on the accrual basis. P. 98.

4. A taxpayer's declaration in his income tax return as to whether it is made on the accrual basis, or on that of actual receipts and disbursements, is not conclusive. P. 99.

5. The use of inventories, and the inclusion in the returns of accrual items of receipts and disbursements appearing on the taxpayer's books, indicate the general and controlling character of the account, and support the finding of the trial court in this case that books and returns were on the accrual basis. *Id.*

6. It was competent for the Commissioner—the record not disclosing that the taxpayer offered to make a return for 1917 on the basis of actual receipts and disbursements, or could do so—to correct the return for 1917 to conform it to the system of accounting in fact adopted, by excluding from it the munitions tax which had accrued in 1916, whether appearing on the books for that year or not. *Id.*

31 F. (2d) 669, affirmed.

CERTIORARI, 280 U. S. 540, to review a judgment of the Circuit Court of Appeals affirming a judgment of the District Court, 24 F. (2d) 230, for the Collector in an action to recover income and excess profits taxes assessed and paid for 1917.

Mr. John T. Scott for petitioner.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Assistant Attorney General Youngquist, Messrs. Sewall Key, J. Louis Monarch,* and *S. Dee Hanson,* Special Assistants to the Attorney General, and *Mr. Erwin N. Griswold,* were on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner, a manufacturer of metal castings, brought suit in the District Court for Northern Ohio to recover income and excess profits taxes assessed and paid for the calendar year 1917. Right to recover was asserted on the sole ground that a munitions tax levied under Title III of the Revenue Act of 1916, c. 463, 39 Stat. 756, 780, which became due and was paid by petitioner in 1917, was

correctly deducted from gross income in petitioner's tax return for that year. The Commissioner, rejecting this contention, deducted the tax from gross income for 1916, the year when it accrued, see *United States* v. *Anderson,* 269 U. S. 422, and collected a correspondingly increased income and profits tax for 1917, which is involved in the present suit.

The District Court, finding that petitioner kept its books and filed its tax returns for 1916 and 1917 on the "accrual basis," gave judgment for the Collector, 24 F. (2d) 230, which the Court of Appeals for the Sixth Circuit affirmed, 31 F. (2d) 669. Both courts held, on the authority of *United States* v. *Anderson, supra,* that as the books were kept and returns made on the accrual basis, the munitions tax which accrued in 1916 could not be deducted in the return for 1917.

Petitioner's returns for 1916 and 1917 were made after the effective date of §§ 12 (a), 13 (b) and 13 (d) of the Revenue Act of 1916 (c. 463, 39 Stat. 767, 771). The Act imposes a tax on net income and profits ascertained, as provided by § 12 (a), by deducting from gross income expenses, interest and taxes paid, and losses sustained, during the calendar year. Section 13 (d) provides that "A corporation . . . keeping accounts upon any basis other than that of actual receipts and disbursements, unless such other basis does not clearly reflect its income, may, subject to regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, make its return upon the basis upon which its accounts are kept, in which case the tax shall be computed upon its income as so returned."

Petitioner, in response to an inquiry on the form for the 1916 return, stated that it was "made on the basis of actual receipts and disbursements," a statement which it repeated in the 1917 return with the qualification that "Bills and accounts payable and receivable are treated

as receipts and disbursements." In both returns, bills and accounts, payable and receivable, in fact were treated as actual receipts and disbursements; and both were based on inventories taken at the beginning and end of the taxable year. The munitions tax deducted in the 1917 return first appeared on the taxpayer's books in that year.

Petitioner contends that its returns were made as "cash receipts and disbursements" returns under § 12 (a) and not under § 13 (d), and that since by § 12 (a) taxes are required to be deducted only in the year when paid, its munitions tax was rightly deducted in the 1917 return. In support of this contention, it is pointed out that § 12 (a) of the 1916 Act does not differ materially from corresponding provisions of the Revenue Acts of 1909 and 1913 (Corporation Excise Tax Act of Aug. 5, 1909, c. 6, § 38, 36 Stat. 11, 112; Corporation Income Tax Act of Oct. 3, 1913, c. 16, § II, subdiv. G, 38 Stat. 114, 172), and as petitioner's returns for 1916 and 1917 would have been authorized under these earlier acts, and Treasury Regulations supplementing them, it is argued that petitioner's right to deduct taxes when paid was not altered by the addition to the revenue laws, in the 1916 Act, of § 13 (d), which merely gave to the taxpayer an option, not availed of by petitioner, to make a return on the accrual basis.

This argument is, in substance, that considered and rejected by the Court in *United States* v. *Anderson, supra,* p. 439. There, as here, the taxpayer's return for 1917 computed income on the basis of inventories and accrued items, payable and receivable, appearing on the taxpayer's books of account for that year, but deducted from gross income the munitions tax, paid in 1917, which had accrued the year before. The return, as made, would have been permissible under the Revenue Acts preceding that of 1916; but it was held that under that Act the tax was required to be deducted in the year when it accrued.

Section 12 (a) of the 1916 Act, like its prototypes in the earlier legislation, deals only with the deduction from gross income of amounts paid out or losses sustained. None of them, in terms, permitted the deduction of accounts payable or made any provision for the use of inventories in computing net income. Experience demonstrating that income derived from merchandising and manufacturing businesses could not be computed on the basis of receipts and disbursements alone, treasury regulations were promulgated requiring the use of inventories in proper cases, and permitting the deduction of accounts payable when accounts receivable were brought into the income account. Treasury Regulations 31, Dec. 3, 1909, under the Act of Aug. 5, 1909; 33, Jan. 5, 1914, under the Act of Oct. 3, 1913.

But this action of the Department, born of necessity in order to arrive at the income of certain businesses, was neither a classification nor an irrevocable designation of items receivable and payable as cash receipts and disbursements. Although the regulations supplemented the provisions of the statute by providing for a different method of computing income, they did not alter the meaning of its words, or preclude acceptance of them at their face value when reenacted in a new legislative setting. Classification took place when § 13 (d) was substituted for existing treasury regulations,[1] and broadly authorized returns under it by taxpayers "keeping accounts upon any basis other than that of actual receipts and disbursements," a phrase which, in the light of the legislative history, plainly indicates that the returns contemplated by § 13 (d) were

[1] Pending the adoption of regulations applicable to the Act of 1916, Treasury Decision 2367, Sept. 14, 1916, continued existing regulations in force only so far as not inconsistent with the provisions of the 1916 Act. New regulations applicable to §§ 12 (a) and 13 (d), adopted in Treasury Decision 2433, Jan. 8, 1917, before petitioner filed its 1916 and 1917 returns, are considered *infra*, p. 98.

to be dealt with as a separate class, distinct from those based on actual receipts and disbursements alone described by § 12 (a).[2]

By these sections the filing of a return under § 13 (d), where the taxpayer is able to comply with its requirements, is optional if he is also able to prepare a return on the basis of actual receipts and disbursements which reflects true income. But "notwithstanding the option given taxpayers, it is the purpose of the Act to require returns that clearly reflect taxable income." *United States* v. *Mitchell,* 271 U. S. 9, 12. By § 13 (b) of the 1916 Act, which was new, the return in every case is required to state such data as are "appropriate and in the opinion of the commissioner necessary to determine the correctness of the net income returned and to carry out the provisions of this title." It follows that the return must be filed on the accrual basis under § 13 (d), where true income cannot be arrived at on the basis of actual receipts and disbursements. See *United States* v. *Anderson, supra,* pp. 437, 440. Any other construction of §§ 12 (a) and 13 (d) would disregard the requirement of § 13 (b) and the dominating purpose of the Act, by enabling the taxpayer to file a return which did not reflect true income. See *United States* v. *Mitchell, supra,* pp. 12, 13. It was in recognition of this, and in compliance with § 13 (b), that Treasury Decision 2433, Jan. 8, 1917, provided with respect to returns made under §§ 12 (a) and 13 (d):

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[2] The Report of the Committee on Ways and Means (House Report No. 922, 64th Cong., 1st Sess., p. 4) states with reference to the income tax provisions of the Revenue Act of 1916:

"As two systems of bookkeeping are in use in the United States, one based on the cash or receipt basis and the other on the accrual basis, it was deemed advisable to provide in the proposed measure that an individual or corporation may make return of income on either the cash or accrued basis, if the basis selected clearly reflects the income."

" This ruling contemplates that the income and authorized deductions shall be computed and accounted for on the same basis and that the same practice shall be consistently followed year after year."

This ruling antedated petitioner's 1916 and 1917 returns, and obviously gross income and deductions in its returns were not " accounted for on the same basis." Its income for 1917 could not be ascertained by deducting from gross income, including receivables, some items of cost and expense, attributable to the production of 1917 income, which accrued but were not paid in that year, and the munitions tax, which was paid in 1917, but which accrued and was attributable to the production of income in 1916.

Petitioner, relying on the declarations in its returns that they were made on the basis of actual receipts and disbursements, contends that for that reason they must be deemed made under § 12 (a) and not under § 13 (d). But whether a return is made on the accrual basis, or on that of actual receipts and disbursements, is not determined by the label which the taxpayer chooses to place upon it. The use of inventories, and the inclusion in the returns of accrual items of receipts and disbursements appearing on petitioner's books, indicate the general and controlling character of the account, *Niles Bement Pond Co.* v. *United States,* 281 U. S. 357, 360; *United States* v. *Anderson, supra,* pp. 442, 443, and support the finding of the trial court that books and returns were on the accrual basis. The record does not disclose that petitioner offered to make a return for 1917 on the basis of actual receipts and disbursements, or that it could have done so. It was, therefore, competent for the Commissioner to correct the return for 1917, to conform it to the system of accounting in fact adopted, by excluding from it the munitions tax which had accrued in 1916, whether appearing on the books for that year or not. *United States* v. *American*

Can Co., 280 U. S. 412; *United States* v. *Anderson, supra; Niles Bement Pond Co.* v. *United States, supra.*

Affirmed.

Separate opinion of MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER.

In our view the decree below should be reversed. This Court has often affirmed: "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen." *Gould* v. *Gould,* 245 U. S. 151, 153. *Crocker* v. *Malley,* 249 U. S. 223, 233; *United States* v. *Field,* 255 U. S. 257, 262; *Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602, 606; *Shwab* v. *Doyle,* 258 U. S. 529, 534; *United States* v. *Merriam,* 263 U. S. 179, 188; *Hecht* v. *Malley,* 265 U. S. 144, 156; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 348.

We think it impossible properly to say that the statute under consideration, by clear import, laid the questioned tax. The petitioner made its return after the mode long approved by the Treasury Department and distinctly disavowed any purpose to accept the option granted by section 13 (d). Under an interpretation, certainly not free from grave doubt, a taxpayer who honestly sought to do what capable counsel well might have advised, has been heavily burdened.

United States v. *Anderson,* 269 U. S. 422, differs materially from the present cause upon the facts and, we think, is not enough to support the conclusion of the court below.

MR. JUSTICE SUTHERLAND, concurring.

I did not agree with the decision in the *Anderson* case, but so long as the majority of the court adheres to it, I

am bound to follow it in similar cases; and in principle, I think, it controls here. It is true that there are differences in matters of fact between the present case and that case, but they seem to me not to be of a character to affect the pertinence of the *Anderson* decision and call for the application of a different rule. For that reason alone I concur in the opinion of the court just announced. Were it not for the *Anderson* case I should join in the dissent.

MR. JUSTICE ROBERTS concurs in this view.

POE, COLLECTOR OF INTERNAL REVENUE, *v.* SEABORN.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 15. Argued October 21, 1930.—Decided November 24, 1930.

1. In §§ 210 (a) and 211 (a) of the Revenue Act of 1926, which lay a tax upon the "net income of every individual," the use of the word "of" denotes ownership and, in the absence of further definition by Congress, a broader significance should not be imputed to the phrase. P. 109.
2. The question whether the interest of a wife in community income amounts to ownership, and is therefore taxable and returnable under the Revenue Act of 1926 apart from the interest of the husband, is to be determined by the state law of community property. P. 110.
3. By the law of the State of Washington, the wife has a vested property right, equal to that of her husband, in the community property and in the income of the community, including salaries or wages of either husband or wife, or both. P. 111.
4. Although, by the Washington law, the husband has broad power of control with limited accountability to the wife, this power is conferred on him as agent of the community; it does not make him the owner of all the community property and income, nor negative the wife's present interest therein as equal co-owner. *Id.*
5. Section 1212 of the Revenue Act of 1926, providing that "Income from any period before January 1, 1925, of a marital community

in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the state law applicable to such marital community for such period" and that "any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse," was not intended to open for the future the question whether in community property States other than California the wife is entitled to make return of one-half the community income, as had been decided in the affirmative by executive construction; the purpose was merely to prevent a serious situation as to resettlements, etc., that would follow if this Court should overturn that executive construction. P. 114.

6. Joint Resolution No. 88, 71st Congress (46 Stat. 589), extending the time for the assessment, refund, and credit of income taxes for 1927 and 1928, in the case of any married individual where such individual or his or her spouse filed a separate income tax return for such taxable year and included therein income which under the laws of the State upon receipt became community property, was intended to save the Government's right of settlement in the event that its test suits should be decided in favor of its contention that under the Revenue Act of 1926 community income in other community property States, as in California, is returnable as the husband's income. P. 115.
7. Where the language of a statute is ambiguous, the Court would be constrained to follow a long and unbroken line of executive construction, applicable to words which Congress repeatedly reëmployed in Acts passed subsequent to such construction and has refused to change. P. 116.
8. The constitutional requirement of uniformity in taxation is not intrinsic, but geographic; and differences of state law, which may bring a person within or without the category designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity. P. 117.

32 F. (2d) 916, affirmed. *United States* v. *Robbins*, 269 U. S. 315; *Corliss* v. *Bowers*, 281 U. S. 376; and *Lucas* v. *Earl*, 281 U. S. 111, distinguished.

CERTIFICATE from the Circuit Court of Appeals upon an appeal from a judgment of the District Court for the taxpayer in an action to recover from the Collector of

Internal Revenue an amount paid under protest on account of income taxes for 1927. This Court ordered the entire record to be sent up. The case is one of four cases instituted by the Government to determine whether, under the Revenue Act of 1926, in the States of Washington, Arizona, Texas and Louisiana, married taxpayers are entitled each to return for income tax one-half of the community income. It was argued with the other cases (see *post,* pp. 118, 122 and 127,) and the arguments, in so far as they related to the construction of the federal statute, were the same in all.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist, Mr. Sewall Key* and *Miss Helen R. Carloss,* Special Assistants to the Attorney General, *Messrs. Clarence M. Charest,* General Counsel, and *T. H. Lewis, Jr.,* Special Attorney, Bureau of Internal Revenue, were on the brief, for Poe, Collector of Internal Revenue.

This Court, in the case of *United States* v. *Robbins,* 269 U. S. 315, held that a married man domiciled with his wife in California should be taxed upon all of their community income, basing its decision in part on the fact that the husband alone could dispose of the fund and exercise exclusive rights of management and enjoyment over it. In *Corliss* v. *Bowers,* 281 U. S. 376, it was again emphasized that the individual might be taxed on income which he had the right to control and enjoy irrespective of whether he held any title whatever to the fund from which it was derived.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds title to the property from which it is derived, is a principle which is recognized in various provisions of the Revenue Acts. Cf. Revenue Act of 1924, § 219 (g), taxing income of revocable trusts to the grantors; Revenue Act of 1926,

§ 219, taxing the income of certain types of trusts to the trustees, of other types to the beneficiaries, and of revocable trusts to the grantors.

Sections 210 and 211 of the Revenue Act of 1926, construed as similar provisions were construed in the *Robbins* case, do not require the taxation of income to the individual having purely formal rights of ownership. Their intent is that the tax shall fall upon the person exercising substantial rights of dominion and enjoyment.

In the *Robbins* case the rights of dominion and enjoyment were measured by very practical tests as to what the husband and wife could do with respect to the community income. The possession of unimportant rights by the wife will not suffice to prove that one-half of the community income should be taxed to her, for wives in States not having the community property system also may restrict to a certain extent the husband's disposition of his property and income. The Act should, if possible, be so construed and applied as not to give married taxpayers residing in the community property States an undue advantage over married taxpayers residing in other States.

The view originally held in the Treasury Department and in the Department of Justice, T. D. 3071, I. R. Cum. Bull. No. 3, p. 221; T. D. 3138, I. R. Cum. Bull. No. 4, p. 238, 32 Op. A. G. 298, 435, that the wife has an interest in income from community property equal to that of her husband and should therefore be permitted to report one-half of it in her return, was based upon local conceptions of title to the fund rather than of dominion and control of the income therefrom. The contention that the person who has formal title to a fund, or to income therefrom, must pay the tax when the power of disposition is vested in another, finds no support in the language of the statute. Indeed the very generality of the

words employed suggests that they are to be understood in their ordinary meaning implying dominion and control, and not in any narrow, technical sense implying formal, legal, or equitable ownership.

The *Robbins* case does not hold that the principle of taxing income to the "owner" of the income is to be discarded, but rather that ownership in the statutory sense must be tested, in cases of community ownership, by the enjoyment of practical rights of ownership, and not by words describing the interests of husband or wife, or of "the community," as "vested" or "expectant," "legal" or "equitable." Cf. *Corliss* v. *Bowers, supra; Lucas* v. *Earl,* 281 U. S. 111; *Tyler* v. *United States,* 281 U. S. 497.

Under the laws and judicial decisions of the State of Washington the husband's interest in the community income is such that he should be required to report the entire amount in his return; the wife's interest is not such that she should be permitted to report one-half of the community income in her return. Sections 6892, 6893, Remington's Comp. Stats. of Washington, 1922; *Way* v. *Lyric Theater Co.,* 79 Wash. 275; *Catlin* v. *Mills,* 140 Wash. 1; *Bellingham Motors Corp.* v. *Lindberg,* 126 Wash. 684; *Maynard* v. *Jefferson County,* 54 Wash. 351; *Schramm* v. *Steele,* 97 Wash. 309; *Littell & Smythe Mfg. Co.* v. *Miller,* 3 Wash. 480; *Anderson* v. *National Bank,* 146 Wash. 520; *Pain* v. *Morrison,* 125 Wash. 267; *Vanderveer* v. *Hillman,* 122 Wash. 684; *De Phillips* v. *Neslin,* 139 Wash. 51; *Peacock* v. *Ratliff,* 62 Wash. 653; *Denis* v. *Metzenbaum,* 124 Wash. 86; *Hammond* v. *Jackson,* 89 Wash. 510; *Palmer* v. *McBride,* 115 Wash. 404; *Marston* v. *Rue,* 92 Wash. 129; *Killingsworth* v. *Keen,* 89 Wash. 597; *Balkema* v. *Grolimund,* 92 Wash 326; *Parker* v. *Parker,* 121 Wash. 24; *Daniel* v. *Daniel,* 106 Wash. 659; *Normile* v. *Denison,* 109 Wash. 205.

Mr. George Donworth, with whom *Messrs. Elmer E. Todd, Frank E. Holman,* and *Charles T. Donworth* were on the brief, for Seaborn.

The language and terms of the Revenue Act of 1926, and previous Acts, clearly authorize the filing of separate returns of community income by husband and wife, and cannot, as a matter of independent statutory construction, be interpreted as taxing the husband in community property States on the half of the community income which admittedly belongs to and is owned by the wife.

The statute taxes the income of each individual, and husbands and wives, as individuals, are authorized and permitted to make separate returns and include in such separate returns the income of each spouse. Revenue Act of 1926, §§ 210 (a), 211 (a), 223 (a), 223 (b).

There is nothing in the language of the Revenue Act of 1926, or prior Acts, expressly or impliedly indicating an intent on the part of Congress to tax an individual on income belonging to another person, on the theory of administration and control over the property and income, exercised by the individual citizen sought to be taxed.

It is well settled and fundamental that statutes will not be construed so as to levy taxes by implication.

The question as to what is property or income, and to whom it belongs, is a matter to be determined by the local state law.

The uniform and long continued executive construction recognizing the right of husband and wife in all community property States, except California, to report separately the share of community income owned by each, together with the repeated refusal of Congress to amend the law so as to avoid such construction, and the re-enactment by Congress, without change, of the provisions so construed, demonstrate that there was no intention in the Act of 1926 to tax husbands on the half of the community partnership income belonging to their wives.

United States v. *Falk,* 204 U. S. 143; *United States* v. *Cerecedo Hermanos y Compania,* 209 U. S. 339; *Copper Queen Mining Co.* v. *Arizona Board of Equalization,* 206 U. S. 474; *National Lead Co.* v. *United States,* 252 U. S. 140; *Komada & Co.* v. *United States,* 215 U. S. 392; *United States* v. *Farrar,* 281 U. S. 624.

The Government's contention that control, and not ownership, is the test of income taxation under this Act is inconsistent with and contrary to the last opinion of the Attorney General on the subject. 35 Op. A. G. 265.

The *Robbins* case deals only with the local law of California, and the underlying theory of the decision is that under the decisions and the statutes of California, the husband is in law the owner of all of the community property and income, and possesses all of the substantial attributes of ownership. *Corliss* v. *Bowers,* 281 U. S. 376, and *Lucas* v. *Earl,* 281 U. S. 111, are inapplicable.

The contention of appellant that the Revenue Acts impose income tax upon one individual as an incident to his control of the income vested in another individual, under the applicable laws of the States, must be rejected, because such construction would render the statute unconstitutional. It would be in part a direct tax not based on the income of the person taxed, and not apportioned. *Eisner* v. *Macomber,* 252 U. S. 189; *Pollock* v. *Farmers Loan & Tr. Co.,* 157 U. S. 429, 158 U. S. 601; *Brushaber* v. *Union Pac. R. Co.,* 240 U. S. 1. It would result in a tax not geographically equal and uniform, as required by § 8 of Art. I, of the Constitution. Such a basis would be so arbitrary and capricious as to constitute taking of property without due process. *Knowlton* v. *Moore,* 178 U. S. 41; *Lewellyn* v. *Frick,* 268 U. S. 238; *Untermyer* v. *Anderson,* 276 U. S. 440; *Blodgett* v. *Holden,* 275 U. S. 142.

The community property system of Washington vests equally in husband and wife the ownership and enjoy-

ment of all community property, real and personal. Neither the accumulated real or personal property, nor the salary or wages of the husband, nor any other community property, can be taken or used for payment of the husband's sole obligations or for his personal torts. Citing numerous statutes and decisions, among them:

Remington's Comp. Stats., §§ 6890, 6891, 6892; *Holyoke* v. *Jackson,* 3 Wash. Ter. 235; *Hill* v. *Young,* 7 Wash. 33; *Mabie* v. *Whittaker,* 10 Wash. 656; *Warburton* v. *White,* 176 U. S. 484; *Adams* v. *Black,* 6 Wash. 528; *Kaufman* v. *Perkins,* 114 Wash. 40; *Spreitzer* v. *Miller,* 98 Wash. 601; *Hoover* v. *Chambers,* 3 Wash. Ter. 26; *Itkin* v. *Jeffery,* 126 Wash. 47; *Schramm* v. *Steele,* 97 Wash. 309; *Olive Co.* v. *Meek,* 103 Wash. 467; *Snyder* v. *Stringer,* 116 Wash. 131; *Marston* v. *Rue,* 92 Wash. 129; *Stewart* v. *Bank of Endicott,* 82 Wash. 106; *McDonough* v. *Craig,* 10 Wash. 239; *Allen* v. *Chambers,* 18 Wash. 341; *Fielding* v. *Ketler,* 86 Wash. 194; *Spinning* v. *Allen,* 10 Wash. 570; *Fidelity & Deposit Co.* v. *Clark,* 144 Wash. 520; *Buchser* v. *Buchser,* 231 U. S. 157; *Ambrose* v. *Moore,* 46 Wash. 463; *Brotton* v. *Langert,* 1 Wash. 73; *Bice* v. *Brown,* 98 Wash. 416; *Kies* v. *Wilkinson,* 114 Wash. 89; *Coles* v. *McNamara,* 131 Wash. 691; *Wilson* v. *Stone,* 90 Wash. 365; *Day* v. *Henry,* 81 Wash. 61; *Peterson* v. *Zimmerman,* 142 Wash. 385; *Spokane State Bank* v. *Tilton,* 132 Wash. 641; *Huyvaerts* v. *Roedtz,* 105 Wash. 657; *Littell Mfg. Co.* v. *Miller,* 3 Wash. 480.

Mr. Justice Roberts delivered the opinion of the Court.

Seaborn and his wife, citizens and residents of the State of Washington, made for the year 1927 separate income tax returns as permitted by the Revenue Act of 1926, c. 27, § 223 (U. S. C. App., Title 26, § 964).

During and prior to 1927 they accumulated property comprising real estate, stocks, bonds and other personal

property. While the real estate stood in his name alone, it is undisputed that all of the property real and personal constituted community property and that neither owned any separate property or had any separate income.

The income comprised Seaborn's salary, interest on bank deposits and on bonds, dividends, and profits on sales of real and personal property. He and his wife each returned one-half the total community income as gross income and each deducted one-half of the community expenses to arrive at the net income returned.

The Commissioner of Internal Revenue determined that all of the income should have been reported in the husband's return, and made an additional assessment against him. Seaborn paid under protest, claimed a refund, and on its rejection, brought this suit.

The District Court rendered judgment for the plaintiff (32 Fed. (2d) 916); the Collector appealed, and the Circuit Court of Appeals certified to us the question whether the husband was bound to report for income tax the entire income, or whether the spouses were entitled each to return one-half thereof. This Court ordered the whole record to be sent up.

The case requires us to construe Sections 210 (a) and 211 (a) of the Revenue Act of 1926 (U. S. C. App., Tit. 26, §§ 951 and 952), and apply them, as construed, to the interests of husband and wife in community property under the law of Washington. These sections lay a tax upon the net income of every individual.[1] The Act goes no farther, and furnishes no other standard or definition of what constitutes an individual's income. The use of the word "of" denotes ownership. It would be a strained construction, which, in the absence of further definition by Congress, should impute a broader significance to the phrase.

[1] The language has been the same in each act since that of February 24, 1919, 40 Stat. 1057.

The Commissioner concedes that the answer to the question involved in the cause must be found in the provisions of the law of the State, as to a wife's ownership of or interest in community property. What, then, is the law of Washington as to the ownership of community property and of community income, including the earnings of the husband's and wife's labor?

The answer is found in the statutes of the State,[2] and the decisions interpreting them.

These statutes provide that, save for property acquired by gift, bequest, devise or inheritance, all property however acquired after marriage, by either husband or wife, or by both, is community property. On the death of either spouse his or her interest is subject to testamentary disposition, and failing that, it passes to the issue of the decedent and not to the surviving spouse. While the husband has the management and control of community personal property and like power of disposition thereof as of his separate personal property, this power is subject to restrictions which are inconsistent with denial of the wife's interest as co-owner. The wife may borrow for community purposes and bind the community property (*Fielding* v. *Ketler,* 86 Wash. 194). Since the husband may not discharge his separate obligation out of community property, she may, suing alone, enjoin collection of his separate debt out of community property (*Fidelity & Deposit Co.* v. *Clark,* 144 Wash. 520). She may prevent his making substantial gifts out of community property without her consent (*Parker* v. *Parker,* 121 Wash. 24). The community property is not liable for the husband's torts not committed in carrying on the business of the community (*Schramm* v. *Steele,* 97 Wash. 309).

[2] Remington's Compiled Statutes, 1922, §§ 181; 182; 570; 989; 1145; 1342; 1419; 6890 to 6896, inc.; 6900 to 6906; 6908; 7348; 7598; 10572; 10575; 10577 and 10578.

The books are full of expressions such as "the personal property is just as much hers as his" (*Marston* v. *Rue,* 92 Wash. 129); "her property right in it [an automobile] is as great as his" (92 Wash. 133); "the title of one spouse . . . was a legal title as well as that of the other" (*Mabie* v. *Whittaker,* 10 Wash. 656, 663).

Without further extending this opinion it must suffice to say that it is clear the wife has, in Washington, a vested property right in the community property, equal with that of her husband; and in the income of the community, including salaries or wages of either husband or wife, or both. A description of the community system of Washington and of the rights of the spouses, and of the powers of the husband as manager, will be found in *Warburton* v. *White,* 176 U. S. 484.

The taxpayer contends that if the test of taxability under Sections 210 and 211 is ownership, it is clear that income of community property is owned by the community and that husband and wife have each a present vested one-half interest therein.

The Commissioner contends, however, that we are here concerned not with mere names, nor even with mere technical legal titles; that calling the wife's interest vested is nothing to the purpose, because the husband has such broad powers of control and alienation, that while the community lasts, he is essentially the owner of the whole community property, and ought so to be considered for the purposes of Sections 210 and 211. He points out that as to personal property the husband may convey it, may make contracts affecting it, may do anything with it short of committing a fraud on his wife's rights. And though the wife must join in any sale of real estate, he asserts that the same is true, by virtue of statutes, in most States which do not have the community system. He asserts that control without accountability is indistin-

guishable from ownership, and that since the husband has this, *quoad* community property and income, the income is that "of" the husband under Sections 210-211 of the income tax law.

We think, in view of the law of Washington above stated, this contention is unsound. The community must act through an agent. This Court has said with respect to the community property system (*Warburton* v. *White*, 176 U. S. 494) that "property acquired during marriage with community funds became an acquêt of the community and not the sole property of the one in whose name the property was bought, although by the law existing at the time the husband was given the management, control and power of sale of such property. This right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community."

In that case, it was held that such agency of the husband was neither a contract nor a property right vested in him, and that it was competent to the legislature which created the relation to alter it, to confer the agency on the wife alone, or to confer a joint agency on both spouses, if it saw fit,—all without infringing any property right of the husband. See, also, *Arnett* v. *Reade*, 220 U. S. 311 at 319.

The reasons for conferring such sweeping powers of management on the husband are not far to seek. Public policy demands that in all ordinary circumstances, litigation between wife and husband during the life of the community should be discouraged. Law-suits between them would tend to subvert the marital relation. The same policy dictates that third parties who deal with the husband respecting community property shall be assured that the wife shall not be permitted to nullify his transactions. The powers of partners, or of trustees of a spendthrift trust, furnish apt analogies.

The obligations of the husband as agent of the community are no less real because the policy of the State limits the wife's right to call him to account in a court. Power is not synonymous with right. Nor is obligation coterminous with legal remedy. The law's investiture of the husband with broad powers, by no means negatives the wife's present interest as a co-owner.

We are of opinion that under the law of Washington the entire property and income of the community can no more be said to be that of the husband, than it could rightly be termed that of the wife.

We should be content to rest our decision on these considerations. Both parties have, however, relied on executive construction and the history of the income tax legislation as supporting their respective views. We shall, therefore, deal with these matters.

The taxpayer points out that, following certain opinions of the Attorney General,[3] the Decisions and Regulations of the Treasury have uniformly made the distinction that while under California law the wife's interest in community property amounts to a mere expectancy contingent on her husband's death and does not rise to the level of a present interest, her interest under the laws of Washington, Arizona, Texas and some other states is a present vested one. They have accordingly denied husband and wife the privilege of making separate returns of one-half

[3] Opinion of Attorney General Palmer, September 10, 1920, (32 Op. A. G., 298); Opinion of Attorney General Palmer, February 26, 1921 (32 Op. A. G., 435).

The Opinion of Attorney General Stone, of October 9, 1924 (34 Op. A. G., 395), and his letter of January 27, 1925, referring thereto (See T. D. 3670) deal only with estate tax, and express no opinion on the question here involved.

See Opinion of Acting Attorney General Mitchell of July 16, 1927, as a result of which this and other suits were initiated (35 Op. A. G., 265).

the community income in California, but accorded that privilege to residents of such other states.[4]

He relies further upon the fact that Congress has thrice,[5] since these Decisions and Regulations were promulgated, re-enacted the income tax law without change of the verbiage found in §§ 210 (a) and 211 (a), thus giving legislative sanction to the executive construction. He stands also on the fact that twice the Treasury has suggested the insertion of a provision,[6] which would impose the tax on the husband in respect of the whole community income, and that Congress has not seen fit to adopt the suggestion.

On the other hand the Commissioner says that, granted the truth of these assertions, a different situation has been created as respects 1926 and subsequent years. For in the 1926 Act there was inserted a section which plainly indicated an intent to leave this question open for the future in States other than California, while closing it for past years. The section is copied in the margin.[7]

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[4] O. D. 426, April, 1920; T. D. 3071, August 24, 1920; T. D. 3138, March 3, 1921; Regulations 62, Art. 31, 1921 Revenue Act.

[5] Act of November 23, 1921, 42 Stat. 227; Act of June 2, 1924, 43 Stat. 253; Act of February 26, 1926, 44 Stat. 9.

[6] The provision desired by the Treasury was as follows: "Income received by any community shall be included in the gross income of the spouse having management and control of the community property." This clause was in the 1921 Act as passed by the House. It was stricken out in the Senate. When the 1924 Act was introduced it contained the same provision, which was stricken out by the Ways and Means Committee and not re-inserted.

[7] SEC. 1212. Income from any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse. (U. S. C. Supp. II. Title 26, Sec. 964a.)

We attribute no such intent to the section as is ascribed to it by the Commissioner. We think that although Congress had twice refused to change the wording of the Act, so as to tax community income to the husband in Washington and certain other states, in view of our decision in *United States* v. *Robbins,* 269 U. S. 315, it felt we might overturn the executive construction and assimilate the situation in Washington to that we had determined existed in California. Section 1212 therefore was merely inserted to prevent the serious situation as to resettlements, additional assessments and refunds which would follow such a decision.

The same comments apply to the Joint Resolution No. 88, 71st Congress, on which the Commissioner relies.[8]

[8] That the three-year period of limitation provided in section 277 of the Revenue Act of 1926 upon the assessment of income taxes imposed by that Act for the taxable year 1927, and the three-year period of limitation provided in section 284 of the Revenue Act of 1926 in respect of refunds and credits of income taxes imposed by that Act for the taxable year 1927 shall be extended for a period of one year in the case of any married individual where such individual or his or her spouse filed a separate income-tax return for such taxable year and included therein income which under the laws of the State upon receipt became community property.

SEC. 2. The two-year period of limitation provided in section 275 of the Revenue Act of 1928 upon the assessment of income taxes imposed by Title I of that Act for the taxable year 1928, and the two-year period of limitation provided in section 322 of the Revenue Act of 1928 in respect of refunds and credits of income taxes imposed by that Act for the taxable year 1928 shall be extended for a period of one year in the case of any married individual where such individual or his or her spouse filed a separate income-tax return for such taxable year and included therein income which under the laws of the State upon receipt became community property.

SEC. 3. The periods of limitations extended by this joint resolution shall, as so extended, be considered to be provided in sections 277 and 284 of the Revenue Act of 1926 and sections 275 and 322 of the Revenue Act of 1928, respectively.

SEC. 4. Nothing herein shall be construed as extending any period of limitation which has expired before the enactment of this joint resolution.

It is obvious that this resolution was intended to save the Government's right of resettlement, in event that the proposed test suits, of which this is one, should be decided in favor of the Government's present contention. See the Report of the Ways and Means Committee on the resolution (Cong. Record, June 11, 1930, pp. 10923–10925).

On the whole, we feel that, were the matter less clear than we think it is, on the words of the income tax law as applied to the situation in Washington, we should be constrained to follow the long and unbroken line of executive construction, applicable to words which Congress repeatedly reëmployed in acts passed subsequent to such construction, (*New York* v. *Illinois,* 278 U. S. 367; *National Lead Co.* v. *United States,* 252 U. S. 140; *United States* v. *Farrar,* 281 U. S. 624), reënforced, as it is, by Congress' refusal to change the wording of the Acts to make community income in states whose law is like that of Washington returnable as the husband's income.

The Commissioner urges that we have, in principal, decided the instant question in favor of the Government. He relies on *United States* v. *Robbins,* 269 U. S. 315; *Corliss* v. *Bowers,* 281 U. S. 376, and *Lucas* v. *Earl,* 281 U. S. 111.

In the *Robbins* case, we found that the law of California, as construed by her own courts, gave the wife a mere expectancy and that the property rights of the husband during the life of the community were so complete that he was in fact the owner. Moreover, we there pointed out that this accorded with the executive construction of the Act as to California.

The *Corliss* case raised no issue as to the intent of Congress, but as to its power. We held that where a donor retains the power at any time to revest himself with the principal of the gift, Congress may declare that he still owns the income. While he has technically parted with title, yet he in fact retains ownership, and all its incidents.

But here the husband never has ownership. That is in the community at the moment of acquisition.

In the *Earl* case a husband and wife contracted that any property they had or might thereafter acquire in any way, either by earnings (including salaries, fees, etc.), or any rights by contract or otherwise, "shall be treated and considered and hereby is declared to be received held taken and owned by us as joint tenants . . ." We held that, assuming the validity of the contract under local law, it still remained true that the husband's professional fees, earned in years subsequent to the date of the contract, were his individual income, "derived from salaries, wages, or compensation for personal services" under §§ 210, 211, 212 (a) and 213 of the Revenue Act of 1918. The very assignment in that case was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate. That case presents quite a different question from this, because here, by law, the earnings are never the property of the husband, but that of the community.

Finally the argument is pressed upon us that the Commissioner's ruling will work uniformity of incidence and operation of the tax in the various states, while the view urged by the taxpayer will make the tax fall unevenly upon married people. This argument cuts both ways. When it is remembered that a wife's earnings are a part of the community property equally with her husband's, it may well seem to those who live in states where a wife's earnings are her own, that it would not tend to promote uniformity to tax the husband on her earnings as part of his income. The answer to such argument, however, is, that the constitutional requirement of uniformity is not intrinsic, but geographic. *Billings* v. *United States,* 232 U. S. 261; *Head Money Cases,* 112 U. S. 580; *Knowlton* v. *Moore,* 178 U. S. 41. And differences of state law, which may bring a person within or without the category

designated by Congress as taxable, may not be read into the Revenue Act to spell out a lack of uniformity. *Florida* v. *Mellon,* 273 U. S. 12.

The District Court was right in holding that the husband and wife were entitled to file separate returns, each treating one-half of the community income as his or her respective income, and its judgment is

Affirmed.

The CHIEF JUSTICE and MR. JUSTICE STONE took no part in the consideration or decision of this case.

GOODELL, COLLECTOR OF INTERNAL REVENUE, *v.* KOCH.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 106. Argued October 22, 1930.—Decided November 24, 1930.

Under the law of the State of Arizona, the wife has such equal interest in the community income as to entitle her to treat one-half thereof as her income, and file a separate return therefor under §§ 210 (a) and 211 (a) of the Revenue Act of 1926. Following *Poe* v. *Seaborn, q. v., ante,* p. 101. P. 120.

Affirmed.

CERTIFICATE from the Circuit Court of Appeals upon appeal from a judgment of the District Court for the taxpayer in an action to recover from the Collector of Internal Revenue an amount paid under protest on account of income taxes for 1927. This Court ordered up the entire record. See statement in *Poe* v. *Seaborn, ante,* p. 101.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist, Mr. Sewall Key, Miss Helen R. Carloss,* Special Assistants to the Attorney General, *Mr. Erwin N. Griswold,* and *Messrs. Clarence M. Charest,*

General Counsel, and *T. H. Lewis, Jr.,* Special Attorney, Bureau of Internal Revenue, were on the brief, for Goodell, Collector of Internal Revenue.

Under the laws and judicial decisions of the State of Arizona, the husband's interest in the community income is such that he should properly be required to report the entire amount in his return; the wife's interest is not such that she should be permitted to report one-half of the community income in her return. Arizona Rev. Stats., §§ 403, 405, 2061, 3850, 3852, 3854, 3855, 3862, 3866, 3869, 3881–3885; *Stiles* v. *Lord,* 2 Ariz. 154; *Gristy* v. *Hudgens,* 23 Ariz. 339; *La Tourette* v. *La Tourette,* 15 Ariz. 200; *Benson* v. *Hunter,* 23 Ariz. 132; *Hageman* v. *Vanderdoes,* 15 Ariz. 312; *Pendleton* v. *Brown,* 25 Ariz. 604; *Hood* v. *Fletcher,* 31 Ariz. 456; *First Nat. Bank* v. *Reeves,* 27 Ariz. 508; *Cosper* v. *Valley Bank,* 28 Ariz. 373; *Richards* v. *Warnekros,* 14 Ariz. 488; *McFadden* v. *McFadden,* 22 Ariz. 246; *Hall* v. *Weatherford,* 32 Ariz. 370. Distinguishing *Schofield* v. *Gold,* 26 Ariz. 296, and *Luhrs* v. *Hancock,* 6 Ariz. 340.

Messrs. Clifton Mathews and *Rhodes S. Baker* argued the cause, and *Messrs. Samuel L. Pattee, James R. Moore, Blaine B. Shimmel,* and *K. Berry Peterson,* Attorney General of Arizona, were on the brief, for Koch.

The wife, in Arizona, has a present vested title in community property equal in all respects to that of the husband, and community income vests equally between them as it accrues. Arizona Rev. Stat., § 3850.

The powers of the husband over community property are in recognition, not of a superior interest or title, but of the necessity of subordinating the exercise of property rights to the family function. See *Warburton* v. *White,* 176 U. S. 484, and *La Tourette* v. *La Tourette,* 15 Ariz. 200.

The interest of each spouse in one-half of the property is a vested legal one, the same as the interest of any other partner in partnership property. *La Tourette* v. *La Tourette, supra; Pendleton* v. *Brown,* 25 Ariz. 604; *Cosper* v. *Valley Bank,* 28 Ariz. 373; *Hall* v. *Weatherford,* 32 Ariz. 370; *Forsythe* v. *Paschal,* 34 Ariz. 380; *Schofield* v. *Gold,* 26 Ariz. 296.

Each spouse has unlimited testamentary power over his or her half of the property; and in the absence of testamentary disposition, the property passes to the descendants of the deceased spouse. Arizona Rev. Stat., § 1100; *Pauley* v. *Hadlock,* 21 Ariz. 340; *Wilson* v. *Sullivan,* 24 Ariz. 124.

Mr. Justice Roberts delivered the opinion of the Court.

This cause presents the same question as respects the return for taxation of community income of a husband and wife, citizens of Arizona, as was presented in *Poe* v. *Seaborn, ante,* p. 101, affecting spouses who are citizens of the State of Washington.

Here Koch and his wife filed separate returns for 1927 each returning one-half of the community income; the Commissioner of Internal Revenue assessed a deficiency on the theory that Koch alone should have returned the entire income; Koch paid under protest, and brought suit against the Collector in the District Court to recover the sum so paid. The Collector demurred. Judgment went for plaintiff. The Collector appealed to the Circuit Court of Appeals, which certified questions to us. This Court ordered the entire record sent up.

What we said in *Poe* v. *Seaborn, supra,* applies here, if under the law of Arizona, the wife's interest in community property is, in legal effect, the same as in Washington.

The collector asserts that the Arizona law of community property closely resembles that of California (cf. *U. S.* v. *Robbins,* 269 U. S. 315); but concedes that in many respects its provisions are similar to those of the law of Washington.

We have examined the statutes* and authorities cited, and have concluded that they present no significant differences from the Washington system. In *La Tourette* v. *La Tourette,* 15 Ariz. 200, 205, it was said: "The law makes no distinction between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community wherein both are equal." As in Washington, each spouse has unlimited testamentary power over his or her interest in the community, and upon failure to exercise it, such interest passes to the descendants of the decedent.

The Arizona Supreme Court has likened the community to a partnership. *Forsythe* v. *Paschal,* 34 Ariz. 380. The husband as agent may not act in fraud of his wife's rights, and if he atempts to do so, she has a remedy in the courts. *Gristy* v. *Hudgens,* 23 Ariz. 339.

Enough has been said to show that our conclusion in *Poe* v. *Seaborn, supra,* holds here, and that the wife has such equal interest in community income as to entitle her to treat one-half thereof as her income, and file a separate return therefor under sections 210 (a) and 211 (a) of the Revenue Act of 1926.

Perhaps we ought also to note that what is said in *Poe* v. *Seaborn* with respect to executive construction and legislative history applies in this case.

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* The applicable provisions (cited from the Revised Statutes of 1913 which were in force in 1927) are: Title 6, §§ 403–405, 865–869, 1102; Title 8, §§ 2058–2062; Title 32, §§ 3848–3856, 3865–3869, 3881–3886; Act of February 10, 1921, Ariz. Session Laws, Regular, p. 6; Act of March 17, 1919, Arizona Session Laws, Regular, p. 98.

For the reasons above given, and more fully stated in the opinion in *Poe* v. *Seaborn,* the judgment of the District Court is

Affirmed.

The CHIEF JUSTICE and MR. JUSTICE STONE took no part in the consideration or decision of this case.

HOPKINS, COLLECTOR OF INTERNAL REVENUE, *v.* BACON.

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

No. 84. Argued October 22, 1930.—Decided November 24, 1930.

The interest of a wife in community property in the State of Texas is properly characterized as a present vested interest, equal and equivalent to that of her husband; and under §§ 210 (a) and 211 (a) of the Revenue Act of 1926, she and her husband are entitled to make separate returns, each of one-half of the community income. Following *Poe* v. *Seaborn, q. v., ante,* p. 101. P. 125. 38 F. (2d) 651, affirmed.

CERTIORARI, 281 U. S. 715, to review a judgment of the Circuit Court of Appeals affirming a judgment of the District Court, 27 F. (2d) 140, for the taxpayer in an action to recover from the Collector of Internal Revenue an amount paid under protest on account of income taxes for 1927. See statement in *Poe* v. *Seaborn, ante,* p. 101.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist, Mr. Sewall Key, Miss Helen R. Carloss,* Special Assistants to the Attorney General, *Mr. Erwin N. Griswold,* and *Messrs. Clarence M. Charest,* General Counsel, and *T. H. Lewis, Jr.,* Special Attorney, Bureau of Internal Revenue, were on the brief, for Hopkins, Collector of Internal Revenue.

Under the laws and judicial decisions of the State of Texas, the husband's interest in the community income during coverture is such that he should properly be required to report the entire amount in his return; the wife's interest is not such that she should be permitted to report one-half of the community income in her return. Texas Rev. Civ. Stats., Arts. 4619, 4620, 4621, 4623, 4634, 4635, 4638; *Moody* v. *Smoot,* 78 Tex. 119; *Stramler* v. *Coe,* 15 Tex. 211; *Coss* v. *Coss,* 207 S. W. 127; *Bell* v. *Crabb,* 244 S. W. 371; *Jordan* v. *Moore,* 65 Tex. 363; *Rowlett* v. *Mitchell,* 52 Tex. Civ. App. 589; *Briggs* v. *McBride,* 190 S. W. 1123; *Wiener* v. *Zweib,* 105 Tex. 262; *First Nat. Bank* v. *Davis,* 5 S. W. (2d) 753; *Dallas Plumbing Co.* v. *Harrington,* 275 S. W. 190; *Shaw* v. *Shaw,* 28 S. W. (2d) 173; *Martin* v. *McAllister,* 94 Tex. 567; *Ochoa* v. *Edwards,* 189 S. W. 1022, writ of error refused, 190 S. W. xv; *Braden* v. *Gose,* 57 Tex. 37; *Seabrook* v. *First Nat. Bank,* 171 S. W. 247; *Fullerton* v. *Doyle,* 18 Tex. 3; *Wright* v. *Hays,* 10 Tex. 130; *Zimpelman* v. *Robb,* 53 Tex. 274; *Hamlett* v. *Coates,* 182 S. W. 1144, writ of error refused, 190 S. W. xv; *Davis* v. *Davis,* 186 S. W. 775; *Hedtke* v. *Hedtke,* 112 Tex. 404; *Strickland* v. *Strickland,* 276 S. W. 795; *Moor* v. *Moor,* 24 Tex. Civ. App. 150, writ of error refused, 58 S. W. xv; *Gonzales* v. *Gonzales,* 117 Tex. 183; *Martin* v. *Martin,* 17 S. W. (2d) 789.

Messrs. Harry C. Weeks and *Palmer Hutcheson,* with whom *Messrs. Rhodes S. Baker* and *R. C. Fulbright* were on the brief, for Bacon.

Under the constitution and laws of Texas and the decisions of its highest courts, community income belongs jointly and equally to husband and wife. All acquisitions of either husband or wife during marriage, whenever or however derived, are the common and equal property of both of them, except such acquisitions as came through

"gift, devise or descent," and except the "increase" of lands so derived (that is, derived through "gift, devise or descent") and increase of lands owned at marriage or acquired subsequent to marriage through "gift, devise or descent." Texas Stats., Arts. 4613, 4614, 4619; *Arnold* v. *Leonard,* 114 Tex. 535.

It is obvious that neither husband nor wife can have any incomes other than their community incomes, except such rare gains as are "increase" of lands. Legislative attempts to enlarge the wife's separate income have been held unconstitutional by the highest courts of Texas. *Arnold* v. *Leonard, supra; Northern Texas Traction Co.* v. *Hill,* 297 S. W. 778; *Teague* v. *Fairchild,* 15 S. W. (2d) 585.

The wife has in the community income such ownership and substantial rights as authorize her under the Revenue Act, separately to return and be taxed upon her share thereof. Texas Stats., Arts. 2578, 2579, 4613, 4614, 4616, 4617, 4620, 8281, 8282; *Warburton* v. *White,* 176 U. S. 484; *Arnett* v. *Reade,* 220 U. S. 311; *Atkins* v. *Davis,* 291 S. W. 968; *Arnold* v. *Leonard,* 114 Tex. 535; *In re Gutierrez,* 33 F. (2d) 987; *Gohlman, Lester & Co.* v. *Whittle,* 114 Tex. 548; *Tannehill* v. *Tannehill,* 171 S. W. 1050; *Taylor* v. *Murphy,* 50 Tex. 291; *Stramler* v. *Coe,* 15 Tex. 211; *Wright* v. *Hays,* 10 Tex. 129; *Zimpleman* v. *Robb,* 53 Tex. 274; *Martin* v. *Moran,* 32 S. W. 904; *Krenz* v. *Strohmeir,* 177 S. W. 178; *Watson* v. *Harris,* 130 S. W. 237; *Coss* v. *Coss,* 207 S. W. 127; *Bicocchi* v. *Casey Swasey Co.,* 91 Tex. 259; *Vercelli* v. *Provenzano,* 28 S. W. (2d) 316; *Gardenshire* v. *Gardenshire,* 172 S. W. 726; *Shaw* v. *Shaw,* 111 S. W. 223; *Dority* v. *Dority,* 96 Tex. 215; *Miller* v. *Miller,* 285 S. W. 837; *Lamar & Smith* v. *Stroud,* 5 S. W. (2d) 824; *Furrh* v. *Winston,* 66 Tex. 521; *Rice* v. *Rice,* 21 Tex. 58; *Maddox* v. *Summerlin,* 92 Tex. 483; *Pellum* v. *Fleming,* 283 S. W. 531, writ of error denied, 287 S. W. 492; *Rowlett* v. *Mitchell,* 114 S. W. 845; *Red River*

Nat. Bank v. *Ferguson,* 109 Tex. 287; Speer's Law of Marital Rights in Texas, 3d ed., pars. 504, 505.

Either spouse may devise during his or her lifetime one-half of the community property. Texas Stat., Arts. 8281–8282; *Parker* v. *Parker,* 10 Tex. 83; *Brown* v. *Pridgen,* 56 Tex. 124; *Moss* v. *Helsley,* 60 Tex. 426; *Rogers* v. *Trevathan,* 67 Tex. 406. The share of each at death is identical. Texas Stat., Arts. 2578–2579; *McCowan* v. *Owens,* 40 S. W. 336; *Clemons* v. *Clemons,* 45 S. W. 199; *Edwards* v. *White,* 120 S. W. 914, 916. The wife's interest, or the interest of her heirs, differs in no wise from that of the husband or his heirs.

Mr. Justice Roberts delivered the opinion of the Court.

This case comes here on writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. It involves the same questions with respect to community income under Texas law as are involved in *Poe* v. *Seaborn, ante,* p. 101, and *Goodell* v. *Koch, ante,* p. 118, under the law of Arizona and Washington.

Respondent was assessed additional income tax for 1927, because he and his wife had made separate returns and had each returned one-half of the community income, whereas the Commissioner of Internal Revenue asserted that the respondent must return the whole thereof. Respondent paid under protest, brought suit in the District Court (27 Fed. (2d) 140) and recovered judgment. The collector appealed and the Circuit Court of Appeals affirmed the judgment. (38 Fed. (2d) 651.)

In view of our decision in *Poe* v. *Seaborn, supra,* the only matter to be examined here is whether under the community property system of Texas the wife has a mere expectancy, as she would under the law of California (cf. *United States* v. *Robbins,* 269 U. S. 315), or on the contrary has a proprietary vested interest in the community

property such as makes her an owner of one-half of the community income.

The statutes contain sweeping provisions as to what shall be included in community property. They provide that each spouse shall have testamentary power over his or her respective interest in the community property. In the event of failure to exercise such testamentary power they provide that the property shall go in the first instance to the descendants of the deceased spouse. They provide, as is usual in States having the community system, that the husband shall have power of management and control such that he may deal with community property very much as if it were his own. In spite of this, however, it is settled that in Texas the wife has a present vested interest in such property (*Arnold* v. *Leonard,* 114 Tex. 535). Her interest is said to be equal to the husband's (*Wright* v. *Hays' Administrator,* 10 Tex. 130). It is held that the spouses' rights of property in the effects of the community are perfectly equivalent to each other (*Arnold* v. *Leonard, supra*). These expressions as to the wife's interest are confirmed by the authorities holding that if the husband, as agent of the community, acts in fraud of the wife's rights, she is not without remedy in the courts. (*Stramler* v. *Coe,* 15 Tex. 211; *Martin* v. *Moran,* 32 S. W. 904; *Watson* v. *Harris,* 130 S. W. 237; *Davis* v. *Davis,* 186 S. W. 775.)

The applicable statutory provisions are noted in the margin.*

In view of what has been said in *Poe* v. *Seaborn, supra,* it remains only to say that the interest of a wife in community property in Texas is properly characterized as a

* Revised Civil Statutes, Texas, 1925, Vols. I, II, Articles 1299–1300; 1983–1985; 2578–2579; 3661–3664; 3666–3670; 3672–3678; 3680–3681; 4613–4627; 4634–4635; 4638. Texas General and Special Laws, Reg. Sess. 1927, Chap. 148.

present vested interest, equal and equivalent to that of her husband, and that one-half of the community income is therefore income of the wife. She and her husband are entitled to make separate returns, each of one-half of such income. The judgment of the Circuit Court of Appeals is *Affirmed.*

The CHIEF JUSTICE and MR. JUSTICE STONE took no part in the consideration or decision of this case.

BENDER, COLLECTOR OF INTERNAL REVENUE, *v.* PFAFF.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86. Argued October 22, 23, 1930.—Decided November 24, 1930.

Under the law of the State of Louisiana the wife has a present vested interest in community property equal to that of her husband, and, under §§ 210 (a) and 211 (a) of the Revenue Act of 1926, the spouses are entitled to file separate income tax returns, each of one-half of the community income. Following *Poe* v. *Seaborn, q. v., ante,* p. 101. P. 131.

38 F. (2d) 649, affirmed.

CERTIORARI, 281 U. S. 715, to review a judgment of the Circuit Court of Appeals affirming a judgment of the District Court, 38 F. (2d) 642, for the taxpayer in an action to recover from the Collector of Internal Revenue an amount paid under protest on account of income taxes for 1927. See statement in *Poe* v. *Seaborn, ante,* p. 101.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist, Mr. Sewall Key, Miss Helen R. Carloss,* Special Assistants to the Attorney General, *Mr. Paul D. Miller,* and *Messrs. Clarence M. Charest,* General Counsel, and *T. H. Lewis, Jr.,* Special Attorney,

Bureau of Internal Revenue, were on the brief, for Bender, Collector of Internal Revenue.

Under the laws and judicial decisions of the State of Louisiana, the husband's interest in the community income is such that he should properly be required to report the entire amount in his return; the wife's interest is not such that she should be permitted to report one-half of the community income in her return. Citing numerous statutes and decisions, including: Louisiana Code of Practice, Arts. 105, 106, 107, 118; Louisiana Rev. Civ. Code, Arts. 121–132, 150, 155, 160, 2403, 2404, 2408, 2410, 2425, 2430, 2446; Act 132 of 1926; *Mitchell* v. *Dixie Ice Co.*, 157 La. 383; *Kelly* v. *Robertson,* 10 La. Ann. 303; *Demarets* v. *Demarets,* 144 La. 173; *McCaffrey* v. *Benson,* 40 La. Ann. 10; *Falconer* v. *Falconer,* 167 La. 595; *Le Rosen* v. *Oil Co.,* 169 La. 973; *Luthy* v. *Phillips Werlein Co.,* 163 La. 753; *Marshall* v. *Mullen,* 3 Robinson 328; *Succession of Curtis,* 10 La. Ann. 662; *Succession of McCloskey,* 144 La. 438; *Successions of M., S. & P. Cason,* 32 La. Ann. 790; *Beck* v. *Natalie Oil Co.,* 143 La. 153; *Hawley* v. *Crescent City Bank,* 26 La. Ann. 230; *National City Bank* v. *Barringer,* 143 La. 14; *Succession of James,* 147 La. 944; *Gosserand* v. *Monteleone,* 164 La. 398; *Fabacher* v. *Rouprich,* 160 La. 433; *Hellberg* v. *Hyland,* 168 La. 493.

While under certain circumstances the wife may bring the community to an end and secure a division of community property, she can not during the existence of the community substitute her management for that of the husband or demand any part of the community income for her own use. La. Rev. Civ. Code, Arts. 123, 150, 155, 160, 2408, 2410, 2425, 2430, 2446; La. Code of Practice, Art. 105; *Gastauer* v. *Gastauer,* 131 La. 1; *Viguerie* v. *Viguerie,* 133 La. 406; *Snoddy* v. *Brashear,* 13 La. Ann. 469.

Messrs. Charles E. Dunbar, Jr., and *Monte M. Lemann,* with whom *Messrs. J. Blanc Monroe* and *Walker B. Spencer* were on the brief, for Pfaff.

The wife, in Louisiana, is owner of one-half of community income and has a vested interest therein. La. Rev. Civ. Code, Arts. 915, 2334, 2399, 2402, 2404; *Phillips* v. *Phillips,* 160 La. 813; *Succession of Marsal,* 118 La. 212; *Succession of May,* 120 La. 692; *Beck* v. *Natalie Oil Co.,* 143 La. 154; *Liebman* v. *Fontenot,* 275 Fed. 688; *Warburton* v. *White,* 176 U. S. 484; *Arnett* v. *Reade,* 220 U. S. 311; *Dixon* v. *Dixon's Executors,* 4 La. 188; *Theall* v. *Theall,* 7 La. 226. See also, *Bek* v. *Miller,* 8 F. (2d) 797; *Rucker* v. *Blair,* 32 F. (2d) 222; *McLarry* v. *Commissioner,* 30 F. (2d) 789. Distinguishing *Guice* v. *Lawrence,* 2 La. Ann. 226.

The modern French commentators upon the Code Napoleon, upon which the Louisiana law is largely based, likewise recognize the wife's half ownership in community property. See Baudry-Lacantinerie, Vol. 13, § 247; Planiol et Ripert, Traite Pratique de Droit Civil Francais (1925), Vol. 8, §§ 156–8, 516.

The husband does not have unfettered command or control of community income under the Louisiana law. La. Rev. Civ. Code, Arts. 2399, 2404; *Childers* v. *Johnson,* 6 La. Ann. 634; *Melady* v. *Succession of Bonnegent,* 142 La. 534; *Bister* v. *Menge,* 21 La. Ann. 216; *Radovich* v. *Jenkins,* 123 La. 355; *Snowden* v. *Cruse,* 152 La. 144; *Succession of Moore,* 42 La. Ann. 332; *Smallwood* v. *Pratt,* 3 Rob. 132.

Whenever the husband proves a bad manager, the wife may obtain a dissolution of the community without seeking a divorce or personal separation, and may enjoin the husband from further management of community partnership property. La. Rev. Civ. Code, Arts. 2425 to 2437; *Davock* v. *Darcy,* 6 Rob. 342; *Jones* v. *Morgan,* 6

La. Ann. 630; *Wolfe & Clark* v. *Lowry,* 10 La. Ann. 272; *Mock* v. *Kennedy,* 11 La. Ann. 525; *Webb* v. *Bell,* 24 La. Ann. 75; *Vickers* v. *Block,* 31 La. Ann. 672; *Chaffe* v. *Watts,* 37 La. Ann. 324; *Brown* v. *Smyth,* 40 La. Ann. 325; *Walmsley* v. *Theus,* 107 La. 417; *Gastauer* v. *Gastauer,* 131 La. 1; *Jones* v. *Jones,* 119 La. 677; *Larose* v. *Naquin,* 150 La. 353, 358; *Hill* v. *Hill,* 115 La. 489; *White* v. *White,* 159 La. 1065; *Smallwood* v. *Pratt,* 3 Rob. 132.

Even if the husband is a good business manager, the wife may terminate his administration by suing for divorce or personal separation whenever he is guilty of misconduct and may then enjoin him from further management or disposition of community property. La. Rev. Civ. Code, Arts. 123, 149, 150, 159; *Dillon* v. *Dillon,* 35 La. Ann. 92; *Succession of Le Besque,* 137 La. 567; *Crochet* v. *Dugas,* 126 La. 285; *Williams* v. *Goss,* 43 La. Ann. 868; *McClelland* v. *Gasquet,* 122 La. 241.

Mr. Justice Roberts delivered the opinion of the Court.

The question presented in this case is the same as that dealt with in *Poe* v. *Seaborn, ante,* p. 101, *Goodell* v. *Koch, ante,* p. 118, and *Hopkins* v. *Bacon, ante,* p. 122. The only variant is that here we are concerned with the community property law of Louisiana. The case comes here on certiorari to the Fifth Circuit Court of Appeals, which affirmed (38 Fed. (2d) 649) a judgment of the District Court (38 Fed. (2d) 642) in favor of the respondent, whereby respondent recovered the amount of an additional assessment paid under protest. As in the other cases the Commissioner made this additional assessment on the theory that under the law of Louisiana the whole community income is to be treated as the income of the husband.

If the test be, as we have held it is, ownership of the community income, this case is probably the strongest of those presented to us, in favor of the wife's ownership of one-half of that income. The relevant statutes of Louisiana are noted in the margin.* So called " common property " includes all property acquired in any manner by husband and wife during marriage except donations made to one of the spouses, and except the wife's earnings and actions for damages when she is living apart from her husband, or carrying on a separate business or trade. The statutes speak of a marriage superinducing as a matter of right, " partnership or community " of acquêts or gains. Repeatedly the statutes refer to the relation as a " partnership or community." The decisions of the Supreme Court of Louisiana clearly recognize the wife's ownership of one-half of all the community income. They unequivocally declare that the wife's half interest in such community property " is not a mere expectancy during the marriage." (*Phillips* v. *Phillips,* 160 La. 813.)

As in the case of other states, whose law we have discussed in connection with this matter in the *Poe, Goodell* and *Hopkins* cases, *supra,* each spouse may by will dispose of only his or her one-half of the community and is powerless to affect the other's half. In case of death intestate one-half descends to the heirs of the decedent, and the other spouse is powerless to prevent this.

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* La. Revised Civil Code, 1870, Articles 57, 64, 120–121, 128, 131–132, 149–150, 155–156, 159–160 (as amended by Act 247 of 1916, p. 521); 915 (as amended by Act 160, 1920, p. 250); 917, 2332, 2334 (as amended by Act 186, 1920, p. 304); 2383, 2386, 2392–2401, 2402 (as amended by Act 68 of 1902, p. 95); 2403, 2404 (as amended by Act 96 Reg. Sess. 1926, p. 136); 2405–2409, 2410 (as amended by Act 4 of 1882, p. 5); 2411–2414, 2417–2419, 2421–2425, 2430; La. Code of Practice, 1870, Articles 105–107, 298; Act 102 of 1916, p. 223; Act 132 Reg. Sess. 1926, p. 207.

While the husband is the manager of the affairs of the marital partnership, the limitations upon the wrongful exercise of his power over community property are more stringent than in many states which have a community system. In Louisiana, if the husband proves, by reason of financial difficulties or the like, an unfit manager, the wife may bring about an immediate dissolution and liquidation of the community property. (*Wolf & Clark* v. *Lowry,* 10 La. Ann. 272; *Webb* v. *Bell,* 24 La. Ann. 75; *Brown & Learned* v. *Smythe,* 40 La. Ann. 325.) And when the wife sues for a separation of the property she is entitled to an accounting from the husband for community income or property in his hands and to reimbursement and retribution for any act done by him in fraud of her rights. (*Hill* v. *Hill,* 115 La. 489; *White* v. *White,* 159 La. 1065.)

In conclusion it may be noted that the Supreme Court of Louisiana has cited our own decisions in *Warburton* v. *White,* 176 U. S. 484, and *Arnett* v. *Reade,* 220 U. S. 311, indicating that the exposition of the wife's rights and of the nature of the community therein contained correctly states the Louisiana doctrine.

Inasmuch, therefore, as, in Louisiana, the wife has a present vested interest in community property equal to that of her husband, we hold that the spouses are entitled to file separate returns, each treating one-half of the community income as income of each " of " them as an " individual " as those words are used in §§ 210 (a) and 211 (a) of the Revenue Act of 1926.

The judgment of the Circuit Court of Appeals is

Affirmed.

The Chief Justice and Mr. Justice Stone took no part in the consideration or decision of this case.

SMITH ET AL., CONSTITUTING THE ILLINOIS COMMERCE COMMISSION, ET AL. *v.* ILLINOIS BELL TELEPHONE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 90. Argued October 20, 21, 1930.—Decided December 1, 1930.

1. In a suit by a public utility to enjoin, as confiscatory, an order of a state commission lowering its rates, an interlocutory injunction was granted upon the condition that, if the injunction were dissolved, the plaintiff should refund to its subscribers the amounts paid by them in excess of those chargeable under the commission's order. A large excess had accumulated when, a number of years later, a final injunction was granted. On appeal, *held*, that, as the decree speaks from its date, the question is necessarily presented, not only whether the rate order was confiscatory when made, but also as to its validity during the period that has intervened, and as to the respective rights of the company and its subscribers in the funds accumulated. P. 142.
2. An Illinois telephone corporation owning an exchange system in Chicago and toll lines from there to other places in the State, did an exchange business local to Chicago, an intrastate toll business and an interstate toll business. The interstate service was performed by means of its Chicago property and connecting lines owned and operated by another corporation (here called the American Company,) and as compensation for its part in that service, including the use of its Chicago property, the Illinois Company received a division of the interstate tolls, agreed upon with the other company. The American Company owned a controlling interest in the stock of the Illinois Company and of like companies in other States, all of which, in connection with still other companies, were operated as a system, in which the American Company was the central authority performing general functions, while the associated companies served their respective communities and dealt with their own local affairs. The Illinois Company paid the American Company percentages of its gross revenues, partly for rent of instruments and partly as compensation for valuable engineering, financial and other services, and purchased, in large part, its equipment and supplies from the Western Electric Company, a

manufacturing subsidiary of the American Company, which sold its products to members of the system and to others also. In a suit by the Illinois Company, the District Court enjoined, as confiscatory, the enforcement of an order of an Illinois commission reducing that company's rates for local exchange service in Chicago. *Held:*

(1) That the Illinois corporation, notwithstanding the control of its stock by, and its intimate relations with, the American Company, was the proper plaintiff. P. 143.

(2) The method adopted by the District Court of testing the adequacy of the reduced rates on the basis of the total Chicago property of the plaintiff, without specifically separating intrastate from interstate property, revenues and expenses, was erroneous, although that court deemed the division of the interstate tolls to be fair, and found, with the aid of computations showing percentages of interstate calls originated by Chicago subscribers and percentages of property used in intrastate and interstate toll service, respectively, that the percentage of return for the total Chicago business was greater than that for the total intrastate business, or than that for the intrastate exchange business. P. 146.

(3) The separation of intrastate and interstate property, revenues and expenses of the company is important not simply as a theoretical allocation to two branches of the business; it is essential to the appropriate recognition of the competent governmental authority in each field of regulation. P. 148.

(4) The fairness of the interstate rates, or of the divisions thereof, was not for the state commission or the court to decide. *Id.*

(5) The validity of the commission's order in this case can be suitably tested only by an appropriate determination of the value of the property employed in the intrastate business and of the compensation receivable for the intrastate service under the rates prescribed; and there should be specific findings as to the value of that property and as to the revenue and expenses of that business, separately considered. P. 149.

(6) This involves a reasonable apportionment of the telephone exchange property used in both classes of service. P. 150.

(7) Although the Illinois Company has the advantage of being a component of a large system to which the benefits of its operations accrue, and obtains through this relation the coöperation of the manufacturing, research, engineering and financing departments

of the American Company, the Illinois Company is to be treated as a segregated enterprise. P. 151.

(8) The plaintiff company having purchased most of its equipment from the Western Electric Company, manufacturing subsidiary of the American Company, and it being contended by the commission that the prices paid were excessive and should not be credited in full to the plaintiff in testing the adequacy of the rates in question, it was erroneous to determine the fairness of the prices by reference to the percentages of net profits realized by the Western Electric Company from all its business, including transactions with outsiders as well as with the plaintiff and other members of the system, or by reference to higher prices charged for like articles by other manufacturers or by the Western Electric Company to independent telephone companies; but there should be findings as to the net earnings made by that company in furnishing equipment to the plaintiff and the other companies in the system, and as to the extent to which, if at all, such profit figured in the estimates upon which the charge of confiscation was predicated. P. 152.

(9) With regard to the services rendered to the plaintiff by the American Company, for which the former paid percentages of its gross income, the court below should make specific findings as to their cost to the American Company and the reasonable amount that should be allocated in this respect to the operating expenses of the intrastate business of the plaintiff in the years covered by the decree. Pp. 153–157.

(10) The property of a public utility represented by the credit balance in a reserve for depreciation can not be used to support the imposition of a confiscatory rate; but due recognition of this property does not require that an amount of annual addition to the reserve, which is shown by experience to have been excessive, shall be allowed for the future. P. 158.

(11) The power of the State to prescribe intrastate rates, and the jurisdiction and duty of the District Court, in considering their validity, to determine the amount properly allowable for depreciation in connection with the intrastate business, are not taken away by the action of Congress in granting jurisdiction to the Interstate Commerce Commission over the depreciation rates of telephone companies doing interstate business, (Interstate Commerce Act, § 20 (5),) where that Commission has taken no action which could be deemed validly to affect depreciation charges in connection with intrastate business so as to affect intrastate rates. P. 159.

(12) Accordingly, the court below should make appropriate findings with respect to the amount to be allowed in this case as an annual charge for depreciation in connection with the intrastate business. *Id.*

(13) In determining whether a regulation of rates is confiscatory, it is necessary to consider the actual effect of the rate in the light of the utility's situation, its requirements and opportunities. P. 160.

(14) The court below should find in this case the rate of return which was realized from the intrastate business and the rate of return which it is fair to conclude would have been realized from that business under the prescribed rates. P. 161.

(15) A rate order which was confiscatory when made may cease to be confiscatory, and one which was valid when made, may become confiscatory at a later period. P. 162.

(16) As the disposition of the amount withheld by the plaintiff under the conditions of the interlocutory injunction will depend upon the final decree, there should be findings as to the results of the intrastate business in Chicago, and the effect of the rates in question, for each of the years since the date of the commission's order. *Id.*

38 F. (2d) 77, reversed.

APPEAL from a decree of the District Court of three judges, which enjoined the enforcement of an order of the Illinois Commerce Commission reducing local rates of the Telephone Company. See also, 269 U. S. 531.

Messrs. George I. Haight and *Benjamin F. Goldstein,* with whom *Messrs. Oscar E. Carlstrom,* Attorney General of Illinois, *Samuel A. Ettelson,* Corporation Counsel, City of Chicago, and *Edmund D. Adcock* were on the brief, for appellants.

Mr. William Dean Bangs, with whom *Messrs. Charles M. Bracelen* and *Horace Kent Tenney* were on the brief, for appellee.

The Illinois Company, being a distinct corporate entity, was the proper party plaintiff.

The court below found as a fact, after "careful scrutiny" of all the evidence relating to the relationship between these two companies, that the American Company had not dominated or controlled the officers and directors of the Illinois Company; that there was co-ordination of activities between the companies to produce efficient unified service; and that there was nothing in the evidence justifying a departure from the rule established by this Court as to transactions between the American Company and a local company whose stock it thus owns. Hence no question of law as to the relationship between these companies is presented which has not already been decided by this Court and by the lower federal courts, *Houston* v. *Southwestern Bell Tel. Co.*, 259 U. S. 318, 323; *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Comm.*, 262 U. S. 276, 288–289; *Northwestern Bell Tel. Co.* v. *Spillman*, 6 F. (2d) 662; *Pacific Tel. & Tel. Co.* v. *Whitcomb*, 12 F. (2d) 279, 284–285; *Chesapeake & Pot. Tel. Co.* v. *Whitman*, 3 F. (2d) 938, 957; *Indiana Bell Tel. Co.* v. *Public Service Comm.*, 300 Fed. 190, 204.

The fact of separate corporate existence cannot be disregarded and the fiction of corporate identity substituted. Controlling stock ownership does not destroy separate corporate identities, nor raise a presumption of control over the company whose stock is thus owned, or over the action of its officers. *Pullman's Palace Car Co.* v. *Missouri Pacific Co.*, 115 U. S. 587, 596; *Peterson* v. *Chicago, R. I. & P. Ry. Co.*, 205 U. S. 364, 391; *Porter* v. *Pittsburgh Bessemer Steel Co.*, 120 U. S. 649, 670; *Cannon Mfg. Co.* v. *Cudahy*, 267 U. S. 333, 335; *United Fuel Gas Co.* v. *Railroad Comm.*, 278 U. S. 300, 320–321.

To treat the company whose stock is owned as a mere agent, the stockholding company must in fact interfere in the regular affairs of the other company, and direct

its actions as if they were its own; and this must be brought about by the united intention of both companies. *Kingston Dry Dock Co.* v. *Lake Champlain Transportation Co.,* 31 F. (2d) 265.

The court below rejected the proposition that the real party plaintiff, and the real operator of the property of the Illinois Company, is the American Company; and that the inquiry as to confiscation and proper rate of return involves the question of confiscation of the property of the American Company, and the rate of return to the investors of that company, disregarding in this inquiry the corporate identity of the Illinois Company. This proposition is not consistent, either with reason or with the rule settled by controlling decisions, and is impossible of application.

The commission, in the enjoined order, did not adopt this proposition, or find that the American Company had exercised any domination over the officers of the Illinois Company. It merely assumed that, because of this stock ownership, contracts between the companies could not be regarded as "made between separate parties." This assumption is exactly contrary to the rule with reference to this very relationship established by the decisions in Illinois, under whose laws both the commission and the corporation were organized, and of the federal courts. *State P. U. Comm. ex rel. Springfield* v. *Springfield Gas & Elec. Co.,* 291 Ill. 209, 234. Quoted with approval in *Southwestern Bell Tel. Co.* v. *Public Service Comm.,* 262 U. S. 276. *Public Utilities Comm.* v. *Romberg,* 275 Ill. 432, 447.

The assumption is also inconsistent with the commission's prior action, for it authorized each increase of the stock of the Illinois Company, which was afterward purchased by the American Company; and also authorized the sale of the stock to, and the purchase by, the American Company. The relationship between these com-

panies thus established by stock ownership has received the commission's repeated official approval.

The cases relied upon by appellants on this question are not in point. Distinguishing: *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257; *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis Civic & Commerce Assn.*, 247 U. S. 490; *Michigan ex rel. Attorney General* v. *Michigan Bell Tel. Co.*, 246 Mich. 198; *Chesapeake & Pot. Tel. Co.* v. *Whitman*, 3 F. (2d) 938, 957; *United Fuel Gas Co.* v. *Railroad Comm.*, 278 U. S. 300.

The finding of the court below that the American Company did not in fact exercise any control over the officials of the Illinois Company is sustained by the evidence.

The efforts of the Bell System to secure universal telephone service by a general policy with reference to matters which affect the service of all companies do not sustain the appellants' contentions. *Public Utilities Comm.* v. *Romberg*, 275 Ill. 432, 445.

The annual reports issued by the American Company cannot be treated as statements made by the Illinois Company, and are not admissible against it. *Peterson* v. *Chicago, R. I. & P. Ry. Co.*, 205 U. S. 364; *Holland* v. *Holland City Gas Co.*, 257 Fed. 679; *Elenkrieg* v. *Siebrecht*, 238 N. Y. 254; *General Motors Corp.* v. *Moffett*, 27 Ohio App. 219. And in any view they do not sustain the theory of appellants' case on this question.

There was no abuse of discretion by the directors and officers of the Illinois Company with regard to the license contract with the American Company. The record shows that the services rendered to the Illinois Company under this contract were necessary to the conduct of its business, the compensation paid therefor was reasonable, and the value of the services was greatly in excess of their cost.

The advantages to the Illinois Company of its general supply contract with the Western Electric Company

are shown by the evidence, which conclusively supports the finding of the court below approving the contract. *Houston* v. *Southwestern Bell Tel. Co.*, 259 U. S. 318; *Southern Bell Tel. & Tel. Co.* v. *Railroad Comm.*, 5 F. (2d) 77; *Northwestern Bell Tel. Co.* v. *Spillman*, 6 F. (2d) 663; *New York Tel. Co.* v. *Prendergast*, 36 F. (2d) 54; *Southwestern Bell Tel. Co.* v. *Public Utilities Comm.*, 115 Kan. 236.

Approval of the method of separation of the interstate property of the company by the court below is sustained by the evidence and the decisions of courts and commissions thereon. *Pacific Tel. & Tel. Co.* v. *Whitcomb*, 12 F. (2d) 279; *New York Tel. Co.* v. *Prendergast*, 300 Fed. 822, 827; *State ex rel Hopkins* v. *Southwestern Bell Tel. Co.*, 115 Kan. 236. The question is one of management in selecting units of service. *Chicago, M. & St. P. Ry. Co.* v. *Wisconsin*, 238 U. S. 491.

No affirmative evidence of any other method of separation was offered by appellants, and the reasonable method used by the company must be approved. *Rowland* v. *St. Louis & S. F. R. Co.*, 244 U. S. 106, 108; *Groesbeck* v. *Duluth, S. S. & A. Ry. Co.*, 250 U. S. 607, 614.

No conflict exists between the method of partial separation approved by this Court in *Houston* v. *Southwestern Bell Tel. Co.*, 259 U. S. 318, and the complete interstate separation presented in the present record.

The commission and the lower court were in substantial agreement in their findings as to reproduction cost new, after correcting the error in the commission's finding. Both the court and the commission sustained the accuracy of the company's books as to original cost, adding an amount for undistributed construction costs not shown in the company's accounts.

The arbitrary act of the commission in finding the property in 90 per cent. condition, and then deducting

the company's depreciation reserve, was an error of law. *Public Utility Commissioners* v. *New York Tel. Co.*, 271 U. S. 23; *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 416; *Pacific Gas & Elec. Co.* v. *San Francisco*, 265 U. S. 403, 406; *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S. 146, 159.

Only actual observed, existing depreciation can be deducted to ascertain present fair value. *New York Tel. Co.* v. *Prendergast*, 300 Fed. 822, s. c., 36 F. (2d) 54; *Southern Bell Tel. & Tel. Co.* v. *Railroad Comission*, 5 F. (2d) 77; *Monroe Gaslight Co.* v. *Public Utilities Comm.*, 292 Fed. 139; *Garden City* v. *Garden City Tel., L. & M. Co.*, 236 Fed. 693; *Kings County Lighting Co.* v. *Prendergast*, 7 F. (2d) 192, affirmed, 272 U. S. 579; *Pacific Tel. & Tel. Co.* v. *Whitcomb*, 12 F. (2d) 279, affirmed, 276 U. S. 97.

A depreciation reserve account is a matter of bookkeeping, under the accounting rules of the Interstate Commerce Commission. Under the existing law, the Interstate Commerce Commission has exclusive jurisdiction of accounting of expense of depreciation. *Oregon-Washington R. & N. Co.* v. *Washington*, 270 U. S. 87; *Southern Railway Co.* v. *Railroad Commissioners*, 236 U. S. 439; *Northern Pacific R. Co.* v. *Washington ex rel. Atty. Gen.*, 222 U. S. 370; *New York Central R. Co.* v. *Winfield*, 244 U. S. 147; *Pennsylvania R. Co.* v. *Public Service Comm.*, 250 U. S. 566; *Postal Telegraph Co.* v. *Warren-Godwin Lumber Co.*, 251 U. S. 27.

The judgment of the company's officers as to the proper rate of depreciation cannot be set aside on the evidence in the record. The evidence would have sustained a much greater valuation than the minimum value used by the court in its computations finding the proposed rates confiscatory.

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

This is an appeal from a final decree of the District Court, composed of three judges as required by section 266 of the Judicial Code, enjoining the enforcement of an order of the Illinois Commerce Commission which prescribed rates for telephone service in the City of Chicago, upon the ground that the order was confiscatory and hence was in violation of the due process clause of the Fourteenth Amendment (38 F. (2d) 77). The order of the Commission was made on August 16, 1923, to be effective October 1, 1923. It reduced rates for four classes of coin box service and thus applied to a large part of the intrastate service of the complainant, the Illinois Bell Telephone Company.

An interlocutory injunction, restraining the enforcement of the rates, was granted on December 21, 1923, and the order was affirmed by this Court on October 19, 1925. 269 U. S. 531. This interlocutory order was made upon the condition that, if the injunction were dissolved, the complainant should refund to its subscribers the amounts paid by them in excess of the sums chargeable under the Commission's order. The suit was not brought to a final hearing until April, 1929, and the court found that at the time of its decision (January 31, 1930) the amount thus reserved for refunds exceeded $11,000,000. The court said that the delay in bringing the case to trial was attributable to the City of Chicago and that the complainant had been ready at all times to proceed. But the decree enjoining the rates speaks from its date, and the question is necessarily presented, not only whether the order of the Commission was confiscatory when made, but also as to its validity during the period that has intervened, and as to the respective rights of the complainant and its subscribers in relation to the fund thus accumulated. *Groes-*

beck v. *Duluth South Shore & Atlantic Railway Company*, 250 U. S. 607, 609.

The court found that ninety-nine per cent. of the stock of the complainant, the Illinois Company, is owned by the American Telephone & Telegraph Company which also owns substantially the same proportion of the stock of the Western Electric Company; that the Illinois and American companies unite in rendering long distance service under an arrangement for a division of tolls; that at the time to which the inquiry related, in October, 1923, there was in effect an agreement by which the Illinois Company paid to the American Company 4½ per cent. of its gross revenues for rent of instruments and as compensation for enginering, executive, financial and other services; that a large part of the materials entering into the construction of the plant and equipment of the Illinois Company were purchased from the Western Electric Company and much of its operating expense consisted of payments made under a contract with that company for apparatus and supplies. The court further found that the American Company owned a controlling interest in fifteen telephone companies which, in connection with other companies controlled by those subsidiaries and some companies in which its interest was not controlling, were operated as a system with the avowed purpose of rendering a nation-wide and unified telephone service; that the American Company had stated that "the associated companies are specialists in local service problems, with local operating forces, identified and familiar with the needs of the communities they serve"; that "the parent company undertakes the solution of the problems that are common to all," and in this way there was provided a central authority equipped to perform adequately general functions, leaving to the local companies responsibility for local affairs.

Upon these facts the City attacked the standing of the Illinois Company as the real plaintiff in the case. The

court overruled this contention, holding that the ownership of stock by the American Company, and its power to control the Illinois Company, did not destroy the distinct corporate identity of the Illinois Company. The court pointed out that the order of the Commission was directed against the Illinois Company, and that it was treated as a corporation for the purpose of compelling it to establish the prescribed rates for service furnished by the operation of the property to which it had legal title. No ground appears for assailing this ruling. The fact that the relation of the Illinois Company to the American Company may demand close scrutiny, in dealing with certain questions which bear upon the validity of the rate order, cannot obscure the essential basis of that order, that is, that the Commission was imposing its requirement upon a corporate organization engaged in an intrastate public service and, as such, amenable to a valid exercise of the Commission's authority.

The Commission, in its final order of August 16, 1923, made the following findings with respect to the value of the property of the Illinois Company: That the original cost as of December 31, 1922, of the property used and useful in the rendering of telephone service in the City of Chicago and exclusive of working capital, materials and supplies, work in progress and going value, but including overhead, was $90,687,816; that the reproduction cost new of that property, with the same exceptions, was $128,769,000; that the property as it then existed was "in at least 90 per cent condition"; that the amount of construction work then in progress, which would eventually be included in capital account, was not more than $4,250,000; that the amount necessary to provide a sufficient cash working capital and to permit the carrying of sufficient materials and supplies was $3,000,000; that the going value of the Chicago property of the Illinois Company was $4,196,872; that the Chicago division of the Illinois

Company had a depreciation reserve of $26,000,000 which had been contributed by the subscribers of the Company and had been used by the Company for extensions and additions to its property, and that these extensions and additions should not be considered in arriving at a base upon which to compute rates for telephone service; and that the fair rate-making base for the Chicago property of the Illinois Company, "including physical property, overhead, working capital, going value and work in progress" as thus found was $96,000,000, which was "exclusive of the $26,000,000 of money taken for depreciation reserve and put into plant and equipment." The Commission also found that on a readjustment of the account of operating expenses, and on making a fair allowance to take care of maintenance and retirement charges, the existing rates, if permitted to remain in effect for the ensuing year (1923) would afford a return of nine per cent. upon the rate-base above stated; that this was an excessive rate and that the reduced rates prescribed by the Commission would enable the Company to obtain a return of seven and one-half per cent. upon that rate base.

The court found that the original cost of the property, taking the Commission's finding of cost as of December 31, 1922, with net additions to June 30, 1923, was $101,626,014; that the reproduction cost new, as of the latter date, was at least $145,000,000; that the finding that the property was in 90 per cent. condition was supported by the evidence, and that on this basis the reproduction cost new, less depreciation, was $130,500,000; that the amount allowed by the Commission, $4,196,067, was the minimum allowance that could be made for going value; that the valuation, or rate basis, of $96,000,000, found by the Commission as of December 31, 1922, or $106,000,000, if the net additions to June 30, 1923, were added, was clearly insufficient, and that the valuation should be not less than $125,000,000, estimating the depreciation at ten per cent.

The court held that the exclusion from the rate base of extensions and additions to the amount of $26,000,000, for which payment had been made from the Company's depreciation reserve, was erroneous; that the customers had paid for service, not for the property used to render it, that in paying for service they had not acquired any interest in the property of the Company, and that profits of the past could not be used to sustain confiscatory rates for the future, citing *Board of Public Utilities Commissioners* v. *New York Telephone Company,* 271 U. S. 23, 31, 32.

The court further found that the readjustment made by the Commission of the Company's account of operating expenses involved a reduction of $360,000 from the payment made to the American Company under the license contract, and a reduction of $1,800,000 from the annual allowance for depreciation; that the amount available for return in 1923 on the value of the property under the rates in force was $6,280,000; that if to this amount were added the above deductions on the license contract and for depreciation there would have been available for such return the sum of $8,440,000; that the reduction for the entire year under the rates established by the Commission would have been $1,700,000, thus leaving a return of $6,740,000, or less than five and one-half per cent., which was held to be confiscatory under conditions existing in 1923.

At the threshold of the discussion, we are met with the fact that, in these findings, the Commission and the court made no distinction between the intrastate and the interstate property and business of the Company. It appears that the property of the Company in Chicago is used to render (1) what is called exchange service, all of which is intrastate, (2) intrastate toll service over its own lines and under arrangements with companies other than the American Company, and (3) interstate toll serv-

ice, which includes all the toll service rendered under arrangements with the American Company. The Company introduced evidence separating the intrastate and interstate business and also the intrastate exchange business. While the court regarded these computations as correct, and approved the method in which they had been made, still the court made no specific findings based on a separation of the intrastate and interstate property, revenues and expenses, but determined the issue on the basis of the total Chicago property of the Company.

The court stated that this was done because that basis was less favorable to the Company than that of its total intrastate property or of its intrastate exchange property. In support of this view, the court said that according to the computations of the company, one-half of one per cent. of calls originated by subscribers resulted in interstate toll calls; that 3.62 per cent of the Company's property in Chicago was used in furnishing interstate toll service, and 2.54 per cent. of its property was used in furnishing intrastate toll service; that both on the reproduction cost new, as claimed by the Company, and on the original cost, the percentage of return was greater for the total Chicago business than for the total intrastate business, and that the return for the latter was greater than for the intrastate exchange business. Considering that the difference would not affect the result, the court deemed it to be more convenient to pass upon the order of the Commission without recasting the figures in order to make allowance for interstate or intrastate toll property and earnings.

The appellants challenge this conclusion.[1] They insist that the American Company used in its long distance service, without properly reimbursing the Illinois Company, the Chicago local exchange plant, and other facili-

[1] In *Board of Commissioners* v. *New York Telephone Company*, 271 U. S. 23, the appellants did not raise this question (*id.* p. 30).

ties of the latter company, and that the additional net income to which the Illinois Company was properly entitled in connection with the long distance service, or that suitably taking into account the value of the property used and the expenses incurred in the long distance service and not deducted from the Chicago property and expenses, would affect the result. It is apparent that this contention can not be dismissed simply on the basis of the number of interstate calls originated by subscribers of the Illinois Company in Chicago, without considering other factors of time and labor entering into the relative use. Nor can the question be disregarded by assuming a rate of return from the total Chicago business, as compared with a rate of return from the intrastate business or the intrastate exchange business, as such an assumption would beg the point in issue.

The separation of the intrastate and interstate property, revenues and expenses of the Company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation. In disregarding the distinction between the interstate and intrastate business of the Company, the court found it necessary to pass upon the fairness of the division of interstate tolls between the American and Illinois companies. The court held that the division was reasonable and the appellants contest this ruling. But the interstate tolls are the rates applicable to interstate commerce, and neither these interstate rates nor the division of the revenue arising from interstate rates was a matter for the determination either of the Illinois Commission or of the court in dealing with the order of that Commission. The Commission would have had no authority to impose intrastate rates, if as such they would be confiscatory, on the theory that the interstate revenue of the Company was too small and could be increased to

make good the loss. The interstate service of the Illinois Company, as well as that of the American Company, is subject to the jurisdiction of the Interstate Commerce Commission, which has been empowered to pass upon the rates, charges and practices relating to that service (Interstate Commerce Act, section 1 (1) (c), (3), (5); section 15 (1); section 20 (5)). In the exercise of this jurisdiction the Interstate Commerce Commission has authority to estimate the value of the property used in the interstate service and to determine the amount of the revenues and the expenses properly attributable thereto. By section 20 (5) of the Interstate Commerce Act, that Commission is also charged with the duty of prescribing, as soon as practicable, the classes of property for which depreciation charges may properly be included in operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property. The proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction, and this cannot be accomplished unless there are findings of fact underlying the conclusions reached with respect to the exercise of each authority. In view of the questions presented in this case, the validity of the order of the state commission can be suitably tested only by an appropriate determination of the value of the property employed in the intrastate business and of the compensation receivable for the intrastate service under the rates prescribed. *Minnesota Rate Cases,* 230 U. S. 352, 435. As to the value of that property, and as to the revenue and expenses incident to that business, separately considered, there should be specific findings. *Railroad Commission* v. *Maxcy,* 281 U. S. 82, 83.

The court found that the Illinois Company owns and operates all the property in the City of Chicago used in interstate calls and connects with the property owned by

the American Company at the city limits. In the method used by the Illinois Company in separating its interstate and intrastate business, for the purpose of the computations which were submitted to the court, what is called exchange property, that is, the property used at the subscriber's station and from that station to the toll switchboard, or to the toll trunk lines, was attributed entirely to the intrastate service. This method was adopted as a matter of convenience, in view of the practical difficulty of dividing the property between the interstate and intrastate services.[2] The appellants insist that this method is erroneous, and they point to the indisputable fact that the subscriber's station, and the other facilities of the Illinois Company which are used in connecting with the long distance toll board, are employed in the interstate transmission and reception of messages.[3] While the difficulty in making an exact apportionment of the property is apparent, and extreme nicety is not required, only reasonable measures being essential (*Rowland* v. *Boyle,* 244 U. S. 106, 108; *Groesbeck* v. *Duluth South Shore & Atlantic Railway,* 250 U. S. 607, 614) it is quite another

[2] On this ground, this method of separation has been approved by a number of state commissions. See Re Northwestern Bell Telephone Co., P. U. R. 1923-B, 112, 170; Public Utilities Commission *v.* New England Telephone & Telegraph Co., P. U. R. 1926-C, 207, 261; Re Hawkinsville Telephone Co., 138 Commission Leaflet (1923), 1112, 1115-1117. But compare Missouri & Kansas Telephone Co., P. U. R. 1918-C, 55; Re Southern California Telephone Co., P. U. R. 1925-C, 627; Re Chesapeake & Potomac Telephone Co. of Virginia, P. U. R. 1926-E, 481, 626; *Chesapeake & Potomac Telephone Co. of Virginia* v. *Commonwealth of Virginia,* 147 Va. 43.

[3] The Interstate Commerce Commission has had under consideration the application of section 20 (5) to the local exchange property which "is open for use in interstate commerce and at any time may be so used." Telephone and Railroad Depreciation Charges, 118 I. C. C. 295, 328-333; also Proposed Report (I. C. C.) of August 15, 1929.

matter to ignore altogether the actual uses to which the property is put. It is obvious that, unless an apportionment is made, the intrastate service to which the exchange property is allocated will bear an undue burden—to what extent is a matter of controversy.[4] We think that this subject requires further consideration, to the end that by some practical method the different uses of the property may be recognized and the return properly attributable to the intrastate service may be ascertained accordingly.

Other questions are presented growing out of the relation of the Illinois Company to the Western Electric Company and to the American Company. While the Illinois Company is a distinct corporate organization, it has the advantage of being a component part of a large system to which the benefits of its operations accrue. Through this relation the Illinois Company obtains the coöperation of the manufacturing, research, engineering and financing departments of the American Company. This does not alter the fact that the Illinois business is to be treated as a segregated enterprise. If a single individual or corporation, having a number of technical staffs, engaged directly in local public services within several States, each State would be entitled to regulate the transactions within its own domain according to its own conception of public pol-

[4] In *Houston* v. *Southwestern Bell Telephone Co.*, 259 U. S. 318, 322, relating to the ordinance of the City of Houston prescribing telephone rates for the Company which operated not only the Houston local exchange but also long distance toll lines connecting the local exchange with various towns and cities in Texas and several other States, the Company in practice, and for the purpose of the suit, "credited the local exchange with 25% of the long-distance toll revenues received from calls originating in Houston as compensation for the use made of the local plant in rendering long distance service," and upon the facts there shown the Court held that the allowance was reasonably sufficient.

icy, provided there were no infringement of the fundamental rights guaranteed by the Federal Constitution, and, if the latter were invoked by reason of the action of any State, it would still be necessary to consider the local enterprise separately and to make whatever apportionments were necessary in that view. The corporate organization of the Illinois Company not only created a legal person amenable as such to governmental authority, but facilitates the examination of the particular transactions subject to that authority. The question presented in the present case is not one of the abuse of intercorporate relations, or of domination or control affecting the integrity of the direction of the affairs of the Illinois Company, but of alleged confiscation through prescribed intrastate rates.

Contentions of the appellants in this relation are directed to the purchases from the Western Electric Company and to the payments to the American Company under what is called its "license contract." It appears that the Illinois Company has purchased practically all its equipment from the Western Electric Company. The state commission in laying the basis for its rate order made no finding as to the fairness of the prices on such purchases. On the record in this suit, the court concluded that the City had failed to support its contention that these prices were exorbitant. The court said that it appeared that for the past fourteen years the average profit of the Western Electric Company on its total business had not been "in excess of seven per cent. and never above ten per cent." That fact has evidentiary value but the finding does not go far enough. The Western Electric Company not only manufactured apparatus for the licensees of the Bell system but engaged in other large operations and it cannot be merely assumed or conjectured that the net earnings on the entire business represent the net earnings

from the sales to the Bell licensees generally or from those to the Illinois Company. Nor is the argument of the appellants answered by a mere comparison of the prices charged by the Western Electric Company to the Illinois Company with the higher prices charged by other manufacturers for comparable material, or by the Western Electric Company to independent telephone companies. The point of the appellants' contention is that the Western Electric Company, through the organization and control of the American Company, occupied a special position with particular advantages in relation to the manufacture and sale of equipment to the licensees of the Bell system, including the Illinois Company, that is, that it was virtually the manufacturing department for that system, and the question is as to the net earnings of the Western Electric Company realized in that department and the extent to which, if at all, such profit figures in the estimates upon which the charge of confiscation is predicated. We think that there should be findings upon this point.

At the time to which the evidence was primarily directed (1923), there was in force a "license contract" between the Illinois Company and the American Company, granting a license under the patents owned or controlled by the American Company and providing for the payment to the latter of 4½ per cent. of the gross revenues of the Illinois Company covering the rental for the use of instruments and for engineering, financial and advisory services. The total amount sought to be charged by the Illinois Company to operating expenses, in 1923, for payments under this contract in relation to the Chicago business was about $1,724,000. The order of the Public Utilities Commission of Illinois, made in December, 1920, which fixed the rates charged in 1923 (the rates still in force under the interlocutory injunction in

this suit) had provided that an allowance of $1.13 was reasonable solely for the use of each telephone instrument, that the services of the American Company were of great value to the Illinois Company, that the annual payment under the license contract then averaged $2.10 per station for the City of Chicago, and that this payment was not excessive.[5] The Illinois Commerce Commission, in the order now under attack, continued this allowance of

[5] The Public Utilities Commission found as follows: "The record in the instant case shows that the present market price for the same instrument is $4.50 and on this basis the Commission finds that an annual allowance of $1.13 is reasonable and adequate solely for the rental of each telephone instrument. The record shows, however, that the license to use various patented devices, the patents covering which are the property of the American Telephone and Telegraph Company, together with engineering, financial and advisory services, are of great actual value to the Chicago Telephone Company, such value being evidenced in part by the actual annual saving effected over and above the operating costs should such devices and services not be available. The present payment made by petitioner and under the present license contract to the American Telephone and Telegraph Company averages about $2.10 per station per annum for the City of Chicago and about $1.91 per station per annum for the suburban territory. At $2.10 per station per annum, therefore, the maximum effect upon any one rate for service cannot exceed $0.18 per station per month. Since payment is made to the American Telephone and Telegraph Company by the Chicago Telephone Company of whose stock the former owns approximately 98%, it is necessary that the underlying contract be given scrutiny notwithstanding the fact that the Chicago Telephone Company, as a legal entity, is a free agent. A careful consideration of the evidence in the instant case discloses the unquestioned value of the general services rendered petitioner by the American Telephone and Telegraph Company. . . . The particular amounts involved have been approved as items of operating expense in different jurisdictions by nine Commissions within the last three years, however, and the Commission after carefully considering all the evidence is of the opinion and finds that the present annual payment under the license contract, limited to $2.10 per station per annum for the City of Chicago and to $1.91 per station per annum for the suburban territory, is not excessive and may be allowed as an item of operating expense."

$2.10 per station as sufficient to cover the rental and the services in question.[6]

The Illinois Company, in its evidence before the court, presented an estimate showing that it would have cost that Company the sum of $709,000, or $1.07 per station, during the year 1923 to provide its own supply of instruments, purchasing them in the open market and providing for a return of eight per cent. on the investment. The appellants urge that this amount is too large by $120,000, and that, in any event, the remainder of the total charge of $1,724,000 for payments under the license contract, that is, $1,015,000, treating this amount as compensation for services in addition to rentals, should be rejected. The court overruled this contention. The court found that the case for the allowance of the entire amount for services was a strong one; that on the basis of a total charge of $2.10 per station, as allowed by the state commission, there would be a reduction of $360,000 in the amount chargeable to operating expenses by virtue of the payments under the license contract, and that there was

[6] The finding of the Commerce Commission, after referring to the ownership of stock by the American Company, was as follows: "The Commission believes from all the circumstances surrounding the payments made by the Illinois Bell Telephone Company to the American Telephone and Telegraph Company and the services rendered by the latter to the former, and the cost thereof, should be at some time fully investigated, to the end that charges for the services may be properly established. The present record does not contain sufficient information to warrant this Commission in departing from the findings of the previous Commission in respect to the payments that should be made by the Illinois Bell Telephone Company to the American Telephone and Telegraph Company. The previous Commission found that payment by the Chicago Telephone Company to the parent company of $2.10 per station was sufficient to cover the value of the services rendered. It is certainly more equitable to base the charges for services rendered on the number of stations rather than on the gross revenue because any change in revenues results in a change in payments to the parent company, and would be made without respect to the services rendered."

no warrant for any further reduction. Without approving the reduction, the court accepted the ruling of the Commission for the purpose of determining the issue of confiscation.

It further appears that in the early part of the year 1926, the payment under the license contract was reduced from 4½ per cent. of the gross earnings to 4 per cent. This reduction was made effective as of January 1, 1926, and the reduced rate was applied in the years 1926 and 1927.[7] At the end of the year 1927, the conditions of the license contract were again changed by providing for the sale by the American Company to the Illinois Company of the telephone instruments (receivers, transmitters and induction coils) and the American Company was relieved from its obligation with respect to their replacement and repair. It is said that the price paid was substantially the current price less 20 per cent. At the same time the payment under the license contract by the Illinois Company to the American Company was reduced from 4 per cent. to 2 per cent. of the gross earnings.[8] On January 1, 1929, the

[7] In the Annual Report of the American Company for 1926 it was stated: "The American Telephone and Telegraph Company was able during the year to make a reduction in its charge to its Associated Companies under its contracts for service, including the furnishing of telephones. The charge was reduced from 4½ per cent. to 4 per cent. of the gross revenue of those companies, effective from January 1, 1926. The purpose of these contracts is not to make money for the American Telephone and Telegraph Company, but to further the development of the telephone art and to enable the growth and expansion of telephone service on a nation-wide basis. While the cost of furnishing the services to any one company, from the nature of the services rendered, cannot be determined, the total cost of furnishing services for all of the companies under the contracts can be approximated. The revenue of $29,850,303 received under the contracts during 1926 only slightly more than offset the estimated cost of over $29,250,000."

[8] With respect to these changes the American Company stated in its report for 1927: "As the business grows and the country

rate of payment was further reduced from 2 per cent. to 1½ per cent. of the gross earnings.

There is evidence that the payment under the license contract in the year 1924 exceeded the amount allowed by the state commission by $358,952; in 1925, by $387,284; in 1926, by $223,249; and in 1927, by $251,964. We find no similar statement for the subsequent period under the reductions of rate then applicable. In view of the findings, both of the state commissions and of the court, we see no reason to doubt that valuable services were rendered by the American Company, but there should be specific findings by the statutory court with regard to the cost of these services to the American Company and the reasonable amount which should be allocated in this respect to the operating expenses of the intrastate business of the Illinois Company in the years covered by the decree.

There is also the question of the annual allowance for depreciation. The Illinois Commission concluded that the accumulation of a large reserve ($26,000,000) despite the fact that the property had been maintained "in at least 90 per cent. condition," showed that the reserve had been built up by annual additions that were in excess of the amounts required. The Commission by its order pro-

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grows, conditions change. In the early days of the telephone business it seemed essential that telephone instruments be owned and maintained by a central organization. This condition no longer obtains, and, therefore, as previously stated, the telephone instruments heretofore owned by the American Telephone and Telegraph Company were sold to the operating companies and a reduction was made in the charge for services furnished under service contracts with those companies. In 1926 this charge was reduced from 4½ per cent. to 4 per cent. of their gross telephone revenues, and this present reduction to 2 per cent. will result in revenues to the American Telephone and Telegraph Company somewhat less than the estimated cost of performing its services under these contracts. This is, however, in accord with our efforts to assist our Associated Companies in keeping down the cost of telephone service in every way practicable."

vided for a "combined maintenance and replacement allowance" which it deemed to be adequate "to fully protect the investment in this property and permit the Company to accrue a reserve in the anticipation of property retirements." The court found that by this method the amount as charged by the Company to operating expenses in 1923 with respect to depreciation had been reduced by the Commission to the extent of about $1,800,000. It was on the assumption of this reduction, that the court, without making any finding as to the proper annual allowance for depreciation, reached its conclusion as to the inadequacy of the rates.

While it has been held by this Court that property paid for out of moneys received for past services belongs to the Company, and that the property represented by the credit balance in the reserve for depreciation cannot be used to support the imposition of a confiscatory rate (*Board of Commissioners* v. *New York Telephone Company, supra*), it is evident that past experience is an indication of the Company's requirements for the future. The recognition of the ownership of the property represented by the reserve does not make it necessary to allow similar accumulations to go on if experience shows that these are excessive. The experience of the Illinois Company, together with a careful analysis of the results shown, under comparable conditions, by other companies which are part of the Bell system, and thus enjoy the advantage of the continuous and expert supervision of a central technical organization,[9] should afford a sound basis for judgment as to the amount which in fairness

[9] The Interstate Commerce Commission has observed: "In devising methods for accumulating, recording, and utilizing the data essential to the ascertainment of service lives and depreciation rates, the railroad companies may well take note of the experience of the telephone companies. Much of this research and planning work has been done for the Bell System companies by a central organization of a few carefully selected engineers and accountants, and in this way

both to public and private interest should be allowed as an annual charge for depreciation.

The Company urges that, as Congress has granted jurisdiction to the Interstate Commerce Commission over the depreciation rates of telephone companies doing an interstate business (Interstate Commerce Act, section 20 (5) as amended by Transportation Act, 1920) this subject is now completely withdrawn from the power of the State. It is said that two rates of depreciation cannot be charged on the same property. The Interstate Commerce Commission has had the matter under consideration (Telephone and Railroad Depreciation Charges, 118 I. C. C. 328-333) but, so far as we are advised, a final determination has not yet been made. The Interstate Commerce Commission has its accounting rules with reference to depreciation charges and, pending its order under section 20 (5) of the Interstate Commerce Act, telephone companies, as well as others subject to the Act, have been directed to continue to observe these requirements. The Company argues that, although the Interstate Commerce Commission has not finally ruled, the action taken by Congress excludes the jurisdiction of state tribunals under familiar principles (*Northern Pacific Railway Company* v. *Washington,* 222 U. S. 370, 378; *Pennsylvania Railroad Company* v. *Public Service Commission,* 250 U. S. 566, 569; *Oregon-Washington Railroad & Navigation Company* v. *Washington,* 270 U. S. 87, 102). We are unable to assent to this view. As the Interstate Commerce Commission has not acted finally in the matter, we are not now called upon to consider the scope of its authority in relation to depreciation charges, but we are of the opinion that, in any event, until action has been

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it has been done better and more economically than if each of the numerous operating companies had been left to its own initiative. The independent telephone companies have also profited from this work." Telephone and Railroad Depreciation Charges, Proposed Report of August 15, 1929, [p. 20].

taken which could be deemed validly to affect the amount to be charged to depreciation in connection with intrastate business so as to affect intrastate rates, the prerogative of the State to prescribe such rates, and the jurisdiction and duty of the statutory court in considering their validity to determine the amount properly allowable for depreciation in connection with intrastate business, are not to be gainsaid. Compare *Board of Commissioners* v. *Great Northern Railway Company,* 281 U. S. 412. Accordingly, the court should make appropriate findings with respect to the amount to be allowed in this case as an annual charge for depreciation in connection with the intrastate business.

Upon the hypotheses adopted by the statutory court, the return to the Illinois Company was found to be inadequate, but what would be a proper rate of return was not determined. In determining what is a confiscatory regulation of rates, it is necessary to consider the actual effect of the rates imposed in the light of the utility's situation, its requirements and opportunities. As was said in *United Railways* v. *West,* 280 U. S. 234, 249, 250, a rule as to rate of return can not be laid down which would apply uniformly to all sorts of utilities; "what may be a fair return for one may be inadequate for another, depending upon circumstances, locality and risk." In that case the Court restated the general rule in the language of the opinion in *Bluefield Company* v. *Public Service Commission,* 262 U. S. 679, 692, 693, as follows: "What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country

on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."

It is evident that in the present case we are not dealing with an ordinary public utility company, but with one that is part of a large system organized for the purpose of maintaining the credit of the constituent companies and securing their efficient and economical management. The record of the Illinois Company shows that for many years it has been able to expand its business so as to meet increasing demands, to pay its operating expenses including interest on money borrowed, to pay dividends of eight per cent. upon its capital stock, and to accumulate a surplus. It was found by the court that the reduction in revenue caused by the rates in question, as applied to the entire business for the year 1923, would amount to about $1,700,000, and the question is whether the loss when ascertained with respect to the intrastate business would cause confiscation under the applicable standard as above set forth in the *Bluefield* case, *supra*. In order to determine this question, the court should find the rate of return which was realized from the intrastate business and the rate of return which it is fair to conclude would have been realized from that business under the prescribed rates.

The conclusion reached by the court as to confiscation had particular reference to the evidence bearing upon the business of the year 1923. The court said that this finding applied "with increasing force to the succeeding

years." But no findings were made as to the value of the property and the revenues and expenses in these years. A rate order which is confiscatory when made may cease to be confiscatory, or one which is valid when made may become confiscatory at a later period. *Des Moines Gas Company* v. *Des Moines,* 238 U. S. 153, 172, 173; *Lincoln Gas Company* v. *Lincoln,* 250 U. S. 256, 268, 269; *Brush Electric Company* v. *Galveston,* 262 U. S. 443, 446; *Bluefield Company* v. *Public Service Commission, supra.* In view of this fact, and as the disposition of the amount withheld by the Company under the conditions of the interlocutory injunction will depend on the final decree, there should be appropriate findings as to the results of the intrastate business in Chicago and the effect of the rates in question for each of the years since the date of the Commission's order.

In order that the necessary findings may be made, and such additional evidence as may be required for that purpose may be received, the decree is set aside and the cause is remanded to the District Court, specially constituted as provided by the statute, for further proceedings in conformity with this opinion, the restraining order entered in this suit to be continued pending further action of the District Court.

It is so ordered.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY *v.* HOLMBERG.

ERROR TO THE SUPREME COURT OF NEBRASKA.

No. 1. Argued October 10, 1928. Reargued October 23, 1930.—Decided December 1, 1930.

A state law so applied as to require a railroad company to provide an underground cattle-pass across its right of way partly at the

expense of the company, not as a safety measure but merely to save a farmer, owning the land on both sides of the railroad, from inconvenience attendant upon the use of an existing grade crossing otherwise adequate, takes the company's property for a private use and without due process of law. P. 166.

115 Neb. 727, reversed.

ERROR to a judgment of the Supreme Court of Nebraska which affirmed, on appeal, an order of the State Railway Commission requiring the Railway Company to establish an underground cattle-pass.

Mr. Wymer Dressler, with whom *Messrs. Robert D. Neely, Richard L. Kennedy,* and *R. N. Van Doren* were on the brief, for plaintiff in error.

Messrs. O. S. Spillman, Attorney General of Nebraska, and *Hugh LaMaster,* Assistant Attorney General, for defendant in error, on the original argument. *Mr. Hugh LaMaster,* Assistant Attorney General, with whom *Mr. C. A. Sorensen,* Attorney General, was on the supplemental brief, for defendant in error on reargument.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on writ of error, allowed under § 237, Jud. Code, before the amendment of Jan. 31, 1928, to review a judgment of the Supreme Court of Nebraska, which sustained an order of the State Railway Commission. 115 Neb. 727. The order directed plaintiff in error to install, at an estimated cost of $1,153 to it and of $453 to the landowner, an underground cattle pass under its tracks, so as to connect the farm lands of defendant in error lying on either side of and adjacent to plaintiff's right of way. The Commission acted under authority purporting to be given by § 5527 Comp. Stat. Neb. 1922, as amended (Laws of Neb., 1923, c. 167), printed in the

margin.[1] The plaintiff assails the statute, as applied in this instance, as depriving it of property without due process of law, and as impairing the obligation of contract in violation of the federal Constitution.

Defendant's farm comprises a quarter section of land, divided approximately in half by plaintiff's track, which crosses from the northwest corner to the southeast. For fifteen or more years plaintiff has maintained a farm crossing, at grade, now equipped with gates, which connects the parts of the farm near its northwest corner. The state court assumed that the crossing was established before 1921 and while the statute provided only that where the same person owns land on both sides of a railroad, the latter "shall, when required so to do, make and keep in good repair one causeway or other adequate means of crossing the same." Amendments (Laws of Neb., 1921, c. 261, and that of 1923) added the provisions authorizing the Commission to entertain complaint by the landowner that a crossing "is not adequate or is unsafe and dangerous to the life and property of

[1] Section 5527. Whenever any person owns land on both sides of the right-of-way of any railroad, such railroad shall provide and keep in repair at least one adequate means for such land owner to cross the right-of-way. Any interested land owner with land on both sides of the right-of-way of any railroad may file written complaint with the state railway commission against any such railroad that the crossing is not adequate or is unsafe and dangerous to the life and property of those who use the same, and the commission thereupon shall make such investigation and hold such hearing as may be necessary, and shall issue such orders as it shall deem necessary, proper and adequate. If circumstances warrant the commission may require overhead, under ground or grade crossings and require wing fences at underground crossings or may require existing crossings to be relocated so as to be safe to those who use them, but where such special crossing involves an expenditure of more than seven hundred ($700.00) dollars the land owner shall bear one-half the expenses in excess of seven hundred ($700.00) dollars.

those who use" it, and to require an overhead or underground crossing "if circumstances warrant."

The proceeding now under review was begun in 1924 by defendant's petition to the Commission, setting up, as the sole basis for the order sought, that the surface crossing was inadequate. The only ground of inadequacy alleged or sought to be proved was that the crossing could not be reached without passing through defendant's cultivated fields on both sides of the track, to avoid which, defendant was compelled, in transferring his cattle from water supply to pasture and return, to drive them back and forth a distance of three-fourths of a mile on a public highway which crosses plaintiff's line at grade. The petition stated that an underground pass could easily be established at another point on plaintiff's line, where there was a depression on each side, so as to connect defendant's pasture with the southwest part of his farm, and with a cattle runway extending to his yards and water supply.

The Commission, after a hearing, found the facts as alleged, and others showing that defendant's farm could be more conveniently operated if the proposed pass were established, concluded that the present crossing was "inadequate and impracticable," and granted the order asked. The Commission did not find, nor was there evidence before it tending to show, that the crossing was not adequate for the passing and repassing of such persons and cattle as would normally go from one part of defendant's farm to the other in conducting usual farm operations.

The state court, in passing on the order, had before it only the evidence given and proceedings had before the Commission. Saying that the record did not adequately present the point, it assumed, upon the basis of concessions stated to be in briefs before it, that plaintiff ac-

quired its right of way by condemnation prior to 1921. It pointed out that at that time the statute required plaintiff to maintain a causeway or "other adequate means of crossing" between the two parts of the farm. It said that compensation for the land condemned must be taken to have been assessed in view of the provisions of the statute, and that plaintiff took its right of way subject to the statutory obligation to construct and maintain the "adequate" farm crossing defined by the statute. It mooted, without deciding, the question whether the present crossing was adequate within the meaning of the statute as originally enacted, suggested that there might be "a further definition" of adequacy "by the state in proper exercise of its police power," and supported the order of the Commission on the ground that the state could, in the exercise of its police power, "eliminate the perils of grade crossings."

There is no occasion for us to consider how far, if at all, the state's power to remove the dangers of public grade crossings, see *Erie Railroad Co.* v. *Board of Public Utility Commissioners,* 254 U. S. 394, extends to private farm crossings when unsafe to the traveling public or individual users. The Nebraska statute has delegated to the State Railway Commission authority to order farm crossings underground because either inadequate or dangerous, if circumstances warrant. But there is nothing in this record to suggest that the order of the Commission was either asked or granted as a safety measure. The Commission did not find that the crossing was dangerous either to the public, the litigants, or their property. Neither did it find that this crossing was in anywise different from the usual farm crossing at grade. True, there was testimony that cattle passing over the crossing

needed to be attended and controlled to prevent injury to them by trains. But this was no more true of that crossing than of surface farm crossings in general. The case is one of a single track branch line. The track is straight and it was conceded on argument before this Court that there were only four trains a day. While there are bare assertions in the testimony that the private crossing was dangerous, there was no evidence of any danger beyond that which would attend the use of any farm crossing. Neither the Commission nor the state court regarded the statute as condemning all such crossings, doubtless because the statute distinctly includes that type of crossing among those which it authorizes the Commission to require, its words being, "the Commission may require overhead, underground or grade crossings" as the circumstances may warrant. It is plain that the Commission proceeded upon the assumption that the statute authorized it to compel plaintiff to establish the underground pass for the convenience and benefit of defendant in the use of his own property, and that that alone was the ground and purpose of the order. The application thus given to the statute deprives plaintiff of property for the private use and benefit of defendant, and is a taking of property without due process of law, forbidden by the Fourteenth Amendment. *Missouri Pacific Ry. Co.* v. *Nebraska,* 164 U. S. 403; *Missouri Pacific Ry. Co.* v. *Nebraska,* 217 U. S. 196; *Great Northern Ry. Co.* v. *Minnesota,* 238 U. S. 340; *Great Northern Ry. Co.* v. *Cahill,* 253 U. S. 71.

The judgment below, which affirmed the Commission's order, is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

LEKTOPHONE CORPORATION *v.* THE ROLA COMPANY.

MILLER BROTHERS COMPANY *v.* LEKTOPHONE CORPORATION.

CERTIORARI TO THE CIRCUIT COURTS OF APPEALS FOR THE NINTH AND THIRD CIRCUITS.

Nos. 19 and 68. Argued November 26, 1930.—Decided December 8, 1930.

Hopkins Patent No. 1,271,529, granted July 2, 1918, for an acoustic device for the propagation, from a record or equivalent element, of self-sustaining sound waves in free air, as distinguished from the then prevailing use of the sound box and horn, comprised a bodily movable conical tympanum of crisp, strong, and more or less rigid material, such as paper, continued in one piece to form an annular rim which was rigidly supported between two rings. The patentee attached importance to the size of the tympanum as well as its structure. *Held,* narrowly confined by the prior art, if valid, and not infringed by a device (radio loud speaker) in which the rim of the tympanum is made of limp leather or cloth. P. 171.

34 F. (2d) 764, affirmed.

37 F. (2d) 580 (Dist. Ct.), reversed.

WRITS OF CERTIORARI, 280 U. S. 551 and 281 U. S. 713, to review conflicting decisions in the Ninth and Third Circuits in two suits brought by the Lektophone Corporation alleging the infringement of a patent. The cases are stated fully in the opinion.

Mr. William H. Davis for the Lektophone Corporation.

Mr. Thomas G. Haight, with whom *Messrs. Charles E. Townsend, William A. Loftus,* and *Theodore S. Kenyon* were on the brief, for the Rola Company.

Messrs. Samuel E. Darby, Jr., and *Theodore S. Kenyon* for Miller Brothers Company.

MR. JUSTICE HOLMES delivered the opinion of the Court.

These are two suits brought by the Lektophone Corporation alleging the infringement of a patent. In the first named, No. 19, in the Ninth Circuit, the decision was for the defendant, 34 F. (2d) 764, affirming the decree of the District Court, 27 F. (2d) 758, and declining to follow the Third Circuit's decision in *Lektophone Corporation* v. *Brandes Products Corporation,* 20 F. (2d) 155. A writ of certiorari was granted by this Court, 280 U. S. 551. Later, the second of the suits before us, No. 68, was brought in the Third Circuit, and the District Court, in obedience to the precedent there, decided for the plaintiff, 37 F. (2d) 580. An appeal was taken to the Circuit Court of Appeals. A writ of certiorari was granted by this Court without the formality of awaiting the result. 281 U. S. 713.

The patent is No. 1,271,529, granted July 2, 1918, to Hopkins, assignor, by mesne assignments, to the Lektophone Corporation; the original application having been filed July 14, 1913, in the time of the phonograph and before the days of radio, for an "Improvement in Acoustic Devices." The object is the "direct propagation, in free air, from a record or equivalent element subjected to the action of the original sound waves or vibrations, of self-sustaining sound waves substantially corresponding in intensity and amplitude, as well as in pitch or timbre, to the said original sound waves"; as distinguished from the then prevailing use of the sound box and horn. The device, as set forth in claim 8, comprised "a tympanum embodying a bodily movable, central conical portion, and an annular rim which encircles said conical portion and which is rigidly supported, said conical portion being freely exposed on all sides to unconfined air and being of sufficient area to produce self-sustaining sound waves in the surrounding air when vibrated." On the question

what is a sufficient area the patent says, " If satisfactory regeneration by sounds from a record or other sound-vibrated element is to be had, the whole diameter of the tympanum, that is, the diameter of the aperture in the rings [that rigidly clamp the edges of the tympanum] should exceed nine inches." " The diameter of the base of said conical portion should be at least eight-tenths of the diameter of the said aperture "—with further details. Paper is pronounced a satisfactory material, the requirement being that it should be crisp and strong and have considerable rigidity within itself.

The state of the art at and before 1913 will be found in the cases already cited, two excellent discussions by Thacher, D. J., in *Lektophone Corporation* v. *Western Electric Co.,* 20 F. (2d) 150 and Hickenlooper, D. J., in *Lektophone Corporation* v. *Crosley Radio Corporation,* Southern District of Ohio, not reported, and in the English case of *Lektophone Corporation* v. *S. G. Brown, Ltd.,* Ch. Div., January 23, 1929; Court of Appeals, July 12, 1929. It is unnecessary to repeat, because it is conceded that the conical tympanum and material were known in connection with a sound box for the phonograph of which Hopkins was thinking, as shown by the words ' from a record ' quoted from the patent. The effect of increasing the size of the cone also was known. The contribution of Hopkins, if he made one, as held in several cases in the lower Courts and abroad, was to combine abandoning the sound box, determining the size of the cone deemed by him most suitable to reproduce the sounds communicated to it by vibration, and tightly gripping and rigidly supporting the outer edge of the above mentioned annular rim of the cone between two rings. A result claimed for the rigid support, although seemingly not thought of at the time, is to avoid interfering sounds, ' blasting ' and rattling, that were made when the edge of

the cone was loose. As said by Hickenlooper, J., "All of these elements in combination went to make up the novelty of his alleged invention." "To the size, shape and proportion thus disclosed the patentee is limited by the prior art and the very essence of his invention." If the patent was valid it must be confined narrowly to the combination described.

In No. 19 the defendant's device is very like that of the plaintiff but differs in at least one particular. The plaintiff's cone, of crisp, strong, more or less rigid material, is continued in one piece under the rings that give it a rigid support. Its tympanum includes this outer edge. On the other hand, as said by Judge Thacher about another contrivance, "the defendant's structure, although it comprises a tympanum support having a circular aperture, does not comprise a tympanum having its outer edge rigidly mounted on said support in said aperture within the meaning of claim 4. Nor does it comprise an annular rim which encircles the conical portion of the tympanum within the meaning of claim 8." *Lektophone Corporation* v. *Western Electric Co.*, 20 F. (2d) 150, 154. The defendant's tympanum is only the paper cone, distinct from the rim. The rim is made of limp leather. In view of the importance attached to this element in the plaintiff's patent it is impossible to say that it is infringed. To quote again from the last cited case, "to hold that the defendant's device comprises 'a tympanum rigidly supported at its periphery' within the meaning of the claims is to construe the claims contrary to the plain import of their terms." *Ibid.* There are other questions that would have to be answered before the plaintiff could prevail, such as the difference in size, argued in this case, 27 F. (2d) 758, 760; s. c. on appeal, 34 F. (2d) 764, 773; the size being regarded by Hopkins as of the essence of his invention. But we think the matter too plain to need

more words. The same conclusion applies to the second case where the rim is made of cloth.

Decree in No. 19 affirmed.
Decree in No. 68 reversed.

The CHIEF JUSTICE took no part in the decision of these cases.

WAMPLER *v.* LECOMPTE, STATE GAME WARDEN, ET AL.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 402. Argued November 25, 1930.—Decided December 8, 1930.

1. A state law for the conservation of water fowl and for the protection of persons engaged in shooting them, which provides that duck blinds in the public waters shall be at least 500 yards apart and gives the riparian owner a preferential right to select the position for a blind, but which forbids him to place one within 250 yards of the land of an adjoining owner without the latter's consent, does not violate the equality clause of the Fourteenth Amendment as a discrimination in favor of persons owning a water frontage of more than 500 yards and against those who own less. P. 174.
2. That the law does not apply uniformly to all the waters of the State, in that for some the minimum distance between blinds is 250 yards and for others there are special exemptions, is not a ground for declaring it invalid, in the absence of facts proving the classification unreasonable. *Id.*

159 Md. 222, affirmed.

APPEAL from a judgment of the Court of Appeals of Maryland which upheld the validity under the Federal Constitution of a state statute regulating the erection and maintenance of duck blinds in the waters of the State. The court affirmed a decree of the trial court denying an injunction and dismissing the bill in a suit to restrain state officers acting under authority of the statute.

Mr. Thomas Morris Wampler, pro se.

Messrs. Robert H. Archer and *William L. Marbury, Jr.*, Assistant Attorneys General of Maryland, were on the brief for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The game laws of Maryland provide for granting annual licenses for the erection and maintenance of duck blinds in the waters of the State. No blind may be placed at a greater distance from the natural shore than 300 yards; and blinds must be at least 500 yards apart. A preferential right to select the position for a blind is conferred upon the riparian owner; but he may not place a blind "within 250 yards of the dividing line of any property owned by him and the adjoining property bordering on said waters . . . unless with the consent of the adjoining landowner." For certain waters the limitations prescribed are different from those above stated. In some, permission to erect a blind is wholly denied. For others, existing licenses are made renewable without condition. Code of Public General Laws of Maryland (Supp. 1929), Article 99, §§ 40–47.

Wampler, a resident of Charles County, owns land bordering on the Potomac River for a distance of less than 44 feet. Claiming to act under a license issued to him in June, 1929, he erected a duck blind at a point within 250 yards of the dividing line of his land and that of the adjoining owners on both the north and the south. Game wardens, acting pursuant to the statutes, destroyed Wampler's blind as being an illegal structure; and they threatened to destroy any other blind which he might erect under like conditions. To enjoin such action Wampler brought this suit against them in a state court. He conceded that the State has power to prohibit altogether the erection of blinds or to regulate their erection and

maintenance.[1] His sole claim is that this statute violates the equality clause of the Fourteenth Amendment, because it discriminates in favor of riparian owners with a frontage of more than 500 yards; and also because it does not apply uniformly to all the waters of the State. The hearing was on bill and answer. The trial court dismissed the bill on the merits. Its decree was affirmed by the highest court of the State. 150 Atl. 455.

No fact is shown on which to base the contention that the State's power of classification has been exercised unreasonably. The purpose of the legislation is, as the court found, "the conservation of water fowl and the protection and safety of those engaged in shooting them. The necessity for such regulation is apparent, for if blinds could be erected in broad waters at any distance from the shore, without regard to the distance separating them, it would not only be conducive to the destruction and annihilation of ducks and other water fowl, but extremely dangerous to those shooting them." 150 Atl. 457. The provision which prohibits placing a blind within 250 yards of the land of an adjoining owner without securing his consent, is a necessary incident of the preferential right conferred upon riparian owners. See *Sheehy* v. *Thomas,* 155 Md. 688. There was obviously no intention to discriminate in favor of persons having a large water frontage; for the consent provision enables owners of small frontages to join in erecting blinds spaced the requisite distance apart.

Nor is the equality clause violated by the special provisions that in certain inland waters blinds need not be placed farther apart than 250 yards. The state court, relying upon *Lindsley* v. *Natural Carbonic Gas Co.,* 220

[1] Compare *Smith* v. *Maryland,* 18 How. 71; *McCready* v. *Virginia,* 94 U. S. 391; *Manchester* v. *Massachusetts,* 139 U. S. 240; *Lawton* v. *Steele,* 152 U. S. 133.

U. S. 61, 78, said: "Why these provisions were inserted in the statute we are not informed, but we may assume, until the contrary is shown, that a state of facts in respect thereto existed which warranted the legislature in so legislating." 150 Atl. 458. This long-settled rule disposes also of the alleged discrimination created by the special exemptions applicable to certain other waters of the State.[2]

Affirmed.

POWERS-KENNEDY CONTRACTING CORPORATION ET AL. *v.* CONCRETE MIXING AND CONVEYING COMPANY.

CONCRETE MIXING AND CONVEYING COMPANY *v.* R. C. STORRIE & COMPANY.

CERTIORARI TO THE CIRCUIT COURTS OF APPEALS FOR THE SECOND AND NINTH CIRCUITS.

Nos. 3 and 4. Argued April 16, 17, 1929. Reargued October 24, 1930.—Decided December 15, 1930.

Patent No. 1,127,660, to McMichael, for improvements in methods and apparatus for transporting and treating concrete, *held* void for want of novelty and invention. P. 186. The principal features are: An upright chamber, in the top of which is an opening for introducing the material, equipped with a door to close the opening air-tight; a hopper-shaped bottom to the chamber, discharging into the delivery duct; a pipe through which compressed air enters the chamber above the mass of concrete within, to propel it into the duct; and another pipe delivering compressed air at or near the discharge or lower end of the hopper.

27 F. (2d) 668, reversed.

27 F. (2d) 838, affirmed.

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[2] See *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 475; *Powell* v. *Pennsylvania*, 127 U. S. 678, 685; *Chicago Dock Co.* v. *Fraley*, 228 U. S. 680, 686; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357.

CERTIORARI, 278 U. S. 595, to review decisions in two patent-infringement suits involving the same patent. In No. 3, the District Court sustained the patent and was affirmed by the Circuit Court of Appeals for the Second Circuit. In No. 4, the patent was held void by the District Court, 23 F. (2d) 131, and the Circuit Court of Appeals for the Ninth Circuit.

Messrs. John D. Morgan and *Alan M. Johnson* for the Powers-Kennedy Contracting Corporation et al.

Messrs. Stephen J. Cox and *Lynn A. Williams,* with whom *Messrs. Clifford C. Bradbury* and *Albert G. McCaleb* were on the brief, for the Concrete Mixing & Conveying Company.

Mr. Charles E. Townsend for R. C. Storrie & Company.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

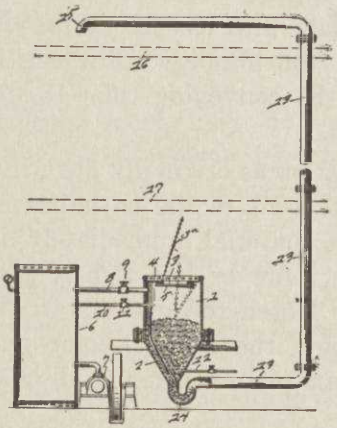
These cases involve the validity, and the alleged infringement, of letters patent No. 1,127,660, of date February 9, 1915, isued to John H. McMichael, and assigned to Concrete Mixing and Conveying Company.

The Court of Appeals of the Second Circuit, in *Concrete Mixing and Conveying Company* v. *Ulen Contracting Corporation,* 12 F. (2d) 929, held the patent valid and infringed. In No. 3 the District Court followed that decision. Its decree was affirmed by the Circuit Court of Appeals of the Second Circuit, 27 F. (2d) 668.

Meantime, in No. 4, the District Court for the Western District of Washington held the patent void for want of novelty and invention, 23 F. (2d) 131. Subsequent to the decision of the Court of Appeals of the Second Circuit, that of the Ninth Circuit affirmed the Washington District Court, 27 F. (2d) 838. In view of the conflict

thus disclosed this court granted certiorari in both cases, "the two cases to be heard as one." 278 U. S. 595.

The patent is for certain new and useful improvements in methods of and apparatus for transporting and treating concrete. The accompanying drawing illustrates the apparatus.



It consists of a chamber 1, for the reception of the material, the lower portion being hopperlike in form, as indicated at 2. The cover 4 is provided with an opening 3, in which there is a door 5. A chain or rope 3a is adapted to be used in partly or entirely closing the door. Air pressure in the chamber also acts to hold this door in closed position. A pressure tank 6 holds compressed air supplied by an air compressor 7, and has a connection 8 leading the air under pressure from the tank to the chamber 1; the air inlet is preferably near the top. An air pipe 10 controlled by a valve 11 also leads into the chamber, the delivery end of this pipe being at or near the discharge or lower end of the hopper.

The apparatus includes a valve-controlled water supply pipe 12 adapted to deliver water at the lower end of

the hopper so as to make the mass more easily movable when desired and also a crook or U-shaped bend 14 in the discharge duct 13.

The operation as described in the application for patent consists in depositing material in the chamber, closing the door, turning the air from the reservoir through the pipe 8 into the upper portion of the chamber, thus insuring the immediate firm closure of the door and forcing the material in the hopper downward, it being carried along through the conveying tube 13 until it is finally discharged at 15.

In the application as originally filed, it was stated that, owing to the provision of the U-shaped bend in the conveying tube, the material, immediately after leaving the hopper, will be more or less tightly packed; and it is added that "to loosen the material at the lower end of the hopper should the same become packed, I provide the additional air pipe adapted to discharge air through the material."

It should also be remarked that in the original application the invention was described as useful improvements in apparatus for "elevating and transporting granular and plastic building material, such as sand, plaster, mortar and concrete."

The application was filed in the Patent Office on January 14, 1907. Its prosecution was most dilatory. Claims made were repeatedly disallowed, and at one time it lapsed and had to be renewed. Radical changes were made in the statement of invention, and radically new claims were made in 1911 and expanded in 1913. The applicant eliminated from the scope of his invention the transportation of granular and plastic material generally, and limited it to the transportation and treatment of concrete; and the patent as issued is so limited. While his original assertion that the compressed air admitted to

the chamber behind the mass was the propelling force was retained, statements were added and claims were made, ascribing to the air discharged by pipe 10 new action and effect, namely, that it operated to "engage submasses" or to "impinge upon successive portions" of the mass of concrete moving through the hopper and discharge duct, and to aid or assist in their movement in the duct, as well as assisting in mixing and mingling the elements of the concrete in the duct, so as to make a more perfect mixture.

The device alleged in No. 3 to infringe consists of a container, in all material respects like that of the patent, with a discharge duct. It, however, employs no upper air behind the mass in the container. It has no U-bend in the duct at the outlet of the hopper, nor does it have a pipe terminating in the hopper near the outlet. On the contrary it has a pipe which discharges compressed air into the duct at the right-angle elbow therein immediately below the outlet of the hopper, thus forcing air into and along the duct in the direction in which the material is to move.

The device alleged in No. 4 to constitute an infringement is made under the Hackley patent, No. 1,619,297, of date March 1, 1927. It consists of a cylindrical container set horizontally instead of vertically. The door for admission of the concrete is on the top of the apparatus, a funnel-shaped exit is located at one end, the bottom of said funnel being continuous with the lowest portion of the cylinder wall, and the upper portion of the funnel joining a part of the end of the cylinder. Four pipes are led into the cylinder, the first of which discharges into the funnel and the other three at various distances to the rear of the first, along the bottom of the cylinder and in the direction of the funnel. Its method of operation is that, after the cylinder is filled with concrete and

the door closed, compressed air is discharged through the pipes in order, first through the one which ends in the funnel, and successively through the others to the rearward until the last one is opened. There is no provision for admission of compressed air on top of or behind the mass, as in the McMichael apparatus. Nor is there any trap or U-bend in the delivery duct, which is continuous with the mouth of the funnel and runs in a direct line therefrom.

If the patent in question were valid as disclosing novelty and invention, we should be bound to analyse the differences of structure and operation above indicated, to determine the question of infringement. We have concluded, however, that it does not disclose invention, and that we need not, therefore, narrowly examine the devices and their operation to ascertain whether there is infringement.

The idea of moving fluids and solids through a pipe by air pressure, or other fluid pressure, is old, and was well known at the time of the alleged invention. Both granular and plastic materials had been so moved by devices quite similar to that of the patent. These covered a wide range, from lift-pumps for sand and sulphur, to apparatus for transporting muck, spoil, grout, and concrete.

It is averred, however, that neither an apparatus nor a method such as that devised by McMichael had theretofore been applied to the transportation of concrete. If this be true, its truth must lie in the fact that McMichael either discovered an improvement in apparatus or an improvement in method over the prior art. We think that he did not do so; and we shall call attention to some of the facts which lead us to this conclusion.

The provision of a hopper-shaped bottom for the cylinder, thus causing the mass of material to converge towards the delivery duct, is specified by McMichael as an

element in his invention. It was old in the art. Warren had employed it in a sand-blast apparatus patented April 2, 1901, No. 671,303. Goldie had used it in a cementing apparatus patented August 26, 1902, No. 707,840. Canniff had shown it in a pneumatic grout-mixing and discharging apparatus patented December 10, 1907, No. 873,345. Nor is there any merit in the claim of invention in making the funnel-shaped discharge end of the cylinder connect with the delivery duct smoothly and without offsets.

The next element to be considered is the introduction of air behind the mass in order to propel it into the discharge duct. This was old in the art. Smith had provided for the employment of such compressed air in an enclosed chamber above the mass in his patent for machinery for laying concrete pavement, of January 2, 1872, No. 122,498. Duckham had employed it in an apparatus for discharging muck or spoil (English patent No. 4400, December 18, 1875). Canniff had used it in his patent above referred to, as had McIlvrid in a grout-mixing and discharging machine, patent No. 958,421, Farnham in a sand-blast apparatus patented December 22, 1903, No. 747,396, and Warren in a similar apparatus in his patent above referred to. Other devices might be cited.

Much reliance is placed upon the pipe 10, with its end or nozzle in the chamber near the outlet. In his original application McMichael described its operation somewhat as follows:

He called attention to the U-bend or trap 14 just below the outlet of the chamber. He stated that this would cause the mass to pack tightly as it was driven down by the upper air pressure, and claimed that the blast of air from the pipe 10 would tend to prevent clogging or arching at this point, thus enabling the material to move more

freely into the discharge duct. If this be a claim to novelty or invention, it is clearly anticipated by the Duckham English patent above cited. In the device covered by that patent air is admitted to an airtight chamber above the mass of muck or spoil to be moved, thus driving it, as in McMichael's, to the outlet. One or more nozzles for the delivery of similar compressed air are placed near the outlet of the chamber, so that the air from them will mingle with and stir up the mass. It is added that a nozzle may also be placed in the discharge pipe for the same purpose, and attention is called to the usefulness of larger nozzles where the material to be moved is clay or similar matter which is likely to harden and form a resistant mass near the outlet of the chamber.

In the amendment to his specifications, McMichael, while still claiming the function of pipe 10 to be to loosen material at the lower end of the hopper and to assist movement of the mass, added an additional claim, saying that it "serves the double function of preventing choking in the entrance to the delivery pipe and of supplying air under pressure in sharp jets directly to the delivery pipe itself." He says that he has found that this supplemental air pipe 10 is very effective in aiding the passage of the material into and through the conveyor pipe. He claims that this second air pipe " gives to the material the velocity which is needed to carry it to the remote point of delivery." He explains that the upper pipe supplies air which acts by pressure, and the lower pipe supplies air which acts by velocity. Again he states that the air from this pipe "may force itself into the body of the mass," and adds that it "engages with the submasses to push them along." He phrases the matter differently by claiming that this air acts upon submasses successively, and claims as a result "the thorough commingling of the ingredients" with greater rapidity. At considerable length he then elaborates upon the value of the air discharged by this pipe as a mixing agent.

These specifications and the claims based upon them are particularly important in view of the theory now brought forward—that jets of air from the pipe 10 cut off so-called "slugs" or portions of the concrete and propel them individually like pistons through the delivery pipe. An examination of the specifications and claims discloses no claim to this slug or pistonlike action of the air so delivered. Any such action is quite inconsistent with the claim that the air from the pipe mingles with the mass and causes additional mixing in the delivery pipe making the latter a sort of mixing chamber. Unless the slug theory is disclosed in the patent and is a correct theory of operation it would seem that there is no invention in the use of the pipe 10.

It is conceded that in the commercial form of the patented apparatus the U-bend is entirely discarded. It cannot therefore have any useful function and cannot be the subject of invention. It is further conceded that in the commercial form, pipe 10 is not brought into the chamber and does not terminate in the hopperlike exit. On the contrary, the pipe is led into the elbow in the conduit directly below the hopper and discharges in the direction in which the material is to move. If the function of the pipe is that of a booster or velocity nozzle (as is undoubtedly, amongst other things, claimed in the patent), its use is not invention unless the application of it to concrete is novel and constitutes invention. The use of such nozzles in the conveying of material by compressed air is old in the art. Many of the patents cited and in evidence indicate this, and, apart from them, it is and must be conceded that such use was not uncommon at the time of McMichael's application.

Thomas Leake applied for a patent for an apparatus and method for mixing and transporting concrete, October 7, 1907. In this application he showed two nozzles similar to the pipe 10, discharging into the hopper of

his closed chamber. The District Court and the Circuit Court of Appeals found in No. 4 that this invention in fact antedated McMichael's and we are not prepared to say that the testimony and corroborating documents did not justify this finding. There is considerable evidence tending to show that McMichael recognized the priority of Leake, and, as a result, purchased and took an assignment of Leake's patent while his own application was pending, in order to dispose of an interference declared by the Patent Office between them. It resulted that Leake did not offer evidence or press his claim to priority and that the McMichael patent was granted in 1915 and the Leake patent in 1917, and both of them are owned by the same company.

If there be any virtue in the so-called slug theory, Leake has as clearly disclosed it as McMichael did, although neither of them make this method of operation clear in their specifications and claims.

It remains to discuss whether there is foundation for the claim that McMichael discovered new principles, namely, that concrete could be moved by compressed air, or that if it could not be satisfactorily moved by pressure of compressed air or other fluid agent, it could so be moved by a nozzle which cut off portions of the mass and drove them through the delivery duct like pistons.

Methods and apparatus for moving concrete by compressed air had been previously invented. See Smith's patent, 122,498. The court below, in No. 3, indicated that this had not been found practicable. There is no support in the record for any such finding and against it stands the presumption of operability from its patenting. In No. 4 there was uncontradicted evidence that it would work, and that Canniff's grout machine (Patent 873,345) had been successfully used for concrete. Other apparatus closely approximating that of the patent in suit had been used for transporting grout. In his specifications Mc-

Michael's only suggestion as to why they were unfit for concrete is that the pipes and parts were not of sufficient size. But obviously a mere change in proportion would involve no more than mechanical skill and would not amount to invention.

We find no adequate ground for saying that McMichael's method operated in a novel and useful manner, by reason of the alleged function of the nozzle discharging into the moving mass, cutting off therefrom slugs or pistons of concrete and driving them forward individually.

The slug theory, so-called, seems to have been advanced for the first time in the *Ulen* case; and was there credited and relied upon to sustain the patent. In No. 3 the District Court thought it probable, but the Court of Appeals held the patent valid irrespective of the correctness of the theory.

In No. 4 the District Court found it incorrect and untenable. This coincides with our own view. The top pressure behind the mass and that coming through the pipe 10 is the same. There is no mechanism to produce sharp spurts or jets of air out of the end of pipe 10. That air, as the patent specifications in certain paragraphs suggest, mingles with the mass of concrete as it comes down through the hopper. It does not cut off masses and drive them forward like pistons, but acts merely by velocity. The evidence is persuasive that the concrete issues from the end of the discharge pipe in a stream or solid flow and not in surges of lumps. It is proved that it freely passes ninety-degree bends in the pipe. In short, there is neither theoretical nor practical demonstration of any such phenomenon as the owner of the patent asserts.

And, even if the mode of operation is as claimed, it is to be remembered that Leake in his application of October 7, 1907, uses the same words to describe the operation of his nozzles as we find McMichael subsequently in-

serted in his specifications and claims. When this application came into interference with McMichael's, he, of course, became familiar with Leake's claims. It is significant that he then amended his claims, almost in the very words of Leake. This of itself destroys the patent. *Railway Co.* v. *Sayles,* 97 U. S. 554; *General Electric Co.* v. *Sangamo Electric Co.,* 174 Fed. 246; *Lopulco Systems, Inc.* v. *Bonnot Co.,* 24 F. (2d) 510.

For these reasons we find that the patent is invalid. It consists of a combination of elements all of which were old in the art. Its application to the transportation of concrete did not involve invention. Neither the combination of old elements or devices accomplishing no more than an aggregate of old results (*Hailes* v. *Van Wormer,* 20 Wall. 353; *Office Specialty Mfg. Co.* v. *Fenton Metallic Mfg. Co.,* 174 U. S. 492; *Grinnell Washing Machine Co.* v. *E. E. Johnson Co.,* 247 U. S. 426) nor the use of an old apparatus or appliance for a new purpose (*Roberts* v. *Ryer,* 91 U. S. 150) is invention.

When, in addition, we find that similar combinations had been used for the transportation of granular material, muck and spoil and grout, and that combinations lacking one or another of the old elements of McMichael's had been used to transport concrete, what was said in *Concrete Appliances Co.* v. *Gomery,* 269 U. S. 177, 179, applies with equal force to these cases:

"The several elements in the petitioners' claims which we have enumerated embrace familiar devices long in common use, separately or in smaller groups, both in this and in kindred mechanical arts. It is not argued that there is any novelty in such units or groups; and the only serious question presented is whether, in combination in the apparatus described, they constitute an invention."

This court called attention to the fact that the principle of conveying and distributing a mobile substance by

gravity had been exemplified in various methods for centuries, and that long prior to the patent there in suit the principle had been applied to various substances such as grain, coal, crushed stone, sand, and iron ore, and said [p. 184]:

"The observations of common experience in the mechanical arts would lead one to expect that once the feasibility of using 'wet' concrete in building operations was established, the mechanical skill of those familiar with engineering and building problems would seek to make use of known methods and appliances for the convenient handling of this new building material."

Here it appears that the use of compressed air for conveyance of granular and plastic materials had long been known and practised; so that the cited case is clear authority against invention in the instant cases.

The decree in No. 3 is reversed and the cause remanded with instructions to dismiss the bill of complaint. The decree in No. 4 is affirmed.

No. 3, reversed.
No. 4, affirmed.

BROAD RIVER POWER COMPANY ET AL. *v.* SOUTH CAROLINA EX REL. DANIEL, ATTORNEY GENERAL.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 528 (1929 Term). Argued on Rehearing, December 3, 4, 1930.—Decided December 15, 1930.

Upon rehearing of this cause, the Court, though divided upon the reasons, adheres to the view that the writ of certiorari should be dismissed for want of jurisdiction. See 281 U. S. 537.

Mr. George M. LePine, with whom *Messrs. C. Edward Paxson, W. C. McLain* and *Wm. Marshall Bullitt* were on the supplemental brief, for petitioners.

Even if the statute incorporating the Consolidated Railway and Electric Company created one unified franchise for street railway and electric service, the State could not require operation of the railway at a loss.

This Court is definitely committed to the rule that a State cannot fix a non-compensatory rate on one product on the theory that the losses produced can be absorbed in charges for other products. *Northern Pacific R. Co.* v. *North Dakota,* 236 U. S. 585; *Norfolk & Western Ry.* v. *West Virginia,* 236 U. S. 605; *Chicago, M. & St. P. R. Co.* v. *Public Utilities Comm.,* 274 U. S. 344.

The rule that a public service company may not be compelled to serve, even in a branch of its business, at a rate which is confiscatory, which was asserted in *Northern Pacific R. Co.* v. *North Dakota, supra,* is based on the principle that a utility is entitled to compensation for the use of its property devoted to such branch of its business, and that to require service without compensation constitutes confiscation. When, therefore, it appears, as in the case at bar, that varying rates of fare have been tried and found not to be compensatory, and that no rate of fare can be compensatory, to require service at any rate of fare (for there must be some established rate) must be deemed to constitute confiscation.

As a branch of utility service, the electric light and power business is far more distinct from street railways than wheat traffic was from coal traffic in the *North Dakota* case.

In the case at bar did the Court mean to hold that electric light and power consumers could by increased light and power rates be made to bear the losses in street railway operation, so that the total receipts from the unified franchise would be compensatory for the unified investment? If so, what becomes of the doctrine of the *North Dakota* case?

It is true that the case at bar is not a rate case, but in view of the certainty that street railway service by this company must be given at an operating loss, the case of *Northern Pacific R. Co.* v. *North Dakota, supra,* and the principle on which that case was decided are directly applicable.

The fundamental basis of that decision is that the power of the State to regulate rates (and service) is founded upon its police power, which extends to property which is employed in a public business, and reasonable regulations are to be sustained, while unreasonable regulations are in conflict with the property rights of the owners and are to be set aside.

That it is the dedication of the property to a public use, and not any contractual relation, which authorizes the State to make reasonable regulations as to the service which shall be rendered in the management of the property so dedicated, is evident from other decisions of this Court. These cases establish the rule that, once property has been devoted to a particular public use, the State may make reasonable regulations governing that use, and may require service to be rendered in connection with that use, though pecuniary loss must unavoidably be incurred, but that a State may not require property devoted to one public use to be applied to a different public use, and may not prevent the withdrawal of property devoted to a particular public use when the property can be operated only at a loss. *Chesapeake & O. Ry. Co.* v. *Public Service Comm.,* 242 U. S. 603; *Wolff Co.* v. *Industrial Court,* 262 U. S. 522.

The real basis for the obligations which arise in the case of a railway is the dedication of the property to a public use by putting the railway in operation under a legislative grant, rather than a contract relation which exists from the charter itself. Cf. *Atlantic Coast Line R. Co.* v. *Corporation Comm.,* 206 U. S. 1.

Applying this rule to the case at bar, it becomes evident that when the railway company constructed its line of railway in the city streets it dedicated the same to the carriage of passengers, and so long as it continued in that business it could not refuse to perform any railway service required of it, and it could not withdraw that property from the public service unless continued operation could only be had at a loss; when it engaged in the electric light and power business it dedicated its electric properties to the rendition of electric services, in the same way and subject to the same limitations, and the same limitations apply to its gas properties, but the power of regulation which a State possesses over private property devoted to public use gives no warrant for requiring that an electric property lawfully devoted to a particular public use, such as furnishing light and power, shall be devoted to a further public use, such as carrying passengers on a street railway. Distinguishing: *United Fuel Gas Co.* v. *Railroad Comm.*, 278 U. S. 300; *St. Louis & San Francisco Ry. Co.* v. *Gill*, 156 U. S. 649; *Puget Sound Traction Co.* v. *Reynolds*, 244 U. S. 574.

If the contention of the State of South Carolina and the decision of the state court are to be sustained on the ground that the business of the company must be treated as one public service enterprise, then, as held in *Texas* v. *Eastern Texas R. Co.*, 264 U. S. 79, that property must be considered to have been devoted as one entire property to the use of the public "on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return," and this means that if losses are incurred in the street railway they must be made up out of the electric rates. This results in requiring consumers of electricity to pay a portion of the cost of transportation of street car passengers, who may be an entirely different set of persons. Any such decision is contrary to the decision in the case of *Northern Pacific R. Co.* v.

North Dakota, 236 U. S. 585, and the other decisions which have followed it.

The principles contended for by petitioners have the sanction of other courts. *Mt. Carmel Pub. Util. Co.* v. *Public Utilities Comm.,* 297 Ill. 303; *Illinois Trust & S. Bank* v. *Doud,* 105 Fed. 123.

No binding effect can be given by this Court to the decision of the South Carolina court as to the effect of the consolidated charter or the existence or construction of alleged contracts, but this Court must reach its own independent conclusion thereon.

It is true that where a case involves both federal and non-federal questions, and a non-federal ground of decision has fair support, this Court will not inquire whether the decision of the state court is right or wrong (*Vandalia R. Co.* v. *Indiana,* 207 U. S. 359; *Enterprise Irrigation District* v. *Canal Co.,* 243 U. S. 157,) but if the non-federal ground is without substantial support, constitutional issues will not be permitted to be evaded. *Ward* v. *Love County,* 253 U. S. 17; *Leathe* v. *Thomas,* 207 U. S. 93.

Again, where property rights are claimed to have been interfered with, the nature and scope of those rights is a state question. *Sauer* v. *New York,* 206 U. S. 536; *Fox River Paper Co.* v. *Railroad Commission,* 274 U. S. 651. But where it becomes necessary to consider whether a State is depriving, or attempting to deprive, a litigant of property without due process of law in violation of the Fourteenth Amendment, and the question turns on the existence and terms of an asserted contract, this Court determines for itself whether there is a contract and what are its terms. *Louisville & N. R. Co.* v. *Palmes,* 109 U. S. 244, 255; *Stearns* v. *Minnesota,* 179 U. S. 223; *Texas* v. *Eastern Texas R. Co.,* 264 U. S. 79, 86–87; *Georgia Ry. & Power Co.* v. *Decatur,* 262 U. S. 432; *Appleby* v. *New York,* 271 U. S. 364; *Louisiana Ry. & Nav. Co.* v. *New*

Orleans, 235 U. S. 164; *Douglas* v. *Kentucky,* 168 U. S. 488; *St. Paul Gas Co.* v. *St. Paul,* 181 U. S. 142; *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U. S. 548; *New York Elec. Lines* v. *Empire City Subway Co.,* 235 U. S. 179.

The statute creating the Consolidated Railway and Electric Company did not create a unified franchise for street railway and electric service.

The evidence conclusively shows that the street railway system in question cannot be operated except at a devastating loss.

The statutes, ordinances and private contracts set up by the State do not justify a requirement that the street railway in question be operated.

Mr. Irvine F. Belser, with whom *Messrs. John M. Daniel,* Attorney General of South Carolina, *Cordie Page,* Assistant Attorney General, *Joseph L. Nettles,* City Attorney of Columbia, S. C., *H. N. Edmunds,* and *C. T. Graydon* were on the supplemental brief, for respondents.

PER CURIAM.

At the last term the writ of certiorari in this cause was dismissed for want of jurisdiction. 281 U. S. 537. A rehearing afterwards was ordered by the Court and the rehearing recently has been had. Upon this further consideration the Court adheres to the view that the writ of certiorari should be dismissed for want of jurisdiction, but the members of the Court differ in the reasons which lead to that decision:

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER concur in this disposition of the case, upon the rehearing, for the following reasons: The state court found that the petitioners here "did not make a bona fide effort to make the street railway business a success," but planned to discontinue it and pursued a course tend-

ing to depress the business and make it unremunerative; that "if the street car system had been properly maintained, as it could and should have been, the same would have been patronized by the public generally"; and that the "street railway system can be made to yield a fair return if properly managed and properly maintained." These findings, although opposed to part of the evidence, have such support in other parts that they should be accepted here. In the presence of such findings, so supported, it is apparent that on the present record petitioners are not in a position to maintain that enforced operation of the street railway system will be in contravention of rights secured by the due process of law clause of the Fourteenth Amendment. An essential basis in matter of fact for the right sought to be asserted under that constitutional provision is wanting; and as this is true regardless of whether the electric street railway franchise be independent or so unified with other franchises as to be interdependent, there is no present need to consider or determine its status in that regard.

The CHIEF JUSTICE, MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS and MR. JUSTICE STONE adhere to the views expressed in the opinion heretofore delivered. 281 U. S. 537.

MR. JUSTICE ROBERTS, considering himself disqualified, took no part in the decision of this case.

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FLORIDA ET AL. *v.* UNITED STATES ET AL.

BROOKS-SCANLON CORPORATION ET AL. *v.* SAME.

WILSON LUMBER COMPANY OF FLORIDA *v.* SAME.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

Nos. 16, 17, and 18. Argued October 30, 31, 1930.—Decided January 5, 1931.

1. An order of the Interstate Commerce Commission requiring a railroad to increase its intrastate rates throughout an entire State to correspond with interstate rates prescribed by the Commission for potential traffic in the same commodity between points in a limited region of that State and points in an adjacent State, cannot be sustained under § 13 (4) of the Interstate Commerce Act as an execution of the power to remove undue prejudice "as between persons or localities in intrastate commerce on the one hand and interstate . . . commerce on the other hand," in the absence of explicit findings by the Commission justifying such extension of the order. P. 208.
2. An order of the Commission fixing certain interstate rates and requiring an increase of intrastate rates to the same level, which was made after hearing the parties interested, including the States concerned, should not be upset merely because of the manner in which the proceeding was initiated or because of the generality of the complaint, if findings based on evidence show that in substance the order was within the Commission's authority. P. 209.
3. The power over rates "made or imposed by authority of any State," which is conferred upon the Commission by § 13 (3) and (4) of the Interstate Commerce Act to protect interstate commerce from unjust discrimination, applies to rates which were initiated by a carrier and not affirmatively prescribed by the State, but which were published under its laws and are maintained subject to its authority. P. 209.
4. The general provisions of § 13 (4) prohibiting "unjust discrimination against interstate commerce," and authorizing the Commission to establish intrastate rates to prevent such discrimination, is to be considered in the light of the affirmative duty of the Com-

mission under § 15 (a) to fix rates and take other important steps to maintain an adequate national railway system. P. 210.

5. The effective operation of the Act requires that intrastate traffic should pay a fair proportionate share of the cost of maintenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity between intrastate rates and interstate rates, the Commission is authorized to end the disparity by directly removing it. P. 211.
6. The propriety of an exertion of this authority must be tested by its relation to the purpose of the grant and with regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear. P. 211.
7. The mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates. P. 211.
8. If the action of the Commission is not simply for the removal of undue prejudice against interstate commerce as between persons or localities, and the Commission undertakes to prescribe a statewide level of intrastate rates in order to avoid an undue burden, from a revenue standpoint, upon the interstate carrier, there should be appropriate findings upon evidence to support an order directed to that end. P. 212.
9. In the present instance (where the Commission did not undertake to establish a statewide level of interstate rates) to sustain the order fixing statewide intrastate rates, there should have been findings, supported by evidence, of the essential facts as to the particular traffic and revenue, and as to the effect of the intrastate rates, both existing and as prescribed, upon the income of the carrier, which would justify the conclusion that the order was needed to avoid an undue burden on the carrier's revenues and a consequent interference with the maintenance of an adequate transportation system. A general statement that the intrastate rates resulted "in unjust discrimination against interstate commerce," will not suffice. P. 212.
10. A finding that the existing intrastate rates on the particular traffic were not remunerative or reasonably compensatory, does not justify the order. P. 214.
11. In dealing with unjust discrimination as between persons and localities in relation to interstate commerce, the question is one of the relation of rates to each other; but in considering the authority of the Commission to enter the state field and to change a scale of

intrastate rates in the interest of the carrier's revenue, the question is that of the relation of rates to income. P. 214.

12. The raising of rates does not necessarily increase revenue; it may reduce it by discouraging patronage. *Id.*

13. In the absence of basic findings essential to support the Commission's order, the Court is not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. *Beaumont, S. L. & W. Ry. Co.* v. *United States, ante,* p. 74, distinguished. P. 215.

30 F. (2d) 116; 31 *id.* 580, reversed.

APPEALS from decrees of the District Court upholding an order of the Interstate Commerce Commission reducing intrastate rates, in three suits to set it aside.

Mr. Fred H. Davis, Attorney General of Florida, for the State of Florida et al.

The primary issue before the Commission was the interstate rate; the intrastate rate was involved only incidentally in its relationship to the interstate rate.

The proceedings were adversary proceedings of limited scope in which it was unlawful for the Commission to exercise power under § 13 (4) in its relation with § 15a.

It was unlawful for the Commission to exercise federal power with respect to intrastate rates beyond the sphere in which interstate rates were prescribed. The power under § 13 in its "dovetail relation" with § 15a is not a direct, but is an incidental power, in its essence the same power that was invoked in the original *Shreveport* case. *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *Colorado* v. *United States,* 271 U. S. 153.

It is to be conclusively presumed that Congress did not intend this incidental power to be exercised with respect to intrastate rates except (a) in territory where the direct federal power with respect to interstate rates and rate levels has been exercised, and (b) where a substantial evil has been clearly shown to exist, and (c) then only to

the extent necessary to remedy the particular evil in the particular case in hand.

The only appropriate proceeding for the entry of an order prescribing intrastate rates for application "within and throughout" a State "without exception" is in a direct attack upon the level of the intrastate rates in a proceeding instituted either (a) upon the petition of the carrier, or (b) upon an order of the Commission, entered for that purpose, itself either instituting such proceeding or extending the scope of a pending complaint for that purpose.

Even if it be conceded that the "new power" conferred upon the Commission by § 13 (4) authorizes it, in conjunction with its duty under § 15a, to prescribe intrastate rates in a proceeding where the level of the interstate rate was the primary issue, an intrastate order statewide "without exception" is not appropriate to a proceeding where the primary "relief desired" and granted covered only a small portion of the State.

Neither the showing before the Commission nor the investigation made by it was sufficient to warrant imposing its will upon a sovereign State, statewide and without exception. *Interstate Commerce Comm.* v. *Louisville & N. R. Co.*, 227 U. S. 88; *Illinois Central R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 510; *American Express Co.* v. *South Dakota*, 244 U. S. 617, 625; *Railroad Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 580.

An order of the Commission must be set aside, even when in form within the delegated power, if it be shown that in substance there has been a misuse or abuse of the power delegated. *Interstate Commerce Comm.* v. *Union Pac. R. Co.*, 222 U. S. 541, 547; *Lawrence* v. *St. Louis, S. F. Ry. Co.*, 274 U. S. 588.

Comparison of the case at bar with the *Wisconsin Rate Case*, 257 U. S. 563, demonstrates that the prerequisites

present in the latter for superseding the state power are absent here.

Mr. Henry P. Adair, with whom *Messrs. Charles E. Cotterill, August G. Gutheim,* and *H. Plant Osborne* were on the brief, for the Brooks-Scanlon Corporation et al. *Mr. J. V. Norman* for the Wilson Lumber Company of Florida.

The order of the Commission was beyond the scope of the issues raised in the proceeding before it; it was made without any substantial evidence to support it.

A mere difference in rate levels, interstate as compared with intrastate, is not sufficient to justify an order increasing the intrastate rates within and throughout the entire State.

The fact that the rates on logs intrastate within Florida are lower than certain interstate rates in the same general territory of movement on other low grade commodities, constitutes no justification for a statewide order increasing the intrastate rate on logs.

The order was made without the full hearing required as precedent thereto by the Interstate Commerce Act. *Interstate Commerce Comm.* v. *Louisville & N. R. Co.,* 227 U. S. 88, 91; *New England Divisions Case,* 261 U. S. 184, 200; *Baltimore & O. R. Co.* v. *United States,* 264 U. S. 258, 265.

The order was beyond the scope of the Commission's statutory power. There was no evidence that the Florida intrastate rates constituted a burden upon or unjust discrimination against interstate commerce.

The Commission, in condemning existing rates and in fixing rates for the future, is not authorized to "supplement" the facts shown of record before it, or to rely upon "the common knowledge and skill in rate matters that the Interstate Commerce Commission, the Georgia and

Florida state commissions, and the railroads must have in such matters."

The Commission was without power to regulate the intrastate rates because they were voluntarily initiated and maintained in effect by the carrier and were not rates "made or imposed by authority of any State" within the description of § 13 (3) and (4) of the Interstate Commerce Act.

The order was in contravention of the Federal Constitution.

Assistant to the Attorney General O'Brian, with whom *Solicitor General Thacher* and *Messrs. Charles H. Weston*, Special Assistant to the Attorney General, and *Daniel W. Knowlton*, Chief Counsel, Interstate Commerce Commission, were on the brief, for the United States and Interstate Commerce Commission.

Paragraph (4) of § 13 of the Interstate Commerce Act authorizes the Commission to remove any undue discrimination against interstate commerce caused by an intrastate rate, and paragraph (3) of § 13 provides that the State shall be notified if any rate "made or imposed" by state authority is brought in issue before the Commission. This directory provision is not a jurisdictional limitation on the Commission's power under paragraph (4). Its authority under the latter extends to any intrastate rate, whether or not made or imposed by state authority. Even if the directory provision be a jurisdictional limitation, the Commission could deal with these Florida log rates under § 13 (4), since they were made or imposed by the State of Florida.

The terms of § 13 (4), its purpose as construed in *Wisconsin Railroad Comm.* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, and its interpretation in decisions of the Commission clearly indicate that it permits the Commission,

in any proceeding authorized by the Act where undue discrimination against interstate commerce is in issue, to act against any offending intrastate rate. The Commission therefore was authorized by the statute to make a finding in this case of undue discrimination against interstate commerce, although the proceeding before the Commission was not initiated for the sole purpose of increasing an intrastate rate, and although it did not involve the entire rate structure of a State.

The complaint filed with the Commission charged that these Florida log rates caused undue discrimination against interstate commerce in violation of § 13 (4) and asked relief against this violation. The intervention of certain railroads raised the same issue, and it was indirectly raised by the answer of the Atlantic Coast Line. The complainant alone could not waive this issue, and it also did not intend so to do. The examiner who conducted the hearing considered and passed upon it. Full opportunity was given to present evidence and arguments on it, and the Commission's order directed to the removal of undue discrimination was based on a full hearing.

Where an order of the Commission interferes with a rate which has been put into effect in the affirmative exercise of the rate-making power of a State, a higher degree of proof may be required to sustain it than is required on a court review of other orders of the Commission. This requirement, if it exists, does not apply to the Commission's order increasing these Florida intrastate log rates, since they were not put into effect by any exercise of the State of Florida's rate-making power. Where an order of the Commission, as in this case, merely trenches, in the interest of interstate commerce, on the traditional reserved powers of the State, it is binding when supported by substantial evidence. *Colorado* v. *United States,* 271

U. S. 153. But whatever the degree of proof required, there was here convincing proof, in the form of a showing of the carrier's costs in transporting logs intrastate in Florida in relation to its revenue therefrom under the assailed rates, in the form of extensive and pertinent comparisons with other rates, and in the form of direct testimony, that the rates under attack were so low as to cause undue discrimination against interstate commerce.

Mr. Robert C. Alston, with whom *Messrs. F. B. Grier, Carl H. Davis,* and *W. E. Kay* were on the brief, for the Atlantic Coast Line Railroad Company.

The question involved is one of discrimination, and burden on interstate commerce, and that is a question of fact. *Virginian Ry.* v. *United States,* 272 U. S. 658.

Finding by the Commission of unreasonable discrimination, being supported by substantial evidence, will not be reviewed by the Court. *Virginian Ry.* v. *United States, supra; Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; *New England Divisions Case,* 261 U. S. 184, 204.

The Commission had the power to enter the order because the Florida intrastate rates were unduly preferential of intrastate shippers and unduly prejudicial against interstate shippers and shipments and against localities and against interstate commerce, and unduly preferential of a particular description of traffic. *Minnesota Rate Cases,* 230 U. S. 352; *Houston, E. & W. T. Ry.* v. *United States,* 234 U. S. 342; *American Express Co.* v. *Caldwell,* 244 U. S. 617; *Wisconsin Railroad Comm.* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *Illinois Central R. Co.* v. *Public Utilities Comm.,* 245 U. S. 493; *Colorado* v. *United States,* 271 U. S. 152, 162; *Railroad Commission* v. *Southern Pacific,* 264 U. S. 331, 347; *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.,* 270 U. S. 266, 277; *United States* v. *Village of Hubbard,* 266 U. S. 474; *Missouri Pac. R. Co.* v. *Boone,* 270 U. S. 466.

Congress has exclusive power to deal with the relation of interstate and intrastate rates. *Shreveport Case,* 234 U. S. 354; *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, 477.

The disadvantage at which the Cummer scale of rates placed the competitors of Florida manufacturers in the selling market constituted discrimination.

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

The State of Florida and the members of its Railroad Commission (appellants in No. 16) brought suit in the District Court to restrain the enforcement of that part of an order of the Interstate Commerce Commission which dealt with certain intrastate rates of the Atlantic Coast Line Railroad Company in Florida. The order, made August 2, 1928, required the Railroad Company to establish carload rates for logs (except walnut, cherry, and cedar) in intrastate commerce "within the State of Florida" which should be the same as the rates prescribed by the Interstate Commerce Commission as reasonable for transportation in interstate commerce from points in the northern portion of Florida to destinations in Georgia. The order in that respect was assailed as being outside the scope of the issues raised in the proceeding in which the order was entered and without substantial evidence to support it, and as extending beyond the statutory authority of the Commission and the limits of federal power under the Constitution.

Suits for similar relief were brought by the Brooks-Scanlon Corporation and other corporations (appellants in No. 17) and by the Wilson Lumber Company (appellant in No. 18), manufacturers and shippers of lumber in Florida. The Public Service Commission of Georgia was permitted to intervene, and the three suits were consoli-

dated and heard before a court of three judges as required by the applicable statute.

The court was of the opinion that the order of the Commission touching intrastate rates could be construed as being limited to points of origin on the Atlantic Coast Line Railroad in the northern part of Florida, as the Commission had confined its order to these points of origin in fixing interstate rates. Taking the view that, if construed so as to apply to intrastate rates throughout the State, the order would probably be invalid, the court sustained it upon the narrower construction. Decrees were entered accordingly in January, 1929, dismissing the bills. 30 Fed. (2d) 116.

Thereupon the Interstate Commerce Commission amended its order by inserting additional exceptions of logs, and also with respect to intrastate rates, "for the purpose of clarification," by substituting for the phrase "within the State of Florida" the words "within and throughout the entire State of Florida, without exception." Petitions for rehearing and for leave to file supplemental bills were then presented to the District Court and were granted. The Atlantic Coast Line Railroad Company was allowed to intervene. On the rehearing, both the original and supplemental bills were dismissed. 31 Fed. (2d) 580. The court upheld the amended order of the Commission as to intrastate rates, in its statewide operation, not "because of undue prejudice to shippers and localities, or because of undue discrimination against the *particular* interstate commerce" in the described logs, but solely upon the ground that the order was aimed at a discrimination "against *general* interstate commerce," caused by intrastate rates which were so low as to throw an undue burden upon the interstate revenues of the carrier.

From the decrees entered accordingly the present appeals are brought.

The proceeding before the Interstate Commerce Commission was begun by the filing of a complaint by the Georgia Public Service Commission against the Atlantic Coast Line Railroad Company. The complaint stated that its object was to secure reasonable rates on logs from points on the Railroad Company's line within Florida to all destinations on its line in Georgia, and to remove any unjust discrimination found to exist as provided in the Interstate Commerce Act. The complaint alleged that there was competition between mills and consumers in Georgia and those in Florida in the purchase and transportation of logs from points in Florida to destinations in Georgia. The intrastate log rates of that railroad in Florida, and its interstate log rates between Florida and Georgia, for distances up to 170 miles were set forth, and it was alleged that the interstate rates greatly exceeded the intrastate rates for like distances upon traffic moving under substantially similar conditions. The complaint charged that the interstate rates were unjust and unreasonable in violation of section 1, were unjustly discriminatory in violation of section 2, and were unduly prejudicial to the interstate shipper and preferential in favor of the intrastate shipper in violation of section 3, of the Interstate Commerce Act. It was also charged that the carrier's intrastate rates in Florida gave unreasonable preference to intrastate shippers in that State and were unduly prejudicial to interstate shippers in Georgia, causing an unjust discrimination against interstate commerce in violation of section 13 of the Act. The complainants asked for an order requiring the Atlantic Coast Line Railroad Company to desist from the described violations of the Act, and prescribing just, reasonable, and non-discriminatory interstate rates to be charged by the defendant carrier for the transportation of carload shipments of logs from all Florida points to all destinations in Georgia, and that the measure of such rates should be no higher than

those concurrently in effect for the same kind of property moving in intrastate commerce in Florida.

The State of Florida was notified of the proceeding, and the Florida Railroad Commission appeared in defense of the Florida intrastate rates. There were a number of interveners, including shippers of logs in intrastate commerce in Florida, Georgia lumber companies, and railroad companies operating in Florida and between Florida and Georgia, and all parties were fully heard.

In its report, the Interstate Commerce Commission stated that while the complainant assailed the rates from all Florida points, the record showed that, so far as interstate rates were concerned, relief was desired only with respect to the rates on logs "from that portion of Florida lying north of and including Jacksonville, Gainesville, Burnett's Lake, and High Springs," described as north Florida, "to destinations in Georgia for distances not exceeding 170 miles." The Commission pointed out that the Florida intrastate rates under attack were published for carload lots for 170 miles and less. The history of these rates was reviewed. With certain modifications and extensions, they were what was generally known as the "Cummer scale," which had originally been established by contract between a predecessor railroad company and a lumber company. This contract, the obligations of which were assumed by the Atlantic Coast Line Railroad Company, expired in 1918 and was not renewed. Meanwhile, in 1914, the Railroad Company had entered into a similar contract with the predecessor in interest of the intervener Brooks-Scanlon Corporation, and this contract was to continue in effect until certain timber, tributary to the line of the railroad, had been transported. Accordingly, the Railroad Company filed schedules with the Florida Railroad Commission extending the Cummer scale for described distances. The State Commission refused to permit the proposed rates to become effective because

they were applicable only on trainloads and were not available to all shippers. That Commission further advised the Railroad Company that the rates were too low and such as might be deemed confiscatory. The rates were republished to apply on carloads over all of the Company's lines in Florida. These rates, extended with respect to distances and modified by certain increases and reductions, have been continued by the Railroad Company for the purpose of complying with its contractual obligations and not because it has considered the scale to be a proper one for general application on intrastate traffic within Florida.

While not admitting that the interstate rates were unreasonable, the Railroad Company submitted to the Interstate Commerce Commission a proposal for their revision. The Commission made a tabular comparison of the existing interstate and intrastate rates and the proposed interstate rates from north Florida, and after a further statement of the evidence concluded that the interstate rates thus proposed were reasonable.

The Commission then made the following findings as to interstate and intrastate rates:

"We find that the interstate rates on logs, except walnut, cherry, and cedar, in carloads, from points on defendant's lines in Florida north of and including Jacksonville, Gainesville, Burnett's Lake, and High Springs, to destinations on its lines in Georgia for distances not exceeding 170 miles are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, the following distance scale of rates in cents per 100 pounds, minimum weight 40,000 pounds, which rates we find are and will be reasonable: [inserting schedule] . . .

"We further find that the Florida intrastate rates assailed, which are lower than the interstate rates herein found reasonable for corresponding distances, result, and

will result, in undue preference and advantage of shippers of intrastate traffic within the State of Florida, in undue prejudice to shippers of interstate traffic from points in the State of Florida to points in the State of Georgia, and in unjust discrimination against interstate commerce.

"We further find that said undue preference and advantage, undue prejudice, and unjust discrimination can and should be removed by the establishment of rates for intrastate application within Florida which shall correspond with the rates herein found reasonable for interstate application from Florida to Georgia.

"We further find that whether the aforesaid rates pertain to transportation in interstate commerce or to transportation in intrastate commerce the transportation services in each instance are performed by defendant under substantially similar circumstances and conditions."

The order of the Commission, entered upon this report, after prescribing the interstate rates from northern Florida to Georgia, continued with respect to intrastate rates in Florida as follows:

"It is further ordered, That said defendant be, and it is hereby notified and required to cease and desist from practicing the undue preference and advantage, undue prejudice, and unjust discrimination found in said report to exist in the relation of intrastate and interstate rates and to establish, put in force, and maintain rates for the transportation of logs, except walnut, cherry, and cedar, in carloads, minimum weight 40,000 pounds, in intrastate commerce within the State of Florida which shall be the same as those prescribed in the next preceding paragraph hereof as reasonable for transportation in interstate commerce from points in the State of Florida to destinations in the State of Georgia."

This order, as already stated, was amended so as definitely to provide that the requirement as to intrastate

rates should apply throughout the entire State of Florida, without exception. In making this amendment there was no further report or finding of the Commission.

We agree with the conclusion of the District Court that, on the facts that have been found by the Commission, the order with respect to intrastate rates in its statewide application cannot be sustained by reason of a proper determination of undue prejudice " as between persons or localities in intrastate commerce on the one hand and interstate . . . commerce on the other hand." Interstate Commerce Act, sec. 13 (4). The limitation of the Commission's finding as to interstate rates, and of the order prescribing them, to transportation from points in the northern part of Florida to points in Georgia, defined the interstate commerce which was deemed to be concerned. All of this commerce was potential, no actual movement from Florida to Georgia having been shown. It would be an extreme and unwarranted assumption that to protect this interstate commerce from unjust discrimination as between persons or localities, it was necessary to alter the existing rates for the transportation of logs between all points whatever within Florida. Such a conclusion would not only require evidence to support it but findings of appropriate definiteness to express it. *Illinois Central Railroad Company* v. *State Public Utilities Commission,* 245 U. S. 493, 507, 508; *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563, 579, 580; *New York* v. *United States,* 257 U. S. 591, 600. The District Court, again examining the record upon the rehearing, reaffirmed its opinion that there was no such evidence, and it is sufficient on this appeal to observe that there are no findings of proper explicitness to that effect. Recognizing that the statewide order of the Commission as to intrastate rates was upheld only because the intrastate rates were deemed to

be so low as to cause " undue discrimination against the carrier's general interstate commerce," the Government and the Commission have addressed their argument before this Court to the defense of the order upon that ground.

Dealing with the order in this aspect, we may briefly dismiss the appellants' preliminary objections in relation to the scope of the proceeding and the adequacy of the hearing before the Commission. As the Florida Railroad Commission appeared in defense of the intrastate rates, and the Railroad Company, the rates of which were in question, and other parties in interest, both shippers and carriers, were heard, the question now presented relates to the substance of the determination of the Commission and its support in the evidence rather than to mere matters of pleading and procedure. In making its order, the Commission could exercise all the authority conferred by the Interstate Commerce Act for the purpose of removing such unjust discrimination as was found to exist. If the Commission had made adequate findings supported by evidence upon the point under consideration, we should not be disposed to conclude that the order must be upset because of the manner in which the proceeding was initiated or of the generality of the allegations of the complaint.

Nor do we find that the order exceeds the authority of the Commission in the view that the intrastate rates under consideration were not " made or imposed " by authority of the State within the meaning of section 13 (3) of the Act. While the " Cummer scale " of rates was not prescribed by the Florida Railroad Commission and was not the result of any affirmative action on its part, these rates were maintained in intrastate commerce subject to the authority of the State and were published as required by its laws. These rates may thus be regarded as made by the authority of the State and within the purview of the Act unless its provisions disclose an intention to ex-

clude intrastate rates of this sort. But it is clear that the fundamental purpose of the Congress in enacting section 13, subdivisions (3) and (4), was to reach intrastate rates that were found to result in unjust discrimination against interstate commerce. It was not the fact that the rate was affirmatively prescribed by the State, but that it was maintained as an intrastate rate, and as such was inimical to the proper interests of interstate commerce, that led the Congress to give to the Interstate Commerce Commission express authority to take cognizance of that rate and to prescribe the intrastate rate that should be charged thereafter in order to remove the undue discrimination. See *Board of Railroad Commissioners* v. *Great Northern Railway Company,* 281 U. S. 412, 424–428. The provision of section 13 (3) for notice to, and conference with, the authorities of the State, is important not only where the rates have been prescribed by the State, but also where they are in force with the permission of the State and, as intrastate rates, would otherwise be subject to the jurisdiction of the State. To hold, as some of the appellants urge, that there can be no adjustment of intrastate rates by the Interstate Commerce Commission so far as may be needed to protect interstate commerce until the State itself has first " sat in judgment on the issue of the lawfulness of those intrastate rates " would be to impose a limitation not required by the terms of the statute and repugnant to the grant of authority.

The power of the Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove an unjust discrimination against interstate commerce is not open to dispute. *Houston, East & West Texas Railway Company* v. *United States,* 234 U. S. 342; *Illinois Central Railroad Company* v. *State Public Utilities Commission, supra; Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company, supra; Arkansas Railroad Commission* v. *Chi-*

cago, Rock Island & Pacific Railroad Company, 274 U. S. 597; *Alabama* v. *United States*, 279 U. S. 229. In the exercise of this power, the Congress has given to the Commission authority not only to remove an undue prejudice as between persons or localities, but to establish a statewide level of intrastate rates when this is found to be necessary to accomplish the purpose of the statute. In construing the statute this Court has held that the general provision of section 13 (4) prohibiting "unjust discrimination against interstate commerce" and authorizing the Commission to establish intrastate rates to prevent such discrimination, is to be read in connection with section 15a, both of which were added by Transportation Act, 1920 (secs. 416, 422, 41 Stat. 484, 488). There is what this Court has called a "dovetail relation" between the two provisions. The authority granted by section 13 (4) is thus to be considered in the light of the affirmative duty of the Commission to fix rates and to take other important steps to maintain an adequate national railway system.

As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the Act requires that intrastate traffic should pay "a fair proportionate share" of the cost of maintenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company, supra; New York* v. *United States, supra* (pp. 585, 586).

The question in the present cases, then, is not one of authority, but of its appropriate exercise. The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state

power, the justification of the exercise of the federal power must clearly appear. *Illinois Central Railroad Company* v. *State Public Utilities Commission, supra.* The Commission has no general authority to regulate intrastate rates and the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates. *Arkansas Railroad Commission* v. *Chicago, Rock Island & Pacific Railway Company, supra.* If the action of the Commission is not simply for the removal of undue prejudice against interstate commerce as between persons or localities, and the Commission undertakes to prescribe a statewide level of intrastate rates in order to avoid an undue burden, from a revenue standpoint, upon the interstate carrier, there should be appropriate findings upon evidence to support an order directed to that end. Thus, in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company, supra* (at p. 566) where the question related to the general level of intrastate passenger fares, there were findings as to the effect of the maintenance of the intrastate fares upon the revenues of the carriers, warranting the ultimate finding of undue discrimination against interstate commerce as a whole. Similar facts were shown in *New York* v. *United States, supra* (at p. 601). In the present instance, the Commission did not undertake to establish a statewide level of rates for the interstate transportation of logs, and in order to sustain the statewide order as to intrastate rates (as one needed to avoid an undue burden on the revenues of the carrier and a consequent interference with the maintenance of an adequate transportation system) it must appear that there are findings, supported by evidence, of the essential facts as to the particular traffic and revenue, and the effect of the intrastate rates, both as existing and as prescribed, upon the income of the carrier, which would justify that conclusion.

In the paragraph, which we have quoted, containing the ultimate finding of the Commission with respect to the unjust discrimination caused by the existing intrastate rates as between persons and localities, there is a concluding clause that the intrastate rates result "in unjust discrimination against interstate commerce." This general statement in the language of the statute, neither standing alone nor taken in its context, could be regarded as sufficient to support a statewide order from the standpoint of income, in the absence of supporting findings of fact as to the revenue from the traffic in question.

In its report, the Commission stated that the Florida Railroad Commission, and the interveners from that State, had contended that the intrastate rates were remunerative to the carrier. The State Commission introduced a cost study to support its contention, and the carrier also submitted evidence as to the cost of transporting logs on its line. The Interstate Commerce Commission said that both cost studies were based on "arbitrary assumptions" and that neither could be accepted "to show the approximate actual cost of transporting logs in single carloads intrastate throughout Florida." The Commission made a comparison of "present interstate and intrastate rates and the proposed interstate rates from north Florida in cents per 100 pounds, and the earnings thereunder per car of 50,000 pounds for distances to 170 miles." The "earnings" thus set forth were merely the amounts receivable per car for the given number of pounds under the rates for the prescribed distances. The Commission also stated that the carrier had shown that the earnings under the Florida intrastate rates on logs were materially lower than the earnings under the interstate rates from Florida to Georgia on brick, sand, lime and cement. Comparing the Florida intrastate rates on logs with other intrastate rates and with interstate rates, the Commission reached the conclusion that the intrastate rates assailed were less than reasonably compensatory.

But to justify the Commission in the alteration of intrastate rates, it was not enough for the Commission merely to find that the existing intrastate rates on the particular traffic were not remunerative or reasonably compensatory. The authority to determine the reasonableness *per se* of intrastate rates lay with the state authorities and not with the Interstate Commerce Commission. In dealing with unjust discrimination as between persons and localities in relation to interstate commerce, the question is one of the relation of rates to each other. In considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carrier's revenue, the question is that of the relation of rates to income. The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage.[1] *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company, supra.* The Commission stated in its report that witnesses for the Florida interveners had testified "that any material increase in the Florida intrastate rates would either cause them to move their plants to the timber or abandon operations," and that in either event the carrier would lose considerable traffic.

The Commission made no findings as to the revenue which had been derived by the carrier from the traffic

[1] In the Florida Fertilizer Case, 151 I. C. C. 602, the Interstate Commerce Commission, in refusing to order an increase in the Florida intrastate rates on fertilizer, said: "Furthermore, it is not certain that if the Florida intrastate rates were increased to the interstate level, additional revenue would accrue to the carriers, for if the prophecies of the interior plants and of the Florida commission are justified, practically all shipments would be made from the ports with the result that the total charges would probably be no greater than they now are."

in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service.

The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (*The Beaumont, Sour Lake & Western Railway Company* v. *United States*, *ante*, p. 74), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported. If the facts as to intrastate transportation of logs in Florida are such as to justify an order as to intrastate rates in order to end an unjust discrimination as against interstate commerce either as between persons and localities, or because of an undue burden upon the revenues of the carrier, the Interstate Commerce Commission is still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require.

We conclude that the portion of the order of the Commission which is now under review, with respect to intrastate rates, is not supported by the findings of the Commission and this part of the order must be set aside.

Decrees reversed.

WILLCUTS, COLLECTOR OF INTERNAL REVENUE, *v.* BUNN.

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

No. 22. Argued December 2, 1930.—Decided January 5, 1931.

1. The profits derived by an investor in municipal bonds from their sale by him at a higher price are taxable as income under the Revenue Act of 1924. P. 223.
2. Federal taxation of such profits is not unconstitutional as a tax on state instrumentalities. So *held* where it did not appear that the bonds had been issued at a discount so that the gain derived from their resale could be considered to be in lieu of interest. P. 224.
3. The power to tax is no less essential to our governmental system than the power to borrow money. To preserve the latter, it is not necessary to cripple the former by exempting subjects which fall within the general application of non-discriminatory tax laws, where their taxation lays no direct burden upon a governmental instrumentality, and exerts only a remote, if any, influence upon the exercise of the functions of government. P. 225.
4. In the case of the bonds of a State or its political subdivisions, the subject held to be exempt from federal taxation is the principal and interest of the bonds. Such obligations being contracts of the State or subdivision, a tax upon the amounts payable by their terms has been regarded as bearing directly upon the exercise of the governmental borrowing power. P. 226.
5. But sales of such bonds by their owners, after they have been issued, are transactions distinct from the governmental contracts in the bonds; and the profits on such sales are in a different category of income from the interest payable on the bonds. P. 227.
6. Sales of such bonds by those who have invested in them cannot be deemed inseparably connected with the exercise of the borrowing power of the State, so as to make immune from federal taxation the profits of the sales. P. 228.
7. Before the power of Congress to lay the excise in question can be denied as imposing a burden upon the State's borrowing power, it must be made to appear that the burden is real, not imaginary; substantial, not negligible. Pp. 230, 234.

8. The assertion that such taxes operate to burden governmental power to borrow, is at variance with uniform and long established practice. The history of income tax legislation is persuasive, if not controlling, upon this question of practical effect. Pp. 232, 234.

35 F. (2d) 29, reversed.

CERTIORARI, 280 U. S. 551, to review a judgment affirming a recovery by the present respondent in his suit against the Collector for money paid the latter, under protest, as an additional income tax.

Assistant Attorney General Youngquist, with whom *Attorney General Mitchell,* and *Messrs. J. Louis Monarch* and *Morton Poe Fisher,* Special Assistants to the Attorney General, *Clarence M. Charest,* General Counsel, and *T. H. Lewis, Jr.,* Special Attorney, Bureau of Internal Revenue, were on the brief, for petitioner.

When bonds are sold by a municipality, the price is the then market price. The prospect of profit in excess of the interest or discount is not held out as an inducement. Possible profit from resale, as well as possible loss, depends upon eventualities. It is one of the risks accepted by the owner. The interest on the bond comes to the owner without further effort on his part. It is an exact obligation of the municipality, met with regularity. But gains or losses from sale by the owner result from a combination of factors, including business judgment and sagacity in purchases and sales. The gain, briefly, is derived from a combination of capital, industry, and skill. *Tax Commissioner* v. *Putnam,* 227 Mass. 522, 531. And the tax upon income, including such gain, is not a tax upon any sum received pursuant to the contract provisions of the bond. It is submitted that the use of the general term "income" in certain of the opinions of this Court dealing with the immunity of obligations of the States from taxation by the United States, or *vice versa,*

is not controlling on the question of the immunity of the particular sort of "income" represented by such a gain.

The rulings of the Treasury Department (O. D. 647, 3 C. B. 123; O. D. 737, 3 C. B. 49; O. D. 762, 4 C. B. 31) have consistently held that where a municipality originally issues a bond at a discount and redeems it at par, the return represented by the discount is interest in another form and not taxable; but the exemption has been limited to the amount of the discount, and profit resulting to the holder from the sale has been held taxable.

The court below held that a tax upon income, to the extent that it includes gain from the sale of exempt securities, is an unwarranted interference with and burden upon the exercise by the municipality of the vital function of borrowing money. This conclusion was based upon the premise that the tax would have an economic effect upon the price of such securities. The theory is applicable to the present case only if the United States is restrained by a rule, without exception, to the effect that it can not levy any tax which may, to the slightest perceptible degree, place a burden upon the marketing of municipal securities, or to such degree render them less saleable. *Plummer* v. *Coler,* 178 U. S. 115, 136, 137, demonstrates that the rule is by no means so stringent. See also *Orr* v. *Gilman,* 183 U. S. 278; *Greiner* v. *Lewellyn,* 258 U. S. 384.

The relation of the tax to the security in this case is more remote than a tax on transfers of decedents' estates measured by a value which includes exempt securities. The injury here is neither obvious nor appreciable. The borrowing capacity of States and municipalities has not been curtailed. See *National Life Ins. Co.* v. *United States,* 277 U. S. 508, 532.

The cost to States, counties, and cities of borrowed money has remained practically constant in a rising money

market. Grimes & Craigue, Principles of Valuation, 1928, p. 204.

See *Nauts* v. *Slayton,* 36 F. (2d) 145, 147; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Macallen Co.* v. *Massachusetts,* 279 U. S. 620; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523; *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232; *Gillespie* v. *Oklahoma,* 257 U. S. 501.

The broad provisions of the income tax laws were intended to include income generally. *Irwin* v. *Gavit,* 268 U. S. 161, 166. It is clear that § 213 (a) of the Revenue Act of 1924, is broad enough to require gains from the sale of municipal securities to be included in gross income. The provisions of the Constitution will not preclude such tax unless the burden is obvious and appreciable. Every presumption is in favor of the constitutionality of an Act of Congress. *Nicol* v. *Ames,* 173 U. S. 509; *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *St. Louis S. W. Ry.* v. *Arkansas,* 235 U. S. 350, 369.

Mr. Charles Bunn for respondent.

The fundamental basis of the exemption of instrumentalities of States from federal taxation (and *vice versa*) is no doubt still the necessity of self-preservation announced in *Collector* v. *Day,* 11 Wall. 113. But this Court has made it clear that there are certain instrumentalities of States so closely connected with their existence as independent Governments that any tax upon them by the United States is void. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 524.

Where the instrumentality is of this class, exemption does not depend upon degree of burden. *Gillespie* v. *Oklahoma,* 257 U. S. 501, 505; *Metcalf & Eddy* v. *Mitchell, supra,* p. 522. In this class fall municipal securities. *Weston* v. *Charleston,* 2 Pet. 449, 468; *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, s. c., 158 U. S. 601.

This Court has not made close distinctions between income generally and the special form of income strictly known as interest. In several cases where the income was held to be exempt it was not interest at all. *Gillespie* v. *Oklahoma, supra; Choctaw & Gulf R. Co.* v. *Harrison,* 235 U. S. 292. And in other cases where the income was strict interest the Court has generally rested the exemption on the broader ground, that it was income. *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 583–586, 601–604 652, 653, s. c., 158 U. S. 618, 666, 680, 693.

Nor has this Court made close distinctions as to the manner in which income from exempt instrumentalities is made. The principle is not that payments made by the municipality are free from tax because so paid, but that " the right to tax the contract, to any extent, when made must operate upon the power to borrow before it is exercised, and have a sensible influence upon the contract. The extent of this influence depends upon the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of the government." *Weston* v. *Charleston,* 2 Pet. 449, 468.

It is therefore clearly settled that any direct tax by either Government on income from the public securities of the other is prohibited. The remaining question is whether the income in this case was in fact derived from the municipal securities in question or whether it was, as claimed by the petitioner, " derived from a combination of capital, industry and skill."

Respondent is not a dealer in securities. He bought these bonds for cash, and as investments. He held them for five years. It is very difficult in fact to assign the profit which he realized upon the sale to anything except the securities themselves. It was simply a portion of the income which he made by the investment of his capital. In *Eisner* v. *Macomber,* 252 U. S. 189, at p. 207, this Court defined " gain derived from capital." Within that defini-

tion, this income was derived from the capital invested in these securities, and not from industry or labor.

The contention that a direct tax on the income from municipal securities is void is not weakened by a demonstration that Federal Estate Tax may be imposed on the transfer of state bonds (*Greiner* v. *Lewellyn,* 258 U. S. 384), or *vice versa* (*Plummer* v. *Coler,* 178 U. S. 115), or that a State may tax bank shares at a value based in part on the bank's holding of federal securities (*Van Allen* v. *Assessors,* 3 Wall. 573), or that Congress may tax banks although part of their deposits are state funds (*Manhattan Co.* v. *Blake,* 148 U. S. 412), or that a corporation excise tax may be measured by net income which includes interest from tax exempt securities (*Flint* v. *Stone Tracy Co.,* 220 U. S. 107). In all these cases the tax is on a legitimate and separate subject of taxation, and is not held improper (subject to the limitation enforced in *Macallen Co.* v. *Massachusetts,* 279 U. S. 620) because part of the measure of the tax results from property which would be exempt if taxed directly. So no doubt it would be proper to impose an excise tax on the business of dealing in securities, measured by the profits of the business, although some of the securities dealt in were municipals. But that is not this case.

The tax is illegal because it is in fact an appreciable burden upon the borrowing power of the States. It cannot be disputed that the usual inducements to an investment purchase of securities are two: the direct return in dividends or interest expected, and the hope of profit by increased value of the security itself. The second inducement is no doubt most present in the case of common stocks, but that it is absent in the case of fixed income securities is not a safe assumption. The State, like other solvent borrowers, may sell securities either at high coupon rates at par or at a premium, or at low coupon rates at a discount below par. Most private borrowers

find it good business to adopt the latter plan. The reason obviously is that the certain increment of value as bonds approach maturity induces lenders to accept a lower direct interest return. Also, in a time of generally high interest rates, fixed interest securities are favored by competent investors because they know that, as the going rates of interest decline, the value of the security itself is certain to increase. That increment in many cases can only be realized by sale. A tax upon it is a tax on a gain that the investor hopes to make by his investment. Necessarily it tends to compel a higher coupon rate upon state bonds than would otherwise be needed. It is a burden on the State, only one step less direct than a tax on the interest itself.

This was the view of both the courts below, and was quite recently the view of the Treasury Department as to federal securities, as evidenced by bills prepared by the Department and recommended by the Secretary to the Congress, to authorize the sale of Treasury bills, non-interest bearing, upon a discount basis. See United States Daily, Apr. 23, 1929, pp. 429, 435, Apr. 25, 1929, p. 457. The bills were passed in an amended form. Act of June 17, 1929, c. 26, 46 Stat. 19. But the form in which they were prepared by the Department demonstrates its expert view that taxation by the States on the profits made by sale of federal securities would affect adversely the excellent market which such securities command. The burden works both ways, and, if this conclusion of the Treasury was right, it follows that federal taxation of gains made on sale of municipal securities is a burden on the States. As such, it is invalid.

Messrs. Joseph E. Warner, Attorney General of Massachusetts, *R. Ammi Cutter,* Assistant Attorney General, and *Henry F. Long,* Commissioner of Corporations and

Taxation, by special leave of Court, filed a brief on behalf of the Commonwealth of Massachusetts as *amicus curiae.*

Messrs. Hamilton Ward, Attorney General of New York, and *Henry S. Manley,* Assistant Attorney General, by special leave of Court, filed a brief on behalf of the State of New York as *amicus curiae.*

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

The respondent, Charles W. Bunn, in the years 1919 and 1920, purchased for cash, as investments, bonds issued by various counties and cities in the State of Minnesota. In January, 1924, he sold these bonds, realizing a net profit of $736.26. Upon this net profit, less a net loss of $41.20 suffered by him on similar bonds held less than two years, the Commissioner of Internal Revenue determined an additional income tax in the amount of $85.44. The plaintiff paid this amount to the Collector, under protest, and claimed a refund upon the ground that the tax was illegal because assessed upon income from municipal bonds. The claim was rejected and this suit was brought against the Collector to recover the money paid.

The complaint, alleging these facts, charged that the Revenue Act of 1924, if thus applied, was unconstitutional and void in that the tax was laid upon the instrumentalities of States. Demurrer to the complaint was overruled by the District Court, and, the defendant having declined to plead further, judgment was entered for the plaintiff. The judgment was affirmed by the Circuit Court of Appeals, and this Court granted a writ of certiorari.

The Revenue Act of 1924 (c. 234, sec. 213, 43 Stat. 253, 267, 268, U. S. C. Tit. 26, sec. 954) clearly authorized the

tax. The Act included in the term "gross income" the gains and profits derived from "sales, or dealings in property, whether real or personal." See *Irwin* v. *Gavit*, 268 U. S. 161, 166. The Act gave an express exemption to "interest upon the obligations of a State, Territory or any political subdivision thereof," but this exemption was not extended to profits realized on the sale of such obligations, and the statement of the Government is not challenged that it has been the uniform practice of the Treasury Department in administering the federal income tax acts to include in taxable income the gain derived from the sale of state and municipal bonds.

The authority of the Congress to lay a tax on the profit realized by an investor from the sale or conversion of capital assets in general is not open to dispute and is not disputed. That is a matter of governmental policy and not of constitutional power.[1] The question raised here is not because the securities sold were capital assets but because they were governmental in character.

The question is further limited by the fact that it does not appear that the securities were issued at a discount, so that the gain derived could be considered to be in lieu of interest. Whatever questions might arise in cases of that sort are not now before the court.[2] The present case is simply one of profit obtained from purchase and sale, without qualification by any special circumstances.

The well-established principle is invoked that a tax upon the instrumentalities of the States is forbidden by

[1] *Merchants' Loan and Trust Co.* v. *Smietanka*, 255 U. S. 509, 519, 520; *Goodrich* v. *Edwards*, 255 U. S. 527; *Walsh* v. *Brewster*, 255 U. S. 536.

[2] It appears that the Treasury Department has ruled that where a municipality originally issues a bond at a discount and redeems it at par, the return represented by the discount is interest in another form and is not taxable. See O. D. 647, Cumulative Bulletin No. 3, July–December, 1920, p. 123; O. D. 737, *id.* p. 49; O. D. 762, Cumulative Bulletin No. 4, January–June, 1921, p. 31.

the Federal Constitution, the exemption resting upon necessary implication in order effectively to maintain our dual system of government.[3] The familiar aphorism is " that as the means and instrumentalities employed by the General Government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the General Government." *Ambrosini* v. *United States,* 187 U. S. 1, 7. And a tax upon the obligations of a State or of its political subdivisions falls within the constitutional prohibition as a tax upon the exercise of the borrowing power of the State. *Pollock* v. *Farmers' Loan & Trust Company,* 157 U. S. 429, 584–586; *id.,* 158 U. S. 601, 618; *National Life Insurance Company* v. *United States,* 277 U. S. 508, 521.

The limitation of this principle to its appropriate applications is also important to the successful working of our governmental system. The power to tax is no less essential than the power to borrow money, and, in preserving the latter, it is not necessary to cripple the former by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government. This distinction has had abundant illustration. Thus, while the salary of an officer of the State cannot be taxed by the Federal Government, the compensation paid by a State or a municipality to a

[3] *Collector* v. *Day,* 11 Wall. 113, 127; *United States* v. *Railroad Company,* 17 Wall. 322, 327; *Mercantile Bank* v. *New York,* 121 U. S. 138, 162; *Pollock* v. *Farmers' Loan & Trust Company,* 157 U. S. 429, 584–586; *id.,* 158 U. S. 601, 618; *Ambrosini* v. *United States,* 187 U. S. 1, 17; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523; *National Life Insurance Company* v. *United States,* 277 U. S. 508, 521.

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consulting engineer, who is neither an officer nor an employee of government, for work on public projects, may be subjected to a federal income tax. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 524. No constitutional implications prohibit a non-discriminatory tax upon the property of an agent of government merely because it is the property of such an agent and used in the conduct of the agent's operations and necessary for the agency. *McCulloch* v. *Maryland,* 4 Wheat. 316, 436; *Railroad Company* v. *Peniston,* 18 Wall. 5, 33; *Central Pacific Railroad Company* v. *California,* 162 U. S. 91, 126; *Baltimore Shipbuilding Company* v. *Baltimore,* 195 U. S. 375, 382; *Choctaw, Oklahoma & Gulf Railroad Company* v. *Mackey,* 256 U. S. 531, 537. The Congress may tax state banks upon the average amount of their deposits, although deposits of state funds by state officers are included. *Manhattan Company* v. *Blake,* 148 U. S. 412. Both the Congress and the States have the power to tax transfers or successions in case of death, and this power extends to the taxation by a State of bequests to the United States, and to the taxation by the Congress of bequests to States or their municipalities. *United States* v. *Perkins,* 163 U. S. 625; *Snyder* v. *Bettman,* 190 U. S. 249, 253, 254.

In the case of the obligations of a State or of its political subdivisions, the subject held to be exempt from federal taxation is the principal and interest of the obligations. *Pollock* v. *Farmers' Loan & Trust Company, supra.* These obligations constitute the contract made by the State, or by its political agency pursuant to its authority, and a tax upon the amounts payable by the terms of the contract has therefore been regarded as bearing directly upon the exercise of the borrowing power of the government. In *Weston* v. *Charleston,* 2 Pet. 449, 468, 469, where the tax, laid under an ordinance of the city council upon United States stock which had been issued for loans made to the United States, was held invalid, the principle was

thus stated by Chief Justice Marshall: "The right to tax the contract to any extent, when made, must operate upon the power to borrow, before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. . . . The tax on government stock is thought by this Court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently, to be repugnant to the constitution." This language was applied by the Court in *Pollock* v. *Farmers' Loan & Trust Company, supra* (157 U. S. at p. 586) in holding invalid federal taxation "on the interest" from municipal securities.

But it does not follow, because a tax on the interest payable on state and municipal bonds is a tax on the bonds and therefore forbidden, that the Congress cannot impose a non-discriminatory excise tax upon the profits derived from the sale of such bonds. The sale of the bonds by their owners, after they have been issued by the State or municipality, is a transaction distinct from the contracts made by the government in the bonds themselves, and the profits on such sales are in a different category of income from that of the interest payable on the bonds. Because the tax in question is described as an "income tax" and the profits on sales are included in "income," the distinction is not lost between the nature of a tax applied to interest and that of a tax applied to gains from sales. The federal income tax acts cover taxes of different sorts. *Brushaber* v. *Union Pacific Railroad Company,* 240 U. S. 1, 17; *Stanton* v. *Baltic Mining Company,* 240 U. S. 103, 114. The tax upon interest is levied upon the return which comes to the owner of the security according to the provisions of the obligation and without any further transaction on his part. The tax falls upon the owner by virtue of the mere fact of ownership, regard-

less of use or disposition of the security. The tax upon profits made upon purchases and sales is an excise upon the result of the combination of several factors, including capital investment and, quite generally, some measure of sagacity; the gain may be regarded as "the creation of capital, industry and skill." *Tax Commissioner* v. *Putnam,* 227 Mass. 522, 531.

The tax not being on the obligations of the State or municipality, or on the investment therein, as such, the question is whether the tax must nevertheless be held to be invalid because sales by investors are to be deemed inseparably connected with the exercise of the borrowing power of the State. When the Constitution prohibits States from laying duties on imports, the prohibition not only extends to a tax upon the act of importing, but also to one upon the occupation of the importer or upon the articles imported. A tax on the sale of an article, imported only for sale, is a tax on the article itself. *Brown* v. *Maryland,* 12 Wheat. 419, 444. Similarly, with respect to federal taxation of articles exported from any State, the constitutional inhibition gives immunity to the process of exportation and to the transactions and documents embraced in that process. *Fairbank* v. *United States,* 181 U. S. 283; *United States* v. *Hvoslef,* 237 U. S. 1; *Thames & Mersey Marine Insurance Company* v. *United States,* 237 U. S. 19. Only on that construction can the constitutional safeguard be maintained. Again, when the United States has assumed duties with respect to Indian lands, a State cannot impose an occupation or privilege tax on operations conducted in or upon such lands by lessees who have been constituted federal instrumentalities for the purpose of discharging the Government's obligation, *Choctaw, Oklahoma & Gulf Railroad Company* v. *Harrison,* 235 U. S. 292, 298, or upon the leases themselves or capital stock representing them, *Indian Territory Illumi-*

nating Oil Company v. *Oklahoma*, 240 U. S. 522, 530, or upon the net income of such a lessee, *Gillespie* v. *Oklahoma*, 257 U. S. 501, 504. See, also, *Jaybird Mining Company* v. *Weir*, 271 U. S. 609, 612.[4] These cases are not analogous to the one under consideration. If the tax now in question is to be condemned, it must be because of practical consequences and not because purchases and sales by private owners of state and municipal bonds are a part of the State's action in borrowing money. It would be far-fetched to say that such purchases and sales are instrumentalities of the State. They are not transactions made directly or indirectly in behalf of the State or in the course of the performance of any duty of the State. Sales are merely methods of transferring title to the obligation, that is, the right to receive performance of the promise of the State or municipality.

That a transfer of government bonds is not inseparably connected with the exercise of the Government's borrowing power so as to make the transfer *per se* immune from taxation is clearly demonstrated by the decisions upholding non-discriminatory taxation laid upon the transmission of such securities upon the death of the owner. This Court has decided that a State may lay a transfer tax upon a legacy although it consists entirely of bonds of the United States, *Plummer* v. *Coler*, 178 U. S. 115, and that the Congress may tax the transfer of the net assets of a decedent's estate although municipal bonds are included in determining the net value, *Greiner* v. *Lewellyn*, 258 U. S. 384. In *Plummer* v. *Coler*, *supra* (p. 125), the tax of the State was sustained, despite the provision of the Act of Congress under which the bonds were issued that they should be exempt "from taxation in any form by or under State, municipal, or local authority." *Id.*, pp. 134,

[4] Compare *McCurdy* v. *United States*, 246 U. S. 263; *Shaw* v. *Gibson-Zahniser Oil Corporation*, 276 U. S. 575, 578, 579.

135; Act of July 14, 1870, c. 256, sec. 1, 16 Stat. 272; Rev. Stat., sec. 3701; U. S. C., Tit. 31, sec. 742. See, also *Orr* v. *Gilman,* 183 U. S. 278, 289; *Blodgett* v. *Silberman,* 277 U. S. 1, 12, 13. And in *Greiner* v. *Lewellyn, supra* (p. 387), the Court said that "the estate tax . . . like the earlier legacy or succession tax, is a duty or excise, and not a direct tax like that on income from municipal bonds. *Pollock* v. *Farmers' Loan & Trust Company, supra.* . . . Municipal bonds of a State stand in this respect in no different position from money payable to it. The transfer upon death is taxable, whatsoever the character of the property transferred and to whomsoever the transfer is made. It follows that in determining the amount of decedent's net estate municipal bonds were properly included." On similar grounds, as the Federal Government has power to tax transfers of property by gift *inter vivos, Bromley* v. *McCaughn,* 280 U. S. 124, there would seem to be no question of its constitutional authority to include in such taxation gifts of state or municipal securities.

It is urged, however, that a federal tax on the profits of sales of such securities should be deemed, as a practical matter, to lay such a burden on the exercise of the State's borrowing power as to make it necessary to deny to the Federal Government the constitutional authority to impose the tax. No facts as to actual consequences are brought to our attention, either by the record or by argument, showing that the inclusion in the federal tax of profits on sales of state and municipal bonds casts any appreciable burden on the States' borrowing power. We are left to the inadequate guidance of judicial notice. It may be considered to be a matter of common knowledge that the bonds of States and their municipalities are for the most part purchased for investment. But while, in the language of the tax act regarding deductions for losses, the purchase of municipal bonds for investment, as in the

case of other investments, may be regarded as "entered into for profit" as distinguished from mere personal use, it may be doubted whether the prospect on the part of the ordinary investor of obtaining profit on the resale of such obligations is so important an element in inducing their acquisition that a federal tax laid on such profits, in common with profits derived from the sales of other property, constitutes any substantial interference with the functions of state governments. While the tax is laid on gains, there is also a deduction for losses on sales, and whether investors in such securities would consider it an advantage if both provisions were eliminated is a matter of mere speculation. It must be remembered that we are dealing, not with any express constitutional restriction, but only with an asserted implication. The constitutional provisions authorizing the Congress to lay taxes (Article I, Section 8; Sixteenth Amendment) are certainly broad enough to cover the tax in question, and before we can restrict their application upon the ground of a burden cast upon the State's borrowing power, where the tax is not laid upon the contracts made by the State in the exercise of that power, or upon the amounts payable thereunder, but is laid upon the result of distinct transactions by private owners, it must clearly appear that a substantial burden upon the borrowing power of the State would actually be imposed. But we have nothing but assertion and conjecture. The assertion might as easily be made as to the necessity of the complete immunity of such securities from federal taxation in the case of estate taxes, and, if mere conjecture were sufficient as to the possibility of a burden being cast by the tax on the essential authority of the State, it could be as readily entertained in the one case as in the other. Indeed, the existence of the illegal burden might be more easily assumed in the case of the estate tax, where the entire value of the securities, and not merely gains on sales, are taken into the reckoning in determining the amount of the tax.

There is, however, an outstanding fact, more important than any possible conjecture. That fact is found in uniform and long-established practice. This practice clearly indicates that neither the Federal Government nor the States have found a tax on the profits of the sales of their securities to be a burden on their power to borrow money. So far as we are advised, the Federal Government has not at any time deemed it to be necessary to exempt from taxation the profits realized by owners on the sale of its obligations, with the exception, recently made, of short-term Treasury bills issued on a discount basis and payable without interest.[5] Such profits are included in the general

[5] In *Gray* v. *Darlington*, 15 Wall. 63, where the question related to the federal tax under the Act of March 2, 1867, 14 Stat. 477, 478, upon the profits on the sale of bonds of the United States, the point of the decision was that the statute applied only to *annual* "gains, profits and income" and did not extend to the increase in value of the bonds which had taken place in several prior years and was realized in the preceding year. But it was not questioned that annual gains or profits on the sale of government bonds were taxed by the Act. See *Hays* v. *Gauley Mountain Coal Co.*, 247 U. S. 189, 191.

In O. D. 729, Cumulative Bulletin No. 3, July–December, 1920, pp. 123, 124, the Treasury Department ruled: "In the case of Treasury certificates of indebtedness which are offered by the Government at par and accrued interest and not at a discount, only the coupon interest can be considered exempt from normal tax, and from surtax to the extent provided by the act approved September 24, 1917. Where such certificates are subsequently purchased at a discount, the difference between the purchase price and the par value of the certificates received at maturity is profit subject to both normal tax and surtax. The subscriber for Treasury certificates who sells them at a discount sustains a deductible loss, which is the difference between the par value of the certificates and the selling price. Any gain or loss on the sale of Treasury certificates of indebtedness prior to maturity should be determined in accordance with section 202 of the Revenue Act of 1918."

In the 71st Congress, 1st session, an amendment was proposed to section 5 of the Second Liberty Bond Act as amended (40 Stat. 290,

phrase "gains, profits and income" from "sales, or dealings in property," in the Act under consideration. And we understand that under all federal income tax acts, these or similar words have been construed invariably by the administrative authorities as including profits derived from the sale of state and municipal bonds. The present case appears to be the first in which the tax in this respect has been assailed. No State has ever appeared at the Bar of this Court to complain of this federal tax, and it is not without significance that in the present instance the

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U. S. C., Tit. 31, § 754), providing for the issue of Treasury bills "on a discount basis and payable at maturity without interest" and that [subdivision (b)] all certificates of indebtedness and treasury bills issued thereunder "both as to principal and interest, *and any gain from the sale or other disposition thereof shall be exempt* from all taxation (except estate or inheritance taxes) now or hereafter imposed by the United States, or by any local taxing authority; *and no loss from the sale or other disposition thereof shall be allowed as a deduction, or otherwise recognized, for the purposes of any tax now or hereafter imposed by the United States or any of its possessions.*" H. R. 1648, 71st Cong., 1st sess. The committee reports in the Senate and House of Representatives state that the amendment, in relation to both certificates of indebtedness and the new Treasury bills, "provides that gain from the sale of either shall be tax exempt, with the necessary supplementary provision that any loss shall not be recognized. Inasmuch as these are short-term obligations, any advance in price will as a practical matter represent nothing more than interest." 71st Cong., 1st sess., H. R. Rep. No. 13, Sen. Rep. No. 9. The words above italicized were, however, omitted in the act as passed. Act of June 17, 1929, c. 26, 46 Stat. 19, 20. By Act of June 7, 1930 (c. 512, 46 Stat. 775), a similar provision as to tax on profits on sales, but limited to the short-term Treasury bills issued at a discount, was enacted. The committee report in the House of Representatives stated that the reason for this enactment was found in the special nature of such Treasury bills. 71st Cong., 2d sess., H. R. Rep. Nos. 1609 and 1759. Aside from these Treasury bills, the federal tax on profits on sales of federal securities has not been changed.

States of New York and Massachusetts do appear here as *amici curiae* in defense of the tax.[6]

The history of income tax legislation is persuasive, if not controlling, upon the question of practical effect. *Plummer* v. *Coler, supra,* (pp. 137, 138). Before the power of the Congress to lay the excise tax in question can be denied in the view that it imposes a burden upon the States' borrowing power, it must appear that the burden is real, not imaginary; substantial, not negligible. We find no basis for that conclusion, nor any warrant for implying a constitutional restriction to defeat the tax.

Judgment reversed.

URAVIC, ADMINISTRATRIX, *v.* F. JARKA COMPANY, INCORPORATED, ET AL.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 32. Argued December 8, 1930.—Decided January 5, 1931.

Section 33 of the Merchant Marine Act, which, in connection with the Employers' Liability Act, gives an action at common law to

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[6] Undoubtedly each of these States has in view the circumstance that it subjects to its own income taxation the gains derived from the sale of federal securities, and it does not desire, in the absence of an applicable legislative restriction, to be deprived of that source of revenue as a corollary of a decision against the power of the Federal Government to tax the gains derived from the sale of state securities. The State of New York disavows any claim that "the tax in question has any appreciable tendency to burden its fiscal operations" or those of its municipalities. The State of Massachusetts contends that: "1. The non-discriminatory taxation of all gains derived from the use of business knowledge and of human ingenuity in dealings in intangible property can have no material effect to impair the ability of a government to issue its bonds and obligations, even if gains from the sale of such bonds are subjected to the tax. 2. The history of the exemption of state instrumentalities from Federal taxation and of the exemption of Federal instrumentalities from state taxation reveals that the doctrine of exemption has protected governmental obligations only from taxation of the principal amount of such obligations and of the stated interest upon such obligations."

the personal representative of any "seaman" suffering death from injuries received in the course of his employment, even where such injuries are due to the negligence of a fellow servant, extends to the case of an American stevedore while engaged in unloading, in American waters, a private foreign ship. P. 237.

252 N. Y. 530, reversed.

CERTIORARI, 281 U. S. 708, to review a judgment of the Supreme Court of New York, entered on remittitur from the Court of Appeals. The judgment affirmed the dismissal of the complaint in a death action brought against the Jarka Company, an American stevedoring company, by the Administratrix.

Mr. Raymond Parmer, with whom *Mr. Vernon Sims Jones* was on the brief, for petitioner.

Neither the Merchant Marine Act itself nor the decisions of this Court which interpret it indicate that the right of a longshoreman to recover against his employer is dependent on the registry of the vessel on which the accident takes place. *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50; *Panama R. Co.* v. *Johnson,* 264 U. S. 375; *Raolaslavic* v. *New York Central R. Co.,* 245 N. Y. 91.

Section 33 of the Act is designed to affect the relationship of employer and employee. It does not affect vessels as such.

If the Act does not apply to the members of the crew of a foreign vessel, it is because Congress did not intend to legislate with regard to a relationship of master and servant which is based on a contract of employment ordinarily made under the laws of a foreign country and which exists within the United States only transiently. Cf. *Strathearn S. S. Co.* v. *Dillon,* 252 U. S. 348; *Sandberg* v. *McDonald,* 248 U. S. 185.

But, with regard to American longshoremen, whose contracts of employment are made and whose work is

performed only in the United States, there arises no problem involving foreign interests if the statute is applied to them as a class whether they are working on vessels of United States or foreign registry. *Patterson* v. *Bark Eudora,* 190 U. S. 169; *Resigno* v. *F. Jarka Co.,* 248 N. Y. 225, 240.

The weight of authority in the inferior courts is that § 33 is applicable. *Zarowitch* v. *F. Jarka Co.,* 21 F. (2d) 187; *Mahoney* v. *International Elevating Co.,* 23 F. (2d) 130; *Williams* v. *Oceanic Stevedoring Co.,* 27 F. (2d) 905; *Peterson* v. *Independent Stevedore Co.,* 37 F. (2d) 615; *McGinn* v. *North Coast Stevedoring Co.,* 149 Wash. 1; *Schotis* v. *North Coast Stevedoring Co.,* 1928 A. M. C. 616; *Ranstrom* v. *International Stevedoring Co.,* 152 Wash. 332.

Mr. Ernie Adamson for respondents.

The Act does not apply. Whenever any provision was to apply to foreign vessels, it was made so expressly. *Jackson* v. *Archimedes,* 275 U. S. 463; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 357; *Plamals* v. *Pinar del Rio,* 16 F. (2d) 985; *The Navarino,* 7 F. (2d) 743; *The Seirstad,* 27 F. (2d) 982.

Had Congress intended so to apply the Act, it would not have left so important a regulation to be gathered by implication. *Sandberg* v. *McDonald,* 248 U. S. 185. See *Nogueira* v. *New York, N. H. & H. R. Co.,* 281 U. S. 128.

If a longshoreman becomes a seaman because he does the work formerly done by members of the crew, *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50, there can be no doubt that § 33, like § 20 of the Act of 1915, must be limited to seamen at work upon domestic vessels.

The words " any seaman " mean, as is defined in Rev. Stat., § 4612, " seamen employed upon a vessel belonging to a citizen of the United States."

The question is not one of the relationship of employer and employee. The *locus in quo* controls. *Industrial*

Commission v. *Nordenholt Corp.*, 259 U. S. 50; *Nogueira* v. *New York, N. H. & H. R. Co., supra.*

The weight of authority is that § 33 is inapplicable in the case of a longshoreman injured or killed on a foreign vessel lying in domestic waters. *Plamals* v. *Pinar del Rio,* 16 F. (2d) 984, affirmed on other grounds, 277 U. S. 151; *Rainey* v. *New York & P. S. Co.,* 216 Fed. 449; *The Navarino,* 7 F. (2d) 743; *The Falco,* 20 F. (2d) 362, 364; *The Seirstad,* 27 F. (2d) 982; *Resigno* v. *Jarka,* 248 N. Y. 225; *Clark* v. *Montezuma,* 217 App. Div. 172.

Conversely, an American seaman on an American ship is entitled to the benefits of American law, even if injured in foreign waters. *Thompson Towing & W. Assn.* v. *McGregor,* 207 Fed. 209; *Rainey* v. *New York & P. S. Co.,* 216 Fed. 449; *Pallon Tulley T. Co.* v. *Turner,* 269 Fed. 334; *Panama Co.* v. *Johnson,* 289 Fed. 964; *Wenzler* v. *Robin L. S. S. Co.,* 277 Fed. 812.

Mr. George deForest Lord, by special leave of Court, filed a brief on behalf of The Cunard Steam Ship Company, Limited, as *amicus curiae.*

Mr. Justice Holmes delivered the opinion of the Court.

This is an action that was brought in a court of the State of New York and tried before a jury. At the close of the plaintiff's case the complaint was dismissed upon the merits and the decision was affirmed by the Court of Appeals, 252 N. Y. 530, on the authority of *Resigno* v. *F. Jarka Co.,* 248 N. Y. 225. A writ of certiorari was granted by this Court, 281 U. S. 708, because there is involved an important question as to the applicability of the Jones Act of 1915, c. 153, as amended by the Act of June 5, 1920, c. 250, § 33, 41 Stat. 988, 1007; U. S. Code, Title 46, § 688.

The action was for causing the death of the plaintiff's intestate, Anton Uravic, an American citizen, employed

in work as a stevedore by the F. Jarka Company, a Delaware corporation. The suit against the other defendant named was discontinued. At the time of receiving the injury that caused his death, July 13, 1926, Uravic was helping to unload a vessel flying the German flag, in the harbor of New York. He was on the vessel at the time and we are to take it that he was hurt by the negligence of a fellow servant. That fact was no defence if the above-mentioned § 33 governed, because it is not one in the case of railway employees; Act of April 22, 1908, c. 149, § 1, 35 Stat. 65; U. S. Code, Tit. 45, § 51; and this § 33, giving an action at common law to the personal representative of any seaman suffering death in the course of his employment, makes applicable all statutes of the United States conferring or regulating such right of action in the case of railway employees. It is decided that stevedores come within the benefits conferred by § 33. *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50. But the question is raised whether the statute applies to a stevedore working on a vessel that we assume to have been German, since she flew the German flag.

The language of the statute is general. The right is given to "any seaman," including, as we have said, stevedores. The jurisdiction and the authority of Congress to deal with the matter are unquestionable and unquestioned. *Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100, 124, *et seq.* The conduct regulated is of universal concern. The rights of a citizen within the territorial limits of the country are more extensively determined by the scope of actions for torts than even by the law of crimes. There is strong reason for giving the same protection to the person of those who work in our harbors when they are working upon a German ship that they would receive when working upon an American ship in the next dock, as is especially obvious in the case of stevedores who may

be employed in unloading vessels of half a dozen different flags in turn.

But it is said that stevedores only get their rights by a somewhat artificial extension of the word "seaman," and it is argued that a seaman upon a German vessel clearly would not be given the rights claimed. It is said that the word is defined by R. S. § 4612, U. S. Code, Tit. 46, § 713. But that section merely provides that for the purposes of the chapter "seaman" shall include persons who otherwise might be deemed not to be seamen. It is directed to extension not to restriction, as remarked by Judge Crane in *Resigno* v. *F. Jarka Co.,* 248 N. Y. 225, 242. Then it is argued that the grant of jurisdiction to the Court of the District in which the defendant employer resides or has his principal office, without granting a proceeding *in rem* in the case of tramp steamers from abroad, shows that seamen on a foreign vessel were not contemplated. But the question is not whether they were thought of for the purpose of inclusion, but whether they were intentionally excluded from a description that on its face includes them. The express mention of them in sections as to the payment of wages does not help the respondent since that is a domestic matter of contract that, unless mentioned, might be left to the parties concerned. See *Jackson* v. *S. S. Archimedes,* 275 U. S. 463, 467.

Perhaps it would be a sufficient answer to the objections that, while the § 33 is construed to give the rights of seamen to stevedores, it does not say or mean that stevedores are to be regarded as seamen on the particular vessel upon which for the moment they happen to be at work. They simply are given the rights of seamen and, as they are American workmen, they have the rights of American seamen as well on German as on American ships.

But we may go further. Here we are dealing with the conduct of persons within the jurisdiction affecting the

safety of other persons within it. If the rule is wise there is no reason why it should not be universal. Wise or not, it is law and the question is why general words should not be generally applied. What would be the alternative? Hardly that the German law should be adopted. It always is the law of the United States that governs within the jurisdiction of the United States, even when for some special occasion this country adopts a foreign law as its own. *The Exchange,* 7 Cranch 115, 136. *The Lottawanna,* 21 Wall. 558, 571, 572. *The Western Maid,* 257 U. S. 419, 432. *Cunard S. S. Co.* v. *Mellon,* 262 U. S. 100, 124. There hardly seems to be a reason why it should adopt a different rule for people subject to its authority because they are upon a private vessel registered abroad. They are not within the exception as to public armed vessels of a foreign sovereign, whatever its extent. *The Exchange,* 7 Cranch 115, 143. Crimes committed upon such private vessels may be punished by the territorial jurisdiction. *Wildenhus's Case,* 120 U. S. 1. *Patterson* v. *Bark Eudora,* 190 U. S. 169, 177. We see no reason for limiting the liability for torts committed there, when they go beyond the scope of discipline and private matters that do not interest the territorial power. But in these latter cases the local authority might abstain from interfering simply because it did not care to interfere. It would be extraordinary to apply German law to Americans momentarily on board of a private German ship in New York.

At the argument it was suggested that the case should be governed by the general maritime law. This means, as we have indicated, by the law of the United States, with the provisions of § 33 left out. It is assumed that by the law, so qualified, a master would not be liable to a servant for an injury caused by the negligence of a fellow servant. But that doctrine is of relatively recent appear-

ance in admiralty, following the common law. *The City of Alexandria,* 17 Fed. Rep. 390. And, as we believe, it was introduced into the common law almost within the memory of men still living, upon a principle of policy. Labatt, Master & Servant, §§ 471, *et seq.,* § 484; 2d ed. §§ 1394, 1408. It would be somewhat hard to maintain that principle as still the policy of the law in this case after the doctrine has been abolished for railroad employees and seamen. See *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50, 52.

If it should appear that, by valid contract or special circumstances, seamen on a foreign ship should not be protected by the statute, it will be time enough to consider the exception when it is presented. But the purport of the words is plain and there is no reason to deny stevedores the benefit of them, even if exceptions to the rule for seamen may be found upon peculiar facts.

Judgment reversed.

MEMPHIS & CHARLESTON RAILWAY COMPANY *v.* PACE ET AL.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 8. Argued March 5, 1930. Reargued October 29, 1930.—Decided January 5, 1931.

1. Mississippi road tax sustained as applied to a railroad company having part of its line and other property within the road district. Pp. 245, 249.
2. Whether a tax for the construction of roads shall be state-wide or be confined to the county or local district wherein the improvement is made, and whether it shall be laid generally on all property, or all real property, within the taxing unit, or only on real property specially benefited, are matters within the discretion of the State which are not controlled by either the due process clause or the equal protection clause of the Fourteenth Amendment. P. 245.

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3. But, however the tax may be laid, if it be palpably arbitrary, and therefore a plain abuse of power, it falls within the condemnation of the due process clause; and if it be manifestly and unreasonably discriminatory, it falls within the condemnation of the equal protection clause. P. 246.
4. Where the tax is laid generally on all property, or all real property, within the taxing unit, it does not become arbitrary or discriminatory merely because it is spread over such property on an *ad valorem* basis; nor where the tax is thus general and *ad valorem* does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community. P. 246.

154 Miss. 536, affirmed.

APPEAL from a judgment affirming the dismissal of a bill to enjoin the collection of a tax which was to be applied in making a payment on bonds issued by a road district.

Mr. John B. Hyde, with whom *Messrs. S. R. Prince, L. E. Jeffries,* and *Ely B. Mitchell* were on the brief, for appellant.

Messrs. W. W. Magruder and *Benjamin H. Charles,* with whom *Mr. James A. Cunningham* was on the brief, for appellees.

Messrs. George T. Mitchell, Attorney General of Mississippi, and *J. A. Lauderdale,* Assistant Attorney General, by special leave of Court, filed a brief on behalf of the State of Mississippi, as *amicus curiae.*

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

By a suit in equity brought in the chancery court of Tishomingo County, Mississippi, the appellant sought an injunction forbidding the collection of a tax levied to make a partial payment upon bonds of the Oldham road district in that county. Among other grounds for such relief the bill assailed the state statutes underlying the

existence of the district and the levy of the tax as being invalid under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. After answer and a hearing the chancery court entered a decree for the defendants, which the Supreme Court of the State affirmed. 154 Miss. 536. An appeal brings the case here.

The road district was created, and commissioners therefor were appointed, by the board of supervisors of the county in February, 1926, under chapter 277 of the state laws of 1920. With an approving vote of the district's electors, and at the request of the commissioners, the board of supervisors then issued and sold bonds of the district in the sum of $6,500 to provide money for the construction and maintenance of public roads in the district—the particular roads to be determined later on as provided in section 5 of chapter 277.

At this stage of the proceedings the state legislature, desiring to put at rest any question respecting the validity of the creation of the district and the issue of the bonds, passed two acts confirming both. One of these acts took effect on March 11, 1926, and the other four days later. The first, being chapter 1080 of the local laws of that year, applied to this district alone. The second, being chapter 278 of the general laws of that year, applied broadly to all districts in the situation of this one, and to others.

After the enactment of the confirmatory measures the commissioners, with the approval of the board of supervisors, designated two roads—one branching from the other—as the ones to be constructed and maintained out of the proceeds of the bonds; and in due course the work of construction was begun and carried to completion.

In November, 1926, the board of supervisors, at the request of the commissioners, levied on all taxable property, real and personal, within the district an ad valorem tax to meet the first instalment of interest and principal

upon the bonds, that instalment being payable in the following February. The tax was four-tenths of one per cent of the assessed value of the property as fixed for state and county taxes. The amount so charged on the appellant's property was about $450, and this is the tax against which the suit is directed.

The Supreme Court of the State in the decision under review holds that the creation of the road district, the issue of the bonds and the levy of the tax were all valid under the state constitution and the acts before cited; that the board of supervisors in creating the district acted in a legislative capacity, they being invested by the constitution and statutes of the State with discretion to create the district, or refuse to create it, according to their judgment of the best interests of all concerned; and that the two confirmatory acts were valid under the state constitution and operated to make the district a legislatively created district if it was not such before. These were all questions of state law, and their decision by that court is controlling here.

Counsel for the appellant so understand the situation, for in their last brief they say " that it [appellant] and this Court are bound by the decision of the State's highest court relating to the state constitution and state statutes and that it is no longer possible here for appellant to contend that the district was invalidly organized or that the special validating act approved as constitutional under the constitution of Mississippi did not serve to place the Oldham road district in the class of legislatively created districts." And also that " the Supreme Court of Mississippi in the decision below expressly held that the board of supervisors of a Mississippi county was vested with authority to deny the petition to create the district. Districts thus created, within the discretion of the board of supervisors, are, therefore, under this decision, equivalent to legislatively created districts, and hence a taxpayer

whose property is included therein is not entitled to notice and hearing within the doctrine aforesaid of *Browning* v. *Hooper,* [269 U. S. 396]."

The only question presented in the Supreme Court of the State which is open here is whether the act of 1920 and the confirmatory acts of 1926, as construed and applied in this case, are invalid as authorizing the imposition of a tax which is so palpably arbitrary and unreasonably discriminatory that it offends the due process and equal protection clauses of the Fourteenth Amendment.

On the part of the appellant the tax is said to be thus objectionable, because it is imposed to pay for local road improvements and is not apportioned according to benefits but is laid upon all the property, real and personal, within the district on an ad valorem basis; because the property of the appellant, and particularly its personal property, receives no benefit from the improvements; and because, even if there be some benefit to the appellant's property, the tax laid thereon is disproportionate to the benefit and to the tax laid on other property.

The construction and maintenance of serviceable roads in any community is a matter in which the whole community has an interest and is a typical public purpose for which property may be taxed by the State. *Missouri Pacific R. R. Co.* v. *Crawford Road District,* 266 U. S. 187, 190. Whether the tax shall be state wide or confined to the county or local district wherein the improvement is made, and whether it shall be laid generally on all property or all real property within the taxing unit, or shall be laid only on real property specially benefited, are matters which rest in the discretion of the State, and are not controlled by either the due process or the equal protection clause of the Fourteenth Amendment. *County of Mobile* v. *Kimball,* 102 U. S. 691, 703; *Spencer* v. *Merchant,* 125 U. S. 345, 355–356; *Houck* v. *Little River District,* 239 U. S. 254, 262, 265; *Valley Farms Co.* v. *West-*

chester, 261 U. S. 155; *Missouri Pacific R. R. Co.* v. *Crawford Road District, supra; Kansas City Southern Ry. Co.* v. *Road Improvement District No. 3,* 266 U. S. 379, 386.

But, however the tax may be laid, if it be palpably arbitrary, and therefore a plain abuse of power, it falls within the condemnation of the due process clause, *Houck* v. *Little River District, supra; Valley Farms Co.* v. *Westchester, supra;* and if it be manifestly and unreasonably discriminatory it falls within the condemnation of the equal protection clause. *Gast Realty Co.* v. *Schneider Granite Co.,* 240 U. S. 55; *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 6,* 256 U. S. 658; *Thomas* v. *Kansas City Southern Ry. Co.,* 261 U. S. 481; *Road Improvement District No. 1* v. *Missouri Pacific R. R. Co.,* 274 U. S. 188.

Where the tax is laid generally on all property or all real property within the taxing unit, it does not become arbitrary or discriminatory merely because it is spread over such property on an ad valorem basis; nor where the tax is thus general and ad valorem does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community. *St. Louis & Southwestern Ry. Co.* v. *Nattin,* 277 U. S. 157; *Valley Farms Co.* v. *Westchester, supra; Houck* v. *Little River District, supra; Miller & Lux* v. *Sacramento Drainage District,* 256 U. S. 129; *Missouri & Pacific R. R. Co.* v. *Crawford Road District, supra.*

The Oldham road district was created, not as a temporary expedient to accomplish a particular road improvement and defray the cost of that work, but as a permanent agency invested with continuing authority to provide and maintain suitable district roads under the supervision of the county board. The state laws provide for accomplishing road improvements and paying therefor in two distinct ways—one through special benefit assessment districts

and the other through established local districts authorized to defray the cost by general taxes. In the decision under review the Supreme Court of the State holds that the Oldham district is " not a special benefit assessment district " but one wherein road improvement expenses and bonds issued therefor are to be paid by general taxes.

The district is rural, comprises four full sections of land and fractions of two sections, 2950 acres in all, and is about two miles wide and two and a half miles long. The railroad of the appellant extends through the southerly part of the district for about two miles and for about a half mile more lies just inside the southerly line. The appellant's property in the district consists of right of way, 2.88 miles of main track, 2.69 miles of side track, section house site and a small fraction of its rolling stock. The value of this property as assessed for state and county taxes was $113,200, and the value of other property in the district as so assessed was $68,246, making a total of $181,446. These valuations are not questioned here.

When the district was organized it was not far advanced or well developed. Along the appellant's railroad were two large and extensively worked gravel pits with an output of about 8,000 cars a year, which were being shipped over the appellant's railroad and were bringing it a gross yearly return of about $250,000. The gravel was of superior quality, of almost inexhaustible quantity, and in much demand. Relatively small quantities of pulpwood and lumber were also being shipped from the district over the appellant's railroad in car load lots. Grain and other products of the district destined to be shipped away usually were hauled by the producers to a nearby town which was on the appellant's railroad and without other railroad facilities. The Lee Highway, a good road leading to that town, crossed the most southerly part of the district south of and near the appellant's railroad. Another good road leading to the same town lay north of the dis-

trict. But, apart from the Lee Highway, the roads then in the district were not good at any time and in some seasons were almost impassable.

When the bonds were voted, issued and sold it was not known what road or roads would be constructed with the proceeds, for as yet no road had been selected. Under the state law that matter remained open until the selection was made by the commissioners and approved by the county supervisors. *Board of Supervisors* v. *Callender,* 128 Miss. 159.

The roads ultimately selected and actually constructed are in the form of an inverted Y with the stem extending to the northerly line of the district and the arms extending to the two gravel pits and the adjacent side tracks of the appellant's railroad near the southerly line. From each arm there is a connection with the Lee Highway near the southern border of the district and at the other end of the stem there is a connection leading to the road on the north. The roads so constructed are not parallel to the appellant's railroad, but practically at right angles to it.

The appellant sought by its evidence to prove that these roads could be of no benefit whatever to it. Part of this evidence tended merely to show that railroads receive no benefit from public roads running parallel to them, and so was not in point. And much of it came from witnesses whose knowledge of the relevant conditions within the district and surrounding it was so meagre that little weight could be accorded to their testimony. On the other hand, the appellees produced witnesses having some familiarity with the district and its surroundings whose testimony, although open to some criticism, tended to show that the roads would be of real benefit to the appellant both by enabling it to retain old business and by bringing new business to it. Both state courts found that there would be appreciable benefit, and we think

their finding has such support in the evidence that it should not be disturbed.

Upon applying the settled rules before stated to the case presented, we are of opinion that the appellant has not shown that the tax imposed under the sanction of the state statutes is either palpably arbitrary or unreasonably discriminatory. It was imposed for what obviously is a public purpose. It was a general tax and admissibly was spread over all the taxable property in the district according to the value thereof as fixed by the assessment for state and county taxes. The appellant was afforded ample opportunity by the state law to be heard on that assessment and to have it corrected if erroneous or unfair, and is not challenging it now. The chief complaint made here is that the imposition of the tax on an ad valorem basis was " inherently invalid " under the due process and equal protection clauses. That complaint is not tenable, as is shown in several cases before cited. And, as the tax was general and ad valorem, its validity, as was held in *St. Louis & Southwestern Ry. Co.* v. *Nattin, supra,* " does not depend upon the receipt of any *special* benefit by the taxpayer."

Judgment affirmed.

RAILROAD COMMISSION OF WISCONSIN ET AL. v. MAXCY, RECEIVER, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

No. 464. Argued November 24, 1930.—Decided January 5, 1931.

Decree of the District Court enjoining enforcement of an order of a state commission fixing rates of a water company, affirmed, in the absence of any adequate reason in the record for disapproving findings that the commission's estimates of the company's property and expenses were too low and that its order would cause confiscation. Affirmed.

APPEAL from a decree enjoining enforcement of an order denying an increase of water rates.

Mr. Suel O. Arnold, with whom *Mr. John W. Reynolds,* Attorney General of Wisconsin, was on the brief, for appellants.

Mr. Robert M. Rieser, with whom *Messrs. H. L. Butler, H. H. Thomas, B. H. Stebbins,* and *R. M. Stroud* were on the brief, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Maxcy, Receiver of the Washburn Water Works Company, by an original bill filed in the United States District Court, Western District of Wisconsin, January 2, 1929, sought to prevent enforcement of an order by the Wisconsin Railroad Commission dated December 4, 1928, which denied application of that Company for permission to make a general increase in water rates.

After answer the cause was heard, by stipulation, on the pleadings and affidavits. Without opinion or findings the court entered a decree April 5, 1929, enjoining enforcement of the challenged order, as prayed by the bill. Upon appeal here that decree was set aside and the cause remanded with directions to make findings of fact and conclusions of law and enter a decree thereon. *Railroad Commission* v. *Maxcy,* 281 U. S. 82.

Obeying our mandate the court below made proper findings, and entered a final decree July 5, 1930. The present appeal followed.

The Railroad Commission appraised the property of the Water Works Company for rate making purposes at $75,000.00. It estimated the probable future annual operating income as $17,720.00, operating expenses $12,868.32, net annual return $4,852.82. And it said this

would yield something less than 7% on the approved valuation of the property devoted to public use.

Having again heard the cause upon pleadings and affidavits the court held that the valuation placed upon the property by the Railroad Commission was too low and contrary to the evidence; also that the Commission's estimate of operating expenses was too low and contrary to the evidence; and further that the Commission's order if enforced would cause confiscation. Accordingly, it entered a final decree restraining the defendants from taking any steps to enforce the order.

After examining the findings and conclusions and the record upon which they are based, we can find no adequate reason for disapproving the result reached by the court below. Its decree will be affirmed.

The facts are peculiar; the applicable principles of law have been stated in former opinions here. To enter upon a detailed discussion of them at this time would serve no useful purpose.

Affirmed.

O'GORMAN AND YOUNG, INCORPORATED, *v.* HARTFORD FIRE INSURANCE COMPANY.

SAME *v.* PHOENIX ASSURANCE COMPANY, LIMITED.

APPEALS FROM THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

Nos. 12 and 13. Argued April 30, 1930. Reargued October 30, 1930.—Decided January 5, 1931.

1. The business of insurance is so far affected with a public interest that the State may regulate the rates, and likewise the relations of those engaged in the business. P. 257.

2. A New Jersey statute declaring that rates of insurance against the hazards of fire shall be reasonable, and making it unlawful for a fire insurance company to allow a commission to any person for acting as its local agent respecting such insurance, in excess of that allowed to any of its local agents on such risks in the State, *upheld*, upon the record in the case, as within the power of the State to regulate such rates. P. 257.
3. A state statute, dealing with a subject clearly within the police power, can not be declared void upon the ground that the specific method of regulation prescribed by it is unreasonable, in the absence of any factual foundation in the record to overcome the presumption of constitutionality. *Id.*
4. It does not appear upon the face of the statute here in question, or from facts of which the Court must take judicial notice, that, in New Jersey, evils do not exist in the business of fire insurance for which the statutory provision is an appropriate remedy. P. 258.

105 N. J. L. 642, affirmed.

APPEALS from judgments affirming judgments against the appellant in actions which it brought against the Insurance Companies to recover moneys claimed to be due to it for services as local agent. See also 105 N. J. L. 645.

Mr. Walter Gordon Merritt, with whom *Mr. George C. Austin* was on the brief, for appellant.

The State has no power to regulate the amount of compensation to be paid fire insurance agents. *Tyson & Bro.* v. *Banton,* 273 U. S. 418, 434; *Wolff Packing Co.* v. *Industrial Court,* 262 U. S. 522, 534, s. c. 267 U. S. 552, 566; *Liggett Co.* v. *Baldridge,* 278 U. S. 105, 111; *Adkins* v. *Children's Hospital,* 261 U. S. 525; *Truax* v. *Corrigan,* 257 U. S. 312, 338; *Adair* v. *United States,* 208 U. S. 161, 174–175; *Coppage* v. *Kansas,* 236 U. S. 1, 14; *Meyer* v. *Nebraska,* 262 U. S. 390, 400; *Ribnik* v. *McBride,* 277 U. S. 350; *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389.

Price fixing or wage fixing cannot be sustained except under extraordinary circumstances. The burden of prov-

ing the facts to justify such a law rests upon those who urge its validity.

The Legislature is without power to prohibit private contracts as to the amount of compensation to be paid by employers to their adult employees. *Wilson* v. *New,* 243 U. S. 332; *Adkins* v. *Children's Hospital, supra; Wolff Packing Co.* v. *Industrial Court, supra; Tyson & Bro.* v. *Banton, supra; Ribnik* v. *McBride, supra; Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; *Plummer* v. *Railroad,* 31 F. (2d) 123, 124; *Northwestern National Ins. Co.* v. *Fishback,* 130 Wash. 490; *Niagara Fire Ins. Co.* v. *Cornell,* 110 Fed. 816, 821; *O'Neil* v. *Providence Amusement Co.,* 42 R. I. 479; *Northwestern Bell Tel. Co.* v. *Spillman,* 6 F. (2d) 663.

The power to regulate rates to be charged the public does not imply power to invade the field of private management. *United Gas Co.* v. *Railroad Commission,* 278 U. S. 300, 320; *Banton* v. *Belt Line,* 268 U. S. 413, 421; *Southwestern Tel. Co.* v. *Public Service Comm.,* 262 U. S. 276, 289; *Wolff Packing Co.* v. *Industrial Court, supra; Chicago, M. & St. P. R. Co.* v. *Wisconsin,* 238 U. S. 491–501; *Interstate Commerce Comm.* v. *Chicago G. W. Ry. Co.,* 209 U. S. 108; *Lake Shore Ry. Co.* v. *Smith,* 173 U. S. 684, 691; *Great Northern Ry.* v. *Minnesota,* 238 U. S. 340; *Havre de Grace & Perryville B. Co.* v. *Towers,* 132 Md. 16; *Importers and Exporters* v. *Rhoades,* 239 N. Y. 420, 426.

The New Jersey statute is arbitrary and unnecessary, because the declared purpose of promoting reasonable insurance rates can be accomplished by the simple and direct means of rate regulation, and is not in fact promoted by regulating the compensation of insurance agents.

Liberty of contract cannot be arbitrarily and unnecessarily interfered with under the guise of protecting the public. *Jay Burns Baking Co.* v. *Bryan,* 264 U. S. 504;

Liggett Co. v. *Baldridge,* 278 U. S. 105; *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1, 11; *Meyer* v. *Nebraska,* 262 U. S. 390, 399–400; *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 569; *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116, 121; *McLean* v. *Arkansas,* 211 U. S. 538; *Lawton* v. *Steele,* 152 U. S. 133; *Lochner* v. *New York,* 198 U. S. 45; *Adair* v. *United States,* 208 U. S. 161.

Assuming legislative power to regulate the compensation of fire insurance agents, the regulation in this case is an arbitrary and unconstitutional exercise of such power.

And see *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1; *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 244.

The statute is void for indefiniteness. *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 89; *Connally* v. *General Construction Co.,* 269 U. S. 385, 390; *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 453.

Mr. Ralph E. Lum for appellees.

The State has power to regulate the amount of commissions to be paid fire insurance agents. *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 413; *LaTourette* v. *McMaster,* 248 U. S. 465–467; *McCarter* v. *Firemen's Ins. Co.,* 74 N. J. Eq. 372.

The statute is not an arbitrary exercise of the power. *German Alliance Ins. Co.* v. *Lewis, supra; Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 569.

It is clearly within the province of the Legislature to determine the means to achieve the desired result.

Mr. Justice Brandeis delivered the opinion of the Court.

These cases, which are here on appeals from the highest court of New Jersey, were argued together. They present the question whether the following statutory provision,

effective March 29, 1928, is consistent with the due process clause of the Fourteenth Amendment:

"In order that rates of insurance against the hazards of fire shall be reasonable it shall be unlawful for any such insurer licensed in this State to . . allow . . any commission . . in excess of a reasonable amount, to any person for acting as its agent in respect to any class of such insurance, nor . . to allow . . any commission . . to any person for acting as its local agent in respect to any class of such insurance, in excess of that . . allowed to any one of its local agents on such risks in this State." (New Jersey Laws 1928, c. 128, p. 258.)

In each case, O'Gorman and Young, Inc., a domestic corporation licensed as an insurance broker, sues a licensed foreign fire insurance company to recover a balance alleged to be due for services performed as local agent at Newark after the effective date of the statute. In the *Phoenix Assurance Company* case, the complaint is on a contract terminable at will, made prior to the enactment of the statute, by which the company agreed to pay to the agent twenty-five per cent. of the premiums. In the *Hartford Fire Insurance Company* case, the complaint is on a contract, made after the enactment of the statute, by which the defendant agreed to pay as compensation "what such services were reasonably worth"; and the complaint alleges that the services were reasonably worth twenty-five per cent. of the premiums. Each complaint alleges that the defendant has paid the plaintiff only twenty per cent. of the premiums. Each answer admits the facts alleged in the complaint. As a defense, it sets up the statute and the fact that the defendant had at the date of its enactment, and ever since has had, several persons acting as its local agents within the State to whom the compensation allowed in respect to the same class of business has been only twenty per cent. of the premiums.

Each case was heard upon a motion to strike out the answer and for judgment on the ground that the statute is void under the due process clause of the Fourteenth Amendment. In each case the trial court denied the motion and entered judgment against the plaintiff, the facts alleged in the answer being admitted. In an opinion discussing the question presented, that court said:

"Our statute provides that the rates for fire insurance 'shall be reasonable.' Since the commissions paid to local agents naturally enter into the cost of such insurance to the public, and therefore influence the rates which must be charged to the public for such insurance, it is within the police power of the state to require that the commissions must be reasonable, otherwise such large commissions might be allowed as to impair the financial stability of the insurance companies, and thus imperil their ability to meet their financial obligations to their policy holders.

"Since twenty per cent. is the amount of commissions paid to some of its local agents, the effect of this legislation is to determine that a commission in excess of that is unreasonable. The presumption is in favor of the reasonableness of the law until the contrary is made to appear.

"In the facts or argument, there is nothing to overcome that presumption. . . ." 105 N. J. L. 645.[1]

[1] It is the settled practice in New Jersey that where the subject regulated is properly within the scope of the police power of the State, a charge of discrimination or lack of reasonable relation between the object of the act and the means employed, must be supported by facts in the record sufficient to overcome the general presumption of constitutionality. *Hopper* v. *Stack,* 69 N. J. L. 562; *Meehan* v. *Board of Excise Commissioners,* 75 N. J. L. 557, 562; *Commercial Trust Co.* v. *Hudson County Board,* 86 N. J. L. 424, affirmed, 87 N. J. L. 179; *State* v. *Sutton,* 83 N. J. L. 46, 49, affirmed, 87 N. J. L. 192, 193, affirmed, 244 U. S. 258; *Public Service Ry. Co.* v. *Public Utility Commissioners,* 89 N. J. L. 24, 27, 28, affirmed, 254 U. S. 394; compare *Thorne* v. *Town of Kearny,* 100 N. J. L. 228, affirmed sub. nom. *Thorne* v. *Casale,* 101 N. J. L. 418.

On that opinion the Court of Errors and Appeals affirmed the judgments of the trial court. 105 N. J. L. 642. We think it was right in so doing.

The business of insurance is so far affected with a public interest that the State may regulate the rates, *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389; and likewise the relations of those engaged in the business, *La Tourette* v. *McMaster,* 248 U. S. 465; *Stipcich* v. *Metropolitan Life Insurance Co.,* 277 U. S. 311, 320. Compare *McCarter* v. *Firemen's Insurance Co.,* 74 N. J. Eq. 372, 382. The agent's compensation, being a percentage of the premium, bears a direct relation to the rate charged the insured. The percentage commonly allowed is so large that it is a vital element in the rate structure and may seriously affect the adequacy of the rate. Excessive commissions may result in an unreasonably high rate level or in impairment of the financial stability of the insurer. It was stated at the bar that the commission on some classes of insurance is as high as thirty-five per cent. Moreover, lack of a uniform scale of commissions allowed local agents for the same service may encourage unfair discrimination among policy holders by facilitating the forbidden practice of rebating. In the field of life insurance, such evils led long ago to legislative limitation of agents' commissions.[2]

The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutional-

[2] Laws of New York, 1906, c. 326, § 97, pp. 794–797; Insurance Law of New York (Baldwin), 1930 Edition, § 97, pp. 96–101. See Report of Joint (Armstrong) Insurance Investigating Committee, Feb. 22, 1906, pp. 399–417; Laws of New Jersey, 1927, c. 167, pp. 324, 325; 1928, c. 128, p. 257.

ity must prevail in the absence of some factual foundation of record for overthrowing the statute.[3] It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the State indicates that such evils did exist.[4] The record is barren of any allegation of fact tending to show unreasonableness.

Affirmed.

Separate opinion of MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER.

We are of opinion that the judgments below should be reversed.

The Appellees (defendants below) are separate fire insurance companies. The facts are not in dispute; both

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[3] *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 475; *Powell* v. *Pennsylvania*, 127 U. S. 678, 685; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 79, 83; *Chicago Dock Co.* v. *Fraley*, 228 U. S. 680, 687; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357; *Wampler* v. *Lecompte*, *ante*, p. 172. Compare *Minnesota Rate Cases*, 230 U. S. 352, 461; Henry Wolf Biklé, "Judicial determination of facts affecting the constitutional validity of legislative action." 38 Harv. L. Rev. 6.

[4] Compare *Heath & Mulligan Mfg. Co.* v. *Worst*, 207 U. S. 338, 355; *Welch* v. *Swasey*, 214 U. S. 91, 108; *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358, 365; *Adams* v. *Milwaukee*, 228 U. S. 572, 583; *Barrett* v. *Indiana*, 229 U. S. 26, 29; *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Price* v. *Illinois*, 238 U. S. 446, 452; *Bunting* v. *Oregon*, 243 U. S. 426, 438; *Dominion Hotel* v. *Arizona*, 249 U. S. 265, 268. The alleged existence of such evils throughout the United States led recently to an enquiry by the National Convention of Insurance Commissioners. See report of proceedings at annual meeting Sept. 9, 1930. The United States Daily, Supplement Sept. 23, 1930.

records present like circumstances and questions of law. It will suffice here to point out the essentials disclosed in No. 12.

O'Gorman and Young, a New Jersey corporation, under proper license transacts business as an insurance broker. For many years it has been the agent of appellee, a Connecticut corporation authorized to issue fire policies in New Jersey. Prior to March 29, 1928, the agreement of employment provided that for negotiating and selling such policies the agent should receive 25% of prescribed premiums. On that day the original contract was changed and now it provides that the agent shall be paid "what such services were reasonably worth."

Acting under this modified arrangement, O'Gorman and Young negotiated and sold policies upon which the premiums amounted to $2,454.61. As reasonable compensation, demand was made for $613.68—25% of the premiums. The Insurance Company paid $490.92, 20%, and denied further liability.

Thereupon (October, 1928), asserting that its services were reasonably worth 25% of the premiums, O'Gorman and Young brought an action against the Insurance Company in the Circuit Court, Essex County, New Jersey, to recover $122.76. The complaint sets out the foregoing facts and asks for judgment; it says nothing concerning any New Jersey statute.

The answer admits the allegations of the complaint except "defendant denies that it owes the plaintiff the sum of $122.76 as in said complaint alleged for the reasons hereinafter in this answer set forth." They are set out in the three paragraphs immediately below.

Chapter 128*, Act of the New Jersey Legislature approved March 29, 1928, provides (Section 1)—"In order

* CHAPTER 128.

An Act to amend an act entitled "A further supplement to an act entitled 'An act to provide for the regulation and incorporation of

that rates for insurance against the hazards of fire shall be reasonable it shall be unlawful for any such insurer licensed in this State to directly or indirectly pay or allow, or offer or agree to allow, any commission or other com-

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insurance companies and to regulate the transaction of insurance business in this State,' approved April third, one thousand nine hundred and two," which said supplement was approved March eighteenth, one thousand nine hundred and thirteen.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section one of the act of which this act is amendatory be and the same is hereby amended so that the same shall read as follows:

1. No corporation, firm, association, individual or aggregation of individuals, hereinafter called "insurer," doing the business of insurance within this State shall fix or make any rate or schedule of rates, or charge, demand, collect or receive, directly or indirectly, or through any special rate, tariff, drawback, rebate, concession, device or subterfuge, a rate for insurance, which discriminates unfairly between risks within this State of essentially the same hazard, nor shall any insurer against the hazards of fire or legal liability of employers make any such insurance within this State except in accordance with general basis schedules, embodying basis rates, charges, credits, terms, conditions, permits, standards and other data necessary to the computation of equitable rates and rules of practice for such insurance, which general basis schedules, embodying basis rates, charges, credits, terms, conditions, permits, standards and other data used for the determination of rates shall be filed by such insurer or its agent or expert duly authorized, with the Commissioner of Banking and Insurance within three months after this act goes into effect, or with the amendments to such general basis schedules which may be filed with the Commissioner of Banking and Insurance from time to time thereafter. Any one or more of such insurers singly or jointly may employ for the making of such general basis schedules and rates and the filing of the same the services of such experts as it, or they, may deem advisable for such purpose. In order that rates for insurance against the hazards of fire shall be reasonable it shall be unlawful for any such insurer licensed in this State to directly or indirectly pay or allow, or offer or agree to allow, any commission or other compensation or anything of value, in excess of a reasonable amount, to any person for acting as its agent in respect to any class of such insurance, nor to directly or indirectly pay or allow, or offer or agree

pensation or anything of value, in excess of a reasonable amount, to any person for acting as its agent in respect to any class of such insurance, nor to directly or indirectly pay or allow, or offer or agree to allow, any commission or

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to allow, any commission or other compensation or anything of value, to any person for acting as its local agent in respect to any class of such insurance, in excess of that offered, paid or allowed to any one of its local agents on such risks in this State. On the written complaint of any insurer or any agent licensed in this State, that there has been any violation of the provisions of this act, or when the commissioner deems it necessary without such complaint, the commissioner shall inquire whether or not there has been any violation of the provisions of this act in the commissions paid or payable on such risks in this State.

Every such insurer or agent shall, within ten days after written demand therefor, furnish to any person, upon whose property or risk a rate has been made by said insurer, or to his authorized representative, full information as to such rate, and if such property or risk be rated by schedule applying particularly to each risk, a copy of such schedule, and shall provide such means as may be approved by the Commissioner of Banking and Insurance whereby any person or persons affected by such rate may be heard on an application for a change in such rate. Whenever it is made to appear to the satisfaction of the Commissioner of Banking and Insurance that any such rate or general basis schedule or amendment thereof discriminates unfairly between risks within this State of essentially the same hazard or that any insurer has made any insurance within this State at any rate not in accordance with the general basis schedule or amendment thereof filed by it, he may, after a full hearing, either before himself or before any salaried employee of the Department of Banking and Insurance whose report he may adopt, order such discrimination removed, or such rate corrected in accordance with such general basis schedule or amendment thereof; and all such insurers affected thereby shall forthwith comply with such order; nor shall such insurers or any of them remove such discrimination by increasing the rates on any risk or class of risks affected by such order unless it is made to appear to the satisfaction of the Commissioner of Banking and Insurance that such increase is justifiable.

This supplement shall not apply to any contract of life insurance, nor to any contract of insurance upon or in connection with marine or transportation risks or hazards other than contracts for automo-

other compensation or anything of value, to any person for acting as its local agent in respect to any class of such insurance, in excess of that offered, paid or allowed to any one of its local agents on such risks in this State."

Also (section 2)—"Any insurer, agent, expert, person or corporation violating any of the provisions of this act shall be subject to a penalty of five hundred dollars for each and every violation to be sued for and recovered by the Commissioner of Banking and Insurance, or by any citizen of this State and paid to the State Treasurer. In case any insurer is convicted of a violation of this act, every local agent of the insurer in this State shall be

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bile insurance, nor to contracts of insurance upon property or risks located without this State, nor to contracts of title insurance or mortgage guaranty.

2. Section two of the act of which this act is amendatory be and the same is hereby amended so that the same shall read as follows:

2. Any insurer, agent, expert, person or corporation violating any of the provisions of this act shall be subject to a penalty of five hundred dollars for each and every violation to be sued for and recovered by the Commissioner of Banking and Insurance, or by any citizen of this State and paid to the State Treasurer. In case any insurer is convicted of a violation of this act, every local agent of the insurer in this State shall be entitled to the same commission or compensation, or other thing of value, for business done for the insurer during the calendar year in which the discrimination took place, on risks in this State, and any local agent may recover from the insurer in any court of competent jurisdiction, the amount of such excess commission or compensation, or other thing of value, if any, to which he may become entitled under the provisions of this act.

If any section, provisions or part of this act be questioned in any court of competent jurisdiction, and declared to be unconstitutional, the said section, clause or part shall be exscinded and the remainder of the act shall continue in full force and effect.

3. This act shall take effect immediately.

Passed March 29, 1928.

entitled to the same commission or compensation, or other thing of value, for business done for the insurer during the calendar year in which the discrimination took place, on risks in this State, and any local agent may recover from the insurer in any court of competent jurisdiction, the amount of such excess commission or compensation, or other thing of value, if any, to which he may become entitled under the provisions of this Act."

"On and subsequently to March 29, 1928, this defendant had and now has several persons acting as its local agents duly authorized to represent it in writing fire insurance in the State of New Jersey; that the commission allowed by this defendant to its said several agents so acting as aforesaid in respect to the class of insurance mentioned in the said complaint was, on said last mentioned day and from thence hitherto and now is, twenty per centum on each premium charged; that pursuant to the terms of the said statute it became and was unlawful on and after March 29, 1928, to pay to the plaintiff herein the commission of twenty-five per centum of the premium charged, theretofore paid by this defendant to the said plaintiff."

Admitting that since March 29, 1928, a commission of 20% had been regularly allowed by the Insurance Company to certain agents in New Jersey and asserting the invalidity of the Act of that date because of conflict with the Fourteenth Amendment, complainant moved to strike out the answer as insufficient. This motion was denied and final judgment went for the defendant upon the pleadings and admission.

The Circuit Court (Judge Dungan) said—

"The other question is whether or not the act deprives the plaintiff of its property without due process of law, and therefore is a violation of the 14th Amendment to the Federal Constitution.

"Federal and State laws are in favor of the regulation of the business affairs of persons and corporations which affect the public interest, and there are federal and state decisions in almost every state in this country upholding the constitutionality of such laws, provided they are reasonable. Of course the mere statement in the law itself as to the reasonableness of its provisions does not make them so, but that is a question to be decided sometimes by the Court and sometimes by a jury. Whether or not the business of a fire insurance company is affected with a public interest is not an open question in this state. In *McCarter, Attorney General* v. *Firemen's Ins. Co.*, 74 N. J. Eq. 372 (at p. 383), our Court of Errors and Appeals said, 'The business of the defendants [insurance companies] is in point of fact one that directly affects the interests of the public, and such public interest has been recognized as a subsisting one by the Legislature of this State, and that in point of law, the business of the defendants is affected with a public interest.'

"If the regulations prescribed are reasonable, they are valid. Our statute provides that the rates for fire insurance 'shall be reasonable.' Since the commissions paid to local agents naturally enter into the cost of such insurance to the public, and therefore influence the rates which must be charged to the public for such insurance, it is within the police power of the State to require that the commissions must be reasonable, otherwise such large commissions might be allowed as to impair the financial stability of the insurance companies, and thus imperil their ability to meet their financial obligations to their policy holders.

"Since twenty per cent. is the amount of commissions paid to some of its local agents, the effect of this legislation is to determine that a commission in excess of that is

unreasonable. The presumption is in favor of the reasonableness of the law until the contrary is made to appear.

"In the facts or arguments, there is nothing to overcome that presumption, and therefore the answers should not be stricken out as an unlawful deprivation of the plaintiff of his property without due process of law."

The Court of Errors and Appeals affirmed the questioned judgment "for the reasons expressed in the opinion by Judge Dungan in the Circuit Court."

The matter for our consideration comes to this: A foreign insurance Company, licensed to operate in New Jersey, employed an agent and agreed to pay reasonable compensation. The agent demanded 25% of the premiums collected. The Company paid 20% of these and successfully resisted the claim for more upon the sole ground that "since twenty per cent. is the amount of commissions paid to some of its local agents, the effect of this legislation [Act March 29, 1928] is to determine that a commission in excess of that is unreasonable." Abstractly stated, the principal paid "A" commissions at the rate of 20%; therefore, it has been held, solely because of the Act nothing above 20% can be recovered by "B," who claims under a contract fair on its face and not expressly inhibited, which definitely provides for reasonable compensation.

It cannot rightly be said that the burden of establishing any underlying disputable fact rests upon the appellant before it can successfully challenge the validity of the questioned enactment. This is not a proceeding to enjoin enforcement of a statute because of alleged discrimination or other circumstance, the existence of which requires consideration of facts not known to the court. Opinions in cases of that character are not in point. The court below

ruled, in effect, that without regard to any evidence which might be presented, the complainant, although relying upon a contract fair upon its face, could recover nothing above the rate allowed to another agent—that the statute restricted the right to contract for services for reasonable compensation. And we must determine whether, thus construed, and in the absence of any emergency, the statute necessarily conflicts with the Fourteenth Amendment. Is such legislation permissible in the ordinary circumstances of which the court must take judicial notice?

Under *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, the appellant does not deny that because of the public interest involved reasonable rates for issuing fire insurance policies may be fixed by statute. But that decision "marks the extreme limit to which this court has thus far gone in sustaining price-fixing legislation." *Tyson & Bro.* v. *Banton,* 273 U. S. 418, 434.

The German Alliance Company questioned the validity of an order by the Superintendent of Insurance of Kansas which undertook to reduce its duly announced basic schedule of rates. The definite point for decision was thus stated: "Whether a contract of fire insurance is private and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest." An affirmative answer followed.

The decision is authoritative as to the point so ruled, but not otherwise. Nothing there determined would permit regulation of all the undertakings of an insurance company. Here we are not dealing directly with a contract to insure. And certainly it does not follow that because the State has power to regulate the rate for insur-

ance she may control every agreement having any possible relation thereto.

The public has no direct, immediate interest in the agency contract here set up. Its concern is with rates. Like any other expense item, brokers' commissions may ultimately affect the rate charged for policies; but this is true of the wages of office boys, printers, bookkeepers, actuaries, officers; the price paid for pens, ink, or other supplies—indeed whatever expense may be incurred. Broadly speaking, the funds of an insurance company come from premiums collected; and necessarily all disbursements are made therefrom and, therefore, in some sense may be said to affect the necessary rate of charge.

The State may not permit a foreign Insurance Company to do business within her limits upon condition that it shall submit to deprivation of rights guaranteed by the Constitution. *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1; *Hanover Ins. Co.* v. *Harding,* 272 U. S. 494, 508.

This Court has steadfastly upheld the general right to enter into private contract and has definitely disapproved attempts to fix prices by legislative fiat. "Freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." "That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, [of the Fourteenth Amendment] is settled by the decisions of this court and is no longer open to question." *Adkins* v. *Children's Hospital,* 261 U. S. 525, 545, 546. *Adair* v. *United States,* 208 U. S. 161, 174, 175; *Coppage* v. *Kansas,* 236 U. S. 1, 14; *Wilson* v. *New,* 243 U. S. 332; *Adams* v. *Tanner,* 244 U. S. 590; *Truax* v. *Corrigan,* 257 U. S. 312, 338; *Meyer* v. *Nebraska,* 262 U. S. 390; *Wolff Co.* v. *Industrial Court,* 262 U. S.

522; *Tyson & Bro.* v. *Banton, supra; Ribnik* v. *McBride,* 277 U. S. 350; *Liggett Co.* v. *Baldridge,* 278 U. S. 105, 111.

Also it must be accepted as settled that the right to regulate a business does not necessarily imply power to fix the scale for services therein, or to trespass on the duties of private management. *Adams* v. *Tanner, supra; Truax* v. *Corrigan, supra; Tyson & Bro.* v. *Banton, supra; Southwestern Bell Tel. Co.* v. *Public Service Commission,* 262 U. S. 276, 289; *Wolff Co.* v. *Industrial Court, supra.*

Even if it be admitted that the power of the legislature to establish reasonable rates for insurance necessarily presupposes existence of the right to command or inhibit what is essential to the accomplishment of that end, certainly this implied right extends to nothing which does not clearly appear to be necessary for such purpose.

The statute under review does not prescribe a schedule of rates or point out the basis for determination of reasonable rates; it leaves with each company the primary right and duty of deciding upon rates to be demanded. But it inhibits payment to any agent, irrespective of the worth of his services and without regard to any contract with him, of anything in excess of what may be actually paid to another agent. As construed, it declares that the smallest compensation voluntarily paid to any agent shall thereby become reasonable for every other agent. And it permits an agent who has been paid according to his agreement to recover more if he can show that some other agent has received greater compensation.

The objections to the statute, no extraordinary conditions having been disclosed by the defendant, should be obvious. It goes far beyond the mere regulation of the business of insurance and interferes directly with the right of insurers to control the conduct of their internal affairs; it restricts the right of both company and agent to make reasonable private agreements in respect of com-

pensation for ordinary services; and the restrictions have no immediate or necessary relation to the maintenance of insurance rates fair to the public.

The difference between regulation and management is pointed out in the cases cited above. Congress has power, for example, to regulate interstate commerce; but generally, at least, it may not say what shall be paid to employees or interfere with the freedom of the parties to contract in respect of wages. This was distinctly pointed out in *Wilson* v. *New,* 243 U. S. 332, 347—"It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority."

In order to justify the denial of the right to make private contracts, some special circumstances sufficient to indicate the necessity therefor must be shown by the party relying upon the denial. Here the right freely to agree upon reasonable compensation has been abridged; and no special circumstances demanding such action have been disclosed. Under the construction placed upon the statute, no agent can make an enforcible agreement with an insurance company definitely fixing his compensation. Always the company can defeat his claim for the agreed amount, reasonable in fact, by paying less to another agent.

The inability of the company to make enforcible agreements with necessary agents has no appreciable relation to fair rates. One agent's efforts often produce much more valuable results than those of another. Such interference with the freedom of the parties hinders the proper conduct of the business and may ultimately cause increased rates. The statute prescribes no definite rate of compensation; under it no two companies are required to pay

at the same rate for like services in the same locality; and competition for business is necessarily abridged. And in order to operate at all at some points, the insurer may find it necessary to pay agents much more than prudent management would require, and beyond the real value of their services at such places.

Although agents are usually paid a specified percentage of premiums collected, the statute is not limited to that situation. Certainly we cannot say that exercise by the companies of the ordinary right freely to contract touching compensation for services will tend materially to interfere with reasonable rates for insurance. Rates constitute the matter of public concern, not the compensation of employees or representatives, which is, after all, only an item of expense. And, so far as we can see, this legislation will afford no protection to those who wish to insure.

The statute before us goes far beyond the usual provisions of state laws concerning the insurance business. We are advised that a similar one was enacted by the State of Mississippi in 1924 and by the State of Louisiana in 1926. Diligent counsel have disclosed no others. The restrictions are novel and lack the sanction of general assent and practical experience.

In our view the statute is arbitrary, unreasonable and beyond the power of the legislature.

STANGE *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 23. Argued December 2, 3, 1930.—Decided January 5, 1931.

Section 250 (d) of the Revenue Act of 1921, referring to income and excess profits taxes under earlier Acts, provides that the amount due under any return made under such Acts shall be determined and assessed within five years after the return was filed, unless the

Commissioner and taxpayer consent in writing to a later "determination, assessment, and collection" of the tax; and that no suit or proceeding for the collection of taxes, due under the prior Acts, shall be begun after the expiration of five years after the date when such return was filed. *Held:*

1. The taxpayer's waiver of the limitation is effective even though executed more than five years after the filing of his return under the prior taxing Act. P. 273.

2. An agreement by the taxpayer waiving any and all statutory limitations as to the time within which assessments might be entered, but not in terms referring to "determination" or "collection" of the tax, was valid and comprehended both assessment and collection. P. 275.

3. A waiver is not a contract, and the provision of § 250 (d) requiring the Commissioner's signature was inserted for purely administrative purposes and not to convert into a contract what is essentially a voluntary, unilateral waiver of a defense by the taxpayer. P. 276.

68 Ct. Cls. 395, affirmed.

CERTIORARI, 281 U. S. 707, to review a judgment rejecting a claim for recovery of money collected under a deficiency income tax assessment.

Mr. W. W. Spalding for petitioner.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch,* Special Assistant to the Attorney General, *Joseph H. Sheppard,* and *Bradley B. Gilman* were on the brief, for the United States.

Mr. John E. Hughes, by special leave of Court, filed a brief on behalf of the Holmes Manufacturing Company as *amicus curiae.*

Messrs. Wm. E. Leahy and *Wm. J. Hughes, Jr.,* by special leave of Court, filed a brief on behalf of Frank A. Vanderlip et al. as *amici curiae.*

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In February, 1915, Stange made a return of taxable income for the year 1914, under the Revenue Act of October 3, 1913, c. 16, 38 Stat. 114, and paid the tax assessed thereon. In February, 1924, the Commissioner of Internal Revenue made a deficiency assessment. Proceedings for collection were instituted in March, 1925. In order to avoid distraint, Stange paid the amount assessed, with interest, and duly made claim for a refund on the ground that the return made in 1915 had included all the income taxable. Upon the rejection of this claim, he filed a supplementary claim for a refund on the ground that the collection of the additional tax had been barred by the statute of limitations contained in § 250 (d) of the Revenue Act of November 23, 1921, c. 136, 42 Stat. 227, 265. After the lapse of six months without a determination by the Commissioner, he brought this suit in the Court of Claims to recover the money so paid. There he urged both contentions. In answer to the latter, the Government insisted that the statute had been waived by a written agreement signed by Stange in November, 1922, and by the Commissioner in March, 1923. The trial court entered judgment for the United States. 68 Ct. Cls. 395. This Court granted a writ of certiorari, limited "to the questions involving the validity and effect of the waiver of the statute of limitations." 281 U. S. 707.

No constitutional question is presented. Whether the petitioner is entitled to recover depends upon the construction and effect of § 250 (d) and of the written agreement called the waiver. That section provides:

"The amount of income, excess-profits, or war-profits taxes due . . . under any return made . . . under prior income, excess-profits, or war-profits tax Acts,

or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: . . ." 42 Stat. 265.

The waiver provides:

"C. H. Stange, of Merrill, Wisconsin, in consideration of the assurance given him by officials of the Income Tax Unit of the Bureau of Internal Revenue that his liability for all Federal taxes imposed by the Act of Congress approved October 3, 1913, . . . on his net income received from all sources in the year ended December 31, 1914, . . . shall not be determined except after deliberate, intensive, and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. . . ."

First. It is contended that the waiver was of no effect because executed more than five years after the filing of the return.[1] The argument is that to give effect to a

[1] On this question, there has been conflict in the lower federal courts. See, sustaining the validity of such waivers, *Stange* v. *United States*, 68 Ct. Cls. 395; *W. P. Brown & Sons Lumber Co.* v. *Commissioner*, 38 F. (2d) 425 (C. C. A. 6th); *Sabin* v. *United States*, 44 F. (2d) 70 (Ct. Cls.). Denying validity: *Joy Floral Co.* v. *Commis-*

waiver executed after the expiration of the period of limitation would give to the statute a retroactive effect, which Congress cannot be presumed to have intended. There was no lack of power. Prior to the 1921 Act no legislation barred the enforcement of the liability for a tax under the Act of 1913. Taxes duly assessed could be collected at any time by suit. There was a three-year limitation on assessment[2] (Section II (E), 38 Stat. 169), which if duly made might be followed by distraint. But there was no limitation upon the time within which the tax liability could be enforced by suit without a prior assessment.[3] The 1921 Act was the first to interpose a limitation upon the right of the Government to enforce a tax liability already accrued.[4] It barred collection in

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sioner, 29 F. (2d) 865 (Ct. App. D. C.) (same question under § 278 (c) of the Act of 1924, c. 234, 43 Stat. 253, 300); *Spear & Co.* v. *Heiner,* 34 F. (2d) 795; *Pictorial Printing Co.* v. *Commissioner,* 38 F. (2d) 563 (C. C. A. 7th); *Columbian Iron Works* v. *Brock,* 38 F. (2d) 816; *Chicago Railway Equipment Co.* v. *Commissioner,* 39 F. (2d) 378 (C. C. A. 7th) (both under the 1924 Act); *Wetherell Bros. Co.* v. *White,* D. Mass., decided December 3, 1930, U. S. Daily, December 30, 1930, p. 3291 (under § 278 (e) of the 1926 Act, c. 27, 44 Stat. 9, 59).

[2] There was doubt whether this provision required the Commissioner both to discover the error in the return and to make an additional assessment, or merely to make discovery, within the three years. See *Aiken* v. *Burnet,* decided this day, *post,* p. 280, note 2; *W. P. Brown & Sons Lumber Co.* v. *Burnet,* decided this day, *post,* p. 286, note 2.

[3] Compare *United States* v. *Nashville, C. & St. L. Ry.,* 249 Fed. 678; *United States* v. *Ayer,* 12 F. (2d) 194; *United States* v. *Kelley,* 24 F. (2d) 234; *United States* v. *Greenfield Tap & Die Corp.,* 27 F. (2d) 933.

[4] The provisions in § 250 (d) of the Revenue Act of 1918 (40 Stat. 1057, 1083) were not in terms retroactive and applied only to taxes assessed under that Act. Compare *Bowers* v. *N. Y. & Albany Lighterage Co.,* 273 U. S. 346, 350; *Florsheim Bros. Co.* v. *United States,* 280 U. S. 453, 459, note 5. Even after the Act of 1921 suit might be brought, within the limitation period, though no assessment had been made. See Revenue Act of 1924, c. 234, § 278 (d), 43 Stat. 253, 300.

any manner after five years only in case no waiver was given. Congress must have intended that a waiver should be operative even though before the passage of the Act five years had elapsed from the time the return had been filed. Among the earlier revenue acts referred to in § 250 (d) was that of 1909, the returns under which were required to be filed more than ten years prior to the passage of the 1921 Act. Section 38, Third, 36 Stat. 114. And returns under the Revenue Act of 1913 were required to be filed more than six years before the passage of the 1921 Act. Section II (D), 38 Stat. 168. The consent clause in § 250 (d) deals broadly with all assessments and collections under past and future acts, and there is no indication of an intention to confine it to those few cases under the early revenue acts in which no return had been filed or a so-called common law waiver had been given prior to 1921. Unless it is to be rendered practically meaningless as applied to tax returns under these earlier acts, it must be construed to permit the execution of waivers after the period of five years. Moreover, there is the analogy of the rule that private debts barred by the statute of limitations may be effectively revived, after the bar has fallen, by a new promise without new consideration. Williston, Contracts, §§ 160–184.

Second. It is contended that the so-called waiver was inoperative because its provisions did not conform to § 250 (d) of the Revenue Act of 1921, in that it waived "any and all statutory limitations as to the time within which assessments based upon such liability may be entered," but did not in terms refer to the "determination" or "collection" of the tax.[5] The argument is that Con-

[5] On this question, the Government has uniformly prevailed below. *Stange* v. *United States,* 68 Ct. Cls. 395; *Sabin* v. *United States,* 44 F. (2d) 70 (Ct. Cls.); *Columbian Iron Works* v. *Brock,* 38 F. (2d) 816; *Washington Coal & Coke Co.* v. *Heiner,* 42 F. (2d) 681; *Solomon* v. *Heiner,* 43 F. (2d) 592; *Crowell Elevator Co.* v. *Allen,* 43 F.

gress had, in respect to a waiver, prescribed an exact and mandatory procedure under which the Commissioner was authorized to defer action only if the taxpayer expressly waived the limitations on all three steps, determination, assessment, and collection,—reliance being had on the use of the conjunctive "and" in the section; that the statutory authority given the Commissioner to consent to a later performance of these three steps did not imply a like authority as to any one of them; that under § 250 (d) the periods within which both assessment and collection must be made, run concurrently five years from the filing of the return; and that nothing was accomplished by consenting to the assessment, since the assent to a later collection was withheld.

We are of the opinion that the validity of a waiver under § 250 (d) was not conditioned on the precise use of the three words therein mentioned. As pointed out in *Florsheim Bros., etc.* v. *United States,* 280 U. S. 453, 466, a waiver is not a contract, and the provision requiring the Commissioner's signature was inserted for purely administrative purposes and not to convert into a contract what is essentially a voluntary, unilateral waiver of a defense by the taxpayer. The ambit of the Commissioner's authority may be in many respects limited by the statute, *Florsheim Bros., etc.* v. *United States, supra,* at 464, but no reason appears why it was essential that specific reference be made to the period for collection, or why he could not, with the taxpayer's consent, employ one word instead of three to secure the desired result. The waiver, in terms, was executed by the taxpayer in order "that his liability . . . might be determined" only after intensive and thorough reconsideration by the Commis-

(2d) 772; see, also, Watt & Holmes Hardware Co. *v.* Commissioner, 8 B. T. A. 372; Sunshine Cloak & Suit Co. *v.* Commissioner, 10 B. T. A. 971 (under § 278 (c) of 1924 and 1926 Acts); Lutcher & Moore, etc. Co. *v.* Commissioner, 19 B. T. A. 887; cf. *Roy & Titcomb, Inc.* v. *United States,* 69 Ct. Cls. 614.

sioner. The parties cannot have intended to have the amount of the tax ascertained and to leave the taxpayer free to pay it or not. They clearly contemplated the entire procedure necessary to determination and collection of the tax. This does not mean that the distinctions between assessment and collection were to be disregarded, but merely that the employment of a single term comprehended both steps.

In November, 1922, both parties understood that the tax would be assessed and collected after a proper consideration of the taxpayer's objections to any additional assessment. To secure sufficient time for this purpose, the so-called waiver was executed. The failure to insert in the written consent words expressly waiving the statutory limitation upon collection, is explained by the belief prevailing prior to the decision in *Bowers* v. *N. Y. & Albany Lighterage Company,* 273 U. S. 346, that distraint, the common method for coërcing payment, was possible even when the statutory period for collection by suit had expired. That the parties at the time may have believed that collection was possible independent of any waiver, does not make less effective the instrument given for the purpose of tolling the limitation on the ultimate determination and collection of the tax. It must be assumed that an effective and not a futile act was intended.

Affirmed.

AIKEN, ADMINISTRATRIX, *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE.

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

No. 69. Argued December 3, 1930.—Decided January 5, 1931.

1. The right of the taxpayer to make, and the authority of the Commissioner of Internal Revenue to accept, a waiver of the period of limitations on assessment of income and excess profits tax, existed before the enactment of the Revenue Act of 1921,

which was the first of the revenue acts to provide in terms for waivers. § 250 (d). P. 280.

2. If statutory authority was needed for the acceptance of such waivers, prior to the Revenue Act of 1921, it may be found in the general administrative provisions of earlier revenue acts. P. 281.
3. While § 250 (d) of the Revenue Act of 1921 first specified that a waiver should be in writing and signed by the Commissioner, it did not invalidate an earlier waiver of "any and all statutory limitations" upon an assessment of 1917 taxes, even as applied to limitations imposed by § 250 (d) itself. P. 281.
4. A waiver referring to taxes imposed by the Act of Sept. 8, 1916, as amended by the Act of October 3, 1917, *held* operative to extend the period for assessment of war-profits as well as income taxes. P. 282.
5. A waiver purporting to extend the time for assessment *held* applicable also to the time for collection. *Stange* v. *United States, ante,* p. 270. P. 282.
6. Under §§ 270 and 278 (d) of the Revenue Act of 1924, income and excess-profits taxes for 1917, assessed March 12, 1925, pursuant to valid time extensions, are collectible within six years of the assessment. *Id.*

35 F. (2d) 620, affirmed.

CERTIORARI, 281 U. S. 713, to review a judgment sustaining a decision of the Board of Tax Appeals, 10 B. T. A. 553, which had affirmed an assessment of income and excess-profits taxes.

Mr. W. Leo Austin, with whom *Messrs. James H. Maxey* and *L. E. Cahill* were on the brief, for petitioner.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch,* Special Assistant to the Attorney General, *Joseph H. Sheppard* and *Bradley B. Gilman* were on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

On March 30, 1918, Aiken filed his return of income and excess profits taxes for the year 1917. On March 12, 1925,

the Commissioner made a jeopardy assessment which, upon a claim for abatement, he reduced, on October 7, 1926. Aiken thereupon appealed to the Board of Tax Appeals on the grounds that the jeopardy assessment had been erroneously computed, and that both assessment and collection were barred by the statute of limitations. The Commissioner's determination was affirmed by the Board, 10 B. T. A. 553; and its decision was affirmed by the Circuit Court of Appeals for the Eighth Circuit, 35 F. (2d) 620. This Court granted a petition for certiorari, the argument to be "limited to the questions concerning the validity and effect of the waivers," 281 U. S. 713.

The Revenue Act of November 23, 1921, c. 136, § 250 (d), 42 Stat. 227, 265, provides a five-year period of limitation for the assessment and collection of income and excess profits taxes under earlier revenue acts. The five years from the filing of the return expired March 30, 1923. In order to sustain the validity of the assessment and the right of collection, it was necessary to establish a waiver effective March 12, 1925, the date of the jeopardy assessment. Several waivers had been given. The first, which was executed by the taxpayer on February 5, 1921, and filed with the Bureau two days later, was not executed by the Commissioner until after the enactment of the 1921 Revenue Act. That waiver expired April 1, 1924.[1] Before that date, a second waiver had been duly executed, which, by its terms, was to remain in effect for "one year after the expiration of . . . the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made. . . ." Thus the jeopardy assessment was made shortly before April 1, 1925, the expiration period of the first waiver as extended by the second; and in order that this tax may be collected, both waivers must be valid.

[1] It was unlimited in time, but expired under a departmental ruling, promulgated April 11, 1923, by which all such waivers were to terminate April 1, 1924. Mim. 3085, I. R. Cum. Bull. II–1, p. 174.

First. It is contended that the waiver of February 5, 1921, is invalid because it was executed prior to the enactment of § 250 (d) of the Revenue Act of 1921 which was the first of the revenue acts to provide in terms for the giving of waivers. The argument is that prior to the enactment of that section the Commissioner lacked authority to accept waivers of the limitation on the period within which assessment might be made under the Acts of 1916 and 1917.[2] This contention is not sound. The limitation periods on assessment could be waived by the taxpayer in the same fashion as other statutes of limitations are waived. No reason appears why the Commissioner could not accept such a waiver prior to the Act of 1921. Although the Government might at that time still have brought suit even though the period for assessment had expired, it was thought desirable to follow the normal and simpler course of assessment and collection by distraint proceedings because of the advantages afforded.[3] The Commissioner requested the taxpayer to execute a

[2] Section 9 (a) of the Act of September 8, 1916, c. 463, 39 Stat. 756, 763, provided that where a false [erroneous] return had been filed, the Commissioner had three years in which to discover the error and to make an additional assessment. Section 3 of the Act of October 3, 1917, c. 63, 40 Stat. 300, 301, incorporated these provisions by reference. Compare, as to the 1909 and 1913 Acts, *Eliot National Bank* v. *Gill*, 218 Fed. 600; *National Bank of Commerce* v. *Allen*, 223 Fed. 472; *Woods* v. *Lewellyn*, 252 Fed. 106; and see Reg. 33 (1914) Arts. 25, 177; *id.* (Rev. ed. 1918) Arts. 38, 233; *W. P. Brown & Sons Lumber Co.* v. *Burnet*, decided this day, *post*, p. 286, note 2.

[3] Compare Article 233 of Regulations 33 (Rev. ed. 1918) which stated in this connection: "While the Government is fully authorized to recover such taxes by suit, it is desirable, in order to obviate needless expense and annoyance to the taxpayer and the Government, that the collection be made as a result of a formal assessment." See also *id.*, Art. 38.

waiver in cases where prolonged reëxamination of the return seemed necessary. If authority was needed for the acceptance of such waivers, it may be found in the general broad administrative provisions of the respective acts.[4] Even after the Act of 1921, a so-called waiver was not a contract. The requirement in § 250 (d) of that Act that the Commissioner sign the consent was inserted to meet exigencies of administration, and not as a grant of authority to contract for waivers. See *Stange* v. *United States,* decided this day, *ante,* p. 270; *Florsheim Bros.* v. *United States,* 280 U. S. 453, 466.

Second. It is contended that the first waiver should not be construed as waiving a limitation prescribed by a statute thereafter enacted. The argument is that § 250 (d) of the Act of 1921 superseded this waiver and required a new consent executed subsequent to its enactment and in accordance with its terms. While § 250 (d) first specified that a waiver be in writing and signed by the Commissioner, there was nothing in that section which invalidated waivers made prior to its enactment or limited the effect of such instruments on the limitations therein imposed. Compare *Florsheim Bros.* v. *United States,* 280 U. S. 453, 467. The first waiver, by its express terms, embraced "any and all statutory limitations" upon the assessment of these 1917 taxes. We see no reason for

[4] Revenue Act of October 3, 1917, c. 63, 40 Stat. 300, 325, § 1001, provides: "That . . . every person . . . liable to any tax imposed by this Act, or for the collection thereof . . . shall comply with such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may from time to time prescribe." This was followed by § 1309 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1143, which authorized "all needful rules and regulations for the enforcement of the provisions of this Act." Compare Revenue Act of March 3, 1917, c. 159, 39 Stat. 1000, 1002, § 207.

restricting this language so as to exclude the limitations subsequently imposed by § 250 (d) of the Act of 1921.

Third. It is contended that the first waiver, even if valid, did not operate to extend the period for the assessment of war-profits as distinguished from income taxes. The argument is based on the reference in the waiver, which was prepared by the Commissioner, to "all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress, approved October 3, 1917," and it is contended that the war-profits tax was a separate enactment, not an amendment to the 1916 Act, and hence not included within the waiver. It is clear that this waiver was intended to embrace all liability under the 1917 return then pending. Moreover, the only statute approved October 3, 1917, was the Revenue Act of that year, Chapter 63, the general object of which was to increase for war purposes the taxes levied by the Act of 1916.

Fourth. The petitioner has argued also that the first waiver did not purport to extend the time for collection. This waiver is identical with that before us in *Stange* v. *United States,* decided this day, *ante,* p. 270, which we held was intended to embrace all the steps necessary for the ultimate collection of the tax. The second waiver expressly included "determination, assessment, and collection." Consequently, as the assessment of March 12, 1925, was timely, the right of collection is within § 278 (d) and § 280 of the Revenue Act of 1924, c. 234, Tit. II., 43 Stat. 253, 300, 301, which gives six years from the making of the assessment. *Florsheim Bros.* v. *United States,* 280 U. S. 453, 467. Compare *Russell* v. *United States,* 278 U. S. 181.

Affirmed.

W. P. BROWN & SONS LUMBER COMPANY *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE.

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

No. 115. Argued December 3, 1930.—Decided January 5, 1931.

1. A return for 1917 income and profits tax was filed April 1, 1918; the taxpayer, within the three year period for assessment allowed by the Revenue Act of 1917, filed a waiver extending that period to April 1, 1924; notice of a deficiency, an intradepartmental appeal therefrom, a jeopardy assessment, and a claim of abatement all occurred in 1923, within the extended period. *Held* that the waiver was valid even though executed by the taxpayer before the date of the Revenue Act of 1921 and not executed by the Commissioner until 1922, and that, under § 250 (d) of the Act of 1921, the assessment was in time. *Stange* v. *United States, ante,* p. 270; *Aiken* v. *Burnet, ante,* p. 277. P. 285.
2. Three successive waivers *held* valid and productive of successive extensions of the period for collecting 1917 taxes beyond the five year period provided in § 250 (d), Revenue Act of 1921, although the first waiver was executed by the taxpayer before the date of that Act and not executed by the Commissioner until 1922, and did not refer expressly to collection, and although the other two, both in terms covering collection, were given after five years from the filing of the return. *Aiken* v. *Burnet, ante,* p. 277; *Stange* v. *United States, ante,* p. 270; *Burnet* v. *Chicago Ry. Equipment Co., post,* p. 295. P. 286.
3. The right to collect a deficiency assessment of 1917 taxes, the limitation period for which, as extended by waivers, did not expire until after the taxpayer had appealed from the assessment to the Board of Tax Appeals, did not become barred under § 250 (d) of the Revenue Act of 1921 when the time specified in the last extension expired pending the appeal, even though the Commissioner, despite the appeal, remained free to collect the tax as assessed. So *held* in view of provisions of the Revenue Act of 1926, mentioned below. P. 288.

4. The deficiency in 1917 taxes was assessed, but not paid in full, before June 3, 1924; the Commissioner, after June 2, 1924 (date of the Revenue Act of that year,) but before the date of the Revenue Act of 1926, finally determined the amount of deficiency; and the taxpayer's appeal to the Board of Tax Appeals was taken before the date of the 1926 Act and was then pending. *Held:*

(1) That § 283 (f) of the Act of 1926 confirmed the jurisdiction of the Board over the appeal. P. 288.

(2) Sections 274 (a) and 277 (b) of that Act were made applicable by § 283 (f) and extended the period for collection until after final determination by the Board. P. 290.

(3) Section 1000 of the Act of 1926, amending the 1924 Act by providing that, where the Board found a tax barred by limitations, its decision should be that there was no deficiency, was intended to confirm its jurisdiction in making final disposition of a deficiency already barred, and does not affect the special jurisdiction conferred by § 283 (f) *supra*. P. 291.

(4) Under § 283 (f), Act of 1926, the suspension by § 277 (b) of the time limit on collection applies retroactively to the date the appeal was filed with the Board of Tax Appeals. P. 292.

(5) Section 278 (e), Act of 1926, which prohibits collection, in the absence of a waiver prior to that Act, if at the date of its enactment the tax was already barred, does not apply where, although the waiver had in terms expired before that date, the time is extended under § 283 (f) pending appeal before the Board. P. 292.

(6) Section 283 (l), Act of 1926, which provides that in case of any tax imposed by a prior Act there shall be added to the period of suspension given by § 277 (b), any period prior to the Act of 1926 during which the Commissioner was prohibited from beginning distraint or proceeding in court, does not limit application of §§ 274 (a) and 277 (b), as directed by § 283 (f), *supra*, to the present case, even though the Commissioner was free to make collection between the date of the appeal to the Board and the date of the 1926 Act. P. 293.

38 F. (2d) 425, affirmed.

CERTIORARI, 281 U. S. 718, to review a judgment of the Circuit Court of Appeals affirming a decision of the Board of Tax Appeals, 13 B. T. A. 1425, which sustained an income and profits tax against the defense that it was barred by limitations.

Mr. W. W. Spalding for petitioner.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher,* and *Messrs. Claude R. Branch,* Special Assistant to the Attorney General, *Joseph H. Sheppard,* and *Bradley B. Gilman* were on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

On April 1, 1918, W. P. Brown & Sons Lumber Company filed its income and profits tax return for the year 1917. The tax thereon was duly paid. On March 6, 1923, the Bureau of Internal Revenue duly mailed to the taxpayer notice of a deficiency. A timely appeal was taken to the Commissioner who had meanwhile, in March, 1923, made a jeopardy assessment. On March 27, 1923, the taxpayer filed a claim for abatement. On June 4, 1924, this claim and the appeal were sent by the Income Tax Unit to the Committee on Appeals and Review.[1] On October 28, 1925, the Commissioner duly mailed to the taxpayer notice of his determination, the claim for abatement being allowed in part and rejected in part. On November 18, 1925, the taxpayer appealed to the Board of Tax Appeals for a redetermination of the deficiency. There the parties stipulated the amount of the additional tax, and submitted the question whether it was barred by the statute of limitations. The Board held that it was not, 13 B. T. A. 1425; and its decision was affirmed by the Circuit Court of Appeals, 38 F. (2d) 425. This Court granted a writ of certiorari, the briefs and arguments to be "limited to the question of the validity and effect of the waivers." 281 U. S. 718.

The jeopardy assessment was clearly made in time. The return was filed April 1, 1918; the assessment was

[1] See *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551, 563, note.

made in March, 1923. By § 250 (d) of the Revenue Act of November 23, 1921, c. 136, 42 Stat. 227, 265, a period of five years from the filing of the return, was allowed for assessment, see *Stange* v. *United States,* decided this day, *ante,* p. 270. Moreover, while there was under the Act of 1917 a limitation of three years on the period for assessment,[2] the taxpayer had duly executed and filed on December 13, 1920, before the three years expired, a waiver which extended the period for assessment to April 1, 1924.[3] This waiver was valid even though executed by the taxpayer before the Act of 1921 and not executed by the Commissioner until 1922. *Aiken* v. *Burnet,* decided this day, *ante,* p. 277. The original letter advising the taxpayer of the deficiency, the intradepartmental appeal therefrom, the jeopardy assessment, and the claim for abatement were all made in 1923 within the extended period.

The sole question for discussion is whether the right of collection has been barred under § 250 (d) of the Revenue Act of 1921 which imposed a five year limitation on col-

[2] There was doubt whether the 1916 and 1917 Acts required the Commissioner both to discover the error in the return and to make an additional assessment, or merely to make discovery, within three years. Revenue Act of 1916, c. 463, § 14 (a), 39 Stat. 756, 772, incorporated by reference into Revenue Act of 1917, c. 63, § 206 (c), 40 Stat. 300, 305. At that time, the Commissioner thought it sufficient that he discover the error within the three years. See Reg. 33 (Rev. ed. 1918) Art. 233. Compare *Eliot National Bank* v. *Gill,* 218 Fed. 600, 602; *United States* v. *Nashville, C. & St. L. Ry.,* 249 Fed. 678, 682; *Du Pont* v. *Graham,* 283 Fed. 300, 302, reversed on other grounds, 262 U. S. 234. Section 250 (d) of the 1921 Act extended this period for assessment to five years, (compare *United States* v. *Chicago & E. I. Ry.,* 298 Fed. 779), but provided that the time run from the filing of the return.

[3] This waiver was unlimited in time but expired April 1, 1924, under a departmental ruling promulgated April 11, 1923, Mim. 3085, I. R. Cum. Bull. II–1, p. 174. See *Aiken* v. *Burnet,* decided this day, *ante,* p. 279, note 1.

lection. See *Stange* v. *United States, supra.* No payment has been made on account of the additional tax; and no proceeding for collection has been taken, either by suit or by distraint. Unless extended by waiver, the period allowed for collection expired April 1, 1923. Three waivers were given. The first was executed by the taxpayer and filed with the Bureau December 13, 1920; was approved by the Commissioner on December 2, 1922; and expired April 1, 1924. The second was executed by both the taxpayer and the Commissioner on December 10, 1923, and expired by its terms one year from its date. The third was executed by the taxpayer and the Commissioner on October 25, 1924; and it was in terms declared to be "in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, or the statutory period of limitations as extended by Section 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau." All three waivers were effective in extending the period for collection. The first was valid although executed by the taxpayer before the Act of 1921 and not executed by the Commissioner until 1922, and operative even though it did not make express reference to collection. *Aiken* v. *Burnet,* decided this day, *ante,* p. 277. The second was valid because given within the period as extended by the first. The third was valid because given within the period as extended by the second. Moreover, both were valid although given after five years from the date of the filing of the return.[4] See *Stange* v. *United States, ante,* p. 270; *Burnet* v. *Chicago Railway Equipment Co., post,* p. 295. In terms, both covered collection. The third had not ex-

[4] Inasmuch as the second and third waivers were in themselves sufficient to extend the period for collection, the first waiver may be disregarded in this connection, as was done by the lower court. See 38 F. (2d) 428.

pired when the appeal was taken to the Board of Tax Appeals on November 18, 1925.

Whether the right of collection became barred thereafter depends upon the construction to be given to the applicable statutes. The taxpayer contends that the right of collection was barred on December 10, 1925, that is twenty-two days after the appeal to the Board of Tax Appeals had been taken, although this appeal was then pending without having been heard, and indeed could not have been heard under the practice of the Board. See Rule 15, 1 B. T. A. 1289; Rules 24–25, 7 B. T. A. 1361–62. Besides the Act of 1921, provisions of the Revenue Act of 1924 and of the Revenue Act of 1926 are relied upon. The argument is that despite the appeal to the Board, the Commissioner was at all times at liberty to enforce payment of the tax as assessed by the jeopardy assessment or as later reduced; that hence, collection was barred on December 10, 1925, by § 250 (d) of the 1921 Act; and that there was nothing in either the Revenue Act of June 2, 1924, c. 234, 43 St. 253 or the Revenue Act of February 26, 1926, c. 27, 44 Stat. 9, which kept alive the right of collection. The Board of Tax Appeals rested its decision on provisions of the 1924 Act;[5] the Circuit Court of Appeals on those and also on the 1926 Act. Only the latter act need be considered.

Section 283 (f) of the Revenue Act of 1926, 44 Stat. 64, provided:

[5] It relied upon G. L. Ramsey *v.* Commissioner, 11 B. T. A. 345, where it has held that on a jeopardy assessment which had been made within the five year period as extended by a valid waiver, the Commissioner had, under § 278 (d) of the Revenue Act of 1924, six years after the assessment within which to commence proceedings for collection, even though the parties had agreed in the waiver for a different period for collection. The Board held further that there was nothing in § 278 (d) of the Revenue Act of 1926 which restricted this period to that mentioned in the waiver.

"If any deficiency [in any 1916–21 income or profits taxes] . . . was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined . . . in the same manner as provided in subdivision (e) of this section. . . ." [6]

This section is applicable to the case at bar. The deficiency was assessed in March, 1923; and hence before "June 3, 1924," "and was not paid." On October 28, 1925, between the effective dates of the 1924 and the 1926 Acts, the Commissioner finally determined the amount of the deficiency; and on November 18, 1925, also prior to the enactment of the 1926 Act, the taxpayer appealed to the Board of Tax Appeals. One effect of the section was to confirm the jurisdiction of the Board.[7] Another

[6] Somewhat similar provisions relating to like cases under prior estate and gift tax statutes were enacted at the same time. See Revenue Act of 1926, c. 27, §§ 318, (d), (e), and (f), 44 Stat. 9, 82–83; De Sabichi *v.* Commissioner, 4 B. T. A. 445.

[7] Although some doubt was expressed in Appeal of Reynolds & Reynolds Co., 1 B. T. A. 275, the Board of Tax Appeals very early took jurisdiction in these cases. Appeal of Joseph Garneau Co., Inc., 1 B. T. A. 75; Appeal of Ormsby McKnight Mitchell, 1 B. T. A. 143; Appeal of Boston Structural Steel Co., 1 B. T. A. 602; Appeal of Buffalo Slag Co., 1 B. T. A. 749. Compare Appeal of Terminal Wine Co., 1 B. T. A. 697. Following the Act of 1926, the Board has uniformly held that § 283 (f) confirmed its jurisdiction. See Appeal of Covert Gear Co., 4 B. T. A. 1025; Appeal of Elizabeth W. Strana-

effect was to make applicable to the case at bar § 274 (a) and § 277 (b) of the 1926 Act.[8] Section 274 (a) provided that no distraint or proceeding in court for the collection

han, 4 B. T. A. 1141; Appeal of Nice Ball Bearing Co., 5 B. T. A. 484; Appeal of Slater Mills, Inc., 5 B. T. A. 971; Appeal of Ocean Accident & Guarantee Corp., 6 B. T. A. 1045; Reliance Mfg. Co. *v.* Commissioner, 7 B. T. A. 583. Such was clearly the legislative purpose of the section. See Hearings Before the Committee on Ways and Means on Revenue Revision of 1925, 69th Cong., 1st Sess., pp. 898, *et seq.*, particularly the statement of the Board Chairman, Charles D. Hamel, p. 923; H. Rep. No. 1, *id.*, December 7, 1925, p. 13; Sen. Rep. No. 52, *id.*, January 16, 1926, p. 32; Conference Report, H. Rep. No. 356, *id.*, February 22, 1926, pp. 46–47.

[8] Subdivision (f) of § 283 refers to subdivision (e). That section provides that the situation dealt with therein should be treated as though a deficiency notice had been sent under § 274 (a), and that the tax "shall be collected and paid in the same manner and subject to the same provisions and limitations . . . as in the case of a deficiency imposed [by the 1926 Act], except as otherwise provided in section 277," and in certain sections relating to interest and jeopardy collection, which are here immaterial. 44 Stat. 64. Deficiencies under the 1926 Act were governed by §§ 273, 274, and 275, 44 Stat. 55–57. Section 273, defining the term, and § 275, providing for additions in the case of negligence, fraud, etc., are not here applicable. Section 274 (a) is quoted in the text. Section 277 (a) related to the periods for assessment and collection generally and reënacted the five year limitation on the collection of 1917 taxes. It was qualified by § 277 (b), quoted in the text.

Section 283 (f) was, in addition, limited by § 283 (j) which prohibited an appeal to the Circuit Court of Appeals if the hearing before the Board had been held prior to the enactment of the 1926 Act. *Blair* v. *Curran*, 24 F. (2d) 390; *Blair* v. *Hendricks*, 24 F. (2d) 819; *Power & Bro.* v. *Commissioner*, 27 F. (2d) 116. In the case at bar, the hearing was held on April 26, 1928. Also, § 284 (d), 44 Stat. 67, which imposed restrictions on the allowance of refunds and credits after an appeal had been taken to the Board of Tax Appeals, was made inapplicable to cases under § 283 (f). Compare *Burnet* v. *Chicago Railway Equipment Co.*, decided this day, *post*, p. 301, note 8.

of the deficiency "shall be made, begun, or prosecuted . . . if a petition has been filed with the Board [of Tax Appeals], until the decision of the Board has become final." [9] And § 277 (b) provided that the running of the statute of limitations on "the beginning of distraint or a proceeding in court for collection, in respect of any deficiency shall . . . be suspended for the period during which the Commissioner is prohibited from . . . beginning distraint or a proceeding in court, and for 60 days thereafter." [10] That period still continues as there is not yet a final determination of the Board.[11] The taxpayer concedes that § 283 (f) of the 1926 Act confirmed the jurisdiction of the Board of Tax Appeals in the present case, but contends that it did not operate to extend the period for collection until after a final determination.

First. It is argued that § 283 (f) cannot be interpreted as extending the time for the collection of the tax because of § 1000.[12] The latter section amended the 1924 Act by providing that where the Board found that the tax was barred by the statute of limitations, its decision should be that there was no deficiency. This section was inserted

[9] 44 Stat. 55. Notwithstanding the prohibition in R. S. 3224, such suit or distraint proceeding may, by express provision in § 274 (a), be enjoined. *Peerless Woolen Mills* v. *Rose*, 28 F. (2d) 661.

[10] 44 Stat. 58–59.

[11] Section 274 (h), 44 Stat. 56, provided that the decision of the Board should become final according to the rules set out in § 1005. That section provides that finality shall be given thirty days after the issuance of the mandate of this Court, in case of an affirmance or dismissal, or upon correction in case of a modification or reversal. 44 Stat. 111; 26 U. S. C., § 1228.

[12] 44 Stat. 105, 107. This section was a general amendment to Title IX of the Revenue Act of 1924. An entire new section, § 906, was, *inter alia*, thereby added to the 1924 Act, of which subdivision (e) is relied upon by respondent.

to confirm the jurisdiction of the Board in making final disposition of a deficiency already barred.[13] It contains nothing which affects the special jurisdiction conferred by § 283 (f).

Second. It is argued that neither § 277 (b), which suspended the running of the statute, nor § 283 (f), which incorporated the former,[14] indicate that § 277 (b) was to be given a retroactive effect. The argument is unsound. Subdivision (f) of § 283 shows that it was the intention of Congress to apply the provisions of § 277 (b) to cases like that at bar. Since in such cases the assessment (before June 3, 1924), the final determination and the appeal to the Board (after June 2, 1924), must expressly have occurred prior to the enactment of the 1926 Act, the reference to § 277 (b) contained in § 283 (f) necessarily meant that in these cases the former section was to be applied retroactively.

Third. The taxpayer relies also upon § 278 (e)[15] of the 1926 Act which prohibited collection, in the absence of a waiver prior to that Act, if at the date of its enactment the tax was already barred. The argument is that since the last waiver by its terms expired on December 10, 1925, that is, prior to the effective date of the 1926

[13] See Hearings Before Committee on Ways and Means on Revenue Revision of 1925, *supra*, note 7, pp. 849, *et seq.*, 900–02. The Board had early decided that it had jurisdiction in such cases under § 900 of the 1924 Act. Appeal of National Refining Co., 1 B. T. A. 236. Compare note 12, *supra*.

[14] See note 8, *supra*.

[15] "This section . . . shall [not] authorize . . . the collection [of a tax] (1) if at the time of the enactment of this Act [such collection] was barred . . . unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act." 44 Stat. 59.

Act, this section bars collection. That interpretation is not correct. As was said by the court below: "The authority for extending the time for collection under the facts of the case at bar is found in § 283 (f), and not in § 278. . . . If we are to accept petitioner's contention that § 278 (e) is inconsistent with the interpretation we have given § 283 (f), we must necessarily hold that § 278 (e) in effect nullifies the clear provisions of § 283 (f). Not only is there nothing in the statute to warrant this interpretation, but the interrelation of § 278 (e) and § 283 (f) makes the contrary clear." [16] 38 F. (2d) 431.

Fourth. It is argued that inasmuch as the Commissioner was not prohibited from making collection between November 18, 1925, the date of the appeal, and February 26, 1926, the effective date of the 1926 Act,[17] and since

[16] As was pointed out below, the latter part of § 278 (e), which prohibits collection contrary to § 274 (a), quoted *supra* p. 290, recognizes and reinforces the prohibition against collection while a case is pending before the Board. See note 9, *supra*. Since this same subsection 274 (a) is incorporated in § 283 (f), *supra* note 8, it seems clear from this interrelation that § 278 (e) was not intended to limit § 283 (f), and that the suspension of the statute given by § 277 (b) is applicable to the instant case. See 38 F. (2d) 431.

[17] The filing of the claim for abatement of the jeopardy assessment did not operate as a stay of collection. The claim filed in the present case, under § 252 of the 1921 Act (42 Stat. 268) and R. S. 3228 as amended by § 1316 of that Act (42 Stat. 314), was apparently not accompanied by a bond. Under such circumstances the filing of the claim would not have prevented collection if the Commissioner had believed that collection of the tax was jeopardized. See Reg. 33 (1918 ed.), Art. 261; Reg. 45, Art. 1032; Reg. 62, Art. 1032; *cf. United States* v. *Burden, Smith & Co.*, 33 F. (2d) 229, 230. Prior to the decision in *Bowers* v. *N. Y. & Albany Lighterage Co.*, 273 U. S. 346, it was, however, the common practice to postpone collection upon the filing of a claim for abatement if there was no doubt as to the taxpayer's solvency. See H. Rep. No. 2, 70th Cong. 1st Sess., December 7, 1927, p. 34.

the period for collection, as extended by the waivers, expired December 10, 1925, § 277 (b) does not aid the Commissioner because the statute had run before that section could cause it to be suspended. Attention is called to another section of the 1926 Act, § 283 (l), which provided that in the case of any tax imposed by a prior Act there shall be added to the period of suspension given by § 277 (b), any period prior to the Act of 1926 during which the Commissioner was prohibited from beginning distraint or proceeding in court.[18] The argument is that this section indicates that § 274 (a) and § 277 (b) are not to be applied retroactively; that only the period, if any, obtained under § 283 (l) can be added to the waivers; and that since the Commissioner was not prohibited from collecting prior to the expiration of the last waiver, § 283 (l) is inapplicable. Section 283 (l) expressly provides that the time therein granted shall be " in addition to the period of suspension provided for in subdivision (b) of section 277." It undoubtedly had reference to those cases in which a claim for abatement, accompanied by a bond, had been filed and collection stayed between the 1924 Act and 1926 Act.[19] It cannot limit the application to the case at bar of § 274 (a) and § 277 (b), as § 283 (f) directs. This argument of the taxpayer is also unsound.

Affirmed.

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[18] 44 Stat. 66.

[19] See § 279 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 300. Compare § 283 (b) and (c) of the 1926 Act. These sections confirmed the jurisdiction of the Board in cases in which an assessment had been made and an appeal taken, or in which the 60-day period had not expired before the 1926 Act. Compare Plains Buying & Selling Ass'n. *v.* Commissioner, 5 B. T. A. 1147, 1153. In such cases a jeopardy assessment and claim for abatement, accompanied by a bond and providing for a stay of collection, between the 1924 and 1926 Acts, would have been possible, and § 283 (l) would have applied.

Syllabus.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* CHICAGO RAILWAY EQUIPMENT COMPANY.

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

No. 231. Argued December 3, 1930.—Decided January 5, 1931.

1. The power of the Commissioner of Internal Revenue, under § 278 (c) of the Revenue Act of 1924, to sign with the taxpayer a waiver to extend the time for assessment of income and profits taxes under the Act of 1918, could be exercised after his determination of deficiency had been appealed to and was pending before the Board of Tax Appeals. P. 298.
2. The Commissioner, when contemplating the making of a jeopardy assessment which the taxpayer desired to avoid, was authorized, under his general administrative powers, to accept instead the waiver, as a substitute means of insuring ultimate collection. P. 298.
3. The power of the Commissioner to sign a waiver under § 278 (c) of the 1924 Act existed after the expiration of the five year limitation on assessment. § 277 (a). So *held* where that period expired after the date of the Act, and without deciding whether § 278 (e) qualifies § 278 (c) as to waivers on assessments barred before that date. P. 298.
4. Section 281 (e) of the 1924 Act, which extended the time for making claims for refund where a waiver of assessment had been filed prior to certain specified dates, was merely to extend the time for filing claims for refund in particular cases of taxes. There is no necessary relation between it and § 278 (c). P. 300.
5. A taxpayer who has signed a waiver and has had the validity of the alleged deficiency determined in the courts, on appeal from the Board of Tax Appeals, has no good ground for complaint that he cannot thereafter raise the same question on a claim for refund. P. 301.
6. A waiver, signed while appeal from a deficiency determination, duly noticed, was pending before the Board of Tax Appeals, provided that the time for making assessment should continue until a date specified and should then expire, "except that if a

notice of deficiency in tax is sent to said taxpayer and if an appeal is filed with said Board, then said date shall be extended by the number of days between the date of mailing of said notice and the date of final decision by said Board." *Held* that the quoted provision applied to the existing notice and appeal, the object of the waiver having been to have the pending case determined without exacting payment, or a bond, from the taxpayer meanwhile. P. 302.

7. A waiver extending time for a deficiency assessment, made when assessment was already barred, cannot be held void for duress because procured by a threat of the Commissioner to make a jeopardy assessment and enforce collection, where, in the absence of a determination that the bar had attached, it was the Commissioner's duty to proceed to insure the assessment and collection. P. 303.

39 F. (2d) 378, reversed.

CERTIORARI, *post*, p. 821, to review a judgment of the Circuit Court of Appeals reversing the Board of Tax Appeals in proceedings for the assessment of an income and excess profits tax. See also 4 B. T. A. 452; 20 F. (2d) 10; 14 B. T. A. 471.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch,* Special Assistant to the Attorney General, *Joseph H. Sheppard,* and *Bradley B. Gilman* were on the brief, for petitioner.

Mr. Henry W. Price, with whom *Mr. W. S. Oppenheim* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Revenue Act of June 2, 1924, c. 234, § 278 (c), 43 Stat. 253, 300, provides concerning income and profits taxes under the Revenue Act of 1918: "Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed

at any time prior to the expiration of the period agreed upon." Section 277 (a) (2), 43 Stat. 299, provides that the tax "shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period." Section 277 (b) provides that if due notice of the determination of a deficiency has been mailed to the taxpayer, and an appeal is taken to the Board of Tax Appeals, the time for making the assessment shall be extended "by the number of days between the date of mailing of such notice and the date of the final decision by the Board." Section 278 (d) provides that when assessed within the period prescribed by § 277 or § 278, "such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax." This case presents, among others, the question whether a waiver given while the case was pending before the Board of Tax Appeals but after the expiration of five years from the filing of the return tolls the statute of limitations.

On June 16, 1919, the Chicago Railway Equipment Company filed its income and profits tax return for 1918. On March 14, 1925, the Commissioner determined a deficiency and gave due notice thereof. On May 6, 1925, the taxpayer filed its appeal with the Board of Tax Appeals. On December 10, 1925, the taxpayer and the Commissioner executed an agreement which provided that "the time for making any assessment . . . shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and . . . if an appeal is filed with said Board [of Tax Appeals] then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said board." On July 28, 1926, the Board confirmed, in the main, the Com-

missioner's determination, 4 B. T. A. 452; but the Circuit Court of Appeals remanded the case to it for further proceedings. 20 F. (2d) 10. Then, for the first time the defense was made that the deficiency had been barred by the statute of limitations. The Board overruled the objection, 13 B. T. A. 471; but its decision was reversed by the Circuit Court of Appeals, 39 F. (2d) 378. This Court granted a writ of certiorari.

First. The taxpayer contends that the agreement of December 10, 1925, was inoperative because the Commissioner lacked the power to sign a waiver after an appeal from his determination to the Board of Tax Appeals. The argument is that once such an appeal has been filed, the Commissioner's powers of investigation and determination have been exhausted; that thereafter his duty in making an assessment pursuant to the Board's order is purely ministerial; that the waiver is in effect an agreement not to plead the statute of limitations; and that the Commissioner is not authorized to receive such a waiver. As we said in *Stange* v. *United States,* decided this day, *ante,* p. 270, the Commissioner's signature was required purely for administrative purposes. See *Florsheim Bros. Co.* v. *United States,* 280 U. S. 453, 466. There was nothing in this requirement which limits the period during which a waiver may be effectively given. Compare *Aiken* v. *Commissioner,* decided this day, *ante,* p. 277. Moreover, at the time this waiver was executed, the Commissioner was contemplating the making of a jeopardy assessment which the taxpayer desired to avoid. The Commissioner was clearly authorized, under his general administrative powers, to accept instead the waiver as a substitute means of insuring ultimate collection. See *Aiken* v. *Commissioner, supra.*

Second. The taxpayer contends that the waiver was inoperative because the Commissioner lacked the power to sign a waiver after the expiration of the five-year

period.[1] What was said on this subject in reference to a waiver under the 1921 Act in *Stange* v. *United States, supra,* is applicable also to the corresponding provision of the 1924 Act. A difference in phraseology is called to our attention; but it is without significance. The further argument is made that in view of other sections in the 1924 Act,[2] an interpretation of § 278 (c) which permitted the giving of a waiver after the expiration of the five years, would lead to absurdities and inequalities which Congress could not have intended. Reference is made, first, to § 278 (e)[3] which, it is urged, renders inoperative any waiver signed after the enactment of the statute where the assessment in question was already barred prior thereto.[4] The inequality charged is that the limitation period for the assessment of 1918 taxes due under a return filed before June 2, 1919, could not, under the suggested interpretation, be waived after June 2, 1924, but that the corresponding limitation for the same tax due under a return filed after June 2, 1919, could be so waived. We

[1] See *Joy Floral Co.* v. *Commissioner,* 29 F. (2d) 865; *Columbian Iron Works* v. *Brock,* 38 F. (2d) 816. In these cases the taxpayers' contention was sustained and the waivers held inoperative.

[2] Respondent also cites § 278 (e) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 59, which substantially reënacted § 278 (e) of the 1924 Act, and urges that particular discriminations would result from the combined effect, under certain suggested interpretations, of these two sections. But the effect of a later statute cannot authorize an unintended and undesirable construction of an earlier act. Compare *Russell* v. *United States,* 278 U. S. 181, 188.

[3] "(e) This section shall not (1) authorize the assessment of a tax . . . if at the time of the enactment of this Act such assessment . . . was barred by the period of limitation then in existence. . . ." 43 Stat. 300.

[4] In the case at bar, the assessment would not have been barred until June 16, 1924, five years from the date of the return, and after the enactment of the 1924 Act, so that § 278 (e) is wholly inapplicable. Respondent offers the case of a tax under an earlier return merely for the purposes of its argument.

need not determine whether respondent is correct in assuming that § 278 (e) qualifies § 278 (c) in respect to waivers on assessment of taxes barred prior to June 2, 1924;[5] for even if that section has this effect, no objectionable inequality would result in permitting a revival of liability in one case and not in the other. Some arbitrary date must be taken for the imposition of a period of limitation. It may be taken likewise in regard to its removal.

Attention is also called to § 281 (e) of the 1924 Act,[6] which extended the time for making claims for refund where a waiver of assessment had been filed prior to certain specified dates,[7] and it is said that § 278 (c), as inter-

[5] Subdivision (e) cannot be said to qualify every other subdivision in § 278. Nothing indicates an intention to have it limit the effect of § 278 (a) which permits assessment to be made or suit to be brought at any time in the case of a false or fraudulent return or a failure to file any return. Compare *United States* v. *Updike*, 281 U. S. 489, 495; *United States* v. *Lazenby*, 5 F. (2d) 827. Nor is there any indication that it should qualify subsection (c) which provides for the giving of waivers. But see *Jacobs Brothers Co.* v. *Commissioner*, 19 B. T. A. 315, which involved § 278 (c) and related sections of the 1926 Act, *supra*, note 2. Compare *Steiner Mfg. Co.* v. *Commissioner*, 18 B. T. A. 740; *James & Holmstrom Piano Co.* v. *Commissioner*, 19 B. T. A. 322; *Gillespie* v. *Commissioner*, 20 B. T. A. 1068, 1079; *Wetherell Bros. Co.* v. *White*, D. Mass., decided December 3, 1930, U. S. Daily, December 30, 1930, p. 3291. The decision in *Russell* v. *United States*, 278 U. S. 181, involved the interpretation of subdivision (d) which extended the period for collection without any act on the part of the taxpayer. Subdivision (c) is effective only if the taxpayer voluntarily executed a waiver.

[6] 43 Stat. 302, as amended by the Act of March 3, 1925, c. 435, 43 Stat. 1115.

[7] E. g., for 1917 taxes, within five years after the return was filed; for 1918 taxes, before June 15, 1924; for 1919 taxes, before June 15, 1925. Claims might be made on or before April 1, 1925 for 1917 and 1918 taxes, on or before April 1, 1926 for 1919 taxes; or if the waiver was extended by a new waiver, then respectively before April 1, 1926 or April 1, 1927; or within four years after the tax

preted, would, when read with § 281 (e), result in a discrimination against those taxpayers who had signed a waiver after the statute had run. The argument is that such taxpayers would still be liable for the tax, but that no corresponding extension of the limitation on claims for refund would be given. The dates specified in § 281 (e), however, do not coincide with the periods of limitation on assessment and collection. The purpose of that section was merely to extend the time for filing claims for refund in particular cases of taxes for the years 1917–1919. There is no necessary relation between it and § 278 (c). Moreover, a taxpayer who has signed a waiver and has had the validity of the alleged deficiency determined in the courts, on appeal from the Board's determination, has no good ground for complaint that he cannot thereafter raise the same question on a claim for refund.[8]

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was paid. 43 Stat. 116, 302, 1115–16. See Reg. 65, Art. 1307. These provisions followed a similar section in the Act of March 4, 1923, c. 276, 42 Stat. 1504–05, dealing with 1917 taxes; they were reënacted, to include claims for the refund of 1920 and 1921 taxes, in § 284 (g) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 67. Prior to the enactment of § 281 (e) of the 1924 Act, all claims for refund had to be filed within five years from the date the return was due, or within two years from the date the tax was paid, R. S. § 3228, as amended by the Act of March 4, 1923, *supra*. See Revenue Act of 1918, c. 18, § 252, 40 Stat. 1057, 1085; Revenue Act of 1921, c. 136, § 252, 42 Stat. 227, 268; Revenue Act of 1924, c. 234, § 1012, 43 Stat. 253, 342. Compare § 1112 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 115; *Minnesota Mutual Life Ins. Co.* v. *United States*, 66 Ct. Cls. 481, 493, certiorari denied, 279 U. S. 856; *Oxford Bank* v. *United States*, 44 F. (2d) 253.

[8] The 1926 Act expressly provided that where an appeal had been taken from a deficiency determination, no credit or refund could thereafter be allowed except in conformance with the decision of the Board. Section 284 (d), c. 27, 44 Stat. 9, 67. And refund or credit was allowable only if the petition had been filed with the Board within four years after the tax was paid, or a timely claim for refund had been made. Section 284 (e), 44 Stat. 67. This section was

Third. The taxpayer contends that, by its terms, the waiver expired December 31, 1926. The argument is that since the appeal to the Board of Tax Appeals had already been taken, the latter part of the instrument, relating to an extension of the time for assessment equal to the number of days the case would be before the Board, is inapplicable. The immediate object for which the waiver was given was to enable the case to be determined, without respondent being obliged to pay or to furnish bond; and it must have been assumed that thereafter the Commissioner would duly assess and collect the amount of the deficiency. The record reveals that three days before the execution of the waiver, the Solicitor of Internal Revenue wrote respondent that " as it is impossible at this time to determine whether the case will be disposed of by the board prior to the expiration of the period. . . . you are requested to execute . . . the enclosed waiver . . ."; and he stated further that if the waiver were not given, the Commissioner would make a jeopardy assessment and require a bond as a condition of deferring collection. Consequently, the provisions of the latter part of the waiver were clearly intended to be applicable; and while its language perhaps was not as apt as it might have been,[9] there is no basis for denying its obvious purpose.

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amended by § 507 of the 1928 Act, c. 852, 45 Stat. 871; 26 U. S. C., § 1065 (e), to make the filing of a claim for refund or credit unnecessary where an appeal was taken. On the general problem of refunds, compare H. Rep. No. 1, 69th Cong., 1st Sess., December 7, 1925, pp. 13–14; Hearings Before the Committee on Ways and Means on Revenue Revision of 1925, *id.*, pp. 285–92, 504, 934, *et seq.*, 981–83; Hearings Before the Senate Committee on Finance, on H. R. 1, *id.*, January 4, 1926, pp. 192–94, 208–09.

[9] The waiver was executed on the standard mimeographed form generally used prior to the mailing of a deficiency letter. Had it read: ". . . if a notice of deficiency *was* sent . . ." before

Fourth. The taxpayer contends that the waiver was inoperative because secured by duress. The argument is that while the Commissioner in December, 1925, might have made a jeopardy assessment and have enforced collection, such action would have been illegal because the statutory period had then expired, and that a waiver procured by such a threat is ineffective. Whether or not the Commissioner would have been liable to the taxpayer for a collection made as the result of a jeopardy assessment in 1925, we need not determine. He clearly had the power to make such assessment and thereby compel the filing of a claim for abatement and the giving of a bond,[10] or, if such claim and accompanying bond were not filed, to make collection and relegate respondent to an action at law. In the absence of a determination that this deficiency was barred,[11] it was the Commissioner's duty to proceed to insure the assessment and collection of the tax. At his suggestion, the taxpayer executed the waiver. Thereby it was enabled to have all questions concerning the alleged deficiency considered by the Board. A waiver given under such circumstances is not invalid. This contention, which seems to have been raised for the first time in this Court, is also unsound.

Reversed.

December 31, 1926, there could be no doubt of its applicability to the appeal then pending. Its meaning, in view of the circumstances under which it was given, is nevertheless clear.

[10] See Revenue Act of 1924, c. 234, § 274 (d) and § 279 (a), 43 Stat. 253, 297, 300.

[11] Other waivers were alleged to be in existence, and while they were not produced at the trial before the Board, it is evident that in December, 1925, the Commissioner was of the opinion that the deficiency, already determined, was not barred. This was clearly stated in the letter to respondent requesting a waiver.

Argument for the United States.

UNITED STATES v. BENZ.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 112. Argued December 8, 1930.—Decided January 5, 1931.

1. A federal district court which has imposed a sentence of imprisonment upon a defendant in a criminal case, has power, during the same term of court, to amend the sentence by shortening the term of imprisonment, although the defendant already has been committed and has entered upon service of the sentence. *United States* v. *Murray*, 275 U. S. 347, distinguished. P. 306.
2. Thus to reduce a sentence by amendment is as much a judicial act as was the imposition of the sentence in the first instance; it is not a usurpation of the pardoning power of the executive. P. 311.

RESPONSE to a question certified by the Circuit Court of Appeals, on an appeal by the Government from an order of the District Court reducing a sentence of imprisonment.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist* and *Messrs. Mahlon D. Kiefer* and *Erwin N. Griswold* were on the brief, for the United States.

The decisions of this Court and of other courts tend to support the conclusion that the beginning of service of a valid sentence ends the power of the court, even in the same term, to change it. *Ex parte Gordon*, 1 Black 503; *Ex parte Lange*, 18 Wall. 163; *United States* v. *Murray*, 275 U. S. 347; *Miller* v. *Snook*, 15 F. (2d) 68; *Yutz* v. *Pearman*, 33 F. (2d) 906. See *United States* v. *Howe*, 280 Fed. 815, 819; *Stewart* v. *United States*, 300 Fed. 769, 777; *Archer* v. *Snook*, 10 F. (2d) 567, 568; *Hynes* v. *United States*, 35 F. (2d) 734, 735; *Cisson* v. *United States*, 37 F. (2d) 330, 332; *In re Graves*, 117 Fed. 798. Cf. *Emerson* v. *Boyles*, 170 Ark. 621; *Tanner* v. *Wiggins*,

54 Fla. 203; *State* v. *Ensign,* 38 Idaho 539; *Brabandt* v. *Commonwealth,* 157 Ky. 130; *State* v. *Davis,* 31 La. Ann. 249; *State ex rel. Reid* v. *District Court,* 68 Mont. 309; *Commonwealth* v. *Mayloy,* 57 Pa. 291; *Ammon* v. *Johnson,* 3 Ohio Cir. Ct. 263; *Matter of Brittain,* 93 N. C. 587. See also *State* v. *Meyer,* 86 Kan. 793; *Brown* v. *Rice,* 57 Me. 55; *People* v. *Meservey,* 96 Mich. 223; *In re Richards,* 150 Mich. 421; *In re Jones,* 35 Neb. 499; *People* v. *Sullivan,* 54 Misc. 489; *State* v. *Cannon,* 11 Ore. 312.

Considerations regarding the division of powers between the judiciary and the other branches of Government tend to support this conclusion that the power of the trial court to amend a valid sentence should cease when the defendant has been committed.

Brown v. *Walker,* 161 U. S. 591, 601; and *The Laura,* 114 U. S. 411, make it clear that the doctrine of separation of powers does not necessarily require the decision of this case in favor of the Government. But we submit that the doctrine does furnish a useful guide which should be taken into account in defining the power of a court which may conflict with the exercise of executive or legislative authority.

This Court has drawn the line between the judicial and executive power in similar cases, and in each instance it has indicated that the judicial power should be restricted by the implications drawn from the doctrine of separation of powers. *Ex parte United States,* 242 U. S. 27; *United States* v. *Murray,* 275 U. S. 347.

Mr. Francis Biddle for Benz.

Mr. Justice Sutherland delivered the opinion of the Court.

This case is here on a certificate from the court below under § 239 of the Judicial Code, as amended by the act of February 13, 1925, c. 229, 43 Stat. 936, 938; U. S. C.,

Title 28, § 346. Benz was indicted for a violation of the National Prohibition Act. He entered a plea of guilty and was sentenced to imprisonment for a term of ten months beginning December 27, 1929. While undergoing imprisonment under this sentence, and before expiration of the term of the federal district court which had imposed the sentence, he filed a petition asking that the sentence be modified. The court, over the objection of the United States, entered an order reducing the term of imprisonment from ten to six months. The government appealed, and the court below, desiring the instruction of this Court, certified the following question:

"After a District Court of the United States has imposed a sentence of imprisonment upon a defendant in a criminal case, and after he has served a part of the sentence, has that court, during the term in which it was imposed, power to amend the sentence by shortening the term of imprisonment?"

The contention of the government is that after the defendant has been committed and has entered upon service of a valid sentence, the power of the court to alter the sentence, even at the same term, has come to an end. In addition, some stress is put upon the fact that the powers of the three departments of government are separated by the Constitution, so that one of the departments may not exercise the powers conferred upon either of the others; and it is suggested that from this separation the implication fairly may be drawn that a reduction by the court of a valid sentence after it has been partly served is, in effect, an invasion of the power to pardon offenses, including the power to commute, vested in the executive by Art. II, § 2, cl. 1, of the Constitution.

The general rule is that judgments, decrees and orders are within the control of the court during the term at which they were made. They are then deemed to be "in the breast of the court" making them, and subject to be

amended, modified, or vacated by that court. *Goddard* v. *Ordway,* 101 U. S. 745, 752. The rule is not confined to civil cases, but applies in criminal cases as well, provided the punishment be not augmented. *Ex parte Lange,* 18 Wall. 163, 167–174; *Basset* v. *United States,* 9 Wall. 38. In the present case the power of the court was exercised to mitigate the punishment, not to increase it, and is thus brought within the limitation. Wharton, in Criminal Pl. and Pr., 9th ed., § 913, says: "As a general practice, the sentence, when imposed by a court of record, is within the power of the court during the session in which it is entered, and may be amended at any time during such session, provided a punishment already partly suffered be not increased."

The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall " be subject for the same offense to be twice put in jeopardy of life or limb." This is the basis of the decision in *Ex parte Lange, supra.* There, the punishment prescribed by statute was imprisonment for not more than one year *or* a fine of not less than ten dollars nor more than two hundred dollars; but Lange was sentenced to one year's imprisonment *and* to pay two hundred dollars fine. Five days after the imprisonment had begun, after payment of the fine and during the same term, Lange was brought before the same court on a writ of *habeas corpus;* an order was entered vacating the former judgment, and he was again sentenced to one year's imprisonment from that time. This Court stated the rule to be, p. 167: " The general power of the court over its own judgments, orders,

and decrees, in both civil and criminal cases, during the existence of the term at which they are first made, is undeniable." The Court declared, however, that the power could not be so used as to violate the constitutional guarantee against double punishment, holding (p. 173) that this guarantee applied to all cases where a second punishment is attempted to be inflicted for the same offense by a judicial sentence:

"For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?

"The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it."

But the Court immediately proceeded to say, p. 174: "If the court, for instance, had rendered a judgment for two years' imprisonment, it could no doubt, on its own motion, have vacated that judgment during the term and rendered a judgment for one year's imprisonment; or, if no part of the sentence had been executed, it could have rendered a judgment for two hundred dollars fine after

vacating the first." Then, returning to the question of double punishment, and reciting that Lange had paid the fine and had undergone five days of the one year's imprisonment first imposed, the Court said, p. 175:

" . . . can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him *twice* for the same offence. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing."

The *Lange* case and the *Basset* case, *supra,* probably would have set at rest the question here presented had it not been for a statement in *United States* v. *Murray,* 275 U. S. 347, 358. In that case this Court held that where the defendant had begun to serve his sentence, the district court was without power, under the Probation Act of March 4, 1925, to grant him probation; and, citing *Ex parte Lange* as authority, said: " The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it." But the *Murray* case involved the construction of the Probation Act, not the general powers of the court over its judgments. The words quoted were used by way of illustration bearing upon the congressional intent, but were not necessary to the conclusion reached. That they state the rule more broadly than the *Lange* case warrants is apparent from the foregoing review of that case.

The rule thus being settled for this Court by its prior decisions, we need not discuss the conflicting state cases nor the conflicting decisions of lower federal courts which are cited, further than to say that the federal cases cited by the government in support of its position are comparatively recent, and at least in some instances rest upon the general statement in the *Murray* case just quoted. The earlier view is to the contrary. Thus in the case of *In re Graves,* 117 Fed. 798, where a person had been re-

sentenced to serve for a period of one and one-half years after having been imprisoned for a number of days under a sentence of two years, the court refused to discharge him on *habeas corpus,* saying [p. 799]:

"It involves only the inquiry whether the court possessed the power to recall the prisoner, set aside the sentence, and impose another modified sentence during the same term, notwithstanding the fact alleged that execution of the former sentence had commenced; and, whatever diversity of opinion appears in other jurisdictions, the doctrine is established in the federal courts that such power exists, and that it is applicable as well where the original sentence was in excess of jurisdiction. [Citing, among other cases, *Ex parte Lange* and *Basset* v. *United States, supra.*] In Ex parte Lange, supra, the doctrine so stated is distinctly recognized, but the case is distinguished as one where the statute authorized imprisonment, or fine, in the alternative only, and the sentence imposed both; and the majority opinion merely holds that new sentence of imprisonment alone cannot be imposed after payment of the fine, which operated as a satisfaction of the prior judgment. The sentence under which this petitioner is imprisoned is in all respects more favorable to him than was the original sentence, and escape therefrom is sought on the ground of change in the place of imprisonment after he had 'entered upon the service' of the first sentence.

"As the place of imprisonment was discretionary, and in no sense affected the jurisdiction, and the power of the court over its own judgment within the term is undeniable (Ex parte Lange, supra), I am clearly of opinion that the sentence and commitment in question are valid, and, no ground appearing to grant the petitioner the benefits of a writ of habeas corpus, the application is denied."

With this application of the rule and interpretation of the prior decisions of this Court, we entirely agree.

We find nothing in the suggestion that the action of the district court in reducing the punishment after the prisoner had served a part of the imprisonment originally imposed was a usurpation of the pardoning power of the executive. The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the *enforcement* of the judgment, but does not alter it *qua* judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance.

The question propounded must be answered in the affirmative.

It is so ordered.

UNITED STATES ET AL. *v.* CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 10. Argued April 24, 25, 1930. Reargued November 25, 1930.—Decided January 5, 1931.

A plan of reorganization of an insolvent railroad company provided for participation by stockholders of the old company through an exchange of their shares, plus a cash payment, for securities of the new company. Part of the proceeds of payments made by stockholders under this arrangement went into a separate fund representing $4 per share of the old stock. Of this sum an amount equivalent to $1.50 per share was set aside as a special fund to provide for the compensation of the reorganization managers and commit-

tees, etc., it being specially provided that any balance remaining was to be paid over to the new company as additional working capital or returned pro rata to the holders of certificates of deposit for stock, in the discretion of the reorganization managers. Neither the old company nor the new one was a party or was privy to this contract. The remainder of the $4 fund, that is, $2.50 per share, was to be appropriated to defraying the expenses and costs of foreclosure and other charges in connection with the acquisition of the properties of the old company by the new, and any balance remaining was to be paid over to the new company. The Interstate Commerce Commission, after hearing, issued a certificate of convenience and necessity, and entered an order, under § 20a of the Transportation Act, authorizing the issuance of securities by the new company, with the proviso, however, "that the applicant . . . (b) shall impound in a separate fund the money received from the payment by holders of preferred and common stock in an amount equal to $4 a share, which shall not be paid out unless and until so authorized by order of the court in respect to payments subject to the court's jurisdiction or by this commission." The present suit was brought to have the foregoing clause (b) of the order declared void, and to enjoin its enforcement. *Held:*

1. The terms of the proviso embrace, and were meant to embrace, the entire fund of $4 per share, including the special fund of $1.50. P. 323.

2. The Commission was without power to impose the condition of clause (b) of the proviso, in so far as the $1.50 fund was concerned, and its action in respect thereto was an interference with private property and rights lying outside the field of federal jurisdiction. The contract in respect of that fund was not one in respect of commerce, but involved a transaction distinct and complete in itself without regard to its results; and, whether succeeded by commerce or not, was no part of it. Pp. 324, 326.

3. The power of the Federal Government to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law. P. 327.

4. The principle that the right to continue the exercise of a privilege granted by the State cannot be made to depend upon the grantee's submission to a condition prescribed by the State which is hostile to the provisions of the Federal Constitution,

is applicable to the order of the Commission here involved. The order in itself, being complete and self-sustaining and resting upon grounds found to be sufficient to support it, cannot be made to depend upon submission to a collateral condition which is beyond the statutory and constitutional power of the Commission to impose. Pp. 328–329.

5. The condition in respect of the special fund of $1.50 per share was properly set aside and its enforcement enjoined by the court below. P. 331.

33 F. (2d) 582, affirmed.

APPEAL from a decree of the District Court setting aside and enjoining enforcement of part of an order of the Interstate Commerce Commission, 131 I. C. C. 673.

Assistant to the Attorney General O'Brian, with whom *Attorney General Mitchell, Messrs. Claude R. Branch* and *Charles H. Weston,* Special Assistants to the Attorney General, and *Daniel W. Knowlton,* Chief Counsel Interstate Commerce Commission, were on the brief, for the United States et al.

The report of the Commission shows that it intended by its order to exercise jurisdiction over the payment of all reorganization expenses, including those payable out of the $1.50 fund. The order was valid.

By paragraph (2) of § 20a of the Interstate Commerce Act, the carrier may issue securities only to the extent that the Commission after investigation "of the purposes and uses of the proposed issue and the proceeds thereof" authorizes such issue. The Commission is to make such order only if it finds that the issue is compatible with the public interest, appropriate for or consistent with the proper performance of the carrier's duty to serve the public as a common carrier, and reasonably necessary and appropriate for such purpose.

Under § 20a the duty of the Commission may not be fully accomplished when it has found that the general purpose of a proposed security issue is in the public inter-

est and that it would not weaken the carrier's financial structure. It may also inquire whether the proposed plan of financing is calculated to keep financing charges as low as possible. Thus the Commission has required competitive public bidding for equipment trust certificates, a policy which appears to have brought about a marked reduction in the average spread between the sales price to bankers and their sales price to the public. *Chicago, St. P., M. & O. Ry. Co. Equip. Trust,* 145 I. C. C. 444, 446. Likewise, it has prohibited the payment of underwriting commissions. *Stock of N. Y., N. H. & H. R. Co.,* 131 I. C. C. 233, 238; *Control of Erie R. & Pere Marquette Ry.,* 138 I. C. C. 517, 535.

In the present case it was proposed to issue certain securities for property and cash. The property was known, but the cash was subject to the payment of reorganization expenses which, except for those subject to approval by the court, might be determined by the managers. As the case was presented to the Commission, the managers had it in their power to determine to a material degree the amount of cash which the company would receive in exchange for the securities that were to be issued. Under these circumstances the Commission was called upon to exercise the plenary powers given it by the Act with respect to the proceeds to be derived from the issue of railroad securities. The Commission determined that it was necessary and appropriate in the premises to reserve to itself jurisdiction over the payment of expenses which directly affected the proceeds to be derived from the issue of securities.

The Commission's order retaining jurisdiction over the payment of such of these expenses as were payable out of the $1.50 fund was justified because the terms upon which the new company was issuing its securities entitled it to receive the balance of this fund if it was not returned to the depositing stockholders.

But even if the company's contingent interest in the $1.50 fund was not in itself sufficient to support the jurisdiction of the Commission over it, the reorganization expenses payable therefrom constituted a refinancing charge within the Commission's regulatory powers over new security issues. One of the purposes of the Interstate Commerce Act as amended by the Transportation Act, 1920, is to protect railroad credit. Improper or unreasonable financing charges are injurious to railroad credit and the Commission has consistently interpreted § 20a as permitting it to regulate financing charges. If the Commission in this case could not supervise expenses payable out of the $1.50 fund, reorganization plans may be formulated so as to withdraw all reorganization expenses from the scrutiny and supervision of the Commission.

The authority to enjoin a Commission order " in part " applies to a severable part of an order but not to a condition upon which an order was issued after the carrier has exercised the authority granted by the order. If the condition is attacked *in limine,* then the courts might have jurisdiction because, if the condition is found void, the case may be remitted to the Commission for further proceedings. But if the courts set aside a condition to an order of the Commission after the authority granted has been exercised, they thereby substitute their judgment for that of the Commission upon an administrative question, the determination of which Congress vested in the Commission. *Procter & Gamble Co.* v. *United States,* 225 U. S. 282.

If the courts set aside a condition attached to an order, leaving the order outstanding without the condition, they are deciding a different administrative question from the one passed upon by the Commission. The results sought to be accomplished by the condition might have been deemed so essential that the Commission, if it had been advised that the condition was beyond its powers, would

not have issued any order or would have issued a different kind of order.

Mr. John W. Davis, with whom *Messrs. H. H. Field, O. W. Dynes, Robert T. Swaine,* and *Frederick H. Wood* were on the brief, for appellee.

The condition is void. Its necessary effect was to revise, or to abrogate, a contract between holders of securities of a carrier for the payment of compensation for services rendered to themselves, which were not to be paid for by the carrier, and in respect of which the carrier issued no securities, and to subject to the Commission's determination the fees and expenses of the persons rendering such services. Such an interference with the right of private contract is not within the Commission's powers.

The reorganization plan was a contract between depositing security holders, the managers, and the committees, to which neither the old company nor the new was a party. Neither the parties to the contract nor its subject matter were within the jurisdiction of the Commission.

The Commission is a body of limited jurisdiction. It may not by indirection exercise powers, the express grant of which has been withheld. *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. Ry.,* 167 U. S. 479; *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407; *United States* v. *Louisville & N. R. Co.,* 236 U. S. 318; *United States* v. *Pennsylvania R. Co.,* 242 U. S. 208.

The power to impose conditions, conferred by paragraph (2) of § 20a, is not an unlimited power. The condition must be germane to the subject matter and fairly within the exercise of the powers expressly delegated. Cf. *People ex rel. N. Y. C. & H. R. Co.* v. *Commission,* 227 N. Y. 248; *People ex rel. Binghamton L., H. & P. Co.* v. *Stevens,* 203 N. Y. 7. The Commission cannot, under the guise of administering this or any other section of the Act, draw to itself powers not conferred upon it by the

Act. Cf. *Kuenster* v. *Meredith,* 264 Fed. 243; *School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94; *United States* v. *United Verde Copper Co.,* 196 U. S. 207; *People ex rel. N. Y., N. H. & H. R. Co.* v. *Willcox,* 200 N. Y. 423.

The condition imposed was not within the express or implied powers of the Commission. It had no relation to any administrative question committed to the Commission for determination.

The Act does not invest the Commission with arbitrary power to determine under what circumstances and upon what conditions authority to issue securities may be granted or denied. Such a grant of authority would not only be invalid as a delegation of legislative power without the prescription of a standard, and therefore invalid (see *Field* v. *Clark,* 143 U. S. 649; *Union Bridge Co.* v. *United States,* 204 U. S. 364; *United States* v. *Grimaud,* 220 U. S. 506), but it would be a delegation of power which Congress does not itself have—since Congress can subject the railroads only to such regulation as is reasonably connected with the regulation of interstate commerce. *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456; *Wilson* v. *New,* 243 U. S. 332. The Commission must apply to each case the standards created by the Act itself and reach its determination accordingly. *Chicago Junction Case,* 264 U. S. 258. It may not substitute for such standards other standards of its own. *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U. S. 433.

It may not be doubted that if the Commission, although making all of the findings required by paragraph (2), should deny without reason, an application for the issuance of securities, or should assign as a reason grounds having no relation to the standards established by paragraph (2), it could by mandamus be compelled to enter an order authorizing their issuance. *United States* v. *Schurz,* 102 U. S. 378; *Butterworth* v. *Hoe,* 112 U. S. 50; *Illinois Dental Examiners* v. *People,* 123 Ill. 227; *Matter of Picone* v. *Commissioner of Licenses,* 241 N. Y. 157;

People ex rel. South Shore T. Co. v. *Willcox,* 196 N. Y. 212; *State ex rel. Mauldin* v. *Matthews,* 81 S. C. 414.

The condition may not be sustained as a requirement for the receipt of additional consideration for the securities to be issued. If the consideration was inadequate, it was the duty of the Commission so to find and also to find the extent of the deficit. It did neither. That the purpose of the condition was not to provide an adequate consideration, but to regulate compensation and fees payable out of the trust fund, is established by the Commission's report.

The exercise of implied powers such as the Commission here sought to exercise would result in extending its jurisdiction far beyond what Congress intended in the Interstate Commerce Act.

The condition, as construed by the Commission, being void, was no part of the order, and respondent was entitled to disregard it and issue its securities; and the enforcement of the order may now be enjoined notwithstanding that respondent has availed itself of the valid part.

It is fundamental that an administrative body, or indeed a State, having power to grant or withhold a privilege, may not, by imposing a condition upon such grant, exercise an authority which it cannot exercise directly. *Western Union* v. *Kansas,* 216 U. S. 1; *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Ludwig* v. *Western Union,* 216 U. S. 146; *Southern Ry. Co.* v. *Green,* 216 U. S. 400; *Terral* v. *Burke Construction Co.,* 257 U. S. 529; *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426; *Frost Trucking Co.* v. *Railroad Commission,* 271 U. S. 583; *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494.

Mr. Justice Sutherland delivered the opinion of the Court.

In 1925 the Chicago, Milwaukee and St. Paul Railway Company, a Wisconsin corporation, became insolvent and

passed into the hands of receivers appointed by the federal district court for the northern district of Illinois and subsequently by other federal district courts. Thereupon, and pending a decree of foreclosure of outstanding mortgages, committees were formed by and for the various classes of security holders for the purpose of protecting their several interests in the receivership proceedings and in the ultimate disposition of the railway property. Reorganization managers were appointed by the committees for the purpose of preparing and submitting a plan of reorganization. Thereafter, a plan was submitted to, and adopted and approved by, the committees, with an exception not material here, and after some modification was approved by the court below. There was a final decree of foreclosure under which the properties of the Railway company, in November, 1926, were sold, subject to certain existing liens, to persons acting as agents for the managers and for the benefit of the security holders. This sale was confirmed and the plan held valid by the court, with a proviso that conveyances should not be delivered to appellee, the new company formed in pursuance of the reorganization plan, until after the Interstate Commerce Commission, pursuant to law, had authorized such company to issue the securities provided for in the plan.

The reorganization plan provided that the stockholders of the old company who accepted the plan might participate in the reorganization by depositing their common and preferred stock, together with the sum of $32 for each share of the former and $28 for each share of the latter. Each depositor was thereupon to receive in exchange common and preferred stock in the new company, and in addition $28 and $24, respectively, in five per cent bonds of the new company. Out of the remainder of the money deposited, being $4 per share of the old stock, an amount equivalent to $1.50 per share was separated from the remaining $2.50 of the $4 fund and " set aside to provide for the compensation of the reorganization managers

and the committees . . . and the fees and disbursements of their counsel and all depositaries and sub-depositaries, any balance of said sum to be paid over to the new company as additional working capital or, if the reorganization managers in their discretion shall so determine, to be returned *pro rata* to the holders of certificates of deposit for stock." The discretion so to be exercised by the managers was declared to be absolute and uncontrolled. The amount to be paid as compensation to the managers was definitely fixed by agreement contained in the plan and compensation for the services of the committees was to be fixed by the managers unless the plan should be abandoned, in which event none was to receive any compensation. Payment to other persons for services was to be made whether the plan should be carried through or abandoned. In respect of the remainder of the $4 fund, namely $2.50 per share, the effect of the plan was to require that after satisfying such expenses as costs of foreclosure, court allowances, engraving of securities for the new company, charges of corporate trustees, etc., any balance remaining should be paid over to the new company.

An application was made to the commission for a certificate of public convenience and necessity under the appropriate provisions of the Transportation Act, 1920, and for an order under § 20a of that act (c. 91, § 439, 41 Stat. 494; U. S. C., Tit. 49, § 20a) authorizing and approving the issue of securities in accordance with the reorganization plan. Section 20a of the act among other things provides:

"(2) . . . It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even

though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

"(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2).

* * * * *

"(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is re-

quired, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; . . ."

The commission, after a hearing, certified that public convenience and necessity required the acquisition and operation by the new company of the lines of railroad theretofore owned by the Chicago, Milwaukee and St. Paul Railway Company, and entered an order that the new company be authorized to issue the securities which were described in the report and order of the commission, "Provided, however, . . . that the applicant . . . (b) shall impound in a separate fund the money received from the payment by holders of preferred and common stock in an amount equal to $4 a share, which shall not be paid out unless and until so authorized by order of the court in respect to payments subject to the court's jurisdiction or by this commission."

The present suit was brought to have the foregoing clause (b) of the proviso declared beyond the lawful authority of the commission and void, and perpetually to enjoin appellants from enforcing the order of the commission in that respect. In addition to the facts hereinbefore set forth, and others, it was alleged in the petition that the commission and the United States had threatened to institute criminal or civil proceedings against appellee, in accordance with applicable provisions of the Interstate Commerce Act, for violation of the condition imposed by clause (b) of the proviso. Appellants answered separately, admitting all the material allegations of the petition pertinent to the question now under review; and separately moved to dismiss the petition on the ground that the court was without jurisdiction to set aside that part of the order which was assailed. After

argument the court below entered a decree denying the motions to dismiss and perpetually setting aside, suspending and annulling, and perpetually enjoining the enforcement of, or attempt to enforce, the condition (b) imposed by the proviso, so far as it here is in question; that is to say, such part thereof as required appellee to obtain the special fund of $1.50 per share and impound the same, and which prohibited the making of any payment out of that fund without a prior determination by the commission in respect thereof.

The court below was of opinion that the proviso should be so construed as to include only the $2.50 part of the fund and exclude the special fund of $1.50 per share from its operation; otherwise that the condition in respect of the latter was void. The court further held that the case made by the petition was within the jurisdiction transferred to the district courts from the Commerce Court by c. 32, 38 Stat. 219, namely, jurisdiction over "Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." c. 309, 36 Stat. 539. 33 F. (2d) 582.

We do not stop to discuss the holding of the court below in respect of the construction of the proviso further than to say that, contrary to the view of that court though plausibly stated, we have reached the conclusion that the terms of the proviso embrace, and were meant to embrace, the entire fund of $4 per share, including the special fund of $1.50. Thus construed, two questions remain for consideration: (1) Was it within the power of the commission to impose the condition so far as it included the special fund? (2) Was that condition such a *part* of the commission's order as to cause it to fall within the jurisdiction conferred by the language last quoted above?

First. The legality of the acquisition and operation by the new company of the lines of railroad theretofore owned by the old company is not now in question. The

requisite certificate of public convenience and necessity was issued by the commission. The order of the commission authorizing the new company to issue securities was made after a finding of all the facts required by the act as a necessary basis therefor. By subdivision (3) of § 20a the commission is empowered to make its grant of authority to issue securities upon such conditions as the commission may deem necessary or appropriate in the premises. The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily or (since Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard, *Union Bridge Co.* v. *United States,* 204 U. S. 364, 384–385) unless there be found substantial warrant for the conditions in the applicable standards established by the provisions of the act relating to such securities. The powers possessed by the commission are delegated by Congress under, and are to be exercised in conformity with, the constitutional grant of authority to regulate interstate and foreign commerce. Proceeding under that grant, as applied to the present matter, neither the commission nor Congress itself may take any action which lies outside the realm of interstate commerce. *Hammer* v. *Dagenhart,* 247 U. S. 251. It follows that if the condition in question relates not to such commerce, or to the rights or duties of the carrier engaged in such commerce, but exclusively to extrinsic matters, it is imposed without authority of law.

In the light of the foregoing, we examine the provision of the reorganization plan in respect of the special fund of $1.50 per share. That provision embodies a contract between the committees (voluntarily created by private persons), the managers, and such stockholders as shall elect to become depositors under the plan and shall advance, with other monies for other purposes, the specified sum for the distinct and sole purpose of paying the man-

agers and others for services rendered in behalf of and for the exclusive benefit of these depositors. Neither the old company nor the new one was a party or was privy to this contract. Neither the contract when made nor any of the parties to it, in respect of the contract, was subject to the jurisdiction of the commission. It was not contemplated by any of the parties, by the new company, or by the court which held the plan to be valid, that the new company should have any enforceable interest in this special fund. Indeed, by contract between the new company, the managers and the purchasers at the sale, it was expressly agreed that the remainder of all cash received by the managers under the reorganization plan should be paid over to the new company, *except the special fund of $1.50 per share of the old company's stock,* " which, as provided in the reorganization plan, is to be set aside to provide for the compensation of the managers and the committees, fixed as therein provided, and the fees and disbursements of their counsel and of all depositaries and subdepositaries." And, correlatively, the new company agreed to pay all other expenses incurred by the managers except such as were to be paid out of this special fund. These agreements of the interested parties lend emphasis to the conclusion that the services to be rendered and expenses to be incurred in formulating and bringing about an approval of the plan were to be paid for out of the special fund as matters in which the private parties alone were concerned.

If the security holders, instead of agreeing to the provision for a special fund incorporated in the body of the reorganization plan, had bound themselves by a separate contract to compensate the managers and others for their services in behalf of the security holders, and had placed a sum of money in the hands of a trustee to secure payment of the estimated amount, as they well might have done, it probably would not have been contended that the

commission lawfully could impose upon the issue of the securities the condition that the new company should take control of this money or that it should be paid out under the direction of the commission. But in principle how does the case under review differ from the case supposed? The agreement in respect of the special fund, though contained in the body of the plan, is in effect as distinct as though it had been made by separate contract. It seems plain enough that the commission, by the condition here in question, has undertaken to lay its hands upon and control the disposition of a fund created by contract between private persons to which the carrier was not a party, in which the carrier had no enforceable interest, and which was not within the purview of the regulating power of the commission. The most that can be said is that the creation of the special fund—like production or manufacture of commodities, *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12—"may [or may not] result in bringing the operation of commerce into play." The contract was not one in respect of commerce but involved a transaction distinct and complete in itself without regard to its results; and, whether succeeded by commerce or not, was no part of it. *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611, 616.

The proviso itself aptly illustrates by contrast the extent of the commission's power to impose conditions in respect of the matter under review. From the entire fund of $4 per share, $2.50 per share was set apart to be used for paying costs of foreclosure, court allowances, etc., and any balance remaining was to be paid over to the new company; and by a subsequent agreement this balance, together with an unexpended amount intended for expenses not yet liquidated, was formally conceded to be the property of the new company. This portion of the fund, therefore, was properly a part of the carrier's resources; constituted a subject matter upon which the

legislative standards controlling the action of the commission in respect of the issue of securities had a direct bearing; was proximately related to, and might substantially affect, the commercial activities of the carrier; and, accordingly, was a subject in respect of which the condition properly could be imposed by the commission. In the case of the special fund of $1.50 per share, however, the carrier had no such interest. That fund was owned by and subject to the sole control of private persons. Whether the carrier would receive any part of it in the future was a matter of speculation being wholly dependent upon the unrestricted will of its custodians. It results that the condition, in so far as it affects the special fund of $1.50 per share, was an interference with private property and rights lying outside the field of federal jurisdiction.

The power to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 336; *United States* v. *Joint Traffic Association,* 171 U. S. 505, 571–572; *Adair* v. *United States,* 208 U. S. 161, 180. Both the liberty of contract and the right to property here are involved. The contract was valid and had been so adjudged by the court having jurisdiction of the foreclosure and sale. The parties to it were willing and were entitled to have the contract executed according to its terms. There is no power in any department of the government to order otherwise. And certainly a carrier whose only interest in the property lies in the speculative possibility that some remnant of it in the future may come to the carrier as a *gift* is in no position to take it as of *right* without compensation. In that view, any legis-

lative or administrative edict which purports to empower the carrier to take the property without compensation and dispose of it, not as the contract provides, but as the governmental body may direct, must fail as a futile attempt to accomplish what the Constitution does not permit.

Second. The jurisdiction of the federal district courts, as already pointed out, extends over cases brought to enjoin, set aside, annul, or suspend, in whole or *in part*, any order of the commission. The contention of the government is that the authority to enjoin an order in part, applies to a severable part of the order, but not to a condition upon which the order was issued after the carrier has exercised the authority granted by the order. No pertinent authority is cited in support of this contention, and none has been called to our attention. A condition contained in the order by which the grant is limited is as much a part of the order as any of its substantive provisions, and if beyond the jurisdiction of the commission is not ratified by an acceptance of the valid part of the order. It long has been settled in this court that the rejection of an unconstitutional condition imposed by a state upon the grant of a privilege, even though the state possess the unqualified power to withhold the grant altogether, does not annul the grant. The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant. There are many decisions to this effect; but we need cite only *Frost Trucking Co.* v. *Railroad Commission,* 271 U. S. 583, 593–599, and *Hanover Ins. Co.* v. *Harding,* 272 U. S. 494, 507–508, where the cases are collected and reviewed. The decisions rest upon a principle, which "is broader than the applications thus far made of it," *Frost Trucking Co.* v. *Railroad Commission, supra,* at p. 598. Broadly stated, the rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a con-

dition prescribed by the state which is hostile to the provisions of the federal Constitution. *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1, 47–48; *Western Union Tel. Co.* v. *Foster,* 247 U. S. 105, 114.

Without attempting to determine how far this principle may be carried in its application to orders of the Interstate Commerce Commission, or attempting to formulate any general rule in respect thereof, we are of opinion that the principle does apply to the order now under review; and for present purposes that is enough.

An examination of the report shows that the commission first considered the question in respect of the authority to issue securities sought by the new company. As to that matter it found specifically all the facts required by § 20a as prerequisites to an order granting such authority. The commission further found that the value of the properties sought to be acquired, which included no part of the $4 fund, exceeded the amount of the securities, including preferred stock, to be issued or assumed, by more than $70,000,000.* In determining the value of

* The finding in detail is as follows:

"In the instant case the testimony is that the value of the properties proposed to be acquired ranges from $640,000,000 to $900,000,000. For purposes of argument, the Jameson committee took $700,000,000. The book value on May 31, 1927, in round numbers was $707,000,000. Against these values or this investment there will be outstanding after the proposed reorganization the following: Undisturbed bonds, excluding $22,129,000 of bonds assumed pursuant to the lease of Terre Haute, $160,001,960; 50-year 5 per cent mortgage gold bonds, $106,395,096; adjustment-mortgage bonds $182,873,693; preferred stock $119,845,800; total $569,116,549. Using the lowest figure, $640,000,000, and deducting from that amount the total par value of the securities enumerated, or approximately $569,100,000, would leave $70,900,000 as representing the value of the 1,174,060 shares of common stock without nominal or par value. In the hypothetical balance sheet as of May 31, 1927, the applicant shows $174,342,841.64 for the book value of the common stock. Without expressing any opinion as to the value of the no-par-value

the properties as a basis for the issue of the securities, the commission gave no consideration to the $4 fund, or to the amount of any balance which might remain after payment of the charges against it, upon the theory that it constituted any part of these properties. After a comprehensive review of the reorganization plan, the commission concluded: "Upon consideration of all the facts we are of opinion that the public interest will be served by an approval of the application, even though we should believe that a stronger financial structure might have been erected by the adoption of some other plan of reorganization."

The commission, having thus disposed of the application for authority to issue securities, turned to a consideration of the $4 fund and announced that the authority granted to issue the securities would be upon the condition set forth in clause (b) of the proviso. But nowhere in the report do we find the slightest suggestion that any part of the fund was included with the properties which were held to be a sufficient basis for the issue of the securities, together with the proposed non-par-value common stock. The fund was dealt with as an independent and separate matter upon the theory that the commission could reserve jurisdiction over it "for the purpose of taking further testimony as to the expenses of the reorganization, the nature and scope of the services performed for the compensation and fees claimed, and any other matters appropriate in the premises, and for the entering of pertinent orders in connection therewith." That it was not regarded as involving the basic ground for granting the authority is borne out by the concurring opinion of

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common stock, it would appear that upon applying the test suggested there will remain an unmortgaged equity in the properties sufficient to permit the bondholders to assign to the stockholders an interest therein and to support the issue of stock in the amounts proposed."

Commissioner Hall, who evidently so understood. He said, "I am in accord with the conclusions authorizing issuance and assumption of liability in respect of securities and granting certificate of public convenience and necessity. I do not conceive that as a commission we have anything to do with the application which may be made of the $4 per share paid in to the reorganization managers by existing stockholders. What those stockholders do with their money is their affair unless and until some part of that money is paid over to the applicant."

The order in itself, being complete and self-sustaining and resting upon grounds found to be sufficient to support it, cannot be made to depend upon submission to a collateral condition, which, as we have shown, is beyond the statutory and constitutional power of the commission to impose. Whatever may be the general rule, we have no difficulty in concluding that, under the circumstances above recited, the principle in respect of the separability of unconstitutional conditions imposed upon a privilege granted by a state is applicable to the present order of the commission—and for a stronger reason, since that body, unlike a state in the class of cases referred to, does not possess the power arbitrarily to deny the authority here sought by the carrier.

From the foregoing it results that the condition in respect of the special fund of $1.50 per share was properly set aside and its enforcement enjoined by the court below.

Decree affirmed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

Opinion of MR. JUSTICE STONE.

I think the judgment should be reversed and the order of the Interstate Commerce Commission upheld as one within its statutory authority. But even if it be assumed

that the condition attached to the order was an improper one, it would seem that the respondent is now estopped to challenge it. In any case, I think the Court should not permit the order to stand as an unqualified approval of the proposed issue of securities, after striking from it the condition upon which the Commission's approval was given.

1. The obvious purpose of subsection (2) of § 20 (a) of the Transportation Act is the prevention of any issue of securities by a rail carrier unless the Interstate Commerce Commission, "after investigation . . . of the purposes and uses of the proposed issue and the proceeds thereof, . . . finds that such issue . . . is . . . compatible with the public interest, . . . and . . . reasonably necessary and appropriate" for the corporate purposes of the carrier. I suppose no one would doubt, and the opinion of the Court seems to concede, that if the assessments which, under the reorganization plan, were to be levied upon the stockholders of the old company, were all to be paid into the new one in exchange for the new securities, it would have been the duty of the Commission to investigate the purposes and uses of the new issue and its proceeds; and if it found that the issue to raise a fund for the payment of extravagant reorganization expenses was not compatible with the public interest, or reasonably necessary and appropriate for the corporate purposes of the new company, the Commission could have refused to approve it. Under subsection (3)[1] the Commission could have provided against improper expenditures by annexing to its order the very condition which it added in the present case.

[1] (3) "The commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the commission may deem necessary or appropriate. . . ."

But it is said that, because no part of the $1.50 fund provided by the stockholders to pay for the reorganization would necessarily ever come into the possession or control of the new company, and since its disposition was a mere matter of private contract between the stockholders and the reorganization managers, the condition was beyond the power of the Commission. The question is thus presented, whether the salutary provisions of § 20 (a) can be avoided, and an issue of securities, so far as it is made to raise a fund to defray excessive reorganization expenses, withdrawn from the control of the Commission, by the simple expedient of so arranging the reorganization plan that reorganization managers may retain and disburse, from the moneys paid in by the old stockholders to procure stock in the reorganized company, such amounts as may be required for reorganization expenses.

The history of the receivership resulting in the present reorganization will be found in the report of the Commission in the *Chicago, Milwaukee & St. Paul Investigation,* 131 I. C. C. 615, issued the same day as its report in the present case. The old company having reached the end of its financial rope, and protective committees representing respectively the bondholders, the preferred, and the common stockholders having been organized, its bankers, the present reorganization managers, were active in bringing about the receivership and have since dominated the reorganization. The Commission said (pp. 667, 668):

"For months prior to the receivership they [the railroad's directors] were impotent. It was an ideal situation for the bankers to control. This they promptly did, arranged all the details, framed up the committees favorably to themselves, put themselves on the bondholders' protective committee and constituted themselves reorganization managers."

As managers they formulated the reorganization plan, and incorporated it in an agreement between themselves

and the committees. In every practical sense the reorganization managers controlled the foreclosure proceedings resulting in the sale of the property of the old company. Their representatives were the purchasers at the foreclosure sale. They created and controlled the new company, which is the appellee here. The reorganization plan gave them full power to modify it as a whole or in detail, with the approval of the committee representing the securities affected. They were authorized to carry out the plan; and in doing so they were empowered to act for, and as intermediaries between, the committees, the stockholders, and the new company. Both preferred and common stockholders of the old company were required by the plan to surrender their stock in that company, and to pay $32 for each share of their common stock, and $28 for each of their preferred, in order to procure the securities of the new company. The alternative was loss of their rights as stockholders, which were still of substantial value. The plan called for the use of these sums to pay certain obligations of the old company, and such miscellaneous fiscal requirements of the new as were not supplied by the proceeds of its funded debt, and to create the $1.50 fund, from which were to be paid, in the uncontrolled discretion of the managers, the reorganization expenses incurred in launching the new company and securing the transfer to it of the business and property of the old.

It would seem that technical distinctions between possible methods of procuring payment of the last from funds raised by a security issue of the new company ought not to affect the authority of the Commission. I should have thought that, under our decisions, the Commission, where its order controls only the action of the appellee, might look through legal forms and, disregarding the corporate entity of appellee, treat the action of the reorganization managers, in dealing with the sums paid by the stockholders for the new stock of appellee, as that of their

creature and *alter ego,* the appellee. See *United Fuel Gas Co.* v. *Railroad Commission of Kentucky,* 278 U. S. 300, 308; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minneapolis Civic Assn.,* 247 U. S. 490; *United States* v. *Delaware, Lackawanna & Western R. R. Co.,* 238 U. S. 516; *United States* v. *Lehigh Valley R. R. Co.,* 220 U. S. 257.

But even if we disregard this identity of interest, and whatever the form of the transaction, whether the reorganization expenses were to be paid out by the new company directly, or merely for its account by the reorganization managers, its creators, in order to enable it to acquire the railroad property for the benefit of its stockholders, the source of the expense fund was the assessments paid by the old stockholders, in reality and legal effect part consideration for, and proceeds of, the issue of the new stock. To say that so much of the reorganization agreement as related to the creation and expenditure of the $1.50 fund for the payment of these expenses was a mere private agreement, unrelated to the issue of securities, with which the Commission is vitally concerned, is to ignore its plain terms and disregard its practical operation.

The first installment of the assessments was not to be paid in by the stockholders until the plan under which the new securities were to be issued was declared operative by the managers. Stockholders who failed to pay the installments in full could acquire no rights to securities in the new company. It cannot be supposed that one dollar of the $1.50 fund would ever have been contributed by stockholders, had not the reorganization agreement definitely undertaken to issue the securities under the plan to those stockholders who deposited their stock and made the required payments. The creation of this fund for the payment of the reorganization and other expenses was a part of the necessary price exacted for the new securities. It was an important purpose for which the new stock was issued, and one of the purposes which the

Commission was directed by the statute to investigate in determining, as it was bound to do,[2] whether the issue was in the public interest and reasonably necessary and appropriate for the corporate purposes of appellee. The considerations affecting the judgment of the Commission in passing upon the reasonable necessity for the issue, its effect upon the public interest and upon the carrier's performance of its public service, are the same whether the expense fund was to be paid directly to the new company for disbursement by it, or short circuited, through the managers, from stockholders of the old to the various claimants for services rendered in creating the new.

Neither the public interest nor the duty imposed on the Interstate Commerce Commission is limited to insuring the payment of debts by any particular railroad, or procuring for it an adequate amount of money or property for the securities which it issues. An important purpose of the Transportation Act of 1920 was to preserve for the nation the transportation system as a whole, and, to that end, to secure a fair return on capital devoted to the transportation service. See *New England Divisions Case*, 261 U. S. 184, 189; *Railroad Commission* v. *C., B. & Q.*

[2] The Transportation Act of 1920, § 20a, provides (subsection 2): ". . . it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier . . . unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, . . . the commission by order authorizes such issue . . . The commissoin shall make such order only if it finds that such issue . . . (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

R. Co., 257 U. S. 563, 585; *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 478. The preservation of the transportation system and the stability of its credit essential to its preservation depend not alone upon the ability of individual carriers to meet their obligations, but upon the ability of all to attract the investment of funds in their securities. If such investments are impaired by receiverships of the carriers, followed by reorganizations of excessive cost, and if railroad shareholders, compelled by the necessities of their situation, must contribute to the rehabilitation of their properties excessive amounts upon which the reorganized carrier may not earn an adequate return, railroad credit in a broad sense is affected, the permanency and stability of the transportation system as a whole is impaired, and the public interest suffers. No one familiar with the financial and corporate history of this country could say, I think, that railroad credit and the marketability of railroad securities have not been profoundly affected, for long periods of time, if not continuously, by the numerous railroad reorganizations, in the course of which junior security holders have found it impossible to save more than a remnant of their investment, and that only by the assumption of a heavy burden of expense, too often the result of wasteful and extravagant methods of reorganization.

The public likewise has an interest in the costs of reorganization insofar as they may affect rates and the application of the recapture provision of the Transportation Act. Such costs may play an important part in the going concern value of the new company, which is an element of value for rate making purposes. See *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, 165; *Denver* v. *Denver Union Water Co.*, 246 U. S. 178, 184, 192; *Bluefield Co.* v. *Pub. Serv. Comm.*, 262 U. S. 679, 686; *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 414. In *United*

Railways v. *West,* 280 U. S. 234, a substantial amount was included in the rate base to cover "Cost of Financing." The mere fact that going concern value is supplied from sources other than the treasury of the carrier, here the stockholders of the old company who became stockholders of the new, is not material. See *United Railways* v. *West, supra.* The Commission is specially charged with public duties with respect to rates, valuation, and the administration of the recapture provisions. In all these respects the public interest may be adversely affected if railroad securities may be issued to effect, either directly or indirectly, the payment of excessive costs of reorganization.

If example were needed of the nature and extent of the public interest which may be involved, it is afforded by the present case. In passing upon the present issue of securities, the Commission had before it the results of its elaborate *Investigation of the Chicago, Milwaukee & St. Paul Ry. Co., supra,* entered into after the receivership, in the course of which it commented on the excessive fees and commissions paid in the past by the Railway Company to its bankers, the present reorganization managers. It had before it tentative estimates of the total cost of reorganization running as high as $6,494,900. The $4 fund set apart for expenses approximated $9,330,000, of which the $1.50 fund was a part aggregating about $3,500,000, out of which were to be paid the reorganization managers, various protective committees, counsel, and depositaries. The estimated expenses to be paid from this fund ranged from $2,636,000 to $3,381,000, of which the compensation to be paid to the reorganization managers was $1,044,000.

These estimates were eighteen months old at the time the Commission made its report. The Commission concluded that the record was insufficient to enable it to arrive at an opinion as to the reasonableness of these expenses. It reserved jurisdiction to take testimony and

to make further inquiry as to the expenses of reorganization, and the nature and scope of the services performed for the compensation fees claimed; but in order that the reorganization might proceed and the railroad property be released from the receivership, the authority for the issue of the new securities was granted upon the condition that the appellee impound the entire $4 fund, which was to be paid out only upon order of court or the Commission.

Since the Commission had concluded that the expenses might be excessive and that there was no adequate safeguard against improper payments, it could, under the express terms of the statute,[3] have rejected the application. But it is said that even though the Commission might rightly have refused its permission to issue the securities, still, having granted permission, it could not annex this condition to the order; and that, as it could not compel the reorganization managers to impound the expense fund paid over to them, or to submit the reasonableness of the expenses which they had incurred to the Commission or the court, it was an arbitrary and unwarranted exercise of power to make the Commission's approval of the stock issue conditional upon such action.

If that were a valid argument, it would follow that the Commission, notwithstanding the authority given it by subsection (3), could never attach any condition to its approval of an issue of securities, when compliance with the condition would involve the performance of acts which the Commission could not command. But the only purpose of subsection (3) would seem to be to enable the Commission to induce, not compel, action, by annexing to its order, as the statute authorizes, " such terms and conditions as the Commission may deem necessary or appropriate." Notwithstanding this broad language, it may be assumed that only those conditions which, like the present, are germane to the purposes of subsection (2) are

[3] See statute, *supra,* note 2.

intended; and that, consequently, only such terms and conditions may be annexed to the order as tend in some measure to remove objections to the issue, which legitimately might be the basis of withholding favorable action.

If the Commission, as I think it might, could have refused to approve the present issue of securities on the ground that they were to be issued to procure payment of reorganization expenses which were or might be excessive, then, plainly, under the provisions of subsection (3) and within the purview of subsection (2), it could have made its consent to the issue conditional upon the modification of the plan, in such manner as to preclude the payment of unreasonable expenses. Appellee was not obliged to comply with the condition, since it was not compelled to proceed with the plan, although compliance with it, through the exercise of the power of the managers to modify the plan, would not, so far as appears, have been impossible or even difficult. But as the condition was one which the Commission had power to impose, appellee, having accepted the plan, cannot repudiate the condition.

2. Even if it be held that the condition which the Commission attached to its order was beyond its authority, I should still have thought the present case not a proper one for a court of equity to lend its aid to the appellee, and in any event that the decree below should have been so framed as to leave no doubt that the Commission was free to treat the whole order as though it had not been made.

So far as appears, not until appellee filed the present petition did it disclose any purpose to disregard the condition upon which the order depended. In the meantime it had taken full advantage of the benefits of the order. After it was granted, appellee presented to the Commission two supplemental petitions for orders authorizing payments, from the expense fund, of specific amounts for

corporate purposes, not including any item payable out of the $1.50 fund. The first of these was granted. Appellee stated in its first petition:

"The applicant will make such further application or applications, if any, with respect to matters dealt with in the commission's order and not covered hereby as from time to time may be necessary or proper."

The order of the District Court having jurisdiction of the foreclosure directed that deeds of the property should not pass to the appellee until it should have been authorized by the Commission to issue the securities. The appellee, without disclosing any purpose not to comply with the Commission's order, petitioned the District Court for an order directing the delivery of the deeds, exhibiting, the court below found, the order and certificate of the Commission. Upon consideration of this application, the court ordered the delivery of the deeds; and appellee then issued the new securities. Only after the reorganization had thus become an accomplished fact by appellee taking the benefit of so much of the order as suited its purposes, did it elect to repudiate the condition upon which the order was founded. Of the appellee's application to the District Court, the court below rightly said, "The petition was a representation to the court that plaintiff [appellee here] had accepted the order and expected to comply with the condition. . . ."

If appellee were unable or unwilling to comply with the order as made, equity and good conscience required, at least, either disclosure of that fact to the District Court before securing the transfer of the railroad property to it; application, upon full statement of the facts, to the Commission to exercise the jurisdiction, which it had reserved, to approve a modified plan; or prompt initiation of the present proceedings to test the validity of the order before a situation had been created prejudicial to the public interest and to the Commission's performance of its

duties. Instead, appellee adopted a course of conduct consistent throughout only with its apparent purpose to comply with the order; and now, without tendering any excuse for the belated disclosure of its real purpose, it asks relief from the condition only after it has enjoyed benefits which it cannot be said would have been granted without the condition. Neither this Court nor the court below is acting any the less as a court of equity because its powers are invoked to deal with an order of the Interstate Commerce Commission. The failure to conform to those elementary standards of fairness and good conscience which equity may always demand as a condition of its relief to those who seek its aid, seems to require that such aid be withheld from this appellee. See *Davis* v. *Wakelee*, 156 U. S. 680.

3. By the opinion of the Court, the order of the Commission, so far as it approves the issue of the securities, is treated as effective without the condition. But even if we assume that the condition which the Commission attached to the order is beyond its power, we should not attempt to substitute our judgment for that of the Commission, since the statute requires its consent, not ours; and we should not allow the order to stand without the condition, since that is not the order which the Commission made. By the Transportation Act, the giving or withholding of consent to the issue of securities is an administrative power, conferred, not upon the courts, but upon the Interstate Commerce Commission. Courts may determine whether the Commission lacks the power to impose a particular condition; but they may not strike from an order the condition upon which it was granted, and thus declare that it shall stand although the condition is not complied with. See *United States* v. *Louisville & Nashville R. R.*, 235 U. S. 314, 320; *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Assigned Car Cases*, 274 U. S. 564.

Whether or not the Commission has in fact consented does not turn on whether the condition is good or bad, but on whether it can fairly be said that the Commission would have given its unqualified consent independently of the condition. As the report of the Commission discloses, consent to the issue was given only with reluctance, to release the properties from the receivership at the earliest possible moment, but with the undoubted assumption on its part as a moving cause for its consent, that by annexing the condition it would exercise control over the reorganization expenses, with respect to the amount of which it had expressed grave concern. With four of the Commissioners voting unconditionally against the issue, I see no sufficient warrant for assuming that any would have voted for it without the condition and without the further investigation which it thought necessary, and which it was authorized to make before unconditionally approving the issue. Both the report and order of the Commission state that the authority granted was upon the "express condition" which is now the subject of this controversy. If in the face of this language there can be any doubt as to the intention of the Commission, we need not speculate upon what it might have done, had it thought it was without power to impose the condition, since it is able to speak for itself if this Court permits it to do so by setting aside the entire order without prejudice to further action by the Commission, under the statute, upon the application for approval of the issue of the securities.

The judgment below, as interpreted by this Court, not only makes effective an order different from any the Commission has granted, but precludes any future action by the Commission in the performance of its statutory duty. In this respect the case differs from those in which this Court has set aside an unconstitutional condition imposed by state legislation on a foreign corporation seeking

to do business within a state. In those cases the judgment of this Court in no way restricts the further exercise of the legislative power of the state in any constitutional manner. Here the Commission is ousted from the exercise of power which Congress has given it, and an order is sanctioned authorizing an issue of securities which it cannot be said the Commission has approved, and which this Court does not purport to say is appropriate under the statute.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur in this opinion.

GO-BART IMPORTING COMPANY ET AL. *v.* UNITED STATES.

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

No. 111. Argued November 25, 1930.—Decided January 5, 1931.

1. A warrant issued by a United States Commissioner, addressed only to the Marshal and his deputies, and based upon, and reciting the substance of, a complaint that was verified merely on information and belief and that did not state an offense,—*held* invalid on its face, and no authority to prohibition officers to make an arrest. P. 355.
2. Acting under color of an invalid warrant of arrest, and falsely claiming to have a search warrant, prohibition agents entered the office of a company, placed under arrest two of its officers, and made a general search of the premises. They compelled by threats of force the opening of a desk and safe, and seized therefrom and from other parts of the office, papers and records belonging to the company and its officers. The officers of the company were arraigned before a United States Commissioner, and by him held on bail further to answer the complaint (U. S. C., Title 18, § 591), while the seized papers were held under the control of the United States Attorney in the care and custody of the prohibition agent in charge. The company, and its two officers individually, before

an information or indictment had been returned against them, applied to the District Court for an order to enjoin the use of the seized papers as evidence and directing their return. On a rule against the United States to show cause, the United States Attorney appeared and opposed the motion and an affidavit of the agent in charge was also filed in opposition. The applications were denied. *Held:*

(1) In the proceedings before him, the Commissioner acted merely as an officer of the District Court in a matter of which it had authority to take control at any time. P. 353.

(2) Notwithstanding the order to show cause was addressed to the United States alone, the proceeding was in substance and effect against the United States Attorney and the prohibition agent in charge, the latter being required by the Prohibition Act to report violations of it to the former and being authorized by the statute, subject to the former's control, to conduct such prosecutions; and both these officers were subject to the proper exertion of the disciplinary powers of the court. P. 354.

(3) The District Court had jurisdiction summarily to determine whether the evidence should be suppressed and the papers returned to the petitioners. P. 355.

(4) The company being a stranger to the proceedings before the Commissioner, the order of the District Court as to it was final and appealable. P. 356.

(5) There being no information or indictment against the officers of the company when the application was made, and nothing to show that any criminal proceeding would ever be instituted in that court against them, it follows that the order was not made in or dependent upon any case or proceeding pending before the court, and therefore the order as to them was appealable. *Id.*

(6) The Fourth Amendment forbids every search that is unreasonable, and is to be liberally construed. P. 356.

(7) Assuming that the facts of which the arresting officers had been previously informed were sufficient to justify the arrests without a warrant, nevertheless the uncontradicted evidence requires a finding that the search of the premises was unreasonable. *Marron* v. *United States,* 275 U. S. 192, distinguished. P. 356.

(8) The District Court is directed to enjoin the United States Attorney and the agent in charge from using the papers as evidence and to order the same returned to petitioners. P. 358.

40 F. (2d) 593, reversed.

CERTIORARI, 281 U. S. 719, to review a judgment of the Circuit Court of Appeals which affirmed in part a judgment of the District Court denying applications for an order to suppress and return evidence alleged to have been illegally obtained.

Mr. Edward F. Colladay, with whom *Messrs. Benjamin B. Pettus* and *Joseph C. McGarraghy* were on the brief, for petitioners.

The arrest of petitioners was illegal.

The warrant of arrest was based upon an insufficient complaint. Even assuming the warrant to have been properly issued, the arrest under it was nevertheless invalid because it was not executed by a United States Marshal or one of his deputies.

No felony or misdemeanor had been committed or carried on in the presence of the officers. They had no reasonable grounds for believing that a felony had been committed. Reasonable or probable cause does not exist where the officer obtained his information solely from a superior officer who in turn obtained it from the unsworn statement of another. Probable cause which is insufficient as the basis for a warrant of arrest is insufficient to justify an arrest without a warrant.

The search and seizure were unreasonable and violated the Fourth and Fifth Amendments. A general exploratory search made without the authority of a search warrant is illegal. *Boyd* v. *United States,* 116 U. S. 616; *Weeks* v. *United States,* 232 U. S. 383; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Gouled* v. *United States,* 255 U. S. 298; *Carroll* v. *United States,* 267 U. S. 132.

In *Marron* v. *United States,* 275 U. S. 192, no general search was made. The documents seized were incidentally discovered.

The seizure of books and papers located on premises where an arrest is made is illegal where the books and papers are not the means or fruits of the crime, but are merely private papers of the petitioners. Citing: *United States* v. *Kirschenblatt,* 16 F. (2d) 202, 203; *Kirvin* v. *United States,* 5 F. (2d) 285; *United States* v. *Spallino,* 21 F. (2d) 567; *United States* v. *Epstein,* 33 F. (2d) 982.

A search to secure evidence to be used against defendants in a criminal proceeding is within the constitutional prohibition. An unlawful search and seizure may not be justified by what is found.

The books and papers should be returned to petitioners and the evidence obtained through the seizure should be suppressed.

Solicitor General Thacher, with whom *Assistant Attorneys General Youngquist* and *Sisson* and *Messrs. John J. Byrne* and *Mahlon D. Kiefer,* were on the brief, for the United States.

The possession of an invalid arrest warrant does not render illegal an arrest which may lawfully be made without it. *Stallings* v. *Splain,* 253 U. S. 339; *Marron* v. *United States,* 275 U. S. 192.

The arrests could lawfully be made without a warrant. *Ledwith* v. *Catchpole,* Cald. Cas. 291, 294–295; *Samuel* v. *Payne,* 1 Dougl. 359. See also remarks of Lord Tenterden in *Beckwith* v. *Philby,* 6 Barn. & Cres. 635, 638; 1 Hale P. C. 587–588; 2 Hawk. P. C., 6th ed., 118–119; 4 Bl. Com. 293. *Holley* v. *Mix,* 3 Wend. 350; *Burns* v. *Erben,* 40 N. Y. 463, 466; *Reuck* v. *McGregor,* 3 Vroom. 70, 74; *Kurtz* v. *Moffitt,* 115 U. S. 487; *Brady* v. *United States,* 300 Fed. 540, certiorari denied, 266 U. S. 620; *Wakely* v. *Hart,* 6 Binney 316; *Rohan* v. *Sawin,* 5 Cush. 281, 284–285; *Suell* v. *Derricott,* 161 Ala. 259, 273; *Brish* v. *Carter,* 98 Md. 445.

The arrests being lawful, the contemporaneous search of the immediate premises under the control of the persons arrested, and the seizure of the books and papers here in controversy as things used to carry on the criminal enterprise, were likewise lawful. *Carroll* v. *United States,* 267 U. S. 132; *Agnello* v. *United States,* 269 U. S. 20; *Marron* v. *United States,* 275 U. S. 192.

To argue that the ledger in the *Marron* case was lawfully seized, but that the books and papers in this case were not, is to assert that if the conspirators here had confined the record of their transactions to one volume, its seizure would be lawful, but that because, owing to the magnitude of their operations, their illegal dealings were recorded in a number of books and papers, the latter were immune from seizure.

Mr. Justice Butler delivered the opinion of the Court.

In a criminal proceeding before a United States commissioner in the Southern District of New York in which Gowen, Bartels and others are defendants, the petitioners applied to the district court for an order enjoining the use as evidence of books and papers alleged to have been seized and taken from petitioners in violation of the Fourth and Fifth Amendments and directing their return. The court made an order that the United States show cause why the relief prayed should not be granted. The United States attorney appeared and opposed the motion, and affidavits of W. J. Calhoun, special agent in charge of special agents of the Bureau of Prohibition, and certain of his subordinates were filed in opposition. The district court denied the applications. The Circuit Court of Appeals affirmed as to the United States attorney and held that as to the special agent in charge the order to show cause should have been discharged. 40 F. (2d) 593.

Petitioners' applications to the district court, which are in form affidavits, set forth the following:

June 5, 1929, Calhoun went before the United States commissioner and, in order to have a warrant issued for the arrest of Gowen, Bartels and others, verified and filed a complaint. He alleged, upon information and belief, that beginning January 1, 1929, and continuing down to the filing of the complaint Gowen, Bartels and other defendants conspired in that district to commit a nuisance against the United States, that is to say, to possess, transport, sell and solicit and receive orders for intoxicating liquor in violation of the National Prohibition Act, and that, in pursuance of the conspiracy and to effect its objects, one Heath purchased an automobile on May 23, 1929. See 27 U. S. C., §§ 33, 35. The complaint did not specify any building, structure, location or place or set forth any particulars or other overt act or show any connection between the purchase of the automobile and any offense referred to in the complaint. On the same day the commissioner issued a warrant in the usual form commanding the marshal of the district and his deputies to apprehend the persons so accused and to bring them before the commissioner or some judge or justice of the United States to be dealt with according to law.

On the next day Calhoun's subordinates, prohibition agents O'Brien, Collins and Sipe, went to the petitioning company's office at No. 200 Fifth Avenue. Bartels, the secretary-treasurer of the company, was there when they entered. O'Brien said he had a warrant to search the premises and exhibited a paper which he falsely claimed was such a warrant. The agents arrested Bartels, searched his person and took papers therefrom. While they were there Gowen, the president of the company, came to the office. O'Brien told him that he had a warrant for his arrest and a warrant to search the premises. The agents arrested and searched Gowen and took papers from him. They took his keys and by threat of force compelled him to open a desk and safe, searched and took papers from

them, searched other parts of the office and took therefrom other papers, journals, account books, letter files, insurance policies, cancelled checks, index cards and other things belonging respectively to Gowen, Bartels and the company. For brevity these will be referred to herein as "papers."

Gowen and Bartels were on the same day arraigned before the commissioner and held on bail further to answer the complaint. A date was set for the examination, hearing has been postponed from time to time and no examination has been had. The papers so seized were taken to the office of Calhoun in the Sub-Treasury Building where they were examined by him and the United States attorney and their subordinates, and such papers have since been kept and held there, as is later herein shown, under the control of the United States attorney in the care and custody of the special agent in charge, for use as evidence against Gowen and Bartels.

Soon after the seizures were made each of the petitioners brought a suit in equity in the federal court for that district against the special agent in charge and the United States attorney, to enjoin them from using such papers as evidence and to have them returned. The court dismissed these suits on the ground that the proper remedy was by motion in the criminal proceedings.

Then Gowen and Bartels, each in his own behalf, and the company, acting through Bartels, made these applications. The court made its order that the United States show cause why an injunction should not issue restraining it and its officers from using as evidence the papers so seized and why an order should not issue directing their return.

In opposition, the affidavit of one Braidwood was submitted. It tends to show that in 1927 and 1928 petitioners and others acting together engaged in the unlawful sale of intoxicating liquor, that at the company's office

they exhibited and took orders for intoxicating liquor some of which was delivered there and some elsewhere, and that in April, 1929, he reported these facts to Calhoun. Calhoun's affidavit states that Braidwood had so reported and that by independent investigations he had corroborated such statements and thus knew that a conspiracy unlawfully to sell intoxicating liquors in 1928 and 1929 had been entered into and overt acts in furtherance thereof had been performed within the district and that he believed the petitioners had been parties to such conspiracy, that prior to the day of the arrests he communicated such statements and belief to O'Brien and assigned him to further investigate the case.

O'Brien's affidavit states: From the information given him by Calhoun he believed petitioners and others had so conspired. Calhoun described to him the company's office in detail and the personal appearance of Gowen and Bartels. On June 6, 1929, he took a certified copy of the complaint and warrant " for the purpose of reference as to the names of the various defendants " and went to petitioners' office. It consisted of a suite of three rooms fitted up with office furniture including desks, filing cabinets and a safe. He told Bartels and Gowen that he was an officer of the United States and placed them under arrest for such conspiracy. No warrant was " served " upon either of them. The office was searched and there were found and taken therefrom approximately a dozen bottles of assorted intoxicating liquor, a large number of memoranda, books of account, records, filing cases, and other papers all of which pertained to unlawful dealings by Gowen and Bartels in intoxicating liquors.

O'Brien's affidavit also states that the papers so seized are of such quantity and bulk that it is impracticable to attach copies to the affidavit, that such papers are " specifically incorporated herein by reference and made a part hereof and are further made available for inspection at

any time, if desired by the Court, in connection with the consideration of this order to show cause."

In reply to O'Brien's affidavit petitioners submitted affidavits of Gowen, Bartels and other defendants who were arrested at the company's office on that occasion and affidavits of other persons who were present during some part of the time that the prohibition agents were there. These affidavits show that O'Brien said he had a warrant of arrest and produced a paper which several of these affiants say they read and believe to be the warrant issued by the commissioner, a copy of which was filed with the moving papers. As to these details there is no conflict in the evidence.

The district court refused to sustain the contention that no use was made of the warrant and accepted the statements that O'Brien claimed to have warrants for the arrests and searches. The Circuit Court of Appeals did not definitely express opinion as to that matter. We have examined the evidence. It requires a finding that O'Brien did so claim, that he had the warrant issued by the commissioner or a copy of it and that when he arrested Gowen and Bartels he claimed and purported to act under the warrant. No warrant for the search of the premises was issued.

The orders dismissing petitioners' suits in equity are not before us. The question whether the district court had jurisdiction summarily to deal with petitioners' applications, while not brought forward by the parties, arises upon the record, was considered by the Circuit Court of Appeals and suggested during the argument here.

United States commissioners are inferior officers.[1] *United States* v. *Allred,* 155 U. S. 591, 594. *Rice* v. *Ames,*

[1] As to the office of United States commissioner see: § 4, Act of March 2, 1793, 1 Stat. 334; § 1, Act of February 20, 1812, 2 Stat. 679; Act of March 1, 1817, 3 Stat. 350; §§ 1, 2, Act of August 23, 1842, 5 Stat. 516; R. S., § 627; §§ 19, 20 and 21, Act of May 28, 1896, 29 Stat. 184. *United States* v. *Maresca,* 266 Fed. 713, 719.

180 U. S. 371, 377, 378. Cf. *Ex parte Hennen,* 13 Pet. 230, 257, *et seq.* The Act of May 28, 1896, 29 Stat. 184, abolished commissioners of the circuit courts, authorized each district court to appoint United States commissioners, gave to them the same powers and duties that commissioners of the circuit courts had, required such appointments to be entered of record in the district courts, provided that the commissioners should hold their office subject to removal by the court appointing them (28 U. S. C., § 526) and required them to keep records of proceedings before them in criminal cases and deliver the same to the clerks of the courts on the commissioners' ceasing to hold office. *Id.,* § 529. They are authorized by statute in respect of numerous matters [2] and the relations between them and the district courts vary as do their official acts. Cf. *United States* v. *Allred, ubi supra. Grin* v. *Shine,* 187 U. S. 181, 187. *Todd* v. *United States,* 158 U. S. 278, 282. *Collins* v. *Miller,* 252 U. S. 364, 369. *United States* v. *Berry,* 4 Fed. 779. *Ex parte Perkins,* 29 Fed. 900. *The Mary,* 233 Fed. 121.

We need not consider what power the district court may exert over the commissioners dealing with matters unlike

[2] The powers and duties of United States commissioners include: To arrest and imprison, or bail, for trial (18 U. S. C., § 591; see also §§ 593–597) and in certain cases to take recognizances from witnesses on preliminary hearings (28 U. S. C., § 657); to issue warrants for and examine persons charged with being fugitives from justice (18 U. S. C., § 651); to hold to security of the peace and for good behavior (28 U. S. C., § 392); to issue search warrants (18 U. S. C., §§ 611–627; 26 U. S. C., § 1195); to take bail and affidavits in civil causes (28 U. S. C., § 758); to discharge poor convicts imprisoned for non-payment of fines (18 U. S. C., § 641); to institute prosecutions under laws relating to the elective franchise and civil rights and to appoint persons to execute warrants thereunder (8 U. S. C., §§ 49, 50); to enforce arbitration awards of foreign consuls in disputes between captains and crews of foreign vessels (28 U. S. C., § 393); to summon master of ship to show cause why process should not issue against it for seaman's wages (46 U. S. C., § 603); to take oaths and acknowledgments. 5 U. S. C., § 92. 28 U. S. C., § 525.

that now before us. Here the commissioner acted under R. S., § 1014, which provides that for any crime or offense against the United States, the offender may by any justice or judge of the United States or by any commissioner of the circuit court to take bail (now United States commissioner) be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. 18 U. S. C., § 591. All the commissioner's acts and the things done by the prohibition officers in respect of this matter were preparatory and preliminary to a consideration of the charge by a grand jury and, if an indictment should be found, the final disposition of the case in the district court. The commissioner acted not as a court, or as a judge of any court, but as a mere officer of the district court in proceedings of which that court had authority to take control at any time. *Todd* v. *United States, ubi supra. Collins* v. *Miller, ubi supra. United States* v. *Berry, supra. United States* v. *Casino,* 286 Fed. 976, 979.

Notwithstanding the order to show cause was addressed to the United States alone, this is in substance and effect a proceeding against the United States attorney and the special agent in charge. The special agent in charge was the prosecuting witness. It was his duty under the statute to report violations to the United States attorney. *Donnelley* v. *United States,* 276 U. S. 505. And he was authorized, subject to the control of the United States attorney, to " conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury," 27 U. S. C., § 11. It is immaterial whether he intended or was personally to conduct the prosecution before the commissioner. As the United States attorney had control of the prosecution before the commissioner, whether conducted by his assistants or prohibition agents, the papers were held subject to his control and direction although in the immediate care and custody

of the prohibition officers. He and they voluntarily came before the court to defend the seizure, the retention and proposed use of the papers and so in effect became parties to the proceeding. By making the papers a part of O'Brien's affidavit they brought the papers within the power of the court and constructively into its possession, if indeed the papers had not already come within its reach. In so far as it purports to run against the United States, the form of the order may be treated as a mere irregularity.

The United States attorney and the special agent in charge, as officers authorized to conduct such prosecution and having control and custody of the papers for that purpose, are, in respect of the acts relating to such prosecution, alike subject to the proper exertion of the disciplinary powers of the court. And on the facts here shown it is plain that the district court had jurisdiction summarily to determine whether the evidence should be suppressed and the papers returned to the petitioners. *Weeks* v. *United States*, 232 U. S. 383, 398. *Wise* v. *Henkel*, 220 U. S. 556, 558. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 390. *Cogen* v. *United States* 278 U. S. 221, 225. *United States* v. *Mills*, 185 Fed. 318. *United States* v. *McHie*, 194 Fed. 894, 898. *United States* v. *Lydecker*, 275 Fed. 976, 980. *United States* v. *Kraus*, 270 Fed. 578, 580. Cf. *Applybe* v. *United States*, 32 F. (2d) 873, 874.

The Government concedes that the warrant did not authorize O'Brien or other prohibition agents to make the arrests. The complaint, which in substance is recited in the warrant, was verified merely on information and belief and does not state facts sufficient to constitute an offense. *Ex parte Burford*, 3 Cranch 448, 453. *Rice* v. *Ames*, *supra*, 374. *Byars* v. *United States*, 273 U. S. 28. *United States* v. *Cruikshank*, 92 U. S. 542, 558. *United States* v. *Hess*, 124 U. S. 483. *United States* v. *Ruroede*, 220 Fed. 210,

212, 213. The warrant was improvidently issued and invalid on its face. It does not purport to authorize anyone other than the marshal and his deputies.

The company is not mentioned in the complaint or warrant and is a stranger to the proceeding before the commissioner. Unquestionably the order of the district court as to it was final and appealable. *Cogen* v. *United States, ubi supra. Ex parte Tiffany,* 252 U. S. 32. *Savannah* v. *Jesup,* 106 U. S. 563. *Gumbel* v. *Pitkin,* 113 U. S. 545. When the application was made, no information or indictment had been found or returned against Gowen or Bartels. There was nothing to show that any criminal proceeding would ever be instituted in that court against them. *Post* v. *United States,* 161 U. S. 583, 587. And, as above shown, the complaint does not state an offense. It follows that the order of the district court was not made in or dependent upon any case or proceeding there pending and therefore the order as to them was appealable. *Cogen* v. *United States, ubi supra. Perlman* v. *United States,* 247 U. S. 7, 13. *Burdeau* v. *McDowell,* 256 U. S. 465.

Without pausing to consider the matter, we assume, as held by the lower courts, that the facts of which Calhoun and O'Brien had been informed prior to the arrests are sufficient to justify the apprehension without a warrant of Gowen and Bartels for the conspiracy referred to in Braidwood's affidavit and on that basis we treat the arrests as lawful and valid.

No question is here raised as to the search of the persons. There remains for consideration the question whether the search of the premises, the seizure of the papers therefrom and their retention for use as evidence may be sustained. The first clause of the Fourth Amendment declares: "The right of the people to be se-

cure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made and the papers taken. *Gouled* v. *United States,* 255 U. S. 298, 307. The second clause declares: " and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union. *Agnello* v. *United States,* 269 U. S. 20, 33. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. *Boyd* v. *United States,* 116 U. S. 616, 623. *Weeks* v. *United States, supra,* 389–92.

There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances. It is not, and could not be, claimed that the officers saw conspiracy being committed. And there is no suggestion that Gowen or Bartels was committing crime when arrested. In April, 1929, Braidwood reported to Calhoun the existence of a conspiracy and that in pursuance of it sales and deliveries of intoxicating liquor had been made in 1927 and 1928. The record does not show

any criminal overt act in 1929. Calhoun's description to O'Brien of the company's office in detail and of Gowen and Bartels shows that he knew the place and offenders. Notwithstanding he had an abundance of information and time to swear out a valid warrant, he failed to do so. O'Brien falsely claimed to have a warrant for the search of the premises and he made the arrests under color of the invalid warrant. By pretension of right and threat of force he compelled Gowen to open the desk and the safe and with the others made a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office. It was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298, 306.

Plainly the case before us is essentially different from *Marron* v. *United States,* 275 U. S. 192. There, officers executing a valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place.

The uncontradicted evidence requires a finding that here the search of the premises was unreasonable. *Silverthorne Lumber Co.* v. *United States, supra. Marron* v. *United States, supra,* 199. *United States* v. *Kirschenblatt,* 16 F. (2d) 202. The judgments below must be reversed and the case remanded to the district court with directions to enjoin the United States attorney and the special agent in charge from using the papers as evidence and to order the same returned to petitioners.

Reversed.

Syllabus.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* SANFORD & BROOKS COMPANY.

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

No. 31. Argued December 5, 8, 1930.—Decided January 5, 1931.

1. In its income tax returns for 1913–16, the taxpayer included in gross income for each year payments received in that year under a dredging contract with the United States and deducted for each year expenditures made by the taxpayer during that year in performing the contract. The sum of the expenditures exceeded the sum of the payments received. The work was abandoned, and, in 1920, as the result of a suit on the contract for breach of warranty, the taxpayer received from the United States as compensatory damages an amount equal to such excess. It did not appear that the taxpayer ever filed returns on the accrual basis, or otherwise sought the benefit of the statutory provision in that regard or of Treasury regulations which, with respect to certain long-term contracts, allowed report of all receipts and expenditures on account of a particular contract in the year in which the work was completed, or report each year of the estimated profit corresponding to estimated expenditures of that year. *Held:*

   (1) That, under the Revenue Act of 1918, the money received in 1920 was properly included by the Commissioner as part of the gross income for that year in ascertaining the taxable income for that year. P. 363.

   (2) That a judgment in effect eliminating this money from the 1920 computation upon the condition that the taxpayer amend the earlier returns by omitting therefrom the deductions of related expenditures, was erroneous. P. 362 *et seq.*

2. Receipts from the conduct of a business enterprise are to be included in the taxpayer's return as a part of gross income, regardless of whether the particular transaction results in net profit. P. 364.

3. The excess of gross income over deductions in this case does not any the less constitute net income for the taxable period because the taxpayer, in an earlier period, suffered net losses in its business which were in some measure attributable to expenditures made to produce the net income of the later period. *Id.*

4. The familiar and practical system of taxing annually the net income resulting from all transactions within the tax year, rather than the gains derived from particular transactions, is sustained by the Sixteenth Amendment. P. 365.

35 F. (2d) 312, reversed.

CERTIORARI, 281 U. S. 707, to review a judgment reversing an order of the Board of Tax Appeals which sustained an assessment of income and profits taxes.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key* and *Andrew D. Sharpe,* Special Assistants to the Attorney General, *Erwin N. Griswold,* and *Clarence M. Charest,* General Counsel Bureau of Internal Revenue, and *Prew Savoy,* Special Attorney, were on the brief, for petitioner.

Mr. Harry N. Baetjer for respondent.

Income only can be taxed, and income implies gain. *Eisner* v. *Macomber,* 252 U. S. 189; *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179; *Inland Products Co.* v. *Blair,* 31 F. (2d) 867; *Bowers* v. *Kerbaugh-Empire Co.,* 271 U. S. 170; *Tennant* v. *Smith,* A. C. 151; *Marshall* v. *Commissioner of Internal Revenue,* 10 B. T. A. 1140; *United States* v. *Supplee-Biddle Co.,* 265 U. S. 189; *Merchants Loan & T. Co.* v. *Smietanka,* 255 U. S. 509.

The judgment represents no payment at unit prices and was in no sense a payment made pursuant to the contract which provided for payment at a fixed price per cubic yard of earth removed. *United States* v. *Atlantic Dredging Co.,* 253 U. S. 2.

No requirement as to method of establishing income subject to tax can convert a reimbursement into a gain.

Estoppel cannot prevail against respondent.

Since the jurisdiction of the Circuit Court of Appeals to render a decision requiring that amended returns be filed for the years 1913–1916 eliminating the deduction

claimed in those years in aggregate amount equal to the amount of the judgment, was questioned for the first time in the petition for certiorari, this Court should refuse to consider it.

Section 274 (g) of the Act of 1926 is not applicable to the case, and the Circuit Court of Appeals had jurisdiction to render its decision directly affecting tax liability for the years 1913 to 1916.

Messrs. Charles D. Hamel, Richard S. Doyle, and *Brainard Avery,* by special leave of Court, filed a brief as *amici curiae.*

Mr. Justice Stone delivered the opinion of the Court.

In this case certiorari was granted, 281 U. S. 707, to review a judgment of the Court of Appeals for the Fourth Circuit, 35 F. (2d) 312, reversing an order of the Board of Tax Appeals, 11 B. T. A. 452, which had sustained the action of the Commissioner of Internal Revenue in making a deficiency assessment against respondent for income and profits taxes for the year 1920.

From 1913 to 1915, inclusive, respondent, a Delaware corporation engaged in business for profit, was acting for the Atlantic Dredging Company in carrying out a contract for dredging the Delaware River, entered into by that company with the United States. In making its income tax returns for the years 1913 to 1916, respondent added to gross income for each year the payments made under the contract that year, and deducted its expenses paid that year in performing the contract. The total expenses exceeded the payments received by $176,271.88. The tax returns for 1913, 1915 and 1916 showed net losses. That for 1914 showed net income.

In 1915 work under the contract was abandoned, and in 1916 suit was brought in the Court of Claims to recover for a breach of warranty of the character of the material

to be dredged. Judgment for the claimant, 53 Ct. Cls. 490, was affirmed by this Court in 1920. *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1. It held that the recovery was upon the contract and was "compensatory of the cost of the work, of which the government got the benefit." From the total recovery, petitioner received in that year the sum of $192,577.59, which included the $176,271.88 by which its expenses under the contract had exceeded receipts from it, and accrued interest amounting to $16,305.71. Respondent having failed to include these amounts as gross income in its tax returns for 1920, the Commissioner made the deficiency assessment here involved, based on the addition of both items to gross income for that year.

The Court of Appeals ruled that only the item of interest was properly included, holding, erroneously as the government contends, that the item of $176,271.88 was a return of losses suffered by respondent in earlier years and hence was wrongly assessed as income. Notwithstanding this conclusion, its judgment of reversal and the consequent elimination of this item from gross income for 1920 were made contingent upon the filing by respondent of amended returns for the years 1913 to 1916, from which were to be omitted the deductions of the related items of expenses paid in those years. Respondent insists that as the Sixteenth Amendment and the Revenue Act of 1918, which was in force in 1920, plainly contemplate a tax only on net income or profits, any application of the statute which operates to impose a tax with respect to the present transaction, from which respondent received no profit, cannot be upheld.

If respondent's contention that only gain or profit may be taxed under the Sixteenth Amendment be accepted without qualification, see *Eisner* v. *Macomber*, 252 U. S. 189, *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, the question remains whether the gain or profit which is the

subject of the tax may be ascertained, as here, on the basis of fixed accounting periods, or whether, as is pressed upon us, it can only be net profit ascertained on the basis of particular transactions of the taxpayer when they are brought to a conclusion.

All the revenue acts which have been enacted since the adoption of the Sixteenth Amendment have uniformly assessed the tax on the basis of annual returns showing the net result of all the taxpayer's transactions during a fixed accounting period, either the calendar year, or, at the option of the taxpayer, the particular fiscal year which he may adopt. Under §§ 230, 232 and 234 (a) of the Revenue Act of 1918, 40 Stat. 1057, respondent was subject to tax upon its annual net income, arrived at by deducting from gross income for each taxable year all the ordinary and necessary expenses paid during that year in carrying on any trade or business, interest and taxes paid, and losses sustained, during the year. By §§ 233 (a) and 213 (a) gross income "includes . . . income derived from . . . businesses . . . or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." The amount of all such items is required to be included in the gross income for the taxable year in which received by the taxpayer, unless they may be properly accounted for on the accrual basis under § 212 (b). See *United States* v. *Anderson,* 269 U. S. 422; *Aluminum Castings Co.* v. *Routzahn, ante,* p. 92.

That the recovery made by respondent in 1920 was gross income for that year within the meaning of these sections cannot, we think, be doubted. The money received was derived from a contract entered into in the course of respondent's business operations for profit. While it equalled, and in a loose sense was a return of, expenditures made in performing the contract, still, as the Board of Tax Appeals found, the expenditures were

made in defraying the expenses incurred in the prosecution of the work under the contract, for the purpose of earning profits. They were not capital investments, the cost of which, if converted, must first be restored from the proceeds before there is a capital gain taxable as income. See *Doyle* v. *Mitchell Brothers Co., supra,* p. 185.

That such receipts from the conduct of a business enterprise are to be included in the taxpayer's return as a part of gross income, regardless of whether the particular transaction results in net profit, sufficiently appears from the quoted words of § 213 (a) and from the character of the deductions allowed. Only by including these items of gross income in the 1920 return would it have been possible to ascertain respondent's net income for the period covered by the return, which is what the statute taxes. The excess of gross income over deductions did not any the less constitute net income for the taxable period because respondent, in an earlier period, suffered net losses in the conduct of its business which were in some measure attributable to expenditures made to produce the net income of the later period.

Bowers v. *Kerbaugh-Empire Co.,* 271 U. S. 170, on which respondent relies, does not support its position. In that case the taxpayer, which had lost, in business, borrowed money, which was to be repaid in German marks, and which was later repaid in depreciated currency, had neither made a profit on the transaction, nor received any money or property which could have been made subject to the tax.

But respondent insists that if the sum which it recovered is the income defined by the statute, still it is not income, taxation of which without apportionment is permitted by the Sixteenth Amendment, since the particular transaction from which it was derived did not result in any net gain or profit. But we do not think the amendment is to be so narrowly construed. A taxpayer may be in receipt of net income in one year and not in another.

The net result of the two years, if combined in a single taxable period, might still be a loss; but it has never been supposed that that fact would relieve him from a tax on the first, or that it affords any reason for postponing the assessment of the tax until the end of a lifetime, or for some other indefinite period, to ascertain more precisely whether the final outcome of the period, or of a given transaction, will be a gain or a loss.

The Sixteenth Amendment was adopted to enable the government to raise revenue by taxation. It is the essence of any system of taxation that it should produce revenue ascertainable, and payable to the government, at regular intervals. Only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation. It is not suggested that there has ever been any general scheme for taxing income on any other basis. The computation of income annually as the net result of all transactions within the year was a familiar practice, and taxes upon income so arrived at were not unknown, before the Sixteenth Amendment. See *Bowers* v. *Kerbaugh-Empire Co., supra,* p. 174; *Pacific Insurance Co.* v. *Soule,* 7 Wall. 433; *Pollock* v. *Farmers' Loan & Trust Co.,* 158 U. S. 601, 630. It is not to be supposed that the amendment did not contemplate that Congress might make income so ascertained the basis of a scheme of taxation such as had been in actual operation within the United States before its adoption. While, conceivably, a different system might be devised by which the tax could be assessed, wholly or in part, on the basis of the finally ascertained results of particular transactions, Congress is not required by the amendment to adopt such a system in preference to the more familiar method, even if it were practicable. It would not necessarily obviate the kind of inequalities of which respondent complains. If losses from particular transactions were to be set off against

gains in others, there would still be the practical necessity of computing the tax on the basis of annual or other fixed taxable periods, which might result in the taxpayer being required to pay a tax on income in one period exceeded by net losses in another.

Under the statutes and regulations in force in 1920, two methods were provided by which, to a limited extent, the expenses of a transaction incurred in one year might be offset by the amounts actually received from it in another. One was by returns on the accrual basis under § 212 (b), which provides that a taxpayer keeping accounts upon any basis other than that of actual receipts and disbursements, unless such basis does not clearly reflect its income, may, subject to regulations of the Commissioner, make its return upon the basis upon which its books are kept. See *United States* v. *Anderson,* and *Aluminum Castings Co.* v. *Routzahn, supra.* The other was under Treasury Regulations (Art. 121 of Reg. 33 of Jan. 2, 1918, under the Revenue Acts of 1916 and 1917; Art. 36 of Reg. 45, Apr. 19, 1919, under the Revenue Act of 1918) providing that in reporting the income derived from certain long term contracts, the taxpayer might either report all of the receipts and all of the expenditures made on account of a particular contract in the year in which the work was completed, or report in each year the percentage of the estimated profit corresponding to the percentage of the total estimated expenditures which was made in that year.

The Court of Appeals said that the case of the respondent here fell within the spirit of these regulations. But the court did not hold, nor does respondent assert, that it ever filed returns in compliance either with these regulations, or § 212 (b), or otherwise attempted to avail itself of their provisions; nor on this record do any facts appear tending to support the burden, resting on the taxpayer, of establishing that the Commissioner erred in failing to

apply them. See *Niles Bement Pond Co.* v. *United States*, 281 U. S. 357, 361.

The assessment was properly made under the statutes. Relief from their alleged burdensome operation which may not be secured under these provisions, can be afforded only by legislation, not by the courts.

Reversed.

WHITE *v.* JOHNSON ET AL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 29. Argued December 5, 1930.—Decided January 5, 1931.

1. Upon certificate the Court will not answer questions of objectionable generality; and a question is improper which is so broad and indefinite as to admit of one answer under one set of circumstances and a different answer under another. P. 371.
2. A question certified which inquires merely whether the employment of tangible property in an existing business begets in the proprietor a "property" in the continuance of the business, within the meaning of that word as used in the Fifth Amendment, is too broad and indefinite, and need not be answered. P. 371.
3. The Court is not required to answer questions certified which are contingent upon an affirmative response to another question which it has declined to answer. P. 372.
4. Where the answer to a question certified involves merely an examination of an Act of Congress and a determination whether on its face it violates the Fifth Amendment, it is an academic question, which neither this Court nor the court below is authorized to answer. P. 373.
5. Where a question certified, which involves the validity of the Radio Act of 1927, in respect of its alleged failure to provide a specific method of procedure or to furnish a standard of conduct for the Commission in the matter of applications for renewals of broadcasting licenses, is so framed that to answer it the Court would have to treat the proceedings before the Commission in the complainant's case as irrelevant, to disregard the Commission's interpretation of the language of the Act as applied to him under

all the circumstances of his case, and to ignore his admitted failure to avail himself of the right of review conferred by the statute, the question need not be answered. P. 374.

RESPONSE to questions certified by the Circuit Court of Appeals on an appeal from a decree of the District Court dismissing a bill *quia timet* to enjoin the enforcement of the criminal provisions of the Radio Act of 1927 for violation of an order of the Radio Commission. The right of appeal to the Court of Appeals of the District of Columbia from the Commission's order, authorized by § 16 of the Act, was not pursued.

Mr. Henry K. Urion, with whom *Mr. Henry W. Drucker* was on the brief, for White.

Solicitor General Thacher, with whom *Messrs. Charles H. Weston* and *William G. Davis,* Special Assistants to the Attorney General, were on the brief, for Johnson et al.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The Circuit Court of Appeals has certified five questions. From the statement of facts contained in the certificate it appears that since August 15, 1926, appellant has owned and operated a radio broadcasting station in Chicago and has had successive licenses from the Secretary of Commerce, and (after the enactment of the Radio Act of 1927, c. 169, 44 Stat. 1162; U. S. C. Supp. III, title 47, § 81, *et seq.*) from the Federal Radio Commission. Under those from the Commission he at first broadcasted on a wave length of 760 kilocycles with a power of 500 watts, and subsequently on a wave length of 1340 kilocycles with the same power, and was required to divide time with two other stations.

On January 12, 1928, he filed an application for renewal of his then current license, which would expire on September 1, 1928. May 25, 1928, the Commission entered a

general order concerning that application and 163 others, stating that it was not satisfied that public interest, convenience or necessity would be served by granting any of them, and fixing a date for a hearing. Each applicant was notified that failing an affirmative showing that public interest, convenience or necessity would be served by granting his application it would be denied. Hearings were had on all the applications. Thereafter, on August 22, 1928, an order was promulgated by the Commission modifying the appellant's existing license by reducing the authorized power to 100 watts, and extending the term to October 1, 1928.

The approximate value of the physical equipment of appellant's station is $5,000. He has expended some $16,000 in its operation. At the time of the Commission's action his net profits were about $400 per week. His equipment will not operate efficiently or satisfactorily at 100 watts. To broadcast with that power he will have to replace a very substantial portion of his present apparatus. The reduction in power will restrict the area which can be served to one-fourth of its former size, and will cause the loss of a large portion of his listening public and advertising clientele.

Although § 16 of the Radio Act of 1927 (U. S. C. Supp. III, title 47, § 96) authorized an appeal from the Commission's order to the Court of Appeals of the District of Columbia, it was conceded at bar that appellant took none. He filed a bill *quia timet* in the United States District Court for the Northern District of Illinois praying that the enforcement of the criminal provisions of the act against him for violation of the order be enjoined; and, upon dismissal of that bill, appealed to the Circuit Court of Appeals for the Seventh Circuit.

The questions certified follow.

"Question 1. Did a person who, prior to the enactment of the Radio Act of 1927, applied for and was granted suc-

cessive licenses by the Secretary of Commerce for the operation of a broadcasting station, and who owned and continuously operated such broadcasting station, whereby it developed a following of listeners and advertisers which constituted a going business, have or acquire thereby property in the continued operation of such station, with power appropriate to continue the operation of said business, within the meaning of the word 'property' as used in the Fifth Amendment to the Constitution of the United States?

"Question 2. If the answer to Question 1 is in the affirmative, is the Joint Resolution of Congress of December 8th, 1926 valid as against the claim that by virtue of the waiver it requires it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

"Question 3. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that, by virtue of the waiver required in the last paragraph of Section 5 and by virtue of the condition required to be contained in all licenses by subparagraph (A) of Section 11, it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

"Question 4. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in its action on an application for renewal of license by a person such as is described in Question 1, to take private property for public use without just compensation, either by denying such application or by granting it on such terms as virtually to destroy a going broadcasting business of such person?

"Question 5. If the answer to Question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Fed-

eral Radio Commission, in acting upon an application for renewal of license by said person, to deprive such person of such property without due process of law, in that the only standards provided by the Act for the guidance of the Commission in acting upon such applications are that of 'public interest, convenience or necessity' and that set forth in Section 5 of the Amendatory Act of March 28, 1928, and in that the Act fails to require that the Commission, prior to proceeding to a hearing or decision on such application, shall specify in what respect it deems or has failed to find that the granting of such application would not serve public interest, convenience or necessity?"

Rule 37 (Par. 1) of this Court provides, *inter alia:*

. . . "Only questions or propositions of law may be certified, and they must be distinct and definite."

The court has repeatedly held that it will not answer questions of objectionable generality. *United States* v. *Worley,* 281 U. S. 339, 340; *United States* v. *John Barth Co.,* 276 U. S. 606; *United States* v. *Mayer,* 235 U. S. 55, 70; *United States* v. *Northway,* 120 U. S. 327. And a question is improper which is so broad and indefinite as to admit of one answer under one set of circumstances and a different answer under another. *Enfield* v. *Jordan,* 119 U. S. 680; *Jewell* v. *Knight,* 123 U. S. 426; *Hallowell* v. *United States,* 209 U. S. 101.

The first question inquires merely whether the employment of tangible property in an existing business begets in the proprietor a "property" in the continuance of the business, as the word "property" is used in the Fifth Amendment. It is so broad and indefinite that an answer would not necessarily be of assistance in the decision of the cause. It was never intended that in answer to a question certified, we should give a dissertation on the application of the Fifth Amendment. Were we to attempt to do so, we should have to assume the existence of facts and circumstances, the absence of which from the record

might render our statements wholly irrelevant. *Reinecke* v. *Gardner,* 277 U. S. 239. The essence of the amendment is its application under all the circumstances of a given case. A broad statement as to whether a thing or a status is property within its intent might well be meaningless or misleading.

Much argument was directed to the proposition that one who first establishes a broadcasting station in and serves a given area thereby appropriates that portion of the ether which he employs or through which the station's radio activity operates; and it was suggested that in analogy to the doctrine as to appropriation of waters, *et id omne genus,* a property right is thus acquired. It was urged that the question presents this proposition; but it clearly fails so to do. We are not required to answer it.

Questions 2 and 3 are contingent upon our answer to question 1. The first asks whether, if we answer question 1 in the affirmative, the Joint Resolution of December 8, 1926, is valid as against the claim that by virtue of the waiver it requires of the applicant for a license it violates certain constitutional guaranties. The second asks whether, if our answer to question 1 be in the affirmative, the Radio Act of 1927, as amended, is valid as against the claim that by virtue of the similar waiver required in the last paragraph of Section 5, and the waiver required to be contained in all licenses, it violates the same constitutional guaranties.

The appellees concede that if a person has a right guaranteed by the Constitution, legislation requiring that such right be waived as a condition of the exercise of a privilege granted would be invalid. However that may be, no such concession calls on us to answer questions which are themselves contingent on another which we do not answer.

The fourth question asks us to say whether, if our answer to question 1 is in the affirmative, the Radio Act of

1927, as amended, is valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting on an application for renewal of license by a person such as described in question 1, to take private property for public use without just compensation, by denying or granting the application on terms destructive of the going business of the applicant.

This question we need not answer, for the reasons stated as to the two preceding. But it has another fatal defect. An answer would involve merely an examination of the Act and a determination whether on its face it violates the Fifth Amendment. Neither this Court nor the court below is authorized to answer academic questions. The constitutionality of a statute is not drawn into question except in connection with its application to some person, natural or artificial. We have above called attention to the provisions of the Radio Act which give redress against arbitrary or unjust action by the Commission. We repeat that the appellant did not see fit to avail himself of the right of appeal thereby conferred, but on the contrary chose to violate the Commission's order and to stand on an alleged constitutional right which he says the action of the Commission infringed. It would be subversive of all established principles were courts, in litigations between parties, who have reciprocal rights under the Constitution, to settle their controversies by broad statements to the effect that acts of Congress are unconstitutional upon their face; and this not only in ignorance of the circumstances and manner of the application of the statute by the administrative body, but with knowledge that the party complaining had failed to pursue the remedy provided by law.

The fifth question not only is contingent on our answer to question 1, but assumes that the Radio Act may be unconstitutional because it fails to provide a specific method of procedure and does not furnish a standard of

conduct for the Commission. But the appellant's rights, as respects procedure, depend not alone on the alleged requirements of the Act, but on the adequacy of the hearing in fact afforded him; and his substantive rights under the statute depend upon the public interest, convenience or necessity in view of all the facts adduced and circumstances appearing before the Commission. We are not advised what sort of hearing was held, nor what facts were proved. If the proceeding was an unfair one, as lacking adequate notice, full hearing, or development of all relevant facts, appellant had a remedy provided by the statute, which in the orderly processes of the administration of the law he was bound to pursue. To answer the question as framed we should have to treat the proceedings before the Commission as irrelevant; to hold that body's interpretation of the language of the act as applied to appellant in all the circumstances of his case as of no moment; and to ignore his admitted failure to avail himself of the right of review conferred by the statute. The question need not be answered.

The certificate is dismissed.

AMERICAN BOND AND MORTGAGE COMPANY ET AL. *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 210. Argued December 5, 1930.—Decided January 5, 1931.

Certificate presenting substantially the same questions as in *White* v. *Johnson, ante,* p. 367, dismissed on the authority of that case.

CERTIFICATE from the Circuit Court of Appeals, on an appeal from a decree of the District Court enjoining the operation of a broadcasting station in violation of the provisions of the Radio Act.

Mr. George W. Swain, with whom *Messrs. Frank H. Scott* and *Edward B. Hayes* were on the brief, for American Bond and Mortgage Company et al.

Solicitor General Thacher, with whom *Messrs. Charles H. Weston* and *William G. Davis,* Special Assistants to the Attorney General, were on the brief, for the United States.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The same Circuit Court of Appeals which certified questions in *White* v. *Johnson, ante,* p. 367, also certified six questions in this case. While they are differently phrased, they are in substance the same.

Here a suit in equity was brought by the United States to restrain the proprietor of a broadcasting station from disregarding an order of the Federal Radio Commission, revoking its license, and from operating in defiance of the provisions of the Radio Act. As in the other case, the appellants admittedly failed to avail themselves of the right of appeal afforded by the Act.

The reasons stated in the *White* case for not answering the questions therein certified apply here.

The certificate is dismissed.

FAWCUS MACHINE COMPANY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 40. Argued December 12, 1930.—Decided January 5, 1931.

1. Administrative regulations contemporaneously construing a statute and made for its enforcement under an express general authorization contained therein, and which are not unreasonable or inconsistent with the statute, will not be overruled except for weighty reasons. P. 378.

2. In accordance with Article 845 of Treasury Regulations 45, applicable to the Revenue Act of 1918, and which provides that "federal income . . . taxes are deemed to have been paid out of the net income of the taxable year for which they are levied," the Commissioner of Internal Revenue determined that the invested capital for 1919 of a corporate taxpayer which kept its books and made returns on the accrual basis, should be reduced, in its return for the taxable year 1919, by the amount of income and excess profits taxes for 1918, as of the dates in 1919 when the instalments of taxes fell due and were paid. This computation resulted in an alleged overpayment of excess profits taxes which the taxpayer sued to recover. *Held:*

(1) The regulation was reasonable and consistent with the Act of 1918. P. 378.

(2) In view of the facts that the Act of 1917 required the payment of the same sort of taxes; that the petitioner actually accrued its taxes for 1918 and set them up in a reserve at the end of the year; that taxpayers understood that the policy of the Government with respect to income and excess profits taxes was continuous; and that a Treasury Decision, in substance the same as Article 845, was applicable to the 1917 Act, the regulation was not unreasonable as applied to 1918 taxes, notwithstanding that the Revenue Act of 1918 was not passed until February, 1919, and the taxpayer could not know at the close of 1918 what the exact amount of its taxes for that year would be. P. 379.

68 Ct. Cls. 784, affirmed.

CERTIORARI, 281 U. S. 711, to review a judgment of the Court of Claims in favor of the United States in an action brought by a taxpayer to recover an alleged overpayment of excess profits taxes for the year 1919.

Mr. James S. Y. Ivins, with whom *Messrs. Kingman Brewster* and *Felix T. Smith* were on the brief, for petitioner.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Lisle A. Smith, H. Brian Holland,* and *Erwin N. Griswold* were on the brief, for the United States.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Certiorari was granted to the Court of Claims to review a judgment in favor of the United States in an action to recover an alleged overpayment of excess profits tax for the calendar year 1919. The petitioner, a corporation, kept its books and made its returns of income and excess profits taxes on the accrual basis. In its return for the year ended December 31, 1919, it did not deduct from invested capital any amount on account of income and excess profits taxes for 1918 assessed and paid in 1919.

The Commissioner of Internal Revenue determined that the invested capital for 1919 should be reduced by the amount of income and profits taxes for 1918, as of the dates in 1919 when the instalments of taxes fell due and were paid. To accomplish this he computed an average deduction for the year 1919, and diminished the earned surplus as of January 1, 1919, by subtracting from it the amount so ascertained.

The Commissioner's action was in accordance with Article 845 of Treasury Regulations 45, promulgated April 17, 1919, applicable to the Revenue Act of 1918. The pertinent portion follows:

"federal income . . . taxes are deemed to have been paid out of the net income of the taxable year for which they are levied."

Section 326 (a) of the Revenue Act of 1918 provided that "as used in this title the term 'invested capital' for any year means . . . :

(1) Actual cash bona fide paid in for stock or shares;

(2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, . . . ;

(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year;"

Petitioner asserts that Article 845 was based on the erroneous assumption that income taxes are payable out of the net income of the taxable year for which they are levied.

The United States replies that it is, and since 1914 it has been, required that a taxpayer shall keep his books and make his returns on a basis which will reflect true income; that while the taxes for any year are not payable until the following year, good accounting practice requires an accrual of them as a liability of the current year's business; and that the regulation in question was not only reasonable, but necessary for proper administration of the Revenue Act.

The position of the Government is sound. A corporation cannot claim to have accumulated any net income in any year until provision is made for taxes accrued, based on net income for the same year.

The reasonableness of the regulation is further shown by the fact that "invested capital" was merely a legislative definition of an element in the formula prescribed for computation of excess profits tax. Congress might have expressly declared that taxes should be excluded from invested capital. It did not do so in § 326 (a), or elsewhere in the act. The regulations were made pursuant to express authority (see § 1309 of the Revenue Act of 1918). They are valid unless unreasonable or inconsistent with the statute. *United States* v. *Grimaud,* 220 U. S. 506, 517–518; *International Ry. Co.* v. *Davidson,* 257 U. S. 506, 514. They constitute contemporaneous construction by those charged with the administration of the act, are for that reason entitled to respectful consideration, and will not be overruled except for weighty reasons. *United States* v. *Moore,* 95 U. S. 760, 763; *Brewster* v. *Gage,* 280 U. S. 327, 336.

Petitioner insists that Article 845 is unreasonable as applied to 1918 taxes; that no one could know what those taxes would be at the close of the year, because the so-

called Revenue Act of 1918 was not passed until February, 1919, and made changes in the rates. But the 1917 act was in force, and required the payment of the same sort of taxes, and petitioner concedes it accrued its taxes for 1918 and set them up in a reserve at the end of the year. The Act of 1918 was retroactive and replaced the prior act of October 3, 1917, and taxpayers understood that the policy of the United States with respect to income and profits tax was continuous. In February, 1919, the Treasury promulgated Decision 2791, applicable to the 1917 Act, and in substance the same as Article 845, which was issued under the 1918 Act on April 17, 1919. The taxes in question were provided for by an act passed in February, 1919, but they were for the year 1918. The act was passed in ample time to allow the taxpayer to readjust its accounts for that year by including these taxes; and, since its books were kept on an accrual basis, it was necessary that this should be done in order clearly to reflect the income for 1918.

United States v. *Woodward,* 256 U. S. 632, on which petitioner relies, is clearly distinguishable on the grounds stated in *United States* v. *Anderson,* 269 U. S. 422, 441.

We cannot hold that the regulation on which the Commissioner relied was unreasonable or in conflict with the provisions of the statute. The judgment is

Affirmed.

EDUCATIONAL FILMS CORPORATION OF AMERICA *v.* WARD, ATTORNEY GENERAL OF NEW YORK, ET AL.

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

No. 350. Argued December 1, 1930.—Decided January 12, 1931.

A New York statute taxes each domestic corporation of certain classes "for the privilege of exercising its franchise in this State." The tax is payable in advance for each year beginning November 1st,

and is at a specified rate on so much of the corporation's entire net income for its preceding fiscal year as is, under other provisions, allocated to its business carried on within the State. Net income is defined, by amendments, as embracing income from any source, and entire net income as meaning the total net income, "including all dividends received on stocks and all interest received from federal, state, municipal or other bonds." The income upon which the tax was measured in the present case was derived in part as royalties from copyrights granted by the United States. *Held:*

1. Assuming that federal copyrights and the income therefrom are immune from state taxation as instrumentalities of the federal government, the tax here, in so far as measured by income from the copyright royalties, is not void as a tax on federal instrumentalities. P. 386, *et seq.*

2. The nature of the tax must be determined by its operation rather than by particular descriptive language applied to it. P. 387.

3. Since the tax can be levied only where the corporation both seeks, or exercises, the privilege of doing business in one year and has been in receipt of net income during its preceding fiscal year, the tax, obviously, is not exclusively on income apart from the franchise. P. 388.

4. The state power to tax corporate franchises and the immunity of federal instrumentalities from taxation, should be given such a practical construction as will not unduly restrict the power of the government imposing the tax, or the exercise of the functions of the government which may be affected by it. Pp. 388, 391.

5. There is a logical and practical distinction between a tax laid directly upon all of any class of government instrumentalities, which the Constitution impliedly forbids, and a tax such as the present, which can in no case have any incidence unless the taxpayer enjoys a privilege which is a proper object of taxation, and which would not be open to question if its amount were arrived at by any other non-discriminatory method. P. 391.

6. The rule that a non-discriminatory tax upon corporate franchises is valid, notwithstanding the inclusion of tax-exempt property or income in the measure of it, is applicable to this case, since it can not be said that the present tax, viewed in the light of actualities, imposes any such real or direct burden on the federal government as to call for the application of a different rule. P. 392.

7. The rule applied in *Macallen Co.* v. *Massachusetts* is inapplicable here, because there is nothing to show that the tax was aimed at copyrights, the royalties being included merely because of the general language of the statute as it was before the reference to federal bonds was introduced by amendment. P. 393.

41 F. (2d) 395, affirmed.

APPEAL from a decree dismissing the bill in a suit to enjoin the New York Tax Commission from collecting a tax on the appellant corporation.

Messrs. Benjamin P. Dewitt and *Roger Hinds,* with whom *Mr. Siegfried F. Hartman* was on the brief, for appellant.

Since the income upon which the disputed tax is based consists of royalties from United States copyrights, it is immune from taxation by the State. *McCulloch* v. *Maryland,* 4 Wheat. 316, 432; *People ex rel. Edison Co.* v. *Assessors,* 156 N. Y. 417; *People ex rel. N. Y. Tel. Co.* v. *Neff,* 15 App. Div. 8, 13, affirmed 156 N. Y. 701. *People ex rel. Aluminum Co.* v. *Knight,* 174 N. Y. 475; *Long* v. *Rockwood,* 277 U. S. 142.

The tax, particularly when considered from the standpoint of immunity of federal instrumentalities, is in substance and effect, and in practical operation, a tax on income. *People ex rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N. Y. 48, 57, 62; *Macallen Co.* v. *Massachusetts,* 279 U. S. 620, 629; *Weston* v. *Charleston,* 2 Pet. 449; *De La Vergne Co.* v. *Tax Commission,* 211 App. Div. 227, affirmed 241 N. Y. 517. Distinguishing: *People ex rel. Bass, Ratcliff & Gretton* v. *Tax Commission,* 232 N. Y. 42, affirmed 266 U. S. 271.

The decisions of this Court with respect to the Wisconsin and Massachusetts corporation excise taxes show that there is no inconsistency in holding (as the New York courts have done) that a given tax may be for a privilege and still, in substance and effect, be a tax on

income. *Northwestern Ins. Co.* v. *Wisconsin,* 247 U. S. 132; *Northwestern Ins. Co.* v. *Wisconsin,* 275 U. S. 136; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203; *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68; *S. S. White Dental Co.* v. *Commonwealth,* 212 Mass. 35; *Macallen Co.* v. *Massachusetts,* 264 Mass. 396, s. c. 279 U. S. 620, 634. Cf. *Aberdeen Savings & L. Assn.* v. *Tax Commission,* 57 Wash. 255; *Quicksafe Mfg. Corp.* v. *Graham* (Tenn.), 29 S. W. (2d) 253.

Under the authority of the *Macallen* case, Article 9–A of the tax law is unconstitutional in so far as the tax is based on income from federal instrumentalities. Cf. *Quicksafe Mfg. Corp.* v. *Graham, supra.*

The New York tax cannot, we submit, be an excise as to income from some federal instrumentalities and an income tax as to others.

An attempt to distinguish the New York tax from the Massachusetts tax passed on in the *Macallen* case is, that the income upon which the tax is based under the New York law is that for the preceding calendar or fiscal year. Under the New York law the tax is payable each year in advance for the year beginning November 1st. Thus, in paying its tax in New York a corporation is paying a tax for the succeeding year based on its income for the preceding year. It might well be argued that this elaborate and artificial separation of income year from tax year indicates that the New York legislature in framing the tax law was deliberately trying to conceal the fact that it intended to tax all income—including exempt income. Suffice it to say that, under the tax laws held unconstitutional in Washington and Tennessee, the income upon which the tax is based is, as under the New York law, that of the preceding year, and the Supreme Court of each of those States, nevertheless, held the tax unconstitutional in so far as it reached exempt income. So,

too, in California, the income upon which the tax is based is that of the preceding year and yet the State Board of Equalization expressed the opinion that the tax is unconstitutional.

There are at least four considerations not applicable to the Massachusetts tax indicating that the New York tax is a tax on income and not an excise or franchise tax: (1) The New York law itself uses various expressions indicating that it is essentially a tax on income. (2) In Massachusetts the highest court held that the tax was an excise and not an income tax. (3) The Massachusetts tax is collectible only when the corporation has in fact been engaged in doing business during the taxable year. By contrast, the New York tax is levied upon every domestic business corporation, regardless of whether or not the privilege is availed of. *People* v. *Jersawit,* 263 U. S. 493. (4) In Massachusetts the tax is measured only in part by net income.

The decisions in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, and earlier cases are inapplicable to the statute here involved. The tax in the *Flint* case was a special excise tax. It was not, like the New York tax, one variously denominated " a tax based on income " or " a tax upon entire net income," payable for the privilege of exercising a franchise and declared by the courts to be " in practical operation a tax on income." Neither the statutory language nor any court decision admitted of any characterization of the tax in the *Flint* case as a tax on income, even an indirect one.

Furthermore, unless the tax in the *Flint* case had been, of a certainty, an excise, and by no possibility a tax on income even " in substance and effect," it would have been void *in toto*—for at that time (1909) the Sixteenth Amendment had not been adopted.

Among the later decisions of this Court referred to in the *Macallen* case as preserving the immunity from state taxation of federal instrumentalities, are the following: *Gillespie* v. *Oklahoma,* 257 U. S. 501, 505; *Clallam County* v. *United States,* 263 U. S. 341; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609; *Northwestern Ins. Co.* v. *Wisconsin,* 275 U. S. 136; *Miller* v. *Milwaukee,* 272 U. S. 713; *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218; *Long* v. *Rockwood,* 277 U. S. 142; *National Ins. Co.* v. *United States,* 277 U. S. 508; *State ex rel. Mo. Ins. Co.* v. *Gehner,* 281 U. S. 313.

In the *Macallen* case the New York Tax Commission (appellees in the present case) filed a brief, as *amici curiae,* insisting that whatever decision should be reached would "doubtless apply with like force to the State of New York." The States of Washington and California were also among those States which, as *amici curiae,* filed briefs in support of the petition for re-hearing in the *Macallen* case. Cf. *Aberdeen Savings & L. Assn.* v. *Tax Commission,* 57 Wash. 225; *Quicksafe Mfg. Corp.* v. *Graham,* 29 S. W. (2d) 253.

The fact that the basis of the tax is net income rather than gross income does not justify the inclusion of income from federal instrumentalities.

Mr. Wendell P. Brown, Assistant Attorney General of New York, with whom *Mr. Hamilton Ward,* Attorney General, was on the brief, for appellees.

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal under § 238 of the Judicial Code from a decree of a District Court of three judges for Southern New York, 41 F. (2d) 395, which dismissed, on the merits, the bill of complaint by which appellant, a New York corporation, sought to restrain appellees, the New York State Tax Commission, from the collection of a tax, on

the ground that the taxing statute, as applied, infringes the federal Constitution.

Section 209 [1] of Article 9-A of the New York Tax Law lays an annual tax on every domestic corporation of certain classes " for the privilege of exercising its franchise in this state in a corporate or organized capacity." The tax is payable in advance for each year beginning November 1st, and is at the rate of 4½% of so much of the corporation's entire net income for its preceding fiscal year as is, under other sections, allocated to the business carried

[1] § 209. [Laws N. Y. 1929, c. 385.] Franchise tax on corporations based on net income. For the privilege of exercising its franchise in this state in a corporate or organized capacity every domestic corporation, and for the privilege of doing business in this state, every foreign corporation, except corporations specified in the next section, shall annually pay in advance for the year beginning November first next succeeding the first day of July in each and every year an annual franchise tax, to be computed by the tax commission upon the basis of its entire net income, as defined in subdivision three of section two hundred and eight of the tax law, for its fiscal or the calendar year next preceding, as hereinafter provided, which entire net income is presumably the same as the entire net income which such corporation is required to report to the United States, plus any income received as dividends on stocks or any interest received on bonds of any character, and without deduction for taxes paid on either profits or net income to the government of the United States or for any specific deduction allowed by any other authority, except that the entire net income of a corporation not organized under the laws of any state within the United States which shall be taken as the basis of computation by the tax commission shall be the entire net income in fact and determined as hereinbefore provided rather than the amount earned in the United States or the amount returned to the United States Treasury Department, or as otherwise provided by section two hundred and fourteen of the tax law. However, in determining the entire net income, for purposes of equitable taxation under this article of the tax law, the tax commission may include income from any source, provided only that the assets from which the income arose shall be included in any segregation for the purpose of computing the tax.

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on within the state. By § 209 the net income embraces "income from any source," and "is presumably the same as the entire net income" reported for income taxation to the United States, "plus . . . dividends on stocks or any interest received on bonds of any character." Subdivision 3 of § 208 provides: "The term 'entire net income' means the total net income, including all dividends received on stocks and all interest received from federal, state, municipal or other bonds . . ." Appellant's bill of complaint sets up that during its fiscal year ending June 30, 1929, it was the owner of copyrights granted by the United States upon motion picture films, and had received royalties from the licensing of them. It challenges the tax assessed against it under the statute, for the year beginning November 1, 1929, so far as it is measured by the amount of the royalties.

Appellant's contention is based on two propositions, both essential to its conclusion that the tax is invalid. They are, first, that the copyrights and all income derived from them are immune from state taxation since they, like patents, are instrumentalities of the federal government, taxation of which the Constitution impliedly forbids, see *Long* v. *Rockwood,* 277 U. S. 142; and, second, that the present tax, measured by net income, is void, so far as the measure includes income from the copyrights, because a tax on federal instrumentalities.[2]

For present purposes it is enough if we direct our attention to the second proposition. At the outset appellant contends that the tax, although stated in the taxing act

[2] The equity jurisdiction to enjoin collection of the tax is not challenged. The legal remedy provided by the statute for the recovery of taxes after payment falls short of adequacy in at least two respects. Refund, if any, is expressly without interest. § 219 (d). See *Procter & Gamble Distributing Co.* v. *Sherman,* 2 F. (2d) 165; *Southern California Telephone Co.* v. *Hopkins,* 13 F. (2d) 814, 820, aff'd. 275 U. S. 393. If judicial review of the action of the state

to be on corporate franchises, is in reality a tax on income, and as such falls within the class of taxes which concededly may not be directly imposed on federal instrumentalities. In support of the contention, it points to the language of the statute, (§§ 214 (a) and 214 (8), dealing with the computation of the tax), and to an opinion of the New York Court of Appeals, (*Alpha Portland Cement Co.* v. *Knapp,* 230 N. Y. 48, 57), which refer to the tax as one "upon income."

So far as these considerations are of weight, they are counterbalanced by the later pronouncement of the same court in *People ex rel. Bass, Ratcliff & Gretton* v. *Tax Commission,* 232 N. Y. 42, 46: ". . . although we have said in another connection (*People ex rel. Alpha P. C. Co.* v. *Knapp, supra,* p. 57) that 'the tax imposed upon this franchise must be held in practical operation to be a tax upon the income . . . This tax is equivalent to a tax upon relator's income,' it is primarily a tax levied for the privilege of doing business in the state."

But the nature of a tax must be determined by its operation rather than by particular descriptive language which may have been applied to it. As was said in *Macallen Co.* v. *Massachusetts,* 279 U. S. 620, 625, 626, ". . . neither state courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect. . . . this Court must determine for itself by independent inquiry whether the tax here is what, in form and by the decision of the state court, it is declared to be . . . " On

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tax commission in assessing the tax results in a determination that such action was illegal, the statute calls for the credit of so much of the tax as was illegally exacted, or refund at the direction of the commission. But it is at least doubtful whether any refund can be compelled. § 219 (d). See *Gorham Mfg. Co.* v. *Travis,* 274 Fed. 975, aff'd. 266 U. S. 265; *Dawson* v. *Kentucky Distilleries Co.,* 255 U. S. 288, 295, 296.

appeal from the state court in *People ex rel. Bass, Ratcliff & Gretton* v. *Tax Commission, supra,* this Court upheld the tax and defined its nature, saying, 266 U. S. 271, 280: "It is not a direct tax upon the allocated income of the corporation in a given year, but a tax for the privilege of doing business in one year measured by the allocated income accruing from the business in the preceding year. See *New York* v. *Jersawit,* 263 U. S. 493, 496." See also *Home Insurance Co.* v. *New York,* 134 U. S. 594; *People ex rel. United States Aluminum Printing Plate Co.* v. *Knight,* 174 N. Y. 475; *Anderson* v. *Forty-two Broadway Co.,* 239 U. S. 69.

If we look to the operation of the present statute, it is plain that it can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise. If appellant had ceased to do business before November 1, 1929, it would not have been subject to any tax under this statute, although it had received, during its preceding fiscal year, income which the statute makes the measure of the tax. Since it can be levied only when the corporation both seeks or exercises the privilege of doing business in one year and has been in receipt of net income during its preceding fiscal year, the tax, whatever descriptive terms are properly applicable to it, obviously is not exclusively on income apart from the franchise. Hence we pass to the chief objection urged against it, that such a tax, however described, and even though deemed to be a tax on franchises, is invalid so far as it is measured by income derived from a federal instrumentality.

Under the Constitution the privilege of exercising the corporate franchise is the legitimate object, and the immunity of federal instrumentalities from taxation, a legitimate restriction, of the state power to tax. To give both to the power and to the immunity such a practical construction as will not unduly restrict the power of the government imposing the tax, or the exercise of the func-

tions of the government which may be affected by it, is the problem necessarily involved in determining the extent of the immunity. See *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523, 524. So far as it concerns the power of a state to impose a tax on corporate franchises, the problem has long since ceased to be novel. While this Court, since *McCulloch* v. *Maryland,* 4 Wheat. 316, has consistently held that the instrumentalities of either government, or the income derived from them, may not be made the direct object of taxation by the other, *Weston* v. *City Council of Charleston,* 2 Pet. 449; *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435; *Home Savings Bank* v. *Des Moines,* 205 U. S. 503; *Indian Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Federal Land Bank* v. *Crosland,* 261 U. S. 374, it has held with like consistency that the privilege of exercising the corporate franchise is no less an appropriate object of taxation by one government merely because the corporate property or net income, which is made the measure of the tax, may chance to include the obligations of the other, or the income derived from them. The constitutional power of one government to reach this permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon the other.

The precise question now presented was definitely answered in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 162, *et seq.,* which upheld a federal tax, levied upon a corporate franchise granted by a state, but measured by the entire corporate income, including, in that case, income from tax exempt municipal bonds. In reaching this conclusion, the Court reaffirmed the distinction, repeatedly made in earlier decisions, between a tax, invalid because laid directly on governmental instrumentalities or income derived from them, and an excise which is valid because imposed on corporate franchises, even though the corporate property or income which is the measure of the

tax embraces tax exempt securities or their income. See *Society for Savings* v. *Coite,* 6 Wall. 594; *Provident Institution* v. *Massachusetts,* 6 Wall. 611; *Hamilton Co.* v. *Massachusetts,* 6 Wall. 632; *Home Insurance Co.* v. *New York, supra.*

Upon a like principle other forms of excise tax have been upheld, although the statutory measure of the tax included securities constitutionally immune from any form of direct taxation. A state inheritance or legacy tax is valid, although measured by the value of United States bonds which are transmitted. *Plummer* v. *Coler,* 178 U. S. 115. See also *Orr* v. *Gilman,* 183 U. S. 278; *Blodgett* v. *Silberman,* 277 U. S. 1; cf. *Greiner* v. *Lewellyn,* 258 U. S. 384; *Willcuts, Collector,* v. *Bunn, ante,* p. 216. By parity of reasoning an inheritance tax may be levied by a state on a bequest to the United States, *United States* v. *Perkins,* 163 U. S. 625, and by the United States on a bequest to a municipality. *Snyder* v. *Bettman,* 190 U. S. 249. Similarly, state laws, taxing to stockholders, at full value, shares in national banks, are upheld, although the banks own tax exempt United States bonds. *Van Allen* v. *Assessors,* 3 Wall. 573, 583; *People* v. *Commissioners,* 4 Wall. 244, 255; *Peoples National Bank of Kingfisher* v. *Board of Equalization,* 260 U. S. 702; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 112 *et seq.* A tax on net income is not a forbidden tax on exports because it includes receipts from exports in the computation of the income, *Peck & Co.* v. *Lowe,* 247 U. S. 165; *Barclay & Co.* v. *Edwards,* 267 U. S. 442; nor is the inclusion in a state income tax of receipts from interstate commerce a prohibited burden on commerce. *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Shaffer* v. *Carter,* 252 U. S. 37, 57; cf. *Interborough Rapid Transit Co.* v. *Sohmer,* 237 U. S. 276, 283, 284. It has been held that a state tax upon the franchise of a corporation,

measured by its receipts from transportation, properly apportioned to the business done within the state, is valid, although including receipts from interstate commerce. *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217; cf. *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217. A state may not tax tangible property located beyond its boundaries, *Union Transit Co.* v. *Kentucky,* 199 U. S. 194; but it may measure a tax on franchises of domestic corporations by corporate property, even though without the state. *Kansas City, F. S. & M. Ry. Co.* v. *Kansas,* 240 U. S. 227; *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325. So well settled is this last mentioned application of the doctrine that an excise may be measured by tax-immune property, that an appeal in which such a tax was assailed on the very grounds urged here, was dismissed per curiam during the present term. *Nebraska ex rel. Beatrice Creamery Co.* v. *Marsh, post,* p. 799.

It is said that there is no logical distinction between a tax laid on a proper object of taxation, measured by a subject matter which is immune, and a tax of like amount imposed directly on the latter; but it may be said with greater force that there is a logical and practical distinction between a tax laid directly upon all of any class of government instrumentalities, which the Constitution impliedly forbids, and a tax such as the present which can in no case have any incidence, unless the taxpayer enjoys a privilege which is a proper object of taxation, and which would not be open to question if its amount were arrived at by any other non-discriminatory method.

This Court, in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the op-

erations of government. The necessity for marking those boundaries grows out of our Constitutional system, under which both the federal and the state governments exercise their authority over one people within the territorial limits of the same state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without undue interference by the other. *McCulloch* v. *Maryland, supra,* p. 405; *The Collector* v. *Day,* 11 Wall. 113, 125; *Railroad Co.* v. *Peniston,* 18 Wall. 5, 31; *South Carolina* v. *United States,* 199 U. S. 437, 461; *Flint* v. *Stone Tracy Co., supra,* pp. 154, 172; *Metcalf & Eddy* v. *Mitchell, supra,* pp. 523, 524.

Having in mind the end sought, we cannot say that the rule applied by this Court for some seventy years, that a non-discriminatory tax upon corporate franchises is valid, notwithstanding the inclusion of tax exempt property or income in the measure of it, has failed of its purpose, or has worked so badly as to require a departure from it now; or that the present tax, viewed in the light of actualities, imposes any such real or direct burden on the federal government as to call for the application of a different rule.

The decision of this Court in *Macallen Co.* v. *Massachusetts, supra,* upon which appellant relies, was not such a departure. That case did not overrule *Flint* v. *Stone Tracy Co., supra.* Instead, the opinion rested the decision on the distinguishing fact that the tax exempt securities were included in the measure of the franchise tax by virtue of an amendment to the taxing statute which, it was held, was specifically intended to reach the income from tax exempt national and municipal bonds which had previously not been included in the measure of the tax. The case was thus brought within the purview of *Miller* v. *Milwaukee,* 272 U. S. 713, in which this Court had stated, with respect to a state tax on income, no franchise or

privilege tax being involved [p. 715]: "If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good." But, as the Court in that case was careful to point out, in language later quoted with approval in *Macallen Co.* v. *Massachusetts,* p. 631, "A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them . . ."

It cannot be said that the present tax was aimed at copyrights. Appellant insists that it is, for the same reason as the tax held invalid in *Macallen Co.* v. *Massachusetts, supra,* in that amendments of the taxing act, sufficiently broad to include income from tax immune property in the measure of the tax, were specifically intended to accomplish that result. Reference is made to the legislative history of the statute. In *People ex rel. Standard Oil Company* v. *Law,* 237 N. Y. 142, it was held as a matter of statutory construction that the "entire net income" specified by the act then in force was gross income as defined by the applicable provisions of the federal income tax law, less specified deductions, and that consequently income from state and municipal bonds and some federal bonds was not included in the measure of the tax. After that decision subdivision 3 of § 208 was amended, Laws N. Y. 1924, c. 329, to include in the definition of income "all interest received from federal, state, municipal or other bonds"; and § 209 was amended, Laws N. Y. 1927, c. 479, so as to include in the measure of the tax "income from any source."

But the statute, before these amendments, was sufficiently broad to include income from copyrights within the measure of the tax; and neither before nor after the

amendments did it make any mention of copyrights or their income. There is nothing to suggest that the legislature could at any time have had in mind the addition of income from copyrights to the measure of the tax, or that the statute or the amendments were adopted "for the very purpose of subjecting" it "*pro tanto* to the burden of the tax," which was declared to be the vice of the statute in *Macallen Co.* v. *Massachusetts, supra,* p. 631. That the royalties play some part in the measure of the tax is the result of the application of the general language of the statute to particular circumstances to which the statute makes no specific reference. In this respect, the present statute differs in no substantial way from that upheld in *Flint* v. *Stone Tracy Co., supra.*

Affirmed.

MR. JUSTICE SUTHERLAND, dissenting.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE BUTLER and myself entertain a different view.

The duty of this court to examine taxing acts to see that the use of federal tax-exempt subjects as a measure for taxes imposed in terms upon taxable subjects is not a cloak, under which the former in substance and effect are taxed, was never more imperative than now, when, by reason of increased and increasing public expenditures, states and municipalities are driven to search in every direction for additional sources of revenue.

The self-evident operation of the provisions of the New York tax law is to cause the tax here in question to fall on an instrumentality of the United States. The statute necessarily exacts tribute from the income derived from that instrumentality. The amount of this tax is the same, and its effect, in every respect, is the same as though it had been imposed upon the income in precise terms. Were it not for *Flint* v. *Stone Tracy Co.,* it would be difficult to suggest any reason for ignoring the rule so

often laid down in the earlier cases, that the validity of the tax will depend not on what is named as the subject of the tax, but on its effect. *Macallen Co.* v. *Massachusetts,* 279 U. S. 620, 625–627.

It is true that this court in the *Macallen* case did not overrule the *Flint* case, but it did characterize that case as " the extreme example " of the doctrine that a tax may be measured by income, although a part of such income is derived from nontaxable property. But the *Macallen* case definitely determined that such a tax must be held to be invalid if the legislative purpose to lay the tax upon the nontaxable subject be " fairly inferable from a consideration of the history, the surrounding circumstances, or the statute itself considered in all its parts." In the present case, we are of opinion that the legislative purpose, though not as clear as it is in respect of income derived from federal bonds, is " fairly inferable " in respect of copyrights. And, although it may be conceded that a tax measured by income derived from copyrights does not impose a burden upon the exercise of a vital power of the federal government, as it would in the case of federal bonds, it is, nevertheless, a tax falling upon income which is exempt in virtue of an implied prohibition of the federal Constitution. *Long* v. *Rockwood,* 277 U. S. 142.

A former act of the state had been held not to reach certain federal bonds (*People ex rel. Standard Oil Co.* v. *Law,* 237 N. Y. 142, 149), and that act was amended so as to include " all interest received from federal, state, municipal or other bonds." The amendment by definite words thus clearly manifests the legislative purpose to include in the measure of the tax, income derived from federal bonds of every description, and thereby to disregard the exemption of federal instrumentalities from state taxation. So far then as federal bonds are concerned the case falls precisely within the test laid down in the *Macallen* case, and substantially within the facts

of that case. The legislature, however, was not content with this, but later amended the taxing act so as to include in the measure of the tax "income from any source." The history of these amendments, successively broadening the terms of the statute, fairly justifies the inference that the aim of the legislature was to reach income from every source, including that derived from all varieties of nontaxable subjects, and, therefore, necessarily including copyrights and patents. That aim the state cannot make effective consistently with constitutional principles long respected and vital to the preservation of our dual system of government.

What was said by this court in *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, is peculiarly apposite. In that case a statute of Iowa provided that "Shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies and not to individual stockholders." The statute was assailed on the ground that the tax, though in form upon shares of stock, was in fact upon the property of the banks, etc., and invalid because the value of United States bonds which they owned was included in the valuation of the property assessed to them. The court, looking through the words of the act to its purpose and effect, sustained the contention of the banks. In deciding the question the court said (p. 509):

"It is conceded and cannot be disputed that these securities are beyond the taxing power of the State, and the only question, therefore, is whether in point of fact the State has taxed them. The first step useful in the solution of this question is to ascertain with precision the nature of the tax in controversy, and upon what property it was levied, and that step must be taken by an examination of the taxing law as interpreted by the Supreme Court of the State. A superficial reading of the law would lead

to the conclusion that the tax authorized by it is a tax upon the shares of stock. The assessment is expressed to be upon 'shares of stock of state and savings banks and loan and trust companies.' But the true interpretation of the law cannot rest upon a single phrase in it. All its parts must be considered in the manner pursued by this court in *New Orleans* v. *Houston,* 119 U. S. 265, 278, and *Home Insurance Co.* v. *New York,* 134 U. S. 594, with the view of determining the end accomplished by the taxation, and its actual and substantial purpose and effect. We must inquire whether the law really imposes a tax upon the shares of stock as the property of their owners, or merely adopts the value of those shares as the measure of valuation of the property of the corporation, and by that standard taxes that property itself."

And at page 521:

"If by the simple device of adopting the value of corporation shares as the measure of the taxation of the property of the corporation that property loses the immunities which the supreme law gives to it, then national securities may easily be taxed, whenever they are owned by a corporation, and the national credit has no defense against a serious wound."

That the principle, "an act may become unlawful when done to accomplish an unlawful end," applies to statutes imposing taxes is well established. *Federal Land Bank* v. *Crosland,* 261 U. S. 374, 378.

But wholly apart from extrinsic circumstances the statute itself in terms seems clearly to impose an income tax. The tax is not one *upon* the privilege of doing business, but it is an annual tax *for* the privilege of doing business, to be computed upon the basis of the net income for the year next preceding. The highest court of the state, in *People ex rel. Alpha P. C. Co.* v. *Knapp,* 230 N. Y. 48, 57, so held in an opinion by Judge Cardozo, from the

reasoning of which it is hard to escape. After citing and discussing pertinent decisions of this court, he concludes:

"Tested by these precedents, the tax imposed upon this franchise must be held in practical operation to be a tax upon the income. Such, indeed, it would be in form as well as in substance, if the legislature had not stated (sec. 209) that the 'privilege of doing business' was the consideration for the payment. Nothing but that recital stands between the statute and conceded invalidity. How the legislature itself looked upon the substance of the burden is indicated by other provisions of the same and later statutes. The tax is to be in lieu of all other taxes on personal property or capital stock (Tax Law, sec. 219–J). It is to be in lieu of all other taxes upon income (sec. 350, subd. 7). There surely was no intention that all mercantile and manufacturing corporations, foreign and domestic, should in very truth be exempt from taxes upon property so fundamental in importance as capital and the fruits of capital. The reason for the apparent exemption was that, under the form of a tax upon the franchise, the property of such corporations had already been subjected to its share of public burdens.

"I think, therefore, that in substance, though not in form, in tendency, though not in name, this tax is equivalent to a tax upon relator's income."

There is nothing in the later case of *People ex rel. Bass, Ratcliff & Gretton* v. *Tax Commission*, 232 N. Y. 42, which, in our opinion, challenges Judge Cardozo's cogent view. That case involved the question whether income which arose in part from property outside the State of New York could be constitutionally included in the basis for computing the tax. The court held it could, being "based on a comparison of the total assets with the assets in New York." The court quoted what Judge Cardozo had said in the preceding case, that "'the tax imposed upon this

franchise must be held in practical operation to be a tax upon the income . . . This tax is equivalent to a tax upon relator's income' "; and then added, " it is primarily a tax levied for the privilege of doing business in the state." This amounts to nothing more than a repetition in brief of what Judge Cardozo, more at length, already had said, namely, that in practical operation the tax is one *upon* income *for* the privilege of doing business; and it leaves the conclusion set forth in the quotation we have made from the *Knapp* case wholly without modification.

These views, we submit, require a reversal of the judgment below.

INTERNATIONAL PAPER COMPANY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 37. Argued January 7, 1931.—Decided January 19, 1931.

1. Section 120 of the National Defense Act of 1916, which empowered the President, in time of war, to place obligatory orders with corporations for any product or material required, of the kind usually produced by them, was sufficient authority for taking the right held by a lessee to make use of part of the water in a power canal, such taking being accomplished by requisitioning from the power company owning the canal all the electrical power capable of being produced by the use of all waters capable of being diverted through its intake for its plants and machinery connected therewith. P. 406.
2. A requisition by the Government upon a power company for the production of all the electrical power capable of being produced through the full use of the waters of its intake canal, including the use to which a lessee of the company was entitled under rights which by state law were a corporeal hereditament and real estate, *held* a taking for public use of the water rights of such lessee, and that the latter is entitled to compensation therefor, notwithstanding that, by an agreement made between the Government and the power company at the time of the requisition, the Government

waived delivery of the power on condition that it be distributed to certain designated private companies (of which the lessee was not one) for war uses, and the company waived all right to compensation if permitted to carry on its business and to sell its power consistently with the exigencies of the national security and defense. *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, distinguished. P. 407.

3. Secretary of War, in making war-time requisition of electrical power generated by diversion of water from Niagara River, *held* not to have acted pursuant to powers in respect of navigation or under treaty, but to have exercised power of eminent domain. P. 407.

68 Ct. Cls. 414, reversed.

CERTIORARI, 281 U. S. 710, to review a judgment of the Court of Claims in favor of the United States in a suit against it to recover compensation for property rights in water alleged to have been taken for war purposes.

Mr. John W. Davis, with whom *Messrs. William C. Cannon, Montgomery B. Angell,* and *Porter R. Chandler* were on the brief, for petitioner.

The water rights of the petitioner were without doubt taken, and intentionally taken, during the ten months period in which the requisition order remained in effect. These water rights were of such a character that they constituted private property within the meaning of the Fifth Amendment, for which, if taken, compensation must be paid. *Pumpelly* v. *Green Bay Co.,* 13 Wall. 166; *United States* v. *Lynah,* 188 U. S. 445; *United States* v. *Welch,* 217 U. S. 333; *United States* v. *Wayne County,* 252 U. S. 574; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *North American Transp. Co.* v. *United States,* 253 U. S. 330; *James* v. *Campbell,* 104 U. S. 356; *Central Trust Co.* v. *Hennen,* 90 Fed. 593; *Williams* v. *United States,* 104 Fed. 50. See especially *Duckett & Co.* v. *United States,* 266 U. S. 149. *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, distinguished.

The taking was not accompanied by any revocation of the federal license, and the express promise to pay just compensation negatives any taking under a claim of right.

The Power Company's waiver of compensation cannot operate to deprive the petitioner of its rights to compensation in respect of its own property.

Neither the treaty with Great Britain nor the Federal Water Power Act has the effect of transferring proprietary rights under the laws of the State of New York to the Federal Government.

The taking of petitioner's water rights was pursuant to statute, and was not the mere private or tortious act of the Secretary of War. The extent of a statutory authorization is not to be narrowly or unnecessarily restricted, where the circumstances warrant giving to the words used a wider scope, in order fully to carry out the purpose of the legislation. This is particularly true of a war-time authorization granted to the President as commander-in-chief of the armed forces, or to an agency of the Government acting in the interests of the national defense. *Manufacturers' Land & Imp. Co.* v. *Emergency Fleet Corp.*, 264 U. S. 250, 255. Cf. *Maresca* v. *United States*, 277 Fed. 727, 735, certiorari denied 253 U. S. 498.

If there was any defect in authority under the National Defense Act, there was, we believe, ample authority for the taking under the Urgent Deficiency Appropriation Act of April 17, 1917, c. 3, 40 Stat. 28. Urgent Deficiency Act of December 15, 1917, c. 3, 40 Stat. 429.

When the requisition order was made, the Government had full knowledge of petitioner's rights—had, in fact, taken some pains to inquire as to the extent of those rights—and specifically intended to appropriate petitioner's property. The requisition order was a peremptory command,—an act of sovereignty and not an offer to negotiate. *Liggett & Myers* v. *United States*, 274 U. S. 215, 220. By its terms, the Secretary of War undertook

to make the requisition in the name of the President "and by reason of the exigencies of the national security and defense."

The Government attempts to argue that petitioner's only remedy is an action sounding in tort against the Power Company. Such an action would be met at the threshold with the answer that the shut-off of petitioner's water was not effected by the Power Company, but by the United States Government, acting pursuant to statutory authority.

The taking of petitioner's water was not a mere "regulation" but was a substantial deprivation of property, for which compensation must be paid.

Petitioner is entitled to interest as a part of the just compensation guaranteed to it by the Constitution.

Mr. Claude R. Branch argued the cause and *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Erwin N. Griswold* and *H. Brian Holland* filed a brief, for the United States.

It does not appear that the alleged taking of petitioner's water rights was, expressly or by necessary implication, authorized by legislative enactment, and in the absence of such authorization, petitioner is without recourse against the United States.

Several statutes, such as the National Defense Act, gave the President broad powers with respect to the appropriation of manufactured articles in time of war. It was doubtless under these that the Secretary of War assumed, in behalf of the President, to requisition the output of the power plant. But the grant of authority merely to requisition the product of a power plant does not authorize the taking of water power from a third party in order to increase the productive capacity of the plant.

It does not appear that the President or the Secretary of War was entitled to requisition anything other than

electric power which the Power Company could produce by means of facilities and materials over which it had control. *Duckett & Co.* v. *United States,* 266 U. S. 149, distinguished.

The *res* which was taken was "the total quantity and output of the electrical power," and not the use of waters diverted or capable of being diverted through the canal. The Government did not want water power, and did not take it. It did intend that use should be made by the Power Company of water theretofore used by the Paper Company. But it does not follow from this that the Government intended to expropriate the water. The petitioner was advised of the contents of the requisition order, but it was not directed or requested to relinquish its water rights either to the United States or to the Power Company. Thus there was no physical taking by the United States of any property belonging to the Paper Company, and the case is distinguishable from *Duckett & Co.* v. *United States, supra.*

The execution of the waiver precludes the idea of there having been any appropriation by the United States even of the power produced by the Power Company. Ultimately the Government took nothing, and assumed only to regulate the selection of the Power Company's sale of its product to essential industries. If, as petitioner argues, electrical power is the *alter ego* of water power, then since the Government did not take electricity it did not take water.

There can be no recovery under the Fifth Amendment unless property is actually taken and used by the sovereign for a public purpose, *Legal Tender Cases,* 12 Wall. 457; *Transportation Co.* v. *Chicago,* 99 U. S. 635; *Gibson* v. *United States,* 166 U. S. 269; *Scranton* v. *Wheeler,* 179 U. S. 141; *Wisconsin, M. & P. R. Co.* v. *Jacobson,* 179 U. S. 287; *Hamilton* v. *Kentucky Distilleries,* 251 U. S. 146.

The jurisdiction of the Court of Claims to enter judgment on a claim founded on expropriation of property

must rest on the receipt of a consideration moving to the United States. *Bothwell* v. *United States,* 254 U. S. 231; *Interocean Oil Co.* v. *United States,* 270 U. S. 65, 69.

This case, although not necessarily controlled by *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, is more closely comparable to it than to the *Duckett* case.

The interference with petitioner's property was, at most, a result of the exercise of the power of the United States to regulate industry and the use of natural resources in time of war, for which no compensation is payable. *Morrisdale Coal Co.* v. *United States,* 259 U. S. 188; *Pine Hill Coal Co., Inc.* v. *United States,* 259 U. S. 191; *Atwater & Co.* v. *United States,* 275 U. S. 188.

This Court has repeatedly held that the sovereign may, in the exercise of governmental powers, promulgate regulations and impose restrictions amounting in substance to a deprivation or even complete destruction of property rights. *Louisville & N. R. Co.* v. *Mottley,* 219 U. S. 467; *United States* v. *Delaware & H. Co.,* 213 U. S. 366; *Morris* v. *Duby,* 224 U. S. 135; *Tagg Bros.* v. *United States,* 280 U. S. 420.

If the petitioner is entitled to recover for the taking, it is not entitled to interest.

Mr. Justice Holmes delivered the opinion of the Court.

This is a proceeding by the petitioner to recover compensation for property rights in water of the Niagara River alleged to have been taken by the United States for war purposes. The Niagara Falls Power Company by private grant to it, Letters Patent from the State of New York and acts of the Legislature of that State, was the owner so far as the law of New York could make it owner of land and water rights on the American side of the River above the Falls. Included in them was a power canal through which the Power Company was authorized

to divert 10,000 cubic feet per second, at the time of the alleged taking. From this canal the petitioner, the International Paper Company, was entitled, by conveyance and lease, to draw and was drawing 730 cubic feet per second,—a right that by the law of New York was a corporeal hereditament and real estate.

On December 28, 1917, the Secretary of War wrote to the Power Company that " The President of the United States by virtue of and pursuant to the authority vested in him, and by reason of the exigencies of the national security and defence, hereby places an order with you for and hereby requisitions the total quantity and output of the electrical power which is capable of being produced and/or delivered by you through the use of all waters diverted or capable of being diverted through your intake canal and/or your plants and machinery connected therewith." Immediate and continuous delivery of such power was directed and it was added " You will be paid fair and just compensation for power delivered hereunder." At the same time an agreement was made by the Secretary of War and the Power Company, (reciting that the President has requisitioned the power as above,) to the effect that the Secretary of War " acting for and in behalf of the United States " until further notice waives delivery of the power to the United States on the express condition that the Power Company shall distribute such power as provided in a schedule naming companies and amounts but not naming the petitioner, and on the other side the Power Company waives all right of compensation by reason of said requisition if permitted to carry on its business and to sell consistently with the exigencies of the national security and defence. On December 29, the representative of the Secretary of War wrote to the secretary of the Power Company " Please note that the requisition order covers also all of the water capable of being diverted through your intake canal. . . . This is intended to cut

off the water being taken by the International Paper Company and thereby increase your productive capacity," and on December 31 telegraphed to the counsel of the petitioner " Power Company has been directed to take water hitherto used by International Paper Co." The petitioner had been notified of what was to happen but was allowed time to run out its stock on hand. On February 7, 1918, its use of the water ceased and was not resumed until midnight November 30, 1918, when the order of December 28 was abrogated. The Court of Claims found that the shutting off of the water from the petitioner's mill cost it $304,685.36, direct overhead expense, but gave judgment that the petition be dismissed.

The Government has urged different defenses with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary was authorized by Congress. We shall give scant consideration to such a repudiation of responsibility. The Secretary of War in the name of the President, with the power of the country behind him, in critical time of war, requisitioned what was needed and got it. Nobody doubts, we presume, that if any technical defect of authority had been pointed out it would have been remedied at once. The Government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late. We shall accept as sufficient answer the reference of the petitioner to the National Defense Act of June 3, 1916, c. 134, § 120, 39 Stat. 166, 213; U. S. Code, Title 50, § 80, giving the President in time of war power to place an obligatory order with any corporation for such product as may be required, which is of the kind usually produced by such corporation.

Then it is said that there was no taking, but merely a making of arrangements by contract. But all the agreements were on the footing that the Government had made a requisition that the other party was bound to obey. *Liggett & Myers Tobacco Co.* v. *United States,* 274 U. S. 215, 220. It is said that the Power Company and the petitioner could withdraw water from the River only by license from the United States, under the Act of June 29, 1906, c. 3621, 34 Stat. 626, and that the license was revoked by what was done. But the Secretary of War did not attempt to pervert the powers given to him in the interest of navigation and international duties to such an end. He proceeded on the footing of a full recognition of the Power Company's rights and of the Government's duty to pay for the taking that he purported to accomplish. There is no room for quibbling distinctions between the taking of power and the taking of water rights. The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use. It is true that the petitioner did not come within the scope of the Government's written promise to pay. But the Government purported to be using its power of eminent domain to acquire rights that did not belong to it and for which it was bound by the Constitution to pay. It promised to pay for all the power that the canal could generate. If it failed to realize that the petitioner had a right to a part of the power, its clear general purpose and undertaking was to pay for the rights that it took when it took the power. *Phelps* v. *United States,* 274 U. S. 341, 343. *Campbell* v. *United States,* 266 U. S. 368, 370, 371. *United States* v. *Great*

Falls Manufacturing Co., 112 U. S. 645, 656. Of course it does not matter that by a subordinate arrangement it directed the use of the power to companies that would fulfil its purposes rather than to machinery of its own. That arrangement it was able to make only because it took the power.

We perceive no difficulty arising from the case of *Omnia Commercial Co.* v. *United States*, 261 U. S. 502. There the taking of the whole product of a company went no further than to make it practically impossible for that company to keep a collateral contract to deliver a certain amount of steel to the appellant. But here the Government took the property that the petitioner owned as fully as the Power Company owned the residue of the water power in the canal. Our conclusion upon the whole matter is that the Government intended to take and did take the use of all the water power in the canal; that it relied upon and exercised its power of eminent domain to that end; that, purporting to act under that power and no other, it promised to pay the owners of that power, and that it did not make the taking any less a taking for public use by its logically subsequent direction that the power should be delivered to private companies for work deemed more useful than the manufacture of paper for the exigencies of the national security and defence. See *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U. S. 30.

Judgment reversed.

Mr. JUSTICE MCREYNOLDS, Mr. JUSTICE STONE and Mr. JUSTICE ROBERTS are of opinion that the judgment of the Court of Claims should be affirmed.

GRAHAM AND FOSTER, CO-PARTNERS, *v.* GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE.

NO. 86. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

EASTERN EQUITIES CORPORATION (FORMERLY AMERICAN GLUE COMPANY) *v.* UNITED STATES.

NO. 519. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

DANIEL REEVES, INCORPORATED, *v.* ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE.

JENNINGS, EXECUTRIX, *v.* SAME.

NOS. 463 AND 529. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

WRIGHT & TAYLOR, INCORPORATED, *v.* LUCAS, COLLECTOR OF INTERNAL REVENUE.

NO. 565. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

OAK WORSTED MILLS *v.* UNITED STATES.

TAFT WOOLEN COMPANY *v.* SAME.

SECOND NATIONAL BANK OF SAGINAW, TRUSTEE, *v.* SAME.

BOSTON PRESSED METAL COMPANY *v.* SAME.

NOS. 104, 105, 323, AND 337. CERTIORARI TO THE COURT OF CLAIMS.

Argued December 8, 9, 10, 11, 1930.—Decided January 26, 1931.

1. Section 607 of the Revenue Act of 1928 provides that a tax assessed or paid after the expiration of the period of limitation

applicable thereto shall be considered an "overpayment" and shall be credited or refunded to the taxpayer, if claim therefor is duly filed. Section 611 enacts a qualification by providing that in stated circumstances the payment of the tax shall not be considered an overpayment under the provisions of § 607. These circumstances are (*a*) an assessment of the tax within the time applicable thereto and before June 2, 1924, (*b*) the filing of a claim in abatement, (*c*) the stay of the collection of any part of the tax, and (*d*) the payment of such part of the tax before, or within one year after, the enactment of the Act of 1928. This legislation was occasioned by the fact that applications to abate assessments, and the Treasury Department's mistaken view that the time limit on collection did not apply to collection by distraint, had led in many cases to delays of collection beyond the statutory period, and it was the general purpose of Congress that large amounts so collected, in the circumstances described in § 611, should not be refunded. *Held:*

(1) Section 611 applies retroactively to claims for refunds filed before the enactment of the statute. P. 418.

(2) Section 611 applies to involuntary, as well as to voluntary, payments by taxpayers. P. 420.

(3) The "stay" of collection contemplated by § 611 includes a postponement not required by statute or judicial order but voluntary on the part of the Treasury. P. 421.

(4) The fact that a claim in abatement was rejected before the period of limitation on collection had expired, did not remove the case from the purview of § 611. P. 422.

(5) Sections 607 and 611 do not relate solely to administrative action, and the latter section prevents refunds, in the circumstances therein stated, whether the claim therefor be asserted before the Department or in the courts. P. 423.

(6) Section 611 cannot be construed as inapplicable to a tax payment merely because a suit to recover it was pending when the statute was enacted. There is no distinction in this respect between suits pending against the Collector and those pending against the United States. P. 424.

(7) This section applies where the tax was paid by crediting an overpayment for another taxable year. P. 424.

(8) The general rule that it is inconsistent with due process to take away by statute, from a private party, a right to recover an amount due when the statute is passed, does not apply to the cases covered by § 611. P. 426.

(9) Where a private right to recover money from the Government is without substantial equity and arose out of a mistake of government officers in administering the law, a statute curing the defect of administration, and thereby destroying the cause of action, is not unconstitutional. P. 427.

(10) Section 611 is not arbitrary or capricious in its classification. P. 431.

(11) The section precludes recovery of interest as well as principal. P. 432.

2. Section 3220, Rev. Stats., which authorized the Commissioner of Internal Revenue to remit and refund taxes erroneously or illegally assessed or collected, etc., having been amended by the Revenue Act of 1926 so as to except cases provided for by parts of that Act which placed limitations on credits and refunds, was amended by the Revenue Act of 1928, § 619 (b), by striking out this exception and inserting in lieu thereof "except as otherwise provided by law in the case of income, war-profits, estate and gift taxes." Another Act (May 29, 1928, c. 901, 45 Stat. 883), amending § 3220, Rev. Stats., and omitting this exception, was approved on the same day as the Revenue Act of 1928. *Held:*

(1) That there was no repeal by implication of § 611 of the Revenue Act of 1928, dealing with refunds, which established a special rule for a particular situation in pursuance of a policy deliberately adopted by Congress. P. 424.

(2) The principle that repeal of one statutory provision by another will not be implied unless there is positive repugnancy between them applies especially to revenue laws; and the presumption against such repeal is strongest when the two Acts were passed at the same session and on the same day. P. 425.

35 F. (2d) 586; 42 *id.* 235; 43 *id.* 679; 43 *id.* 683; 45 *id.* 75; 68 Ct. Cls. 539; 69 *id.* 764; 69 *id.* 745; 70 *id.* 272, affirmed.

CERTIORARI to review judgments in nine cases involving questions as to the effect and validity of § 611 of the Revenue Act of 1928. The suits were instituted by the taxpayers to recover involuntary payments in all these cases. In Nos. 36 and 529, judgments of the District Courts favorable to the taxpayers were reversed in the Circuit Courts of Appeals; in Nos. 463 and 565, judgments of the District Courts, 36 F. (2d) 373; 34 F. (2d) 328, against the taxpayers were affirmed in the Circuit Courts of Appeals; and

in No. 519, the judgment of the District Court, 42 F. (2d) 235, was against the taxpayer, and the record was brought up from the Circuit Court of Appeals before hearing in that court. In Nos. 104, 105, 323, and 337, judgments of the Court of Claims were against the taxpayers. The orders granting certiorari will be found in 281 U. S. 708, 717, and in the latter part of this volume.

Mr. John E. Hughes for Graham and Foster.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch, Sewall Key, Norman D. Keller,* and *George H. Foster,* Special Assistants to the Attorney General, were on the brief, for Goodcell.

Mr. Robert E. Goodwin, with whom *Mr. Harris H. Gilman* was on the brief, for Eastern Equities Corporation.

Mr. Elkan Turk, with whom *Messrs. Herman Goldman, Arthur Rothstein, Benjamin Wiener,* and *Donald Bourne* were on the brief, for Daniel Reeves, Incorporated.

Mr. Ewing Everett, with whom *Messrs. Robert N. Miller, J. Robert Sherrod,* and *Arthur N. Colton* were on the brief, for Jennings, Executrix.

Mr. Donald V. Hunter, with whom *Messrs. Robert N. Miller* and *S. Lyman Barber* were on the brief, for Wright & Taylor, Incorporated.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch, J. Louis Monarch, S. Dee Hanson, Norman D. Keller,* and *John MacC. Hudson,* Special Assistants to the Attorney General, and *Erwin N. Griswold* were on the brief, for the United States, Anderson, and Lucas, in Nos. 519, 463, 529, and 565.

Mr. Theodore B. Benson, with whom *Messrs. Guil Barber, William Meyerhoff,* and *Percy A. Matthews* were on the brief, for the Oak Worsted Mills.

Messrs. Frank J. Albus, Theodore B. Benson, Guil Barber, William Meyerhoff, Chester F. Williams, Percy A. Matthews, and *Frederick G. Fischer* submitted for the Taft Woolen Company.

Mr. W. A. Sutherland, with whom *Messrs. Joseph B. Brennan, Samuel Nesbitt Evins, Elmer P. Tuttle,* and *Clement F. Haynsworth* were on the brief, for the Second National Bank of Saginaw, Trustee.

Mr. Harry Friedman for the Boston Pressed Metal Company.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch,* Special Assistant to the Attorney General, and *George H. Foster, Erwin N. Griswold, Bradley B. Gilman,* and *Lisle A. Smith* were on the briefs, for the United States in Nos. 104, 105, 323, and 337.

By special leave of Court, briefs of *amici curiae* were filed as follows:

Mr. Wayne Johnson, on behalf of the Marshall-Wells Company; *Messrs. Robert N. Miller, Donald V. Hunter,* and *S. Lyman Barber; Messrs. Carl Taylor, Rollin Browne,* and *Carter T. Louthan,* on behalf of Mr. Franklin W. M. Cutcheon; *Messrs. Robert A. Littleton, John C. Altman, Abraham Lowenhaupt,* and *Stanley Waite,* on behalf of the Fred Medart Manufacturing Company et al.; *Messrs. Michael F. Gallagher* and *Samuel M. Rinaker,* on behalf of the Illinois Kaolin Company; *Messrs. Maynard Teall, William Wallace Booth, William A. Seifert,* and *Eugene B. Strassburger,* on behalf of the American Refractories Company et al.; and *Messrs. Hugh Satterlee, I. Herman Sher,* and *Albert S. Lisenby,* on behalf of the Tobacco Products Corporation, of New York.

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

These cases involve the question of the effect and validity of section 611, which is to be read in connection

with section 607, of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 874, 875).[1]

No. 36, *Graham et al.* v. *Goodcell*, is typical of this group of cases. On March 22, 1918, petitioners filed their partnership income and excess-profits tax returns for the year 1917 and paid the taxes thereby shown to be due. Additional taxes were assessed by the Commissioner of Internal Revenue in January, 1920. The petitioners filed a claim for the abatement of this assessment on February 11, 1920, and the Commissioner rejected the claim on December 27, 1922. Under section 250 (d) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 265), the five-year period for the collection of the taxes for 1917 expired on March 22, 1923. The Collector served notice and demand for payment on November 19, 1924, threatening distraint, and on November 29, 1924, and December 3, 1924, the petitioners paid the additional taxes under protest. On September 25, 1925, they filed a claim for refund upon the ground that the taxes were collected after the statute of limitations had run. The claim was

[1] These sections are as follows:

"Sec. 607. Effect of Expiration of Period of Limitation against United States. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Sec. 611. Collections Stayed by Claim in Abatement. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

rejected by the Commissioner on January 13, 1926, and this suit to recover the money paid was brought on December 23, 1927, in the District Court of the United States for the Southern District of California. The judgment entered in favor of the petitioners by the District Court was reversed by the Circuit Court of Appeals for the Ninth Circuit, 35 Fed. (2d) 586. This Court granted a writ of certiorari, 281 U. S. 708.

There are variations in the other cases, but the determining features are the same. A claim in abatement was filed and collection was delayed; the collection was made after the statute of limitations had run, and before the enactment of the Act of 1928. In some of the cases, the suit to recover the amount paid was brought after, and in other cases before, the Act of 1928 became a law, on May 29, 1928. The suits were either in the Court of Claims against the United States, or in the District Courts of the United States against the Collector, either individually or officially, or in both capacities. In all these cases the decisions below were in favor of the Government [2] and writs of certiorari were issued by this Court.[3]

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[2] Court of Claims: No. 104, *Oak Worsted Mills* v. *United States,* 36 Fed. (2d) 529, 38 Fed. (2d) 699, 68 Ct. Cls. 539; No. 105, *Taft Woolen Co.* v. *United States,* 38 F. (2d) 704, 69 Ct. Cls. 764; No. 323, *Second National Bank of Saginaw* v. *United States,* 40 Fed. (2d) 129, 69 Ct. Cls. 745; No. 337, *Boston Pressed Metal Co.* v. *United States,* 42 Fed. (2d) 312, 70 Ct. Cls. 272.

Circuit Court of Appeals for the Second Circuit: No. 463, *Reeves* v. *Anderson,* 43 Fed. (2d) 679; District Court, *sub nom. Regla Coal Co.* v. *Bowers,* 37 Fed. (2d) 373; No. 529, *Jennings* v. *Anderson,* 43 Fed. (2d) 683.

Circuit Court of Appeals for the Sixth Circuit: No. 565, *Wright & Taylor, Inc.* v. *Lucas,* 45 F. (2d) 75; District Court, 34 Fed. (2d) 328.

In No. 519, *Eastern Equities Corporation* v. *United States,* there had been no hearing in the Circuit Court of Appeals for the First Circuit when the writ of certiorari was granted; District Court, *sub nom. American Glue Co.* v. *United States,* 42 Fed. (2d) 235.

[3] 281 U. S. 708, 717; *post,* pp. —.

The contentions presented are, in substance, that sections 607 and 611 of the Revenue Act of 1928 do not apply retroactively; that their provisions are not applicable to payments made under duress; that the stay contemplated by section 611 is not a mere voluntary delay in collecting the tax; that these sections were intended to control administrative action only and not to affect judicial proceedings; that section 611 should not be construed to apply to a personal action against the Collector to recover taxes illegally collected; that section 611 was repealed by the Act of May 29, 1928, c. 901, sec. 3, 45 Stat. 986, 996; that section 250 (d) of the Revenue Act of 1921 extinguished the liability for taxes upon the expiration of the five-year period specified; that the Congress having extinguished the liability had no power under the Fifth Amendment of the Constitution to revive it; and that, if section 611 is construed to authorize the collection of the tax in the circumstances shown, it further violates the Fifth Amendment because the statute is unreasonable and arbitrary.

First. As to the construction of the statute. Section 607 provides that a tax assessed or paid after the expiration of the period of limitation applicable thereto shall be considered an "overpayment" and shall be credited or refunded to the taxpayer, if claim therefor is duly filed. Section 611 enacts a qualification by providing that in stated circumstances the payment of the tax shall not be considered an overpayment under the provisions of section 607. These circumstances are (a) an assessment of the tax within the time applicable thereto and before June 2, 1924, (b) the filing of a claim in abatement, (c) the stay of the collection of any part of the tax, and (d) the payment of such part of the tax before, or within one year after, the enactment of the Act of 1928.

The occasion for this legislation, and the general purpose of the Congress in enacting it, are apparent. The

Revenue Act of 1918, by section 250 (d) (c. 18, 40 Stat. 1057, 1083) provided that " no suit or proceeding " for the collection of taxes should be begun " after the expiration of five years after the date when the return was due or was made." This provision applied only to taxes assessed under that Act. Section 250 (d) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 265) prescribed the same period of limitation for collection by suit or proceeding, and the provision was made applicable to the collection of taxes both under that Act and under prior income, excess-profits, or war-profits tax Acts, the five years running from the date of the filing of the return. The Treasury Department ruled that this limitation applied only to judicial proceedings and not to collection by distraint, the common method of enforcing payment.[4] Section 1106 (a) of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 113) provided that the statute of limitations should " not only operate to bar the remedy " but should " extinguish the liability," but that " no credit or refund in respect of such tax " should be allowed unless the taxpayer had " overpaid the tax." In *Bowers* v. *New York & Albany Lighterage Company,* 273 U. S. 346 (decided February 21, 1927), this Court held that the period of limitation fixed by section 250 (d) of the Revenue Act of 1921 did apply to collection by distraint proceedings. It thus appeared that many of the collections theretofore made had been barred by the statute, and suits were brought to recover the moneys paid.[5] In many cases claims in abatement had been filed and proceedings for collection had been delayed until the claims had been acted upon, and thereupon the taxes had been collected despite the fact that the statute of limitations had run. Large

[4] I. T. 1446, Cumulative Bulletin I–2, July–December, 1922, p. 218. See *Stange* v. *United States, ante,* p. 270.

[5] See *Toxaway Mills* v. *United States,* 61 Ct. Cls. 363, reversed on confession of error (March 12, 1927), 273 U. S. 781.

amounts had been paid into the Treasury in this way, and it was the purpose of the Congress that payments made in the circumstances described in section 611 of the Revenue Act of 1928 should not be refunded.[6]

The petitioners urge that section 611, read in its relation to section 607, was intended to apply only prospectively, that is, to action to be taken by the Treasury Department on refund claims filed after the enactment of the Act. Stress is laid upon the language of section 607 that a payment made after the expiration of the period of limitation "shall be considered" an overpayment and "shall be credited or refunded" if claim therefor "is filed." But section 611 was manifestly intended to operate retroactively according to its terms. That is, it expressly applied to internal revenue taxes which had been assessed prior to June 2, 1924, and within the period of limitation applicable to the assessment. The section

[6] Section 611 as it appeared in the bill introduced in the House of Representatives provided not only for the retention of the moneys paid, but also that, in similar circumstances, amounts not yet paid might be collected within a year after the new enactment. The Committee on Ways and Means in its report on the bill stated: "Sec. 611. Collections in Cases in which Claims in Abatement were filed. Prior to the enactment of the Revenue Act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which the period for assessment expired prior to the enactment of the 1924 Act, that the period for collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may

applied to taxes, so assessed, which had been paid before the enactment of the Act of 1928, as well as to those which would be paid within one year thereafter. The provision was applicable to such payments although the period of limitation on assessment and collection had expired when the payments were made; and the provision of section 611 related to such payments only when a claim in abatement had been filed and collection had been stayed. The words of section 607 did apply to future action as to credits and refunds by requiring recognition of the right of the taxpayer, as stated in the section, to have a return of the moneys paid, but that right, under section 611, was not to exist when the payments had been made in the circumstances there described. It was the circumstances in which the tax had been paid, and not the time of filing the claim for a refund of the money, that section 611 made determinative; and it would be inconsistent with the plain

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have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. In order to prevent inequality, it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new Act. Your Committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, and merely withdraws the defense of the statute of limitations. If it is determined that the amount paid is in excess of the proper tax liability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other overpayment." (70th Cong., 1st Sess., H. R. Rep. No. 2, p. 34.)

The Finance Committee of the Senate opposed the provision of section 611 (70th Cong., 1st Sess., Sen. Rep. 960, p. 42). In conference, an amendment was adopted (70th Cong., 1st Sess., H. R. Rep. No. 1882, pp. 6, 7, 22, 23), with the result that section 611 was enacted in its present form, that is, with the provision eliminated as to the collection of amounts not yet paid.

intendment of that section to say that taxpayers should be denied a refund in those circumstances only where their claims for refund were made after the enactment, but not if they had been made before. The words of section 607, if a claim for refund "is filed within the period of limitation for filing such claim," established the appropriate condition that a claim for refund should be duly filed, but do not require the construction that the scheme of the statute, which embraced the important prohibition of section 611, should be limited to those cases where claims for refund should be filed after the statute was enacted.

We are also of the opinion that the statute embraces involuntary payments. The argument of the petitioners points to the provision of section 611 which made it applicable not only to payments before the enactment but to those within one year thereafter. It is said that the latter must be voluntary payments, and that the Treasury Department so construed the statute, as the statute did not purport to authorize collections after the period of limitation had expired.[7] But the statute also applied to payments which had been made in the past. The concern of the Congress lay with the fact that payments had been made after the statute of limitations had run and with the particular situation of taxpayers where claims in abatement had been filed and the collection stayed. Section 611 was to prevent refunding the money if collection had thus been postponed. That situation existed where, after the expiration of the period of limitation, payment had been compelled, and the statute made no exception of such payments. The practice of collecting taxes by distraint, and the mistaken view of the law that the statute of limitations had not barred collection in that manner, had exposed the Treasury to demands which it was the intention of the legislation to defeat.

[7] Mimeograph 3360, July 27, 1928; Cumulative Bulletin VII–2, pp. 82, 85.

Petitioners contend that the stay to which section 611 referred was not simply a voluntary delay in enforcing payment. "Stay" is said to be a term of art, with a meaning opposed to a mere voluntary postponement of action. There would be much force in the point, if the word could be taken out of its particular setting. A "stay" compelled, rather than voluntarily granted, would be either under a judicial order or by virtue of statutory compulsion. Section 3224 of the Revised Statutes (U. S. C., Tit. 26, sec. 154) provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." See *Graham* v. *du Pont,* 262 U. S. 234, 254, 255. Statutory provisions for stay of collection were limited in application. See Revenue Act of 1918, sec. 214 (a) (12) (a); sec. 234 (a) (14) (a). *United States* v. *John Barth Co.,* 279 U. S. 370.[8] There was no mandatory stay, that is, in the absence of agreement, without bond. But section 611 expressly applies where a claim in abatement was filed "with or without bond." The word "stay" cannot therefore be taken to be limited to a mandatory stay. It is said, however, that the words "without bond" were inserted in order to include those cases where there was a contractual stay, as in cases where the Government had been protected by a deposit of money in escrow, or by a deposit in bank as a guarantee of payment, or by other forms of binding agreements, where bonds were not filed. Such cases were exceptional, and to confine the statute to such instances would be to limit it so narrowly as to ignore its apparent purpose. In the case of a taxpayer, believed to be solvent, who had filed a claim in abatement, the postponement of collection would normally

[8] See also Act of October 3, 1917, c. 63, sec. 205 (b), 40 Stat. 305; Revenue Act of 1924, c. 234, sec. 279 (a), 43 Stat. 300; Revenue Act of 1926, c. 27, sec. 279 (f), 44 Stat. 60; Revenue Act of 1928, c. 852, sec. 273 (f) (g) (h), 45 Stat. 855.

take place without agreement. It is urged that if the statute is applied to voluntary delays, the clause as to stay is surplusage. If so, such a construction would be preferable to one that would make the statute virtually inoperative. But the clause is not inappropriate, as it is descriptive of the situation which followed the filing of the claim in abatement. It is true that the statutes and regulations relating to the filing of such claims did not require that there must be a postponement of collection pending decision. The collector was still put to his duty of due diligence, but he had authority to postpone the collection pending the determination of the claim, unless he believed that such action would jeopardize the ultimate recovery.[9] Such postponement, on the assumption that the statute or regulations did not bar proceedings for collection by distraint, created the situation to which section 611 was directed. The view that the word "stay" was intended to embrace this voluntary delay is supported by the statements in the reports of the committees in the House of Representatives and the Senate.[10]

In most of the cases now under review, it appears that the claim in abatement was rejected after the expiration of the period of limitation for collection. In No. 36, *Graham* v. *Goodcell,* however, the claim in abatement was rejected in December, 1922, and the period of limitation did not expire until March, 1923. It is urged that, for this reason, that case falls outside the purview of section 611. The statute makes no such exception, and we are not warranted in implying one. The claim in abatement had been filed and was pending for nearly three years.

[9] R. S., section 3220; Treasury Department Regulations No. 14, Revised, p. 14; Regulations No. 33, Art. 261; Regulations No. 45, Art. 1032; Regulations No. 62, Art. 1032; Regulations No. 65, Art. 1281.

[10] See Note 6, *supra.*

There is room for the inference that, had it not been for this delay, the tax would have been collected before the statute ran. The tax was collected later and the statute, by its terms, is applicable.

It is further insisted on behalf of the petitioners that sections 607 and 611 relate solely to administrative action and not to judicial proceedings. In support of this argument, an elaborate analysis of the revenue acts is presented in order to establish the meaning of the statutory words "credit and refunds" and "overpayment" and the aptness of their reference to administrative proceedings. It is not necessary to review this analysis, for there can be no doubt that these words do have appropriate reference to action in the course of administration. But it does not follow that by the use of these words the statute is limited to such action. There is no basis for the suggestion that there were questions involved of such a character as to make it appropriate to submit them to the exclusive judgment of the Commissioner.[11] The question was not as to the merits of the tax but simply as to the existence of certain facts of time and procedure. These facts were matters of record, easily ascertained and definite in character. It would be anomalous that the right of the taxpayer to obtain a refund from the Department, to which he was under obligation to resort (R. S. 3226, U. S. C. Tit. 26, sec. 156), should be denied, while the right to recover by suit the same amount under exactly the same circumstances should remain unaffected. In the attempt to explain this anomaly, it is said that the provision was inserted because of a distrust of administrative refunds.[12] But section 611 contains no exception

[11] Compare *Fong Yue Ting* v. *United States*, 149 U. S. 698, 714, 715; *United States* v. *Babcock*, 250 U. S. 328, 331; *Ex parte Bakelite Corporation*, 279 U. S. 438, 452.

[12] See Revenue Act of 1928, sec. 710, 45 Stat., p. 882.

as to judicial proceedings, and its prohibition is one which can be enforced appropriately by the courts when the taxpayer demands relief by suit. We are brought back to the fundamental purpose of the statute, and we are unable to conclude that it established one rule for the Department and another for the courts. We think that it was intended to prevent refunds in the circumstances stated and not merely a particular way of getting the money from the Treasury; that the effect of the provision was to deny a right to recover the amount paid and that the provision governs equally wherever the right is asserted.

In this view, it is not material whether the suit was brought by the taxpayer before or after section 611 was enacted. The validity of the statute with respect to its effect upon existing causes of action is a distinct question. So far as the construction of the statute is concerned, it is apparent that the mere pendency of the suit was not made a criterion of the right to recover. Nor is there any warrant for making a distinction in this respect between suits which had been brought against the collector individually and those pending against the United States.

There is also a contention that section 611 does not apply when the tax was paid by the credit of the amount of an overpayment for another taxable year. But the application of a credit against an assessment at a time when collection was barred must be regarded as an erroneous collection, and we see no reason for taking such a case out of the statute.

Second. As to the question of repeal. It is insisted that section 611 was repealed on the same day that it was enacted. This effect is ascribed to section 3 of the Act of May 29, 1928, c. 901, 45 Stat. 986, 996. That section amended section 3220 of the Revised Statutes which contained provisions as to the refunding of taxes erroneously or illegally collected. Section 3220 had been amended

by section 1111 of the Revenue Act of 1926 (44 Stat. 115) so as to except the cases provided for in sections 284 and 319 of the latter Act, which placed limitations on credits and refunds. Section 619 (b) of the Revenue Act of 1928 (45 Stat. 878) amended section 3220 by striking out this exception and inserting in lieu thereof " except as otherwise provided by law in the case of income, war-profits, excess-profits, estate and gift taxes." The amendment made by section 3 of chapter 901, Act of May 29, 1928 (45 Stat. 996), omitted this exception, and hence, it is contended, repealed section 611 of the Revenue Act of 1928. The Revenue Act was approved May 29, 1928, 8 A. M. (45 Stat. 883). The hour of the approval of chapter 901 of the same date does not appear. Section 3 of the latter Act does not expressly repeal section 611 of the Revenue Act of 1928, and the question is whether there is repeal by implication. The familiar principle that repeal will not be implied unless there is a positive repugnancy between the provisions of the new law and those of the old, has most appropriate application, as stated by Mr. Justice Story, to the interpretation of laws for the collection of revenue (*Wood* v. *United States,* 16 Pet. 342, 363), and the presumption against such an intention to repeal is strongest when the two acts are passed not only at the same session but on the same day. *Beals* v. *Hale,* 4 How. 37, 53; *Rodgers* v. *United States,* 185 U. S. 83, 89.[13] In the present instance, there is no irreconcilable

[13] See also, *Smith* v. *The People,* 47 N. Y. 330, 339; *City of Birmingham* v. *Southern Express Co.,* 164 Ala. 529, 538; *McFarland* v. *The Bank,* 4 Ark. 410, 417; *Thompson* v. *Board of Supervisors,* 111 Cal. 553, 556; *Hope* v. *The Mayor,* 72 Ga. 246, 251; *Hutchinson* v. *Self,* 153 Ill. 542, 549, 550; *Shank* v. *State,* 183 Ind. 298, 302; *Eckerson* v. *City of Des Moines,* 137 Iowa 452, 489; *Mayor* v. *German-American Fire Insurance Co.,* 132 Md. 380, 385; *Commonwealth* v. *Huntley,* 156 Mass. 236, 239; *State* v. *Archibald,* 43 Minn. 328, 330, 331; *Walser* v. *Jordan,* 124 N. C. 683, 687, 688; *Commonwealth* v. *City of Pottsville,* 246 Pa. 468; *Town School District* v. *School District No. 2,* 72 Vt. 451, 454, 455.

conflict between the two provisions. Section 611 established a special rule for a particular situation in order to embody a policy deliberately adopted by the Congress, and there is no ground for concluding that contemporaneously with that enactment the policy was abandoned and the enactment repealed. *Rodgers* v. *United States, supra; Washington* v. *Miller,* 235 U. S. 422, 428.

Third. As to the validity of section 611. This is not a case of an attempt retroactively to create a liability in relation to a transaction as to which no liability had previously attached.[14] There is no question here as to the original liability of the taxpayers. The tax was a valid one, and the fact that the taxpayers had been indebted to the Government for the amount which was subsequently collected is not now open to dispute. Delay in collection had followed upon the taxpayers' request for a consideration of their claim that the tax should be abated, and, in the mistaken belief on the part of the administrative authorities that the statute of limitations did not bar collection by the appropriate proceeding of distraint, the delay had been continued until after the statute had run. On the discovery of the mistake, as pointed out by the decision of this Court, the Congress sought to prevent a refund of the amount thus collected. The question is whether these circumstances remove the case from the operation of the general rule that it is not consistent with due process to take away from a private party a right to recover the amount that is due when the act is passed. *Steamship Company* v. *Joliffe,* 2 Wall. 450, 457, 458; *Ettor* v. *Tacoma,* 228 U. S. 148, 156; *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338, 340.

[14] See *Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142; *Untermyer* v. *Anderson,* 276 U. S. 440; *Cooper* v. *United States,* 280 U. S. 409, 412. Compare *Stockdale* v. *Insurance Companies,* 20 Wall. 323, 331; *Wagner* v. *Baltimore,* 239 U. S. 207, 216, 217; *Forbes Boat Line* v. *Board of Commissioners,* 258 U. S. 338, 339.

This rule is well illustrated by the case of *Forbes Boat Line* v. *Board of Commissioners, supra,* where the suit was brought to recover tolls unlawfully collected for passage through the lock of a State canal. The passage was free under the law as it stood at the time, and the subsequent legislation of the State which attempted to validate the illegal collection was held to be in violation of the Fourteenth Amendment. The Court said that the legislature in 1919 could not compel plaintiff to pay for a passage made in 1917 without promise of reward " any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls." But while the legislature could not in such a case retroactively create a liability, the court recognized that there is a class of cases in which defects in the administration of the law may be cured by subsequent legislation without encroaching upon constitutional right, although existing causes of action may thus be defeated.

In *United States* v. *Heinszen & Company,* 206 U. S. 370, it appeared that after the Philippine Islands had come under the military control of the United States, the President had issued an order establishing a system of tariff duties which were levied on goods coming into the Islands whether from the United States or other countries. The tariff was in force when the treaty of peace was ratified and was subsequently continued, with modifications. The President, as commander-in-chief, had authority to impose tariff duties prior to the ratification of the treaty, but not thereafter.[15] Accordingly, those who had been compelled to pay such duties after the ratification, and before the Congress established the tariff, were entitled to recover the amounts paid.[16] Subsequently, the Con-

[15] See *De Lima* v. *Bidwell,* 182 U. S. 1; *Dooley* v. *United States,* 182 U. S. 222; *Dooley* v. *United States,* 183 U. S. 151; *Fourteen Diamond Rings* v. *United States,* 183 U. S. 176.

[16] *Lincoln* v. *United States; Warner, Barnes and Company, Limited,* v. *United States,* 197 U. S. 419; 202 U. S. 484.

gress passed an act purporting to ratify and confirm the collection of such duties. This Court upheld the statute, as against the claim under the Fifth Amendment, stating that the contention ignored the fact that when the goods were brought into the Philippine Islands, there was a tariff in existence under which duties were exacted in the name of the United States, and that Congress had power to ratify the collection. With respect to the effect of the act of Congress upon existing causes of action, the Court observed (*id.* p. 387) that "the mere commencement of the suit did not change the nature of the right" or "operate to deprive the government of the power to enact curative statutes, which, if the actions had not been brought, would have been unquestionably valid."

Another illustration is found in *Tiaco* v. *Forbes,* 228 U. S. 549. Suits had been brought to make the Governor General of the Philippine Islands personally answerable in damages for the deportation of a Chinese person resident in the Philippines, and after the bringing of the suit the Philippine legislature had passed an act purporting to ratify the Governor General's action. Referring to the doubt that naturally would occur whether, if a right of action had vested previously, it could be taken away by such a statute, the court said that " it generally is recognized that in cases like the present, where the act originally purports to be done in the name and by the authority of the state, a defect in that authority may be cured by a subsequent adoption of the act."

The doctrine of the *Heinszen* case, *supra,* was left unquestioned in *MacLeod* v. *United States,* 229 U. S. 416, 434, 435 (where the application of the Act of Congress with respect to Philippine duties was limited so as to carry out its true intent) and was definitely applied in the case of *Rafferty* v. *Smith, Bell & Company, Limited,* 257 U. S. 226, 232. Taxes on the value of exports from the Philippine Islands had been collected under a Philip-

pine act while duties on such exports were forbidden by an act of Congress. The taxpayers had recovered judgments for restitution in March, 1920. The Congress, by Act of June 5, 1920 (c. 253, 41 Stat. 1015, 1025), confirmed the collections. The Court held that the enactment was within the power of Congress, and the fact that the taxpayers had recovered judgments for the amounts collected gave them no higher rights than those possessed by the taxpayers in the *Heinszen* case. See also, *Charlotte Harbor & Northern Railway Company* v. *Welles,* 260 U. S. 8, 11, 12; *Hodges* v. *Snyder,* 261 U. S. 600, 603, 604. In *Forbes Boat Line* v. *Board of Commissioners, supra,* the *Heinszen* and *Rafferty* cases were invoked without success; the court expressed the view that "a tax may be imposed in respect of past benefits" and that in those cases the principle of ratification was not necessarily involved, citing *Wagner* v. *Baltimore,* 239 U. S. 207, 216, 217, and *Stockdale* v. *Atlantic Insurance Company,* 20 Wall. 323.

It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the Government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist.[17] "The

[17] In *United States* v. *Heinszen & Co.,* 206 U. S. 370, 386, 387, this Court said: "But if it be conceded that the claim to a return of the moneys paid in discharge of the exacted duties was in a sense a vested right, it in principle, as we have already observed, would be

power is necessary, that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration." *Charlotte Harbor & Northern Railway Company* v. *Welles, supra.* This principle covers the present case. The petitioners had been indebted to the Government for the amount which was subsequently collected. They had asked for a review of the assessment and collection was postponed. The Treasury Department had mistakenly assumed that the statute of limitations did not apply to distraint proceedings and before the mistake was discovered the period of limitation had expired. The Congress could correct this defect in administration without violating any substantial equity, and this was accomplished by section 611 of the Revenue Act of 1928.

Having reached this conclusion, it is not necessary to consider the authority of the Congress to withdraw the consent of the United States to be sued. See *United States* v. *Heinszen & Company, supra,* at p. 391. The argument of the Government in this respect is not adequate to dispose of the controversy. Some of the present suits were brought against the collector individually and were based upon the right to recover as against him by reason of his illegal acts. Such an action is personal and not against the United States. *Sage* v. *United States,* 250 U. S. 33, 37; *Smietanka* v. *Indiana Steel Company,*

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but the character of right referred to by Kent in his Commentaries, where, in treating of the validity of statutes retroactively operating on certain classes of rights, it is said (Vol. 2, pp. 415, 416): 'The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced. *Goshen* v. *Stonington,* 4 Connecticut 209; *Wilkinson* v. *Leland,* 2 Peters, 627; *Langdon* v. *Strong,* 2 Vermont, 234; *Watson* v. *Mercer,* 8 Peters, 88; 3 Story's Comm. on the Constitution, 267.' "

257 U. S. 1, 4, 5.[18] If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong. See *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* 281 U. S. 673, 679, 680.

The objection to section 611 upon the ground that it is arbitrary and capricious in its classification, and hence offends the Fifth Amendment, is without merit. The broad discretion of the Congress in the exercise of its constitutional power as to taxation (*Brushaber* v. *Union Pacific Railroad Company,* 240 U. S. 1, 24–26; *Evans* v. *Gore,* 253 U. S. 245, 256; *Barclay & Company* v. *Edwards,* 267 U. S. 442, 450) necessarily extends to the whole field

[18] "As the law stood before later statutes a collector was liable personally for duties mistakenly collected, if the person charged gave notice, at the time, of his intention to sue, and warning not to pay over the amount to the Treasury. *Elliott* v. *Swartwout,* 10 Pet. 137. But, after an act of Congress had required collectors to pay over such monies, it was held, against the dissent of Mr. Justice Story, that the personal liability was gone. *Cary* v. *Curtis,* 3 How. 236. Later statutes however recognize suits against collectors in such cases, and the plaintiff contends that they should be construed to create a new statutory liability attached to the office and passing to successors, as was held in this case, the formal defendant being saved from harm by the United States. This however is not the language of the statutes and hardly can be reconciled with the decision of this Court in *Sage* v. *United States,* 250 U. S. 33, and other cases to which we shall refer. . . . In *Patton* v. *Brady,* 184 U. S. 608, a suit against a collector begun after the passage of this statute, it was held that it could be revived against his executrix, which shows again that the action is personal, as also does the fact that the collector may be held liable for interest." *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1, 4, 5.

of supervision and control of the processes of enforcement. It cannot be deemed to be unreasonable that the Congress in the present instance provided for cases in which a claim in abatement had been filed and the collection stayed. In its selection the Congress dealt with an appropriate class and was not bound to include others. Nor is the statute rendered invalid by the provision as to payments made within a year after its enactment. As already stated, the Treasury Department did not construe section 611 as authorizing collections in the future, after the expiration of the period of limitation;[19] and if the Congress saw fit to make the statute applicable to future voluntary payments, it was clearly entitled to fix a limit of time within which it might be so applied.

In some of the cases under review, it is insisted that section 611 does not preclude the recovery of interest, upon the ground that the interest had not been assessed and therefore lay outside the prohibition of the statute. But it does not appear that there was any statutory requirement that interest as such should be assessed, and the valid denial of the right to recover the principal should be deemed to apply also to the interest.

Judgments affirmed.

MAGEE *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 65. Argued December 9, 1930.—Decided January 26, 1931.

1. Decided in part upon the authority of *Graham* v. *Goodcell, ante*, p. 409. P. 433.
2. The time limitation on assessment prescribed by § 250 (d) of the Revenue Act of 1921, was properly applicable to an additional assessment of 1916 income taxes, made in October, 1921, before the Act was passed. P. 434.

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[19] See Note 7.

3. A taxpayer who has benefited by his claim in abatement is not in a position to contest its legality. P. 434.

37 F. (2d) 763; 68 Ct. Cls. 771, affirmed.

CERTIORARI, 281 U. S. 713, to review a judgment denying a claim for refund of an income tax payment.

Mr. Theodore B. Benson, with whom *Mr. William Meyerhoff* was on the brief, for petitioner.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch,* Special Assistant to the Attorney General, *George H. Foster,* and *Erwin N. Griswold* were on the brief, for the United States.

Mr. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The petitioner filed his income tax return for 1916 in February, 1917. In October, 1921, the Commissioner of Internal Revenue assessed an additional tax, and in November, 1921, the petitioner filed a claim in abatement. In 1924, the Commissioner allowed the claim in abatement for a portion of the amount claimed and rejected it as to the residue, which the petitioner then paid, upon the collector's demand. In December, 1927, the petitioner filed a claim for refund, which was rejected, whereupon this suit was brought in the Court of Claims in December, 1928, to recover the amount paid. The court dismissed the action, applying section 611 of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 875), 37 Fed. (2d) 763. This Court granted a writ of certiorari, 281 U. S. 713.

The questions presented with respect to the construction and validity of section 611 are the same as those considered in *Graham* v. *Goodcell, ante,* p. 409. The petitioner contends, however, that this section does not apply to his case, upon the ground that the tax was not assessed within the three-year period of limitation prescribed by

section 9 (a) of the Revenue Act of 1916 (c. 463, 39 Stat. 756, 763). The Court of Claims held that the assessment was valid under the provisions of section 250 (d) of the Act of 1921 (Act of November 23, 1921, c. 136, 42 Stat. 227, 265). We think the court was right in construing this statute as applicable to the assessment, although previously made, and hence that the tax was assessed "within the period of limitation properly applicable thereto," as required by section 611 of the Revenue Act of 1928.

The petitioner also insists that his claim in abatement was illegal under section 250 (d) of the Revenue Act of 1921. We do not find that there was any statutory prohibition of the filing of a claim in abatement in the circumstances here shown. The taxpayer benefited by the claim and is not in a position to contest its legality. Compare *United States* v. *The John Barth Company*, 279 U. S. 370, 376; *Florsheim Brothers Dry Goods Company, Limited*, v. *United States*, 280 U. S. 453, 464. The case falls within section 611 of the Revenue Act of 1928 and this precludes recovery.

Judgment affirmed.

MASCOT OIL COMPANY, INCORPORATED, *v.* UNITED STATES.

UNITED STATES *v.* WYMAN, PARTRIDGE & COMPANY, INCORPORATED.

HEINER, COLLECTOR OF INTERNAL REVENUE, *v.* ERIE COAL & COKE COMPANY.

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

Nos. 400, 416, and 508. Argued December 11, 1930.—Decided January 26, 1931.

Section 1106 (a) of the Revenue Act of 1926, provided, *inter alia*, that "The bar of the statute of limitations against the United

States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax." *Held* that, whatever its proper construction, the fact that the taxes in question were collected while this section was in force, did not save claims for refunds from § 611 of the Revenue Act of 1928. See *Graham* v. *Goodcell, ante,* p. 409.

42 F. (2d) 309; 70 Ct. Cls. 246, affirmed.

41 F. (2d) 886; 70 Ct. Cls. 119, reversed.

42 F. (2d) 214, reversed.

CERTIORARI (see *post*) to review judgments in suits to recover moneys collected as income and profits taxes. In the first case the Court of Claims denied the claim; in the second it allowed it; and in the third a recovery in the District Court, 33 F. (2d) 135, was affirmed on appeal.

Messrs. Theodore B. Benson and *W. A. Sutherland* argued the cause, and *Mr. Benson* and *Mr. William Meyerhoff* filed a brief, for the Mascot Oil Company, Incorporated.

Mr. Frank J. Albus, with whom *Mr. William Meyerhoff* was on the brief, for Wyman, Partridge & Company.

Mr. Robert A. Applegate, with whom *Mr. H. B. McCawley* was on the brief, for the Erie Coal & Coke Company.

Assistant Attorneys General Rugg and *Youngquist,* with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch, Sewall Key,* and *Norman D. Keller,* Special Assistants to the Attorney General, and *Erwin N. Griswold, George H. Foster, Bradley B. Gilman,* and *H. Brian Holland* were on the briefs, for the United States and Heiner.

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

These actions were brought to recover the amount of taxes alleged to have been illegally collected after the

expiration of the statutory period of limitation. The Government resists recovery under section 611 of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 875). In No. 400, *Mascot Oil Company, Inc.*, v. *United States*, the Government was successful. 42 Fed. (2d) 309. In No. 416, *United States* v. *Wyman, Partridge & Company*, 41 Fed. (2d) 886, and in No. 508, *Heiner, Collector of Internal Revenue*, v. *Erie Coal & Coke Company*, 42 Fed. (2d) 214, the decisions below were in favor of the plaintiffs. This Court granted writs of certiorari.

In No. 400, *Mascot Oil Company, Inc.* v. *United States*, the taxpayer had made a deposit in escrow with a bank to cover the amount of the tax, but, when the collector demanded payment, it was made by the taxpayer under protest and not from the deposit. In No. 508, *Heiner, Collector of Internal Revenue*, v. *Erie Coal & Coke Company*, a bond had been given to secure payment of the tax. The making of the deposit in the former case, and the giving of the bond in the latter, were after the statute of limitations had run, but the taxpayer in each case insists that the statute had not thereby been waived.

We may lay that question aside, for if there was no waiver these two cases, together with No. 416, *United States* v. *Wyman, Partridge & Company*, involved the same circumstances as those decided this day in *Graham* v. *Goodcell, ante*, p. 409, save that collections were made while section 1106 (a) of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 113) was in force.[1] That section was repealed,

[1] This section provided: "Sec. 1106 (a). The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

as of the date of its passage, by section 612 of the Revenue Act of 1928 (45 Stat. 875). It is not necessary to attempt to resolve the questions raised by the ambiguous language of this section, as we are of the opinion that, from any point of view, it does not protect the taxpayers from the operation of section 611 of the Revenue Act of 1928. At the time the taxes were collected, there was no liability on the part of the taxpayers, but this was also true in the case of the petitioners in *Graham* v. *Goodcell, supra.* The Congress had constitutional authority in the circumstances set forth in section 611 of the Revenue Act of 1928 to cure the defect in administration which had resulted in the collection of the tax after the statute of limitations had run and to deny recovery to the taxpayers for the amount paid. The fact that section 1106 (a) of the Revenue Act of 1926 was in effect at the time of the collection is a distinction which does not affect the result.

No. 400, *Mascot Oil Company, Inc.,* v. *United States, judgment affirmed.*

No. 416, *United States* v. *Wyman, Partridge & Company, judgment reversed.*

No. 508, *Heiner, Collector of Internal Revenue,* v. *Erie Coal & Coke Company, judgment reversed.*

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* WILLINGHAM LOAN & TRUST COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 53. Argued January 13, 1931.—Decided January 26, 1931.

Under the Revenue Acts of 1918 and 1921, which provide, respectively, as to the time within which assessments may be made, "within five years after the return was due or was made" and

"within four years after the return was filed," the day on which the return is filed is properly excluded from the computation of the period of limitation. P. 439.

36 F. (2d) 49, reversed.

CERTIORARI, 281 U. S. 710, to review a judgment reversing, on appeal, a ruling of the Board of Tax Appeals, 15 B. T. A. 931, which sustained assessments of income and profits taxes made by the Commissioner.

Assistant Attorney General Sisson, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key* and *Morton K. Rothschild,* Special Assistants to the Attorney General, were on the brief, for petitioner.

Mr. J. C. Murphy, with whom *Mr. Joseph M. Hartfield* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case came before the Circuit Court of Appeals upon a short question. Returns for taxes for the fiscal year 1920 and the fiscal year 1921 were filed respectively on March 15, 1921 and March 15, 1922. Assessments for both years were made on March 15, 1926. The question is whether the assessments were too late under the statutes by which they were governed. The earlier one fell under the Revenue Act of 1918, c. 18, § 250 (d), 40 Stat. 1057, 1083, which requires the amount of tax due to be assessed "within five years after the return was due or was made." That for 1921 was governed by Revenue Act of 1921, c. 136, § 250 (d), 42 Stat. 227, 265, which requires the assessment to be "within four years after the return was filed." Both acts are affirmed in Revenue Act of (February 26,) 1926, c. 27, § 277, (a) (2) (3), 44 Stat. 9, 58. The Circuit Court of Appeals held that the assess-

ments were too late. 36 F. (2d) 49. A writ of certiorari was granted by this Court. 281 U. S. 710.

The argument that prevailed with the Circuit Court of Appeals and that is pressed for the respondent is, that a taxpayer is entitled to the most favorable construction of taxing acts, that there is a distinction between a limitation running from a day and one from an event, and that, if the words quoted are taken literally, the part of the day after the return was filed must be part of the four or five years. We are seeking a measure of time, and therefore we have to translate the event into the language of time; and when, as here, there is no special reason for being more precise, the day is the unit, because people generally measure periods of more than one day by days, months or years. When we say "four years after the return was filed," by common usage we think of four years after the day on which the return was filed, and it would seem that Congress was following common usage. The earlier act read, "after the return was due or was made." The return was not due before the end of the day for filing. By § 250 (d) of the Revenue Acts of 1918 and 1921 no suits shall be begun "after the expiration of five years after the date when such return was filed," obviously treating the "date" and the filing as marking the same starting point, and "date" equally plainly meaning the year and day of the month. The general rule was laid down long ago in language quoted from Chief Justice Bronson, *Cornell* v. *Moulton,* 3 Denio 12, [16]: "When the period allowed for doing an act is to be reckoned from the making of a contract, or the happening of any other event, the day on which the event happened may be regarded as an entirety, or a point of time; and so may be excluded from the computation." *Sheets* v. *Selden's Lessee,* 2 Wall. 177. *Owensboro* v. *Owensboro Water Works Co.,* 243 U. S. 166, 171. *Bemis*

v. *Leonard,* 118 Mass. 502, and many more cases. The fiction that a day has no parts is a figurative recognition of the fact that people do not trouble themselves without reason about a nicer division of time.

Judgment reversed.

RAILWAY EXPRESS AGENCY, INCORPORATED, *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 55. Argued January 19, 1931.—Decided February 2, 1931.

A Delaware corporation, which acquired and conducted, as agent of the railroads, the interstate and intrastate railway express business throughout the country, was created after a provision of the Virginia constitution became effective, forbidding any foreign corporation to carry on the business of a public service company, intrastate, and was therefore denied a certificate of authority. *Held:*

1. That the prohibition was not shown to be void as a burden on interstate commerce.

2. That it did not, in violation of the Fourteenth Amendment, deprive the foreign corporation of its right to sue in the federal courts and to remove suits to them on the ground of diversity of citizenship. P. 444.

153 Va. 498, affirmed.

APPEAL from a judgment confirming an order of a state corporation commission denying to a foreign corporation a certificate of authority to do an intrastate business.

Mr. Albert M. Hartung, with whom *Messrs. Wyndham R. Meredith* and *Harry S. Marx* were on the brief, for appellant.

The power of a State to exclude a foreign corporation doing an interstate business is not absolute; it is relative. *Western Union* v. *Kansas,* 216 U. S. 1, 33, 34; *Pullman Co.* v. *Kansas,* 216 U. S. 56, 68–70.

Appellant comes directly within the rule laid down in those cases. It is not seeking to transact a new business but has succeeded to one which has been carried on for upwards of fifty years producing large receipts from all the United States, including the State of Virginia—both interstate and intrastate business. Interstate and intrastate shipments are handled by the one organization, with the same personnel, and with one system of supervision, overhead and accounting. Cf. *Western Union* v. *Kansas,* 216 U. S. 1, 37. The business is necessarily conducted as an entity.

The effect of the decision below would be to deprive the appellant and the public of the benefits of this arrangement and bring about a method of operation wholly impractical and utterly inconvenient.

If the appellant and a Virginia corporation should unite in handling the business by joint equipment, there would be necessary the segregation of the expense of the state and interstate business. This is always difficult and expensive, and, generally impossible of accurate accomplishment. There would be such commingling of state and interstate business that it would be extremely difficult, if not impossible, to determine with respect to some transactions whether the federal or the state laws governed, and whether the federal or the state courts would have jurisdiction. The effect of the Virginia constitutional provision would be substantially to burden interstate commerce, and, therefore, it is void, although the state may not have intended to enact an invalid law. *Ludwig* v. *Western Union,* 216 U. S. 146, 162; *Pullman Co.* v. *Kansas,* 216 U. S. 56, 68.

Nor does the suggestion that the appellant organize a subsidiary corporation, and if it so desire then merge with such corporation, lessen or remove the burden upon interstate commerce. The corporation then would be a domestic corporation of the States of Delaware and Virginia,

and be subject to the laws of those States applicable to corporations organized therein. Distinguishing: *Hemphill* v. *Orloff*, 277 U. S. 537; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181; *Ashley* v. *Ryan*, 153 U. S. 436.

The express service is an integral part of the railroad business; the railroad companies are required to furnish that service directly or through an agent. *Express Cases*, 117 U. S. 1. They have chosen to do so through the agency of appellant, with the approval of the Interstate Commerce Commission, which specifically held the acquisition of the control of the appellant to be in the public interest, and that the proposed grouping of carriers and division of earnings provided in the operating contract will be in the interest of better service to the public and economy in operation. The requirement of the Virginia constitution would defeat that purpose and impose an undue burden on a corporation engaged in interstate commerce as the price for handling the intrastate business incidental thereto. *Houston & Texas Ry.* v. *United States*, 234 U. S. 343.

The business of the appellant is so intermingled that the supreme authority, the Nation, cannot exercise effective control over the interstate commerce without incidental regulation of the intrastate commerce. *Wisconsin Railroad Comm.* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 588; *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, 485; *Western Union* v. *Kansas*, 216 U. S. 1, 37, 38.

Compliance with the requirement by incorporation of a separate corporation in Virginia, either with or without subsequent merger with the Delaware corporation, necessarily will add to the expense of conducting the interstate business, and, therefore, places an undue burden on interstate commerce. *Colorado* v. *United States*, 271 U. S. 153.

The decision denies the equal protection of the laws in depriving appellant of its right to institute suits in the federal courts and to remove suits from the state to the federal courts on the ground of diversity of citizenship, and by classification without reasonable basis.

Mr. Collins Denny, Jr., Assistant Attorney General of Virginia, with whom *Messrs. John R. Saunders,* Attorney General, and *Edwin H. Gibson,* Assistant Attorney General, were on the brief, for appellee.

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a judgment of the Supreme Court of Appeals of Virginia affirming an order of the Corporation Commission that denied to the appellant a certificate of authority to do an intrastate express business in Virginia. 153 Va. 498. The appellant was incorporated in Delaware, in December, 1928, and was given by its charter not only power to engage in international, interstate and intrastate express business, but other most extensive ones to own personal and real property and to engage in other collateral undertakings. Its stock was to be owned by railroad corporations. It has bought the business and assumed the liabilities of the American Railway Express Company, and is an agency of railroads throughout the United States. The appellant's right to do interstate business is not questioned, but it was held by the Supreme Court of Appeals that being a foreign corporation created since the Constitution of the State went into effect in 1902, it was prohibited by that instrument from doing intrastate express business by the plain words of section one hundred and sixty-three. The appellant says that so construed the prohibition is a direct burden upon the interstate commerce which is its principal business, and therefore is void. It also invokes the Fourteenth Amendment for some help.

There is not here, as there was in *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, and *Pullman Co.* v. *Kansas,* 216 U. S. 56, a deliberate attempt to use the State's powers as the means for attaining the unconstitutional result of taxing property outside the State. *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105, 114. Virginia is not attempting to go beyond its power by indirection or to take anything from anybody. It simply is refusing to grant a foreign corporation a permit to transact local business without taking out a charter from the jurisdiction within which that business must be done. There is no substantial evidence that the refusal would impose a burden on interstate commerce and it is presumed to be constitutional. *O'Gorman & Young, Inc.* v. *Hartford Fire Insurance Co., ante,* p. 251. We may add that as suggested by the State Court the difficulties created by the Constitution of Virginia probably will not prove hard to overcome when it is found that they must be met.

The objection based on the Fourteenth Amendment is that the requirement of the Virginia Constitution deprives the appellant of its right to sue in the federal courts and to remove suits to them on the ground of diversity of citizenship. This plainly is inaccurate. The appellant is not deprived of any rights. It can do all that it ever could. If it sees fit to acquire a new personality under the laws of Virginia it cannot complain that the new person has not the same rights as itself. Of course there can be no suggestion here that the clause in the State Constitution was adopted for a sinister end. And, unless it was, the inability of the new State corporation to do all that the appellant could have done is only the legitimate incident of a legitimate act.

Judgment affirmed.

ENSTEN ET AL. *v.* SIMON, ASCHER & COMPANY, INCORPORATED.

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

No. 46. Argued December 12, 1930.—Decided February 2, 1931.

1. To protect the valid part of a patent containing an invalid claim, the patentee must disclaim the invalid part without unreasonable neglect or delay. Rev. Stats., §§ 4917, 4922; U. S. C., Title 35, §§ 65, 71. P. 449.
2. By interlocutory decree in a suit for infringement, the District Court upheld some of the patent claims and adjudged another invalid. The infringer took an interlocutory appeal, unsuccessfully, to the Circuit Court of Appeals; but the patentee took none, and thereafter, when the case, upon remand from that court, was again before the District Court for an accounting, he disclaimed the invalid part in the Patent Office. This was almost two years after the invalidity of the claim had been adjudged by the District Court. Subsequently he brought this suit in another circuit, on the remainder of the patent. *Held*, that the bill for an injunction was properly dismissed, upon the ground that the patentee had unreasonably neglected and delayed making the disclaimer and therefore was not entitled to the benefits of the disclaimer statute. P. 455.

38 F. (2d) 71, affirmed.

CERTIORARI, 281 U. S. 708, to review a decree upholding the dismissal of the bill in a patent infringement suit.

Messrs. O. Ellery Edwards and *Harold Elno Smith* for petitioners.

The patentee had several options after the adverse decision of Judge Westenhaver. He could disclaim immediately; he could wait until a higher court had passed upon the issue of validity; he could have brought a new suit elsewhere. In case he chose to appeal, he could appeal within thirty days or he could wait until the final decree. He took no interlocutory appeal, and he did not

file a disclaimer, but left the matter open for future determination, either by final appeal or by a new suit elsewhere. Under the doctrine of *O'Reilly* v. *Morse,* 15 How. 62, he was entitled to do this.

At that time a decision in his favor on Claim 2 by the appellate court would have done him no good because the other claims were ample to protect the invention and did protect it so that there was a very substantial recovery. Accordingly, after the Circuit Court of Appeals had affirmed the validity of the other claims, and before any final decree was entered, Ensten disclaimed Claim 2 instead of taking an appeal on an issue which would have been largely moot, as it would in no way have affected the matter of damages and profits or the injunction, whichever way the case had been decided. To get the peculiar characteristics necessary for the commercial exploitation of his invention, it was essential to use the elements covered by the other claims which were held valid.

From the foregoing, it is apparent that Ensten was well within the rule laid down in *O'Reilly* v. *Morse, supra,* because he filed his disclaimer prior to the final decree, unless he was prejudiced by the fact that the Judicial Code of 1914 had changed the law so as to permit an interlocutory appeal of which he had not taken advantage, having preferred to let the whole matter go over until the final decree, or until he might file a disclaimer short of that time. He is not to be penalized for doing this. *Seymour* v. *McCormick,* 19 How. 96; *Minerals Separation* v. *Butte & Superior Mining Co.,* 250 U. S. 336.

The filing of the disclaimer has nothing to do with the validity of the patent as to Claims 1, 3, 4, and 5, and relates to costs only. *Sessions* v. *Romadka,* 145 U. S. 129; *Hailes* v. *Albany Stove Co.,* 123 U. S. 582.

Through and including the law of 1836, a patent was void which covered too much. A disclaimer under the law of 1837 saved a patent otherwise void under the Act of

1836. The Act of 1870 repealed the laws of 1836 and 1837, but reënacted the law of 1837 as to disclaimers. Thereafter the disclaimer law was no longer applicable to the conditions it was designed to meet. The law of 1870 confirmed the bargain theory earlier held by courts. It was the deliberate intention of Congress to abolish the old features of the combined patent law and common law which made a patent incurably void if too broad, and to substitute in lieu the more humane and just doctrine, first enunciated by Lord Eldon in 1800. *Cartwright* v. *Arrnott,* 1 Abb. P. C. 171, 174; *Grant* v. *Raymond,* 6 Pet. 218, 241; *Seymour* v. *Osborne,* 11 Wall. 533.

Mr. John F. Neary, with whom *Messrs. Harry S. Bandler, Ramsey Hoguet,* and *Daniel L. Morris* were on the brief, for respondent.

Messrs. Benjamin T. Roodhouse, James A. Brown, and *Charles Neave,* by special leave of Court, filed a brief on behalf of the Excelsior Steel Furnace Company, as *amicus curiae.*

Mr. Justice McReynolds delivered the opinion of the Court.

By an original bill presented to the District Court, Southern District of New York, November 9, 1929, petitioners sought to prevent respondent from further infringing Letters Patent No. 1,313,080, for improvements in knitted caps and to recover damages. They asked a preliminary injunction; affidavits were presented by both sides; the facts are not controverted.

It appears—

That the patent, 6 claims, issued to Louis H. Ensten August 12, 1919. In the first suit upon it—*Ensten* v. *Rich-Sampliner Co., et al.*—commenced in the District Court, Northern District of Ohio, an interlocutory decree,

dated May 24, 1922, adjudged claims 1, 3, 4 and 5 valid and infringed; claim 2 invalid.

That within 30 days the defendants appealed from so much of that decree as upheld the four claims; the complainant might have but did not appeal. The Circuit Court of Appeals approved the decree so far as challenged, June 20, 1923; the validity of claim 2 was not before it. Rehearing was denied October 4, 1923; mandate issued October 18, 1923. 291 Fed. 1003.

That after such remittance the District Court ordered an accounting. The complainant offered to show damages to his exclusive licensee, Lion Knitting Mills Company. As that Company was not party to the cause, the Master rejected the offer; the court affirmed his action.

That on April 30, 1924, Ensten disclaimed as to claim 2 in the Patent Office. Thereafter, he and the Lion Knitting Mills Company presented a joint bill against the original defendants. A motion to dismiss because of unreasonable neglect and delay in making the disclaimer was sustained April 5, 1926, 13 F. (2d) 132—Judge Westenhaver. The Circuit Court of Appeals, May 9, 1927, held the second bill was in effect an amendment to the original one; declared the objection based upon failure to disclaim more promptly moot; reversed the decree of the District Court; and remanded the cause for appropriate proceedings. Subsequently, the parties settled their differences; the defendant paid substantial damages; and final decree went for the complainants November 1, 1928.

No facts except those above detailed are relied upon.

Having heard the parties to the present proceeding, the trial court held that Ensten, the patentee, unreasonably neglected and delayed to disclaim claim 2 after the District Court in Ohio had declared it invalid, denied an application for injunction and dismissed the bill. The

Circuit Court of Appeals affirmed this action February 4, 1930, *Ensten et al.* v. *Simon, Ascher & Co.*, 38 F. (2d) 71; called attention to the conflict between its views and those of the Circuit Court of Appeals, Seventh Circuit, *Excelsior Steel Furnace Co.* v. *Meyer & Bro. Co.*, 36 F. (2d) 447, and suggested the desirability of an authoritative determination of the controverted question of law.

The petition here for certiorari asked for the writ because of the conflict of opinion in the two Circuits. The point contested below and differently ruled in the Circuit Courts of Appeals concerns the effect of the delay in disclaiming. According to the usual practice we will consider nothing else.

Determination of the issue presented must turn upon the construction and effect of §§ 65 and 71, Title 35, U. S. C. (R. S. §§ 4917, 4922; §§ 7 and 9, Act of 1837, 5 Stat. 193), copied in the margin.*

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*"Sec. 65. Disclaimer. Whenever, through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, a patentee has claimed more than that of which he was the original or first inventor or discoverer, his patent shall be valid for all that part which is truly and justly his own, provided the same is a material or substantial part of the thing patented; and any such patentee, his heirs or assigns, whether of the whole or any sectional interest therein, may, on payment of the fee required by law, make disclaimer of such parts of the thing patented as he shall not choose to claim or to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent. Such disclaimer shall be in writing, attested by one or more witnesses, and recorded in the Patent Office; and it shall thereafter be considered as part of the original specification to the extent of the interest possessed by the claimant and by those claiming under him after the record thereof. But no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing it. (R. S. § 4917.)

"Sec. 71. Suit for infringement where specification too broad. Whenever, through inadvertence, accident, or mistake, and without any willful default or intent to defraud or mislead the public, a

The first of these sections provides in substance that whenever, through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, a patentee has claimed more than that of which he was the original or first inventor or discoverer, he may be permitted to make disclaimer of such parts of the thing patented as he shall not choose to claim or hold by virtue of his patent. The other permits the patentee to maintain a suit on his patent, although through inadvertence, accident, or mistake, and without any wilful default or intention to mislead the public, he has claimed some material or substantial part as an invention of which he was not the original or first inventor. He is deprived, however, of the right to recover costs, unless he has filed proper disclaimer before commencement of his suit. And it further provides: "But no patentee shall be entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer."

In order properly to apply these sections consideration must be given to the provisions touching review of inter-

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patentee has, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor or discoverer, every such patentee, his executors, administrators, and assigns, whether of the whole or any sectional interest in the patent, may maintain a suit at law or in equity, for the infringement of any part thereof, which was bona fide his own, if it is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right, notwithstanding the specifications may embrace more than that of which the patentee was the first inventor or discoverer. But in every such case in which a judgment or decree shall be rendered for the plaintiff no costs shall be recovered unless the proper disclaimer has been entered at the Patent Office before the commencement of the suit. But no patentee shall be entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer. (R. S. § 4922.)"

locutory decrees by federal courts. Formerly, federal practice permitted appeals only from final decrees. Section 7, Act March 3, 1891, 26 Stat. 828, empowered Circuit Courts of Appeals to review an interlocutory decree granting or continuing an injunction. *Ex parte National Enameling Co.,* 201 U. S. 156. This section was modified by Act of 1895, Chap. 96, 28 Stat. 666, and by Act of June 6, 1900, 31 Stat. 660. And the Act of April 14, 1906, 34 Stat. 116, amended it to read thus—

"Sec. 7. That where, upon a hearing in equity in a district or in a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed by an interlocutory order or decree, in any cause an appeal may be taken from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver, to the circuit court of appeals: . . ."

The Judicial Code, Act March 3, 1911, 36 Stat. 1134, provided—

"Sec. 129. Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the circuit court of appeals, notwithstanding an appeal in such case might upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: *Provided,* That the appeal must be taken within thirty days from the entry of such order or decree . . ."

See Act of 1925, § 227, Title 28, U. S. C., which further enlarged the right.

Did the patentee Ensten unreasonably neglect or delay to make disclaimer of claim 2 after May 24, 1922, when the District Court in Ohio declared it invalid? He disclaimed April 30, 1924; and only the facts narrated above are relied on for explanation or excuse.

Under the early accepted general rule a patent with an invalid claim was wholly void, and this defect effectually barred suit upon it. Congress undertook to modify this by §§ 7 and 9, Chap. 45, Act of 1837. 5 Stat. 193. In substance these became §§ 4917 and 4922, Revised Statutes, and 65 and 71, Title 35, U. S. C. The two sections "are parts of one law, having one general purpose, and that purpose is to obviate the inconvenience and hardship of the common law, which made a patent wholly void if any part of the invention was wrongfully claimed by the patentee, and which made such a defect in a patent an effectual bar to a suit brought upon it." *Hailes* v. *Albany Stove Co.,* 123 U. S. 582; *Sessions* v. *Romadka,* 145 U. S. 29, 41. Construed together they "enact that where a patentee claims materially more than that which he was the first to invent, his patent is void, unless he has preserved the right to disclaim the surplus; and that he may fail to preserve that right, by unreasonable neglect or delay to enter a disclaimer in the Patent Office." Walker on Patents, 6th ed., § 254.

The statute is remedial; the intent is to aid the inventor free from wilful default or intention to mislead the public by permitting him to avoid the consequence of inadvertence, accident or mistake through prompt disavowal of the apparent right to exclude others from something improperly included in the words of his grant. Escape is permitted only to one who acted originally in good faith and who has complied with the prescribed conditions. "The same principle which forbids a patentee to assert a right to more than he has actually invented compels him to disavow the right as soon as he discovers that it

has been unjustly claimed. Unreasonable delay in disclaiming is thus tantamount to an original fraudulent claim, and through it the patentee loses the privilege of making the amendment by which alone his patent could be saved. The question of unreasonable delay is a question for the court, upon the facts as found either by its own investigation or the verdict of a jury. Delay begins whenever the patentee becomes aware that he has claimed more than he has invented or described. In cases where the excess is not apparent at once upon the inspection of the patent by the patentee, the allowance of his claim by the patent office raises such a presumption in its favor that he may rely on its validity until a court of competent jurisdiction decides that it is broader than his real invention." Robinson on Patents (1890), Vol. II, p. 284.

The petitioners say that, after Judge Westenhaver by interlocutory decree declared claim 2 invalid, the patentee had several options. He might have made disclaimer immediately; he might have appealed from the interlocutory decree within 30 days; he might have awaited the final decree and appealed from that; he might have sued again in another Circuit and prosecuted such suit to final decree. Accordingly, they maintain that the delay which actually occurred cannot be declared unreasonable.

Under this view, a patentee having procured allowance of an invalid claim may hold it in the face of the public for years (here nearly two years) with large possible advantage to himself and much injury to others. By the assertion of his apparent monopoly he may deter others from legitimate action and seriously prejudice the public. See *Miller* v. *Brass Co.*, 104 U. S. 350, 355.

To support their position petitioners rely especially upon *O'Reilly* v. *Morse* (1853), 15 How. 62, 121, and *Seymour* v. *McCormick* (1856), 19 How. 96, 106.

O'Reilly v. *Morse* was decided here when appeals in federal courts lay only from final decrees. The Circuit

Court had sustained all claims of the patent. This court held one invalid and then disposed of the contention that because of the failure to disclaim there could be no right to recover under the valid ones. Mr. Chief Justice Taney for the court said:

"It appears that no disclaimer has yet been entered at the patent office. But the delay in entering it is not unreasonable. For the objectionable claim was sanctioned by the head of the office; it has been held to be valid by a circuit court, and differences of opinion in relation to it are found to exist among the justices of this court. Under such circumstances the patentee had a right to insist upon it, and not disclaim it until the highest court to which it could be carried had pronounced its judgment. The omission to disclaim, therefore, does not render the patent altogether void; and he is entitled to proceed in this suit, for an infringement of that part of his invention which is legally claimed and described. But as no disclaimer was entered in the patent office before this suit was instituted, he cannot, under the act of Congress, be allowed costs against the wrongdoer, although the infringement should be proved. And we think it is proved by the testimony."

Seymour v. *McCormick* declared—"In respect to the question of unreasonable delay in making the disclaimer, as going to the whole cause of action, the court are of opinion that the granting of the patent for this improvement, together with the opinion of the court below maintaining its validity, repel any inference of unreasonable delay in correcting the claim; and that, under the circumstances, the question is one of law. This was decided in the case of the Telegraph, (15 How. [62] 121)."

Neither of these cases lends support to the petitioners. Attention also has been called to *United States* v. *American Bell Tel. Co.*, 167 U. S. 224, *Simmons Co.* v. *Grier*

Bros., 258 U. S. 82, 91, and other causes; but their facts differ so materially from those now presented that special comment upon them is unnecessary.

In certain definitely defined circumstances, and to the end that the mistaken but honest inventor may obtain relief from the old rule, the disclaimer provisions permit him to deprive the public temporarily of complete freedom from the assertion of a monopoly apparently valid, but not so in fact. When a competent court has declared his pretensions without sufficient foundation, we think good faith and the spirit of the enactment demand that he act with such promptness as the circumstances permit either to vindicate his position or to relieve the public from further evil effects of his false assertion. But for the benign provisions of the statute, such an assertion would invalidate the whole patent; and these provisions were intended to protect only those who by prompt action either seek to overturn an adverse ruling or retreat from a false position.

When the District Court in Ohio declared claim 2 invalid, the owner of the patent might have appealed to the Circuit Court of Appeals within thirty days and thus secured an early determination of his rights. He did not choose this course but continued to hold himself out as possessor of the sole right to " make, use and vend " under the rejected claim, for nearly two years. Then he abandoned it. He made no effort promptly to vindicate what he had asserted nor did he surrender it. Thus he failed to earn the offered exemption and now he may not complain.

A similar view of the meaning and effect of §§ 65 and 71 has been often accepted by District Courts and Circuit Courts of Appeals. The doctrine there commonly approved is that, where one claim of a patent is declared invalid, the trial court may refuse a decree sustaining the

others until there is disclaimer as to the invalid one or a prompt appeal. Walker on Patents, 6th ed., § 260, copied in the margin.* First Circuit: *Suddard* v. *American Motor Co.,* 163 Fed. 852 (1908). Second Circuit: *Atwater Mfg. Co.* v. *Beecher Mfg. Co.* (C. C.) 8 Fed. 608; *Tyler* v. *Galloway* (C. C.) 12 Fed. 567; *Brainard* v. *Cramme* (C. C.) 12 Fed. 621; *Matthews* v. *Spangenberg* (C. C.) 19 Fed. 823; *Hake* v. *Brown* (C. C.) 37 Fed. 783; *Electric Accumulator Co.* v. *Julien Electric Co.* (C. C.) 38 Fed. 117; *Union Paper Bag Machine Co.* v. *Waterbury* (C. C.) 39 Fed. 389; *Steam Gauge Co.* v. *Kennedy* (C. C.) 41 Fed. 38; *Williams* v. *Barnard* (C. C.) 41 Fed. 358; *Smead* v. *School Dist.* (C. C.) 44 Fed. 614; *Brush Electric*

* "Sec. 260. An important question arises when a District Court, before any disclaimer has been filed, decides that a part of the claims of the patent in suit are valid, and have been infringed by the defendant, while another part are void for want of novelty, or for want of invention, and ought therefore to be disclaimed. Ought the judge in such a case, to enter a decree for an injunction and an account on the valid claims, and allow the complainant to disclaim the others or not, as he deems most prudent; or should he decline to enter any decree till the complainant shall have filed a disclaimer? The second of these courses has been the practice in the first circuit, in the sixth, in the seventh, and, prior to the decision of Page Machine Co. *v.* Dow, Jones & Co., in the second circuit [168 Fed. 703]; prior to the Page Machine Co. case one of the judges in the second circuit criticised that practice as arbitrary and unjust, and in at least one case in the sixth circuit the practice has not been followed by the Circuit Court, the reason being given that such a requirement would deprive the complainant of the benefit of an appeal from the decree in so far as it held the disclaimed claim invalid. The same reason is stated in the Page Machine Co. case. And one of the judges of the third circuit has held the first course to be the proper practice.

"Where a patentee through inadvertence claimed that of which he was not the original inventor, but a disclaimer was not filed before suit, no recovery can be allowed or injunction, unless a disclaimer be filed within a reasonable time."

Co. v. *Electrical Accumulator Co.* (C. C.) 47 Fed. 48; *Ballard* v. *McCluskey* (C. C.) 58 Fed. 880. Sixth Circuit: *Odell* v. *Stout,* 22 Fed. 159; *Office Specialty Mfg. Co.* v. *Globe Co.,* 65 Fed 599; *Morgan Co.* v. *Alliance Co.,* 176 Fed. 100; *Herman* v. *Youngstown Car Mfg. Co.,* 191 Fed. 579, 587; *Cummer Co.* v. *Atlas Dryer Co.,* 193 Fed. 993, 998; *Higgin Mfg. Co.* v. *Watson,* 263 Fed. 378. Seventh Circuit: *Liquid Carbonic Co.* v. *Gilchrist Co.,* 253 Fed. 54, 58.

In *Page Machinery Co.* v. *Dow, Jones & Co.,* 168 Fed. 703, decided in 1909 prior to the enlarged appeal provision in the Judicial Code, the Second Circuit Court of Appeals expressed disapproval of the then prevailing practice upon the ground that an inventor should not be required to accept the opinion of a single judge. The principal reason for this objection disappeared when the Judicial Code became effective and broader appeals from interlocutory orders were permitted.

In *Excelsior Steel Furnace Co.* v. *Meyer & Bro. Co.,* 36 F. (2d) 447, the Circuit Court of Appeals, Seventh Circuit, declared that "in no case would a court be justified in finding that a patentee unreasonably delayed the filing of a disclaimer until after the expiration of the statutory period within which he might further litigate the question of the validity of the contested claims." But, in *Liquid Carbonic Co.* v. *Gilchrist, supra,* the same court had said "that under the circumstances indicated in these statutes [§§ 4917, 4922, R. S.] benefit of any recovery by the patentee is denied unless or until disclaimer is filed." So far as we are advised no other court has sustained the theory advanced by the petitioners.

Certainly, in this case where an appeal was taken by the defendants, it would have entailed no unreasonable hardship upon the patent owner promptly to have submitted the legality of the rejected claim for determination by

the appellate court. The route to that end was obvious, easy, inexpensive. He deliberately failed to defend his assertion of right by appealing. He has been guilty of unreasonable delay and has not brought himself within the beneficent provisions of the statute.

The judgment below must be

Affirmed.

LOUISIANA *v.* MISSISSIPPI.

No. 8, original. Argument commenced and suspended, and cause referred to a Special Master, October 8, 1928. Submitted on defendant's exceptions to the report of the Special Master, January 5, 1931.—Decided February 2, 1931.

1. In a suit to establish a part of the boundary line of Louisiana and Mississippi between Willow Point and adjacent territory in the former and Township 9 North, Range 8 West, in the latter State, where the Mississippi River forms what is known as Albemarle Bend, the Court, after an examination of the documentary and oral evidence, sustains the master in finding:

   (1) That changes in the course of the river which occurred at the place in question between the years 1823 and 1912–13, by which a considerable area was added to the Louisiana shore, were by gradual erosions and accretions, and not by avulsions. P. 462.

   (2) That a change in 1912–13 by which the river, shifting to the west, cut off a large part of this area, was due to an avulsion. P. 465.

   (3) That Mississippi did not by possession or exercise of sovereignty or dominion acquire right or title to the disputed territory. P. 466.

2. Upon these facts, the boundary is the thread of the main channel of the river as it was immediately prior to the avulsion of 1912–13. P. 467.

FINAL HEARING of an original suit to establish part of an interstate boundary.

Messrs. Gerard Brandon, Percy Saint, Attorney General of Louisiana, *John Dale, Robert Ash, Philip Hough, John*

Dale, Jr., and *L. D. Dale* were on the brief for the State of Louisiana.

Messrs. George T. Mitchell, Attorney General of Mississippi, *H. H. Creekmore, Pat Henry, Rufus Creekmore, E. C. Sharp,* and *Rush H. Knox* were on the brief for the State of Mississippi.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The bill seeks a decree locating and establishing a portion of the boundary line of Louisiana and Mississippi, between Willow Point and adjacent premises in the former, and lands in Township 9 North, Range 8 West, in the latter state, where the Mississippi River forms what is known as Albemarle Bend.

In 1823 the thread of the navigable channel of the river was the true boundary line, and is correctly located by surveys made by the Mississippi River Commission in 1823 and 1824. At that time the territory now in dispute was within Mississippi and consisted of an island (then known as Tullos Island, which lay to the east of the thread of the river and was separated from the Mississippi mainland by a chute) and certain portions of the mainland east thereof. Prior to 1882 the island was renamed "Island No. 98."

The complainant asserts:

That between 1823 and 1913 erosions occurred which ate away all of Tullos Island and large portions of the Mississippi shore;

That accretions attached to the Louisiana shore;

That the river, and consequently the interstate boundary line, gradually and imperceptibly moved eastwardly and northwardly a distance of five or six miles;

That the accretions to the Louisiana shore became the territory of complainant;

That in 1912–1913 the river suddenly changed its course, cut across the bar formed by the said accretions on the Louisiana side, and by avulsion formed a new channel to the west, severing from the Louisiana shore a large portion of the accretion theretofore formed;

That as the last change was by avulsion the boundary line remained and now is at the thread of the extreme easterly and northeasterly channel of the river as it was in 1912–1913.

The Mississippi River Commission surveyed the river in 1882, and admittedly its chart made from that survey correctly shows the shore lines and bar lines and other relevant data as of that year. A further survey was made by the Commission, and a plotting taken therefrom in 1894, and a similar survey and plotting shows the river as it was in 1912–13. These demonstrate that the river had moved to the eastward from its position in 1823, each survey placing it considerably east of its location at the time of the next earlier one.

The respondent avers:

That the complainant has failed to show how the change in the channel came about between the surveys of 1823–1824 and that of 1882;

That as complainant has the burden of showing that the change took place by accretion rather than by avulsion, and has failed to carry that burden, it can make no claim for the land added to the Louisiana shore prior to 1882;

That subsequent to 1882 the river above the point in controversy cut into the Louisiana bank above and along the northern border of Willow Point, was deflected in a northeasterly direction, so that instead of striking Tullos Island it curved around the head of what then remained of the island (as it is shown on the survey of 1882) and enlarged the chute between that island and the Mississippi shore, forming a new channel there;

That subsequently the old channel, which had run to the west of the island, filled up, and thereby the island became attached to the Louisiana shore;

That the new channel running to the north and east of what was left of Tullos Island added by accretion to the easterly side of the island and cut farther into the Mississippi shore until 1912–13, when the river suddenly abandoned the new channel and returned to the old 1882 channel;

That thereby what theretofore had been Tullos Island again became an island separated from the Louisiana shore, although greatly enlarged over its dimensions in 1882 by the accretions added to its easterly side.

As an additional and alternative defense Mississippi asserts that its title to the disputed territory cannot now be assailed because of long continued possession and exercise of sovereignty and dominion, with the acquiescence of Louisiana.

On the issues thus made testimony was taken before a commissioner, and was referred to Thomas G. Haight, a member of the bar of this court, as special master, with direction and authority to report his findings of fact, conclusions of law, and recommendations for a decree. He has filed his report, recommending a decree in accordance with the contentions of the complainant. The respondent has filed exceptions.

The parties are in agreement as to the applicable legal principles. The exceptions raise no questions of law, but go solely to the correctness of the master's fact findings and conclusions. We have, therefore, examined the proofs, consisting of documentary evidence and oral testimony, to determine whether the master's findings are in accord therewith. In brief he finds:

1. That the changes between 1823 and 1912–13 were by gradual erosion of the Mississippi shore and gradual accretions to the Louisiana shore, and not by avulsions.

2. That the change in 1912–13 was due to an avulsion.

3. That the accretions up to the avulsion of 1912–13 and thereafter, so long as the current flowed in the easterly channel as it was prior to the avulsion, became Louisiana territory.

4. That the avulsion of 1912–13 did not change the boundary line.

5. That Mississippi did not by possession or exercise of sovereignty or dominion acquire right or title to the disputed territory; and as a consequence of the foregoing,

6. That the present true boundary line is the middle of the navigable channel prior to the avulsion of 1912–13, as that channel was when the current ceased to flow therein by reason of the formation of the new channel by the avulsion of 1912–13, and the filling of the former channel.

There is no challenge of findings 2 and 4. The whole controversy revolves about the correctness of findings 1 and 3 as to the physical changes which actually took place, and finding 5 as to the exercise of dominion by the respondent.

I. With respect to the physical changes which have taken place in the location of the Mississippi River, the proofs may conveniently be divided into two parts,—those which apply to the period prior to 1882, and those which have to do with that between 1882 and 1912.

It was impossible to procure much or very persuasive oral evidence as to conditions prior to 1882. The master had before him, however, the charts of the Mississippi River Commission of 1823–24 and of 1882, and plats from surveys made in 1866 and 1870. By comparing these and noting facts deducible from them, he concluded that the river moved eastward from its 1823 channel to its 1882 channel gradually and not by avulsion. He found that the Louisiana shore was eroded above Albemarle

Bend and extended to the eastward by accretions at Willow Point. He further found that while this was occurring the eastward sweep of the river gradually cut away the greater portion of Tullos Island. During all of this time the river remained of approximately the same width, thus negativing Mississippi's contention as to the possibility of the change in the channel being sudden and by avulsions of nature. His conclusions were also supported by the relative locations of sand bars and river banks at the dates of the successive surveys. In 1882 a towhead, so-called, had been formed on the sand bar created by the accretions to the Louisiana shore, which was named "Newman's Towhead" because the owner of the Louisiana mainland at the point from which the bar had made out was a man named Newman. On this towhead there had sprung up a growth of willow and cottonwood timber.

From an examination of the proofs and a checking of the processes of reasoning and deduction adopted by the master we are satisfied that his findings on this branch of the case are justified; and that the contention of Mississippi that he has relied upon mere inferences, which do not rise to the dignity of affirmative proofs, is not well founded.

A more serious controversy, complicated by conflicting oral testimony, is disclosed as to what occurred between 1882 and 1912. The complainant adduced proofs tending to show that the eastward and northeastward movement of the channel continued after 1882. These further tend to show that by 1894 all that was left of Tullos Island in 1882 had been washed away, and that the main channel of the river was in part where that island had formerly been and in part east of its location; that the eastward movement of the river and the direction of the current to the east eroded a substantial portion of the

former Mississippi mainland; that from 1894 to 1912 this movement eastward continued until whole sections of Township 9 North, Range 8 West, in Mississippi, had caved away; that in periods of high water in 1912 and 1913 the river overflowed the bar extending out from the Louisiana shore to Newman's Towhead and took a southwesterly course, cutting across the accretions theretofore formed and leaving the eastern portions of the bar, including the towhead, an island; that a portion of this new island occupied the location of what was formerly Tullos Island. Thus complainant claimed that, prior to 1912, the old island had been washed away by the eastward progress of the river channel, and had been replaced by accretions along the westerly side of the river adjacent to Louisiana.

Respondent offered evidence tending to show that while the river reached the extreme easterly position averred by the complainant, it did so not by washing away Tullos Island and moving eastwardly over the former location of that island, but by swinging around to the north and east of that island, enlarging and scouring out the former chute or narrow channel between the island and the Mississippi mainland; that thereafter the river added by accretions to the eastern side of what was left of the island, and that the old channel to the west of it gradually filled up.

If the weight of the evidence is with the complainant, the territory in controversy belongs to Louisiana; if the contrary be found, the disputed territory, originally within the boundaries of Mississippi, so remains.

There is much conflicting testimony as to the location of the main channel between 1890 and 1912; as to whether Tullos Island was scoured away; as to the character of the soil and timber on the island; as to whether the alleged clay soil of the island disappeared and was afterwards replaced by a sand bar formed by accretion; as to

whether the original virgin timber which was on it fell into the river and disappeared with it, or in part still stands as mute evidence that the island was never entirely washed way.

Mindful of the fact that the special master did not see and hear the witnesses, we have felt it incumbent upon us to study the proofs, documentary and oral, to examine the deductions made therefrom, and thereby to test the stated conclusions. The preponderance of the evidence supports the master's finding that from 1882 to 1894 the river moved eastwardly, caving away Tullos Island along its western shore, until it had wiped out that island; that the continued eastward movement caved the Mississippi shore, at the same time adding to the accretions which had already formed on the Louisiana shore opposite Willow Point; and that the bar was continuous from the old high bank on the Louisiana side to the end of Newman's Towhead. Thus by 1912 an area five or six miles in length and several miles in width had been added to the Louisiana shore.

As matters stood in 1912 and 1913, the boundary line between the states was the thread of the navigable channel far to the eastward of the present channel. As above stated, there is no controversy as to what occurred in 1912–13. The river by a sudden avulsion made a short-cut to the west of Albemarle Bend, as it then was; and subsequently the channel in the old bend to the eastward of the new channel silted and filled until it entirely closed at the upper end. This sudden avulsion did not change the boundary line between the states.

II. It remains to discuss the proofs bearing upon the master's fifth finding. The survey of 1882 discloses that accretions attached to the Louisiana shore had at that time extended to the eastward so far as to cover a portion of the territory formerly belonging to Mississippi. The

1894 survey shows these accretions covering a much larger portion, and that of 1912–13 shows a still greater extension over former Mississippi territory. The Newmans, who lived on Willow Point, Louisiana, had a house about one hundred yards east of the 1824 mainland, between the levee and the stream, and just above Albemarle Bend proper. It must, therefore, have been built on accretions formed subsequent to 1824. It caved into the river in 1905. The master found that the possession of the Newmans extended at least to those accretions which had attached to the shore up to the time that their house was destroyed. The disputed territory is low alluvial land subject to overflow at times of high water and is not protected by levees or dikes. Upon portions of it cottonwood and willow timber has grown. The land is not fitted for cultivation or settlement except in a haphazard way. It took its name from the Newman family and was known as the "Newman Towhead." After the avulsion of 1912–13 severed a large portion of it from the Louisiana shore the successors in title of the Newmans leased the cut-off portion of it, lying to the eastward of the new channel, to one Towns. The lease described it as part of the Bell and Willow Point plantations, located in East Carroll Parish, Louisiana. It was occupied under the lease for six or eight years for the pasturing of hogs.

The first knowledge that complainant's witnesses had of any claim on behalf of Mississippi or its citizens was shortly before this action was brought. It appears that in or about 1923 Mississippi sold some of the land in question for delinquent taxes. On the assessment rolls of Issaquena County, Mississippi, the purchasers at these tax sales first appeared as owners in 1925–1926. The respond-

ent put in evidence assessment rolls for certain years between 1848 and 1926. They show that after 1883 certain of the lands within the original boundary of Tullos Island are marked "in river," or "in Mississippi River," and from time to time these lands so designated were assessed for taxation, sometimes for nominal amounts and sometimes for substantial sums. At times "Island No. 98" appears as a separate item on the rolls, although the surveys show that at those times the island had disappeared. It is described as of greatly varying sizes in different years. The evidence to be drawn from this source is quite contradictory and fails to show any dominion by Mississippi over the disputed territory.

The record sustains the master's finding that there is no proof that Louisiana or its citizens knew of or acquiesced in any purported dominion of Mississippi over the disputed territory. The respondent has failed to meet the test laid down in *Michigan* v. *Wisconsin,* 270 U. S. 295, with respect to exercise of sovereignty and dominion over the disputed territory, and acquiescence by complainant in such alleged possession. The master's fifth finding is sustained.

A decree should be entered as recommended by the master, appointing a commission to locate the thread of the main channel of the Mississippi River as the same was immediately prior to the avulsion of 1912–13; and the line when so located is decreed to be the boundary between the states, between latitude 32° 39′ on the north and the division line between Issaquena and Warren Counties, Mississippi (as extended westward), on the south. The parties are accorded forty days within which to submit a decree in accordance with this opinion.

It is so ordered.

UNITED STATES *v.* SWIFT & COMPANY.

CERTIORARI TO THE COURT OF CLAIMS.

No. 56. Argued January 9, 1931.—Decided February 2, 1931.

1. Under §§ 252 of the Revenue Act of 1921, and 284 (b)(1) of the Revenue Act of 1926, where an overpayment of income and excess profits taxes for 1917 was made by credit of an amount overpaid for another taxable year, a claim for refund was barred if not filed within four years from the date of the allowance of the credit. P. 469.
2. Considering the practice of the Bureau of Internal Revenue, the date of allowance of such a credit was neither (1) the date on which the Commissioner referred an overassessment, which had been disclosed and certified in his office, to the Collector, in order that the latter, upon examination of the taxpayer's accounts, might abate the tax reduction so far as warranted and, upon finding an overpayment, credit it against other taxes due (if any) and note and report any balance for refund; nor (2) the date upon which the Collector, following these instructions, entered the credit on the taxpayer's acccunt; but it was (3) the date on which the Commissioner approved the schedule showing the credit, certified to him by the Collector. P. 471, *et seq.*

68 Ct. Cls. 97, affirmed.

CERTIORARI, 281 U. S. 709, to review a judgment allowing a claim for the amount of an overpayment of income and war profits taxes.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher,* and *Messrs. Claude R. Branch,* Special Assistant to the Attorney General, *Charles R. Pollard, Bradley B. Gilman,* and *Clarence M. Charest,* General Counsel Bureau of Internal Revenue, and *Ralph E. Smith* were on the brief, for the United States.

Mr. G. Carroll Todd, with whom *Messrs. Francis E. Baldwin* and *T. Hardy Todd* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This was an action by respondent for the recovery of the amount of an admitted overpayment of income and war-profits taxes for the taxable year 1917, with interest.

In its return for 1917 respondent included the value of stock dividends received. February 28, 1923, it filed a claim for refund, alleging that the dividends in question should have been allocated to other years than 1917. The claim was rejected. Subsequently this court decided that stock dividends did not constitute income, as defined by the Sixteenth Amendment (*Eisner* v. *Macomber,* 252 U. S. 189). September 3, 1927, respondent filed a second claim for refund which it designated as an amended claim, and therein for the first time asserted that the dividends did not constitute taxable income. The Commissioner of Internal Revenue determined that the latter claim was barred by the statute of limitations and rejected it.

The respondent's position is that the second claim should be construed as an amendment of the first; but, if not, then, treating the second as an original claim, it was filed within the time required by law and should have been allowed. The Court of Claims overruled respondent's first contention, but held with it upon its second, and entered judgment in its favor. Upon the petition of the United States this court granted a writ of certiorari.

If the Court of Claims was right in its disposition of respondent's second contention we need not trouble ourselves with respect to the first. It is admitted that if the later claim for refund was filed in time the respondent should recover. The sums of which a refund is sought were not paid in cash, but consisted of a credit of an amount overpaid for other taxable years. Whether the claim was filed in due time depends, therefore, upon a determination of the date when the credit was allowed

within the meaning of the statutes. Section 252 of the Revenue Act of 1921 (42 Stat. 268) contains the following provision:

"That if, upon examination of any return of income made pursuant to . . . the Revenue Act of 1917, . . . it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: . . ."

The applicable portion of Section 284 (b) (1) of the Revenue Act of 1926 (44 Stat. 66) follows:

"No such credit or refund shall be allowed or made after . . . four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; . . ."

Under the quoted statutes the respondent was required to file its claim within four years from the date of the allowance of the credit. The petitioner asserts that the credit was allowed on February 9, 1923, when the Commissioner certified the overassessment to the Collector. The respondent insists that it was when the Commissioner signed the schedule of refunds and credits as reported by the Collector on September 6, 1923. The earlier date is more than four years from the filing of the claim, and the later one is within said period.

The issue thus raised will be resolved by determining what act constituted the allowance of the credit. Proper decision requires an understanding of the procedure followed in such cases.

The record discloses that the practice of the Bureau was in the first instance to examine the taxpayer's return and if it disclosed an overassessment to prepare for the Commissioner a so-called certificate of overassessment, which when certified by the Deputy Commissioner went to the Commissioner. When the Commissioner had accumulated a number of such certificates with respect to taxpayers in a single collection district, a form called a schedule of overassessments was prepared, one line on such schedule dealing with each taxpayer's account for the taxable year in question. On this schedule was noted the overassessment of the taxpayer and blanks were left for further entries by the Collector of the district. To it was attached a subsidiary schedule, called a schedule of refunds and credits, on which the Collector should make report of his actions pursuant to the schedule of overassessments, and these two schedules, together with the individual certificates of overassessment, were forwarded to the Collector. On the schedule of overassessments were certain printed intructions as follows:

"The several amounts herein noted as reduction of tax liability are hereby approved and allowed.

"You will immediately check the items herein against the accounts of the several taxpayers and determine whether the several amounts in which the tax liability has been reduced should be abated in whole or in part and make such abatement as may be warranted by the condition of the taxpayer's account for the year involved.

"If any part of the tax is found to be an overpayment, you will examine all accounts of the taxpayer for sub-

sequent periods and apply such overpayment as a credit against the tax owing (if any) on the taxpayer's account for subsequent periods. (This applies to income, war-profits and excess-profits taxes only.)

"The balance (if any) of the overpayment shall be entered in column 12 and placed upon a schedule of refunds (Form 7777A) and an appropriate memorandum made upon the taxpayer's account.

"You will thereupon complete and certify this schedule and Schedule 7777A and return three copies of each to the Commissioner of Internal Revenue at Washington, making the appropriate entries in your accounts." *

The Commissioner, when he forwarded these papers to the Collector, had no way of knowing whether the overassessment would bring about an abatement of taxes theretofore assessed and unpaid, or would result in an overpayment by the taxpayer. This could only be ascertained by the Collector from the books and records kept by him. Moreover, after the Collector ascertained whether an overpayment resulted, he would have to determine from his books and records the further question whether such overpayment should be applied as a credit on taxes due or, in the absence of any taxes due, ought to be refunded.

When the Collector had completed his investigation and filled in the information as to abatement, overpayment, credit and refund on the schedule of assessments, and the subsidiary schedule of refunds and credits, he certified the correctness of these schedules and returned them, together with the certificates of overassessment, to the bureau in Washington. There the schedule and certificate were examined by the Deputy Commissioner, checked by him

* At the time here in question the schedule of refunds, Form 7777A, referred to in the last two paragraphs of these instructions, had been changed to a schedule of refunds and credits, Form 7805A.

to ascertain whether they were correct, and forwarded by him to the Commissioner of Internal Revenue for action. On the basis of his deputy's certificate the Commissioner would certify the schedule of refunds thus directing the disbursing clerk of the Treasury to draw checks for refunds shown on the schedule and checks for the interest, if any, on such refunds and on credits. Meantime the amounts shown on the schedule with respect to each taxpayer's account had been copied on the certificate of overassessment of that taxpayer, and when checks had been prepared for refunds and interest, if any, the certificate of overassessment, together with the checks, were sent to the Collector to be by him mailed to the taxpayer. The first official notification which the taxpayer received as to how his account had been handled with respect to abatement, credit, refund and interest was the certificate of overassessment which accompanied the check for the payment due him, if any. If there were no payment due him he received a certificate of overassessment with the amount of the credit which had been allowed him noted upon it. It is true that this certificate of overassessment stated that credit would be given, refund would be made, etc., whereas the credit had already been given and the refund check accompanied the certificate when it reached the taxpayer, but we do not think this affects the question of the date of allowance.

One of three dates may possibly be considered the date of the allowance of the credit,—that on which the Commissioner forwarded the schedule of overassessments to the Collector, that on which the Collector finished his calculations and entered the amount of the credit in the taxpayer's account, or that on which the Commissioner approved the schedule of credits and refunds. The petitioner insists upon the first and the respondent upon the last as the date of allowance of the credit; alternatively

the United States says that if the first be not the date of the allowance the intermediate one is.

In *Girard Trust Company* v. *United States,* 270 U. S. 163, this court, after adverting to the above mentioned procedure, said [p. 170]:

"We can not concur, however, in the view of the Treasury Department that the date of the allowance of the claim as intended by the statute is the date when the Commissioner first decides that there has been an overassessment and sends upon a proper form his decision to the Collector of Internal Revenue, who made the collection and keeps the account with the taxpayer. . . ."

In the same case it was also said [p. 170]:

"The Commissioner of Internal Revenue is the final judge in the administrative branch of the Government to decide that an overassessment has been made and that a refund or credit should be granted, and when he has made that decision finally, he has allowed the claim for the refund or credit of the taxes paid within the meaning of the section."

It is conceded that the quoted language applies to the present case, but petitioner points out that it was used in a case in which only the date of allowance of a refund was involved. It is urged that as respects the allowance of a credit it was *dictum;* that conceding its correctness with respect to the date of allowance of a refund, different considerations apply with respect to a credit. The petitioner argues that as was stated in the *Girard Trust Company* case the last significant act done by the Commissioner is to authorize the refund, that being in fact made by the drawing of a check by a clerk and the mailing of a check by the Collector, whereas in the case of a credit the last act of authorization is the forwarding of the schedule of overassessments to the Collector, who then does the mere ministerial act of making the necessary calculations and ascertaining and entering the proper amount of the credit

on his books and on the schedule of refunds and credits which is to be returned to the Commissioner. It insists that when the schedule of refunds and credits is returned to the Commissioner he does authorize the drawing of checks for refunds, but does nothing whatever with respect to the credits shown on the schedule, merely filing it for reference. There is evidence, however, that the subordinates of the Commissioner check the calculations shown on the schedules when they are returned to the Bureau; that the Deputy Commissioner certifies the correctness of the schedule to the Commissioner; and that the official record of the credit is the schedule approved by the Commissioner and filed in his office. Moreover, the final act so far as the taxpayer is concerned is the receipt from the Collector of the certificate showing how the overassessment has been applied.

When he executes the schedule of overassessments the Commissioner has no knowledge as to what the Collector's account with the taxpayer shows. He does not know whether the overassessment will be entirely used up in abatements, or whether, if an overpayment is shown, it will have to be apportioned partly as a credit and partly as a refund. It is true that the Commissioner's directions to the Collector are that the latter shall examine the accounts and make the proper allocations, and it is true that the Collector's action in so doing is ministerial. But after that clerical work is performed the practice requires the return to the Commissioner of a statement or schedule of the allocations, the approval of that schedule by him, and the mailing of the certificate of overassessment, executed on his behalf, to the taxpayer. There is nothing in the record to indicate that the Commissioner might not order corrections to be made in the accounts of the taxpayer prior to the mailing of this certificate. The proofs do not disclose that he has not in practice done so. As the sole discretion and authority to allow a credit rests

with the Commissioner, we think that, in the light of the procedure above outlined, his approval of the schedule of credits and refunds must be taken to be the final exercise of that discretion and the allowance of the credit. This construction of the act brings about uniformity in administration, as it makes the allowance of credits and refunds simultaneous.

It results that even though the second claim for refund filed by the respondent be treated not as an amendment of its original claim of 1923, but as a new and independent claim, it was filed within four years of the payment of the tax, since that payment must be taken to have occurred on the date of the allowance of the credit by the Commissioner's signature approving the schedule of refunds and credits. Such approval was given as respects the credit to respondent on September 6, 1923, which was within four years of the date of the filing of the second claim.

The views herein expressed make it unnecessary to decide whether the later claim may properly be considered an amendment of the original claim for refund.

The judgment of the Court of Claims is

Affirmed.

UNITED STATES *v.* BOSTON BUICK COMPANY. SAME *v.* IRON CAP COPPER COMPANY.

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

Nos. 42 and 43. Argued January 8, 9, 1931.—Decided February 2, 1931.

1. Interest on a credit allowed a taxpayer because of overpayment of income and excess profits taxes must be computed according to the statutory provision for interest in force at the time of such allowance. P. 478.
2. The allowance of credits in these cases was the Commissioner's approval of the schedule of refunds and credits which had been

forwarded to him by the Collector. *United States* v. *Swift & Co., ante,* p. 468. P. 478.
35 F. (2d) 560, affirmed.

CERTIORARI, 281 U. S. 709, to review affirmances of two recoveries by taxpayers, in the District Court (see 27 F. (2d) 395; 31 *id.* 628), in actions for interest upon overpayments of income and profits taxes. The overpayments had been applied as credits against taxes due for other years.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch,* Special Assistant to the Attorney General, *Charles R. Pollard, Bradley B. Gilman,* and *Clarence M. Charest,* General Counsel Bureau of Internal Revenue, and *Ralph E. Smith* were on the brief, for the United States.

Mr. Charles W. Mulcahy, with whom *Mr. Robert N. Miller* was on the brief, for the Boston Buick Company.

Mr. Burton E. Eames for the Iron Cap Copper Company.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

These cases involve the same question as *United States* v. *Swift & Co., ante,* p. 468; namely, what constitutes the allowance of a credit to a taxpayer who has overpaid his income or profits taxes. The issue is made on facts somewhat different from those involved in that case. It is whether interest to be paid on the amounts credited to the taxpayers shall be calculated as provided by § 1324 of the Revenue Act of 1921 (42 Stat. 316) or by § 1019 of the Revenue Act of 1924 (43 Stat. 346). Interest runs from different periods under these acts. As the allowance made by the Act of 1924 is more favorable to the taxpayers in these cases, they claimed interest on their credits

under that act. The Commissioner awarded them interest under the Act of 1921. The date of the allowance of the credits becomes important because we have held that interest on refunds and credits must be computed according to the statutory provision in force at the time of their allowance. *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160; *Blair* v. *Birkenstock*, 271 U. S. 348.

Upon audit of respondents' returns for 1918 it was disclosed that their taxes had been overassessed for that year. In March, 1924, the Commissioner approved schedules which informed the Collector of the overassessments and instructed him to check the same against the taxpayers' accounts, determine whether to abate in whole or in part, determine any overpayment, and apportion the same as between credit and refund. In July, 1924, the Collector completed his work, as to both taxpayers' accounts, and executed and forwarded to the Commissioner schedules of refunds and credits attached to the schedules of overassessments. The Commissioner placed his certificate of approval on the schedules of refunds and credits on July 31 and August 7. The Revenue Act of 1924 became effective June 2, 1924. If the credits were allowed after the effective date of that statute the respondents are entitled to interest computed in accordance with § 1019 of that act; if before, they are entitled to interest computed as provided by § 1324 of the Revenue Act of 1921. The District Court held that the provisions of the 1924 act applied, and the Circuit Court of Appeals affirmed its judgments. On petition of the United States this court issued writs of certiorari in both cases.

In view of the decision in *United States* v. *Swift & Co.*, *supra*, we hold that the Commissioner's approval of the schedule of refunds and credits constituted the allowance, and that interest is to be computed as required by the Act of 1924.

The judgments are *Affirmed.*

POTTSTOWN IRON COMPANY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 113. Argued January 9, 1931.—Decided February 2, 1931.

Interest on a credit for overpayment of an income and excess profits tax, is computed under the statutory provision for interest in force when the credit was allowed; and allowance of credit in this case took place when the Commissioner of Internal Revenue approved the schedule of refunds and credits received from the Collector. *United States* v. *Swift & Co., ante,* p. 468. P. 480.
40 F. (2d) 142, affirmed.

CERTIORARI, 281 U. S. 717, to review a judgment of the Court of Claims allowing a claim for interest on the credit of overpaid taxes.

Mr. Paul F. Myers, with whom *Mr. John R. Yates* was on the brief, for petitioner.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch,* Special Assistant to the Attorney General, *Charles R. Pollard,* and *Bradley B. Gilman* were on the brief, for the United States.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

United States v. *Swift & Company, ante,* p. 468, controls the decision of this case.

Here the Commissioner of Internal Revenue, upon audit of petitioner's income and excess-profits tax return for 1918, found an overpayment, and at the same time found an underpayment of similar taxes for the years 1916 and 1917. On January 22, 1926, he made additional assessments of the underpayments for 1916 and 1917,

and on January 29 he approved a schedule of overassessments which embraced the overpayment for the year 1918. The schedule was transmitted to the Collector of the appropriate district with the usual instructions and authority to check the overassessment against the taxpayer's account and determine whether the amounts in which the tax liability had been reduced should be abated in whole or in part, and if any part of the overassessment was found to be an overpayment to apply the same against taxes due, if any, making the appropriate entry in his accounts.

After this had occurred, petitioner inquired in writing of the Collector as to the status of its account. He replied by letter dated February 23, 1926, stating that he had applied the overassessment to close out the accounts of 1916 and 1917, thus extinguishing the taxpayer's liability as shown by his books. On February 27, 1926, he returned the schedule of overassessments to the Commissioner together with the usual subsidiary schedule of credits and refunds showing how he had credited the overassessment and that there remained a balance of 1918 taxes refundable to the taxpayer amounting to $21,152.12. On April 15, 1926, the Commissioner approved the schedule, thus authorizing the issuance of checks covering the amount to be refunded.

The question is whether interest should be allowed the petitioner under § 1019 of the Revenue Act of 1924 (43 Stat. 346) or under § 1116 of the Revenue Act of 1926 (44 Stat. 119). The latter act took effect February 26, 1926. The Court of Claims held that the act of the Commissioner in approving the schedule of refunds and credits and authorizing the issuance of checks on April 15, 1926, constituted the allowance of the claim for credit, and that interest on credits for 1916 and 1917 taxes should be calculated under the Act of 1926, which had then become effective. The petitioner argues that credit was allowed

or taken when the Collector, prior to February 26, 1926, made the entries upon his books, and that consequently interest on the credits should be calculated under the provisions of the Act of 1924. We hold, in conformity with our decision in *United States* v. *Swift & Co., supra,* that the allowance occurred April 15, 1926, when the Commissioner finally acted on the schedule of refunds and credits. The judgment is

Affirmed.

RUSSIAN VOLUNTEER FLEET *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 39. Argued December 12, 1930.—Decided February 24, 1931.

1. When the United States expropriates the property of an alien friend, the Fifth Amendment requires that it pay just compensation equivalent to the full value of the property contemporaneously with the taking. P. 489.
2. This constitutional right of the alien does not depend upon whether the government of his country renders compensation to our citizens in like cases or upon whether that government is recognized as such by our own. P. 491.
3. The Act of June 15, 1917, which provided for war-time expropriation of ships, etc., and for payment of just compensation, expressly entitling the property owner, if dissatisfied with the amount fixed by the President, to accept 75% thereof and to sue the United States in the Court of Claims under Jud. Code § 145, for such further sum as will make up just compensation, should not be construed as limited, with respect to alien suitors, by Jud. Code § 155, which provides that "Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction."

So *held* in the case of a Russian corporation, where the property was taken under the 1917 Act after the recognition by the United States of the Provisional Government of Russia, successor to the

Imperial Government of that country, and where the suit was brought after the overthrow of the Provisional Government, which has no recognized successor. P. 491.

4. Where a statute presents no difficulty if read according to its terms, a condition that would raise a grave question of its constitutionality should not be implied. P. 492.

68 Ct. Cls. 32, reversed.

CERTIORARI, 281 U. S. 711, to review a judgment of the Court of Claims rejecting a claim for want of jurisdiction.

Mr. William L. Rawls, with whom *Messrs. Charles Recht, Horace S. Whitman, William L. Marbury, Jr.,* and *Osmond K. Fraenkel* were on the brief, for petitioner.

The petitioner is a juristic person with capacity to sue. The United States dealt with it as a legal entity and as owner of the property. Just compensation to it was fixed under the order of August 31, 1917. Since that time the United States Government has had numerous dealings with the Russian Volunteer Fleet as such and has even brought suit against the corporation. See *United States* v. *Russian Volunteer Fleet,* 22 F. (2d) 187.

The Department of State still recognizes the representative of the Provisional Russian Government as the accredited representative of the State of Russia.

But the overthrow of a Government does not carry with it the extinction of private rights, *Vilas* v. *Manila,* 220 U. S. 345, nor destroy the State. The continued existence of the State of Russia has been clearly recognized in *Russian Government* v. *Lehigh Valley R. Co.,* 293 Fed. 133; *id.,* 135; writ of prohibition denied, 265 U. S. 573; *Lehigh Valley R. Co.* v. *Russia,* 21 F. (2d) 396, certiorari denied, 275 U. S. 571.

Petitioner has alleged its continued existence as a corporation under the laws of the Soviet Government, but even were the fact otherwise, as in those cases where the Soviet Government has attempted to destroy the corporate entity, the continued existence of the corporation for the

purpose of bringing suit to collect its assets would be presumed by the courts here, in the absence of recognition by our Government of the validity of the decrees of the Soviet Government. *Petrogradsky W. K. Bank* v. *National City Bank,* 253 N. Y. 23; *Russian C. & I. Bank* v. *Comptoir d'Escompte de Mulhouse,* (1925) A. C. 112, (1923) 2 K. B. 630; *Banque* v. *Goukassow,* (1925) A. C. 150, (1923) 2 K. B. 682.

Even though no payment has been made to petitioner, the Act of June 15, 1917, is broad enough to cover this case. Similar suits have been entertained. *United States* v. *Carver,* 278 U. S. 294; *Seaboard Air Line* v. *United States,* 261 U. S. 299; *Houston Coal Co.* v. *United States,* 262 U. S. 361; *United States* v. *McNeil & Sons,* 267 U. S. 302.

The Act of 1917 must be so construed as to harmonize with the Fifth Amendment. If so construed as to deny just compensation to persons whose property is taken under it, it would be unconstitutional. *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106; *Seaboard Air Line* v. *United States,* 261 U. S. 299; *Phelps* v. *United States,* 274 U. S. 341. An alien is entitled to the protection of the Fifth Amendment. *Wong Wing* v. *United States,* 163 U. S. 228, 242; *Truax* v. *Raich,* 239 U. S. 33, 39.

The case is governed by *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331.

Limitations expressing broad purposes contained in general Acts enacted many years ago, should not be read into special war legislation in such a manner as to limit its remedial character. *United States* v. *Pfitsch,* 256 U. S. 547; *Nassau Smelting Works* v. *United States,* 266 U. S. 101; *United States* v. *Skinner & Eddy Corp.,* 35 F. (2d) 889.

Section 155 of the Judicial Code, like § 3477 of the Revised Statutes discussed in the *Richmond Company Case, supra,* is a limiting Act, taking away rights thereto-

fore conferred upon aliens, and is not an enabling Act as the Court of Claims seems to have supposed. Section 155 does not limit the right to sue the United States to citizens of recognized governments. Its history makes clear that the Act did not confer special privileges on aliens, but took away from certain classes privileges which had theretofore been conferred upon them.

The decisions of this Court have condemned the practice of importing into an Act of Congress seriously affecting international relations, words which it does not contain. *The Three Friends,* 166 U. S. 1.

If petitioner's right is dependent upon § 155 of the Judicial Code, petitioner should be permitted to establish as a matter of fact that the present Russian Government allows suits to be brought against it by citizens of the United States.

A judicial determination that there was in fact a Government in Russia known as the Union of Soviet Socialist Republics, and that such government as a matter of fact carried on the ordinary functions of any civilized government, is not in the least an infringement upon the prerogatives of the Department of State. *United States* v. *Palmer,* 3 Wheat. 610; *Consul of Spain* v. *La Conception,* Fed. Cas. No. 3137; *Yrissari* v. *Clement,* 3 Bing. 432. See also, *Texas* v. *White,* 7 Wall. 700; *Thorington* v. *Smith,* 8 Wall. 1; *United States* v. *Insurance Companies,* 22 Wall. 99; *Williams* v. *Bruffy,* 96 U. S. 176; *Baldy* v. *Hunter,* 171 U. S. 388; *MacLeod* v. *United States,* 229 U. S. 416; *Wulfsohn* v. *Russian Soviet Republic,* 234 N. Y. 372; *Nankivel* v. *Omsk All Russian Government,* 237 N. Y. 150; *Sokoloff* v. *National City Bank,* 239 N. Y. 158; *Russian Reinsurance Co.* v. *Stoddard,* 240 N. Y. 149; *Joint Stock Co.* v. *National City Bank,* 240 N. Y. 368; *Petrogradsky Bank* v. *National City Bank,* 253 N. Y. 23; *Banque de France* v. *Equitable Trust Co.,* 33 F. (2d) 202; *Rossia Ins. Co.* v. *United States,* 58 Ct. Cls. 180. Practically all of the

writers who have had occasion to discuss this subject have come to the same conclusion: Hervey, Legal Effects of Recognition in International Law; Dickinson, The Unrecognized Government or State in English and American Law, 22 Mich. L. R. 29; Fraenkel, The Juristic Status of Foreign States, 25 Col. L. R. 544; Connick, The Effect of Soviet Decrees in American Courts, 34 Yale L. J. 499; Houghton, The Validity of the Acts of Unrecognized Governments, 13 Minn. L. R. 216; 35 Harv. L. R. 607, 768; 37 *id.* 606; 38 *id.* 816, 832; 39 *id.* 127; 41 *id.* 102; 35 Yale L. J. 98, 150, at 155; 30 Col. L. R. 225.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Percy M. Cox, Erwin N. Griswold, H. Brian Holland, Green H. Hackworth*, Solicitor, Department of State, and *Francis M. Anderson*, Assistant Solicitor, were on the brief, for the United States.

The Government submits the case on the opinion of the Court of Claims. Although we do not confess error, we are of the opinion that § 155 of the Judicial Code is not applicable. The Act of June 15, 1917, does not mention § 155, and we think it doubtful whether Congress intended to make the right to sue dependent upon the conditions set forth in § 155. A case involving other statutes relating to suits in the Court of Claims supports the contention that § 155 is not applicable. *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331.

Moreover, there would seem to be grave doubt as to the constitutionality of the Act of June 15, 1917, as construed by the Court of Claims.

If § 155 of the Judicial Code is applicable, we submit that the decision of the Court of Claims was correct. This Government has not recognized any régime which has been functioning as a Government in Russia since 1917. It follows that if the petitioner is a citizen of Russia, it is not a citizen "of any Government" within the meaning of

§ 155, and that the courts in this country can not find that judicial remedies against the Russian Government exist in Russia.

A further question may be suggested, and that is whether a corporation which purports to be a citizen of " the Union of Soviet Socialist Republics " has such a legal existence as to bring suit in any court. But we are of the opinion that this question is not now before this Court. The petition filed in the Court of Claims describes the petitioner as a corporation " duly organized under, and by virtue of, the Laws of Russia." As the record avers facts showing that it was in existence under the régime of the Imperial Russian Government, it can not be assumed without proof that it now has no corporate existence. A recent well-considered case held that such a corporation may bring suits in the courts in this country. *Petrogradsky M. K. Bank* v. *National City Bank*, 253 N. Y. 23. The mere statement that the petitioner is a citizen of " the Union of Soviet Socialist Republics," in its brief, which is not a part of the record, would hardly seem to be sufficient ground for dismissing the case. Whether any corporation created by this so-called Republic can sue is a question which requires more information about the subject than can be obtained either from this record or judicial notice of political acts. Similarly, the question whether the suit is being prosecuted by persons having proper authority from the corporation, alleged to be entitled to compensation, is a matter which can not be determined at the present time.

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

The petitioner brought this suit against the United States in the Court of Claims to recover just compensation for the requisitioning by the United States Shipping Board Emergency Fleet Corporation, under authority

delegated to it by the President, of contracts for the construction of two vessels. The Court of Claims dismissed the petition for the want of jurisdiction. 68 Ct. Cls. 32. This Court granted a writ of certiorari. 281 U. S. 711.

The petition, filed in October, 1924, alleged that the petitioner " is a corporation duly organized under, and by virtue of, the Laws of Russia "; that in January, 1917, the petitioner became the assignee for value of certain contracts for the construction of two vessels by the Standard Shipbuilding Corporation of New York; that in August, 1917, the United States Shipping Board Emergency Fleet Corporation, acting under the authority conferred by the Act of June 15, 1917 (c. 29, 40 Stat. 183) and by the Executive Order of the President of the United States made on July 11, 1917, requisitioned these contracts, and the vessels being constructed thereunder, for the use of the United States; that the United States thereby became liable to the petitioner for the payment of just compensation; that in August, 1919, the petitioner submitted its affidavit of claim, and vouchers in support; that in March, 1920, the United States Shipping Board Emergency Fleet Corporation fixed the just compensation of the petitioner at a total amount of $1,412,532.35; that the value of the contracts taken from the petitioner was $4,000,000, to which the petitioner was entitled after allowing all proper credits and offsets; and that " citizens of the United States are and at the time of and since the commencement of this suit have been accorded the right to prosecute claims against the Russian Government in the Court of that Government."

In May, 1927, the petitioner filed motions to issue commissions to take testimony in Germany and France; the defendant objected, and the motions were overruled. The petitioner then gave notice of the taking of testimony in Washington, D. C., whereupon the defendant moved to quash the notice upon the ground that the

Court was without jurisdiction of the subject matter of the proceeding. On the submission of that motion, the petition was dismissed. The Court of Claims held that, as the United States Government had not recognized the Union of Soviet Socialist Republics in Russia, the petitioner was not entitled to maintain its suit in view of section 155 of the Judicial Code (U. S. C., Tit. 28, § 261). That section is as follows: "Sec. 155. Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction." The court said that the reference to citizens or subjects of "any government" meant such governments as were recognized by the proper authorities of the United States.

The Government in its argument here, while submitting the case on the opinion of the Court of Claims and not confessing error, presents the view that section 155 of the Judicial Code does not apply to this suit, which was brought under the provisions of the Act of June 15, 1917. With respect to the matter of recognition, the Government appends to its brief a letter of the Secretary of State of the United States, under date of December 5, 1930, stating that "the Provisional Government of Russia, the successor of the Imperial Government of Russia, was recognized by the Government of the United States on March 22, 1917"; that, "according to the Department's information, the Provisional Government of Russia was overthrown by an armed uprising which took place in the early part of November, 1917," and that "the Government of the United States has not extended recognition to any régime established in Russia subsequent to the overthrow of the Provisional Government."

As the facts alleged in the petition were admitted by the motion to dismiss, the allegation that the petitioner is a corporation duly organized under the laws of Russia stands unchallenged on the record. There was no legislation which prevented it from acquiring and holding the property in question. The petitioner was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution. *Wong Wing* v. *United States,* 163 U. S. 228, 238; compare *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369; *Santa Clara County* v. *Southern Pacific R. Co.,* 118 U. S. 394, 396; *Truax* v. *Raich,* 239 U. S. 33, 39; *Terrace* v. *Thompson,* 263 U. S. 197, 216; *Home Insurance Co.* v. *Dick,* 281 U. S. 397, 411. Exerting by its authorized agent the power of eminent domain in taking the petitioner's property, the United States became bound to pay just compensation. *United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645, 656; *United States* v. *North American Co.,* 253 U. S. 330, 333; *Campbell* v. *United States,* 266 U. S. 368, 370, 371; *Phelps* v. *United States,* 274 U. S. 341, 343, 344; *International Paper Co.* v. *United States, ante,* p. 399. And this obligation was to pay to the petitioner the equivalent of the full value of the property contemporaneously with the taking. *Phelps* v. *United States, supra; Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123.

The Congress recognized this duty in authorizing the expropriation. The Act of June 15, 1917, under which the requisition was made, provided for the payment of just compensation. The Congress did not attempt to give to any officer or administrative tribunal the final authority to determine the amount of such compensation[1], and recovery by suit against the United States was

[1] See *United States* v. *Jones,* 109 U. S. 513, 519; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 327; *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, 695; *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 559; *United States* v. *Bab-*

made an integral part of the legislative plan of fulfilling the constitutional requirement. The Act provided as follows: "Whenever the United States shall . . . requisition any contract, . . . requisition, acquire or take over . . . any ship, . . . in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code." Section 24, paragraph 20, of the Judicial Code, U. S. C., Tit. 28, § 41, subd. (20), gives jurisdiction to the District Courts of the United States, concurrent with the Court of Claims, of claims against the United States not exceeding $10,000, founded upon the Constitution, or any law of Congress, or upon any contract, express or implied, with the Government of the United States, when the claimant would be entitled to redress against the United States in a court of law, equity, or admiralty, if the United States were suable. The case of an alien friend is not excepted. Section 145 of the Judicial Code (U. S. C., Tit. 28, § 250) gives to the Court of Claims jurisdiction of suits on similar claims against the United States without limit of amount. The authority con-

cock, 250 U. S. 328, 331; *Bragg* v. *Weaver*, 251 U. S. 57, 59; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304; *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 285, 286; *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, 182; *Dohany* v. *Rogers*, 281 U. S. 362, 369.

ferred upon the President by the Act of June 15, 1917, was exercised by him through the United States Shipping Board Emergency Fleet Corporation, and as the compensation fixed by that Corporation was not satisfactory to the petitioner, it became entitled under the express terms of the Act to bring suit against the United States to recover the amount justly payable by reason of the requisition.

The Act of June 15, 1917, makes no reference to section 155 of the Judicial Code with respect to alien suitors, and the question is whether that provision should be implied as establishing a condition precedent and the recovery thus be defeated. It is at once apparent that such an implication would lead to anomalous results. It would mean that, although the United States had actually taken possession of the property and was enjoying the advantages of its use, and the alien owner was unquestionably entitled to compensation at the time of the taking, it was the intention of the Congress that recovery should be denied, or at least be indefinitely postponed until the Congress made some other provision for the determination of the amount payable, if it appeared that citizens of the United States were not entitled to prosecute claims against the government of the alien's country in its courts, or that the United States did not recognize the régime which was functioning in that country.

We find no warrant for imputing to the Congress such an intention. "Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution." *Phelps* v. *United States, supra.* The Fifth Amendment gives to each owner of property his individual right. The constitutional right of owner A to compensation when his property is taken is irrespective of what may be done somewhere else with the property of owner B. As alien friends are embraced within

the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. The provision that private property shall not be taken for public use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments. The Act of Congress should be interpreted in the light of its manifest purpose to give effect to the constitutional guaranty.

Nor do we regard it as an admissible construction of the Act of June 15, 1917, to hold that the Congress intended that the right of an alien friend to recover just compensation should be defeated or postponed because of the lack of recognition by the Government of the United States of the régime in his country. *A fortiori,* as the right to compensation for which the Act provided sprang into existence at the time of the taking, there is no ground for saying that the statute was not to apply, if at a later date, and before compensation was actually made, there should be a revolution in the country of the owner and the ensuing régime should not be recognized. The question as presented here is not one of a claim advanced by or on behalf of a foreign government or régime, but is simply one of compensating an owner of property taken by the United States.

The Act of June 15, 1917, if read according to its terms, presents no difficulty. A condition should not be implied which, to say the least, would raise a grave question as to the constitutional validity of the Act. *Federal Trade Comm.* v. *American Tobacco Co.,* 264 U. S. 298, 307; *Missouri Pacific R. Co.* v. *Boone,* 270 U. S. 466, 471, 472; *Blodgett* v. *Holden,* 275 U. S. 142, 148; *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331, 346; *Lucas* v. *Alexander,* 279 U. S. 573, 577.

Judgment reversed.

Argument for Appellants.

FURST AND THOMAS, PARTNERS, *v.* BREWSTER ET AL.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 76. Argued January 27, 28, 1931.—Decided February 24, 1931.

A state statute denying to any foreign corporation the right to sue in the state courts unless it has filed in the State a copy of its articles and a financial statement and designated a local office and a local agent upon whom process may be served, is repugnant to the Commerce Clause if applied to an action to collect money due by a resident, whether as agent or as vendee, for goods shipped in to him, upon his order, from another State pursuant to his contract with the shipper, even though the latter acted as the agent of a foreign corporation which had not complied with the statute. P. 497.

180 Ark. 1167; 21 S. W. (2d) 863, reversed.

APPEAL from a judgment affirming a judgment against the appellants in their action for goods sold and delivered.

Mr. Frank F. Nesbit, with whom *Mr. M. Danaher* was on the brief, for appellants.

The transaction is not taken out of the field of interstate commerce by the mere designating of one party as the agent of the other. As between them, if the contract involves the interstate carriage of goods, interstate payment therefor and mercantile intercourse between citizens of different States, it is a transaction in interstate commerce, whether one is the vendee, agent, consignee or factor of the other. *Welton* v. *Missouri,* 91 U. S. 275, 280; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282; *International Text-Book Co.* v. *Pigg,* 217 U. S. 107; *Butler Bros. Shoe Co.* v. *U. S. Rubber Co.,* 156 Fed. 1, certiorari denied, 212 U. S. 577; *Caldwell* v. *North Carolina,* 187 U. S. 622; *Adair* v. *United States,* 208 U. S. 161, 177.

The right to enforce and collect in the state courts debts arising out of such transactions is a necessary incident of interstate commerce, and the imposition of un-

reasonable conditions upon the exercise of this right unduly burdens interstate commerce and is unconstitutional. *International Text-Book Co.* v. *Pigg, supra; Peterson* v. *Lynch,* 218 U. S. 664; *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197; *Buck Stove Co.* v. *Vickers,* 226 U. S. 205; *Wilson-Moline Buggy Co.* v. *Hawkins,* 223 U. S. 713; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 280, 282.

No appearance for appellees.

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

The plaintiffs, copartners, doing business in Freeport, Illinois, brought this suit in the Circuit Court of Bradley County, Arkansas, against James G. Brewster, of Warren, Arkansas, to recover for goods sold and delivered to him pursuant to a contract, the performance of which was alleged to have been guaranteed by the defendants E. A. Davis and H. M. Beaty. By the terms of the contract, the firm of Furst & Thomas agreed to sell and deliver to Brewster, on board cars at Freeport, Illinois, or at their option at their nearest branch warehouse, at their current wholesale prices, their products in reasonable quantities as ordered by him, so long as the contract was in force and his account was in a satisfactory condition. Furst & Thomas agreed to give to Brewster free advice as to the best methods of selling to consumers the goods purchased by him under the contract. Brewster agreed to pay Furst & Thomas the regular wholesale prices, with specified discounts, the payments to be made weekly according to his cash sales and collections. On the termination of the contract, Brewster was to have the privilege of returning to Furst & Thomas his stock of unsold goods. The defendants pleaded that the goods delivered by the

plaintiffs to Brewster were manufactured by a corporation, the Furst-McNess Company, organized under the laws of Illinois, with its principal place of business in Freeport, Illinois; that in making the contract, and the deliveries of goods thereunder, Furst & Thomas acted as the agents of the Furst-McNess Company, and that the Furst-McNess Company had failed to comply with the statute of Arkansas, pertaining to foreign corporations, by filing a copy of its charter and a statement of its assets and liabilities, by designating its general offices in the State of Arkansas, and by designating an agent for the service of process in that State. It was alleged that, in consequence, this suit could not be maintained, as the statutes of Arkansas expressly forbade it.[1]

[1] The statutory provisions thus invoked are found in §§ 1826 and 1832 of Crawford & Moses Digest of the Statutes of Arkansas (Acts 1907, p. 744) which provide as follows: "1826. Every company or corporation incorporated under the laws of any other State, Territory, or country, including foreign railroad and foreign fire and life insurance companies, now or hereafter doing business in this State, shall file in the office of the Secretary of State of this State a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and certified by the proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this State, and shall also designate its general office or place of business in this State, and shall name an agent upon whom process may be served.

"1832. Any foreign corporation which shall fail to comply with the provisions of this act, and shall do any business in this State, shall be subject to a fine of not less than $1,000.00, to be recovered before any court of competent jurisdiction, and all such fines so recovered shall be paid into the general revenue fund of the county in which the cause of action shall accrue, and it is hereby made the duty of the prosecuting attorneys to institute said suits in the name of the State, for the use and benefit of the County in which the suit is brought, and such prosecuting attorney shall receive as his compensation one-fourth of the amount recovered; and as an additional penalty any foreign corporation which shall fail or refuse to

At the trial the terms of the contract, as above stated, and the transactions under it, were shown. It appeared that Furst & Thomas did business at Freeport, Illinois; that they received at that place orders from the defendant Brewster; and that the goods so ordered were shipped to Brewster at Warren, Arkansas, from the branch warehouse of Furst & Thomas at Memphis, Tennessee. The goods thus shipped had been obtained by Furst & Thomas in Illinois from the Furst-McNess Company, an Illinois corporation doing business at Freeport, Illinois. It was admitted that this corporation had not been authorized to do business under the laws of Arkansas. Evidence was also introduced for the purpose of showing that Furst & Thomas were agents of the Furst-McNess Company and to support the contention that the transactions between Furst & Thomas and the defendant Brewster under the contract in suit were those of principal and agent.

The evidence was submitted to the jury upon the question of agency. The court refused to give the instruction, which the plaintiffs requested, that the statutes of Arkansas (*supra*) had no application, for the reason that, if applied, they would contravene Article 1, section 8, clause 3, of the Constitution of the United States giving to the Congress power to regulate commerce among the States. The jury found in favor of the defendants. A motion to set aside the verdict upon the ground, among others, of error in refusing the request above-mentioned, was denied. The Supreme Court of Arkansas affirmed the judgment, following its earlier decision in a similar case (*Furst & Thomas* v. *Hartzell*, 172 Ark. 1118), where it

file its articles of incorporation or certificate as aforesaid can not make any contract in this State which can be enforced by it either in law or in equity, and the complying with the provisions of this act after the date of any such contract, or after any suit is instituted thereon, shall in no way validate said contract."

was held that the determinative question was whether the relationship between the parties was that of vendor and vendee or principal and agent; that the contract in suit was ambiguous and that it was proper to submit the question of the effect of the contract to a jury for its determination. *Furst & Thomas* v. *Brewster,* 180 Ark. 1167; 21 S. W. (2d) 863. The plaintiffs bring their appeal to this Court, contending that the statutory provisions in question, as they have been applied by the state court, are repugnant to the commerce clause of the Federal Constitution.

The question is not as to sales made by Brewster in Arkansas, but as to the transactions between Brewster and Furst & Thomas. These transactions were clearly in interstate commerce, whether or not Furst & Thomas were agents of the Furst-McNess Company, and whether or not Brewster was an agent of Furst & Thomas. In pursuance of orders sent by Brewster in Arkansas to Furst & Thomas in Illinois, goods were shipped to Arkansas from the branch warehouse of Furst & Thomas in Tennessee. The ordering and shipment of the goods constituted interstate commerce, and the obligation to pay and the right to recover the amount due, according to the contract pursuant to which the goods were sent, arose in the course of that commerce. In *International Text Book Co.* v. *Pigg,* 217 U. S. 91, 107, this Court quoted with approval the language of the Circuit Court of Appeals for the Eighth Circuit, speaking by Judge Sanborn, in *Butler Bros. Shoe Co.* v. *United States Rubber Co.,* 156 Fed. 1, 17,[2] a case of consignments to a factor, that "all interstate commerce is not sales of goods. Importation into one State from another is the indispensable element, the test, of interstate commerce; and every negotiation,

[2] Certiorari was denied by this Court. 212 U. S. 577.

contract, trade, and dealing between citizens of different States, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce." Such commerce comprehends all the component parts of commercial intercourse between different States, and, according to established principle, any state statute which obstructs or lays a direct burden on the exercise of the privilege of engaging in interstate commerce is void under the commerce clause. *Crutcher* v. *Kentucky,* 141 U. S. 47, 57; *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, 27; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 290, 291. Accordingly, when a corporation goes into a State other than that of its origin to collect, according to the usual or prevailing methods, the amount which has become due in transactions in interstate commerce, the State cannot, consistently with the limitation arising from the commerce clause, obstruct the attainment of that purpose. *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, 204.

In the case last cited, it was recognized that a foreign corporation seeking to enforce such a right in the courts of a State may be required to conform to the prevailing modes of proceeding in those courts and to submit to the usual rules respecting costs, the giving of security therefor, and the like. But the Court, examining the conditions imposed by the state statute, which were similar to those of the provisions here in question, found that they had " no natural or reasonable relation to the right to sue which they are intended to restrict "; that the statutory requirements relating to the appointment of a resident agent upon whom process might be served was particularly burdensome because it required the foreign corporation to subject itself to the jurisdiction of the courts of the State in general, as a prerequisite to suing in any of them even in a single instance. The Court said that in that way corporations engaged in interstate commerce could " be

subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce." See, also, *International Text Book Co.* v. *Pigg, supra,* at pp. 112, 114; *Buck Stove Co.* v. *Vickers,* 226 U. S. 205, 215, 216; *Dahnke-Walker Milling Co.* v. *Bondurant, supra.*

We are of the opinion that the provisions of the statutes of Arkansas, as applied in this case, are in conflict with the commerce clause.

Judgment reversed.

BAIN PEANUT COMPANY OF TEXAS ET AL. *v.* PINSON ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE ELEVENTH JUDICIAL DISTRICT, STATE OF TEXAS.

No. 49. Argued January 12, 1931.—Decided February 24, 1931.

1. A judgment of an intermediate state court upholding the constitutionality of a state statute over objections based on the Federal Constitution, and as to which the Supreme Court of the State dismissed an application for a writ of error "for want of jurisdiction," *held* reviewable here, it appearing that, under the local law, the effect (though not the form) of the action of the Supreme Court was to affirm the judgment of the intermediate court on the constitutional question. P. 500.
2. A state law allowing suits to be brought against private corporations in any county in which the cause of action arose, but against individuals, in like cases, only in the counties where they reside, *held* not repugnant to the equal protection clause of the Fourteenth Amendment. P. 501.

19 S. W. (2d) 203, affirmed.

APPEAL from a judgment of the Court of Civil Appeals, of Texas, affirming recovery by Pinson and Guyger from the Peanut Company in an action on a contract. For earlier phases of the litigation see 273 S. W. 655; 287 *id.* 87; 292 *id.* 204; and 294 *id.* 536. After the argument here, the appeal was ordered dismissed for want of juris-

diction. See *post,* p. 811. It now appearing from an explanatory statement by the Supreme Court of Texas that its jurisdiction over the constitutional question was in fact exercised, the dismissal is set aside, but the judgment is affirmed upon the merits.

Mr. B. G. Mansell, with whom *Mr. B. L. Agerton* was on the brief, for appellants.

Messrs. Gib Callaway and *Mark Callaway* submitted for appellees.

Mr. Justice Holmes delivered the opinion of the Court.

The Bain Peanut Company, a corporation of Texas, was sued in Comanche County of that State, being the county in which the cause of action arose. Its principal office was in Tarrant County, Texas. In due form it raised the question whether the statute of Texas (subdivision 24, Article 1830, R. S. 1911, now subdivision 23, Article 1995, R. S. 1925) that allowed suits against private corporations to be brought in any county in which the cause of action arose, was valid under the Fourteenth Amendment of the Constitution when unincorporated individuals are assumed not to be "subject to suit outside their domiciliary counties in a similar situation." We understand the Supreme Court of the State to have upheld the constitutionality of the statute, although at first we were misled by the form of the order dismissing the application for a writ of error "for want of jurisdiction." A certificate from the Court executed since the question of our jurisdiction was before us satisfies us that the form was adopted in compliance with the Court's interpretation of a statute, and that while the Court was of opinion that the judgment sought to be brought up was correct in upholding the statute, yet, since it also regarded the

opinion as incorrect in its declaration of the law, its duty was to adopt the above quoted form. The judgment below stood affirmed in fact against the fully stated objection of the appellant, and justice requires that the objection should be dealt with, although at first it seemed as if the Supreme Court was acting upon local grounds of procedure with which we have nothing to do, except when used as a cloak, which was not the case here.

Coming then to the merits, we are of opinion that the judgment was right. The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints. In deciding whether a corporation is denied the equal protection of the laws when its creator establishes a more extensive venue for actions against it than is fixed for private citizens, we have to consider, not a geometrical equation between a corporation and a man, but whether the difference does injustice to the class generally, even though it bear hard in some particular case, which is not alleged or proved here. *Louisville & Nashville R. Co.* v. *Barber Asphalt Paving Co.,* 197 U. S. 430, 434. *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144. This it is for the corporation to make out. The range of the State's discretion is large. *Armour & Co.* v. *North Dakota,* 240 U. S. 510, 516, 517. The question seems to be answered by *Cincinnati Street Ry. Co.* v. *Snell,* 193 U. S. 30, 36, 37, which lays down that, if the protection of fundamental rights by equal laws equally administered is enjoyed, the Constitution does not forbid allowing one person to seek a forum from which another in the same class is excluded. But without asserting a universal proposition, it is obvious that there is likely to be such a difference between the business done by a corporation and that done by a private person that the State well may take it into account when it permits a corporation to be formed. That

the provision in question is reasonable is made more probable by the fact that it had been adopted and sustained not only in Texas but in other States. *Grayburg Oil Co.* v. *Powell,* 118 Texas 354; *Lewis* v. *South Pacific Coast R. Co.,* 66 Cal. 209; *Cook* v. *W. S. Ray Mfg. Co.,* 159 Cal. 694; *Central Georgia Power Co.* v. *Stubbs,* 141 Ga. 172; *Begley* v. *Mississippi Valley Trust Co.,* (Mo.) 252 S. W. 84; *Morrimac Veneer Co.* v. *McCalip,* 129 Miss. 671, 683. We cannot say that it is not.

Order dismissing appeal vacated and judgment affirmed.

ALABAMA *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 82. Argued January 29, 1931.—Decided February 24, 1931.

A suit against the United States by a State to recover the amount of a privilege tax, with interest and penalty, the tax being based on a sale by the United States of surplus power generated at its hydro-electric plant in the State, *held* not within the jurisdiction conferred on the Court of Claims by Jud. Code, § 145, over claims founded upon the Constitution, upon any contract, express or implied, with the Government, or for damages arising in cases not sounding in tort. P. 506.

69 Ct. Cls. 340; 38 F. (2d) 897, reversed.

CERTIORARI, 281 U. S. 718, to review a judgment dismissing on the merits a claim which, the opinion holds, should have been dismissed for want of jurisdiction.

Messrs. Thomas E. Knight, Jr., Attorney General of Alabama, and *Oscar W. Underwood, Jr.,* with whom *Messrs. A. A. Evans* and *Charlie C. McCall,* Assistant Attorneys General, and *H. C. Kilpatrick* were on the brief, for petitioner.

In the exercise of granted powers by the Federal Government and of reserved powers by a State, the two sovereignties are upon an equality. *Collector* v. *Day,* 11

Wall. 113, 126, 127; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 521; *Texas* v. *White,* 7 Wall. 700, 725.

Whenever the Federal Government engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the State within which the business is carried on. *South Carolina* v. *United States,* 199 U. S. 437; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 157; *Bank of North Dakota* v. *Olson,* 33 F. (2d) 848.

Particularly is this true where the levying of the tax will not hamper or cripple the Federal Government in the direct and immediate performance of an essential governmental function. *Osborn* v. *U. S. Bank,* 9 Wheat. 740, 860, 866–7, 868; *National Bank* v. *Commonwealth,* 9 Wall. 353, 362; *Metcalf & Eddy* v. *Mitchell, supra,* 522, 523–4.

The State is entitled to recover upon the basis of an implied contract. There is a strong analogy in the cases requiring the United States, under an implied contract, to pay for private property which it takes for public use. *United States* v. *Lynah,* 188 U. S. 445; *United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645, 656.

If it should be found that the State has the right to tax the United States for manufacturing and selling hydro-electric power, a cause of action, springing from the constitutional duty of the United States to pay the tax to the State, and based upon implied contract and within the terms of the Judicial Code, could logically be found, even though the contractual element were as slight as it was in the cases cited.

Under *United States* v. *Louisiana,* 123 U. S. 32, the Court of Claims is open to the States. It seems proper that they should be allowed to come in with the causes of action which are peculiar to them, as well as with those which are common with citizens, provided their peculiar causes are of the general types found within § 145 of the Judicial Code.

In essence the present claim is of the same character as claims by private citizens which have been sustained by this Court. *United States* v. *Palmer,* 128 U. S. 262, 269; *United States* v. *Berdan Firearms Co.,* 156 U. S. 552, 567, 568.

We are not asserting a contract implied in law, but a contract implied in fact, namely, implied from the facts that the United States manufactured and sold the power knowing the meaning of the Constitution, and therefore expecting to pay the tax, and that the State permitted the manufacture and sale expecting to collect the tax.

Two additional bases for recovery seem to be provided: (1) "Claims for damages, liquidated or unliquidated, in cases not sounding in tort." *Dooley* v. *United States,* 182 U. S. 222, 224; *United States* v. *Cornell Steamboat Co.,* 202 U. S. 184; *United States* v. *Morgan,* 99 Fed. 570; *Chappell* v. *United States,* 34 Fed. 673. The word "damages" is one of the broadest possible definition. (2) The claim is one "founded upon the Constitution of the United States." This provision covers claims under the Tenth Amendment to the Constitution as well as those under the Fifth Amendment. By the Tenth Amendment the inherent sovereign power of the State to collect taxes is reserved and is acknowledged, as clearly as if that power were specifically mentioned in the Amendment; so the power of the State to collect taxes is as much a part of the Constitution as is the Fifth Amendment. Cf. Justice Brown's concurring opinion in *United States* v. *Lynah,* 188 U. S. 445, 474–477; *Phelps* v. *United States,* 274 U. S. 341.

Solicitor General Thacher, with whom *Assistant Attorney General Rugg* and *Messrs. Bradley B. Gilman* and *Erwin N. Griswold* were on the brief, for the United States.

A tax is not the result of agreement. As stated in *Russell* v. *United States,* 182 U. S. 516, 530, to give the

Court of Claims jurisdiction, the demand sued on must be founded on a convention between the parties—" a coming together of minds."

A tax obligation is sometimes loosely spoken of as a debt, but it is not a debt based upon any contractual relationship. Cooley, Taxation (4th ed., 1924), § 22; *Camden* v. *Allen,* 26 N. J. L. 398; *Perry* v. *Washburn,* 20 Cal. 318; *Carondelet* v. *Picot,* 38 Mo. 125; *Nebraska City* v. *Gas Company,* 9 Neb. 339; *Pierce* v. *Boston,* 3 Metc. (Mass.) 520; *Peter* v. *Parkinson,* 83 Oh. St. 36; *Lane County* v. *Oregon,* 7 Wall. 71; *Meriwether* v. *Garrett,* 102 U. S. 472, 513; *Liberty Mut. Ins. Co.* v. *Johnson Shipyards Corp.,* 6 F. (2d) 752; *St. Joseph Land Co.* v. *MacLean,* 32 F. (2d) 984; *United States* v. *Minnesota Investment Co.,* 271 U. S. 212, 217.

An implied contract, in order to give the Court of Claims or a District Court under the Tucker Act jurisdiction to give judgment against the Government, must be one implied in fact and not one based merely on equitable considerations and implied in law. To the same effect are: *Merritt* v. *United States,* 267 U. S. 338, 340; *Sutton* v. *United States,* 256 U. S. 575, 581; *Tempel* v. *United States,* 248 U. S. 121.

It is true that an action of debt or assumpsit may, under many circumstances, be brought for the recovery of a tax from a private party. See *United States* v. *Chamberlin,* 219 U. S. 250. But the fact that a private individual would be liable, under the same circumstances, in an action of assumpsit, does not bring the case within the jurisdiction of the Court of Claims. *Goodyear Tire & Rubber Co.* v. *United States,* 276 U. S. 287, 293.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit brought in the Court of Claims by the State of Alabama to recover from the United States a

tax imposed by the law of the State upon the privilege of manufacturing and selling hydro-electric power, together with interest at eight per cent. and a penalty of fifteen per cent. for failure to pay the tax when due. The claim is based upon a sale by the United States of the surplus power generated by it at its dam at Muscle Shoals, Alabama, under the Act of June 3, 1916, c. 134, § 124; 39 Stat. 166, 215. The Government demurred on the ground that the petition does not set forth a cause of action within the jurisdiction of the Court. The demurrer was sustained and the petition dismissed upon its merits. A writ of certiorari was granted by this Court. 281 U. S. 718.

We are of opinion that the petition should be dismissed, not upon the merits, which would import jurisdiction to deal with them, but for want of jurisdiction under the Act establishing the powers of the Court of Claims. Judicial Code, § 145, U. S. Code, Title 28, § 250. That jurisdiction extends to "all claims (except pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable; *Provided*" etc.

The contract to be recovered upon under § 145 Jud. Code must be an actual one, and, if implied, must be implied in fact, not merely implied by fiction, or as it is said, by law. *Baltimore & Ohio R. Co.* v. *United States,* 261 U. S. 592, 597. There is no ground for asserting an actual contract here. The State suggests that cases of property

taken by eminent domain furnish an analogy. But in those cases where there is a recovery the United States admits the title that it takes and in view of the Constitution reasonably is understood to promise the compensation that in such circumstances it is bound to pay. *Phelps* v. *United States,* 274 U. S. 341, 343. *International Paper Co.* v. *United States, ante,* p. 399. But here the United States has not admitted and does not admit the right of the State to tax it for its sales, and therefore does not by selling import a promise to pay for what, so far as appears, it does under a claim of right. Levying a tax does not create a contract. It is a unilateral act of superior power, not depending for its effect upon concurrence of the party taxed.

We do not see how the claim of the State can be said to be founded upon the Constitution. If the claim is valid, which we are far from implying, it is under the State's original powers as such, and the only bearing of the Constitution is that it did not take the power away. Neither do we regard the claim as one for damages in a case not sounding in tort within the meaning of the Act. There are few cases of this sort that cannot be brought under the head of a contract implied in law; and, it being established that such contracts are not within the jurisdiction of the Court of Claims, we think that this phrase cannot be extended to a controversy concerning the boundary between the two sovereign powers. The claim is not technically one for damages as was the claim in *assumpsit.* It is a claim for a tax that the United States never has promised to pay and for a penalty. It does not fall within the Act as it has been construed for many years.

Judgment reversed.

Petition to be dismissed for want of jurisdiction.

WAITE *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 103. Submitted January 30, 1931.—Decided February 24, 1931.

Under the Act of July 1, 1918, which gives a remedy against the United States for the unlicensed use of a patented invention, and provides that compensation to the owners in such cases shall be reasonable and "entire," interest on the amount of the damages should be allowed. P. 509.

69 Ct. Cls. 153, reversed.

CERTIORARI, *post*, p. 817, to review a judgment of the Court of Claims disallowing interest in a suit against the United States for unlicensed use of a patent.

Messrs. O. Ellery Edwards and *Hyman M. Goldstein* were on the brief for petitioner.

Solicitor General Thacher, Assistant Attorney General Rugg, and *Mr. H. Brian Holland* were on the brief for the United States. They conceded that interest should have been allowed.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit under the Act of July 1, 1918, c. 114, 40 Stat. 704, 705; U. S. Code, Title 35, § 68, to recover for the unlicensed use of a patented invention. The liability of the United States is established by the findings of the Court of Claims and is not disputed. Neither is there any dispute that the profits that the plaintiff would have made are a proper measure of the damages suffered. The Court of Claims, however, ruled that interest should not be allowed upon the amount so fixed, and a writ of certiorari was granted by this Court upon that question.

The Government, without formally confessing error, states its belief that interest should have been allowed.

The statute grants 'recovery of his reasonable and entire compensation for such use.' We are of opinion that interest should be allowed in order to make the compensation 'entire.' In addition to the purpose of the word, adverted to in *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331, 343, we cannot doubt that it was intended to accomplish complete justice as between the plaintiff and the United States. See *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299. *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106. *Liggett & Myers Tobacco Co.* v. *United States,* 274 U. S. 215. *Phelps* v. *United States,* 274 U. S. 341.

Judgment reversed.

ALWARD *v.* JOHNSON, TREASURER OF CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 41. Argued January 8, 1931.—Decided February 24, 1931.

1. A State, upon reasonable grounds, may classify property and lay an appropriate tax upon each class. P. 513.
2. A tax on automotive vehicles that are used in operating a stage line and make constant and unusual use of the highways, may be measured by gross receipts and be assessed at a higher rate than taxes on property not so employed. So *held* where the tax was exclusive of all other taxation of the property, and its proceeds were assigned to the maintenance of roads. P. 513.
3. The taxpayer was engaged in operating an automotive stage line between points in California under a mail carrier's contract. The gross income, for the year in question, was over four times the market value of the property employed, and considerably more than half of it came from the mail contract, the rest from freight and passengers. The line could not have been run profitably without the mail contract. Under § 15, Art. XIII, California Constitution, the State laid a tax on the property, in lieu of other taxes, equal to 4½% of the gross receipts. The rate on other property assessed *ad valorem* in the vicinity, did not exceed 3%. *Held:*

(1) That the tax is not repugnant to the Fourteenth Amendment. P. 513.

(2) It is not a direct interference with or burden upon the federal right to transport the mails. P. 514.

208 Cal. 359, affirmed.

CERTIORARI, 281 U. S. 709, to review a judgment affirming dismissal of the complaint on demurrer, in an action to recover part of a tax.

Mr. Simeon E. Sheffley, with whom *Mr. Burke Corbet* was on the brief, for petitioner.

Mr. U. S. Webb, Attorney General of California, with whom *Mr. H. H. Linney,* Deputy Attorney General, was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

A tax reckoned, as required by the State Constitution, upon gross revenues derived from an automotive stage line operated by him during the year 1926 between fixed points in California, was assessed against petitioner Alward. He paid one-half, $1,489.39—the first installment—and then brought suit in the Superior Court of Sacramento County to recover $1,057.16, the amount imposed because of receipts under his contract for carrying the mails. He asked judgment for that amount, together with costs, further relief, etc.

Section 15, Article XIII, of the California Constitution, adopted November 2, 1926, provides—

"Taxes levied, assessed and collected as hereinafter provided upon companies owning, operating or managing any automobile, truck or auto truck, jitney bus, stage or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route, . . . shall be entirely

and exclusively for highway purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies,' as used in this section, shall include persons, partnerships, joint stock associations, companies and corporations.

"(a) All such companies engaged in the business of transportation of persons, or persons and baggage, or persons and express, or persons, baggage and express where the same is transported on the same automobile, jitney bus, stage or auto stage transporting said persons shall annually pay to the state a tax upon their franchises, cars, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to four and one-quarter per cent of the gross receipts from operations of such companies, and each thereof, within this state.

"All such companies operating trucks or auto trucks engaged in the business of transporting property shall annually pay to the state a tax upon their franchises, trucks or auto trucks, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to five per cent of the gross receipts from operations of such companies, and each thereof, within this state. . . .

"Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies; . . ."

The court below declared that the tax prescribed by the foregoing section of the Constitution is identical in kind with the one inaugurated earlier by Section 14, which applies to railroad, telegraph, telephone, etc., companies. Under both sections taxes are laid according to gross receipts.

The complaint alleges in substance—

The plaintiff is engaged in the business of operating an automotive stage line between Redding and Big Bear,

Calif., by virtue of a contract entered into with the Post Office Department. The mails are carried by motor vehicles.

The gross income derived from operating the line during 1926 follows: From carriage of passengers, $8,803.31; from carriage of freight, $9,806.43; from carriage of United States mail, $42,286.73.

Based upon these receipts, the following tax was assessed for the year 1927: On gross income from passengers, $374.14; from freight, $490.32; from United States mail, $2,114.32. He paid one-half of the total sum so assessed—the first installment.

In earning this revenue, plaintiff employed certain designated automotive property, and no other, the actual market value of which did not exceed $15,000. This was devoted chiefly to carrying the mails and had no value in excess of its actual market value; plaintiff's ability to earn more with it than other persons could with the same amount and character of property arose solely from the fact that he had a contract with the United States Government for carrying the mails. Without this the stage line could not be operated profitably.

The assessment against the plaintiff is confiscatory, arbitrary, excessive and does not take into consideration the actual value of the property involved and was made without consideration of any element of value except the gross earnings. The tax rate on property assessed on an ad valorem basis in the counties where plaintiff operates did not exceed three per centum. Replacement value of all property used by him does not exceed $15,000. In carrying the mails he acted under a contract with the Post Office Department and was an agency of the United States not subject to local taxation.

The assessment, in so far as based upon the revenue derived from carrying the mails, was unlawful and the

portion of the first installment reckoned thereon and paid by plaintiff was unlawfully exacted.

The trial court sustained a demurrer to the complaint; its judgment was affirmed by the Supreme Court. The latter held that the tax assessed against the petitioner is essentially one on property and is neither confiscatory, nor so arbitrary as to impair any right under the Federal Constitution. Also that the petitioner did not, through his contract to carry the mails, become an agency of the Federal Government immune from taxation computed according to gross receipts.

The record discloses no question relative to taxation of property outside the State or interference with interstate commerce.

The Supreme Court of the State has declared the tax to be one upon property. The history, purpose and effect of the constitutional provision under consideration have been pointed out in the opinions of that court. *San Francisco* v. *Pacific T. & T. Co.,* 166 Cal. 244; *Pacific Gas & Elec. Co.* v. *Roberts,* 168 Cal. 420; *Lake Tahoe Ry. Co.* v. *Roberts,* 168 Cal. 551. Also by this court in *Pullman Co.* v. *Richardson,* 261 U. S. 330, and *Hopkins* v. *Southern California Tel. Co.,* 275 U. S. 393.

The California Constitution divides property within the State for taxation purposes into several classes and provides for different burdens upon them. There can be no doubt of the general power of a State, where there is reasonable ground therefor, to classify property wholly within her limits and to lay an appropriate tax upon each class. *Bekins Van Lines* v. *Riley,* 280 U. S. 80, 82. It is not possible for us to say that the circumstances of the present cause disclose any arbitrary or unreasonable exertion of such power by the State. The distinction between property employed in conducting a business which re-

quires constant and unusual use of the highways, and property not so employed, is plain enough. Here the tax laid was exclusive of all other taxation, and the funds arising therefrom were assigned to the maintenance of roads, essential to petitioner's operations.

Certainly, petitioner is in no position to complain of an arbitrary exactment. The prescribed method of assessment was permissible, and the mere fact that he was required to pay a higher rate upon property devoted to his peculiar business than was demanded of property not so employed is unimportant.

Nor do we think petitioner's property was entitled to exemption from state taxation because used in connection with the transportation of the mails. There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely. *Railroad Co.* v. *Peniston,* 18 Wall. 5, 30; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514. The facts in *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, and *New Jersey Bell Tel. Co.* v. *State Board,* 280 U. S. 338, were held to establish direct interference with or burden upon the exercise of a Federal right. The principles there applied are not controlling here.

The judgment of the court below must be

Affirmed.

DENMAN, ADMINISTRATOR OF THE ESTATE OF CHARLES H. NAUTS, COLLECTOR OF INTERNAL REVENUE, *v.* SLAYTON.

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

No. 60. Argued January 20, 1931.—Decided February 24, 1931.

By Revenue Act of 1921, Title II, § 213 (b) (4), in computing gross income, interest on obligations of a State or any political subdivision thereof is excluded, and by § 214 (a) (2) all interest paid

or accrued on indebtedness owed by the taxpayer is deductible from gross income, except interest on indebtedness incurred or continued to purchase or carry obligations (other than certain specified obligations of the United States) the interest upon which is wholly exempt from taxation under the Title. *Held* that the purpose of the exception was to prevent the escape from taxation of income properly subject thereto by the purchase of exempt securities with borrowed money, and that it is not unconstitutional either (a) as discriminating against owners of non-taxable securities and nullifying their immunity from taxation; or (b) as discriminating against dealers in municipal bonds who, in the course of their business, pay interest on money borrowed to buy or carry such securities but can not deduct it in their tax returns, although those engaged in other kinds of business are allowed to deduct interest as an operating expense; or (c) as arbitrarily discriminating in favor of those who are able to purchase and carry securities without borrowing. *National Life Ins. Co.* v. *United States,* 277 U. S. 508, distinguished. P. 519.

36 F. (2d) 145, reversed.

CERTIORARI, 281 U. S. 712, to review a judgment which affirmed a recovery from the Collector in a suit in the District Court for money collected as an additional income tax.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch, J. Louis Monarch* and *Morton Poe Fisher,* Special Assistants to the Attorney General, *Clarence M. Charest,* General Counsel, Bureau of Internal Revenue, and *T. H. Lewis Jr.,* Special Attorney, were on the brief, for petitioner.

The statute applies to a dealer in municipal bonds as well as to a private investor.

A deduction for interest paid can not be taken as a business expense under § 214 (a) (1) of the Revenue Act of 1921. In the Revenue Acts the two classes of deduction have always been distinguished and have been separately provided for. The very provision as to the exception here

involved shows an intent to allow them as distinct items of deduction.

The statute does not operate to impose a direct tax on income from municipal bonds or to impose an appreciable burden upon the borrowing power of the State. The case differs from *National Life Ins. Co.* v. *United States,* 277 U. S. 508, in that, there, the exclusion from income of tax-free interest was exactly offset by a corresponding diminution of another item of deduction, while here there is no exact or necessary relation between the exclusion of tax-free interest from income and the denial of a deduction of interest paid to buy or carry tax-free bonds. The limitation does not affect one who receives tax-free interest differently from one who does not.

The limitation is not a burden upon the borrowing power of the States, for it has no relation to the exercise of that power, and has not in fact affected it.

The classification is just and reasonable. Taxpayers have no inherent right to deductions. Congress may classify incomes for purposes of taxation and may limit deductions of interest. Other similar classifications have been made.

If any portion of the interest paid was chargeable to purposes other than buying and carrying tax-free bonds, the amount of it does not appear. In any event, taxing statutes can not be applied with mathematical exactness. That the statute may work an occasional hardship does not condemn it.

Every presumption is in favor of the constitutionality of the Act.

Mr. Thomas O. Marlar, with whom *Mr. E. J. Marshall* was on the brief, for respondent.

This case is controlled by *National Life Ins. Co.* v. *United States,* 277 U. S. 508.

The actual figures show that it was a distinct disadvantage under the proposed operation of § 214 (a) (2) for the respondent to carry non-taxable securities.

By the operation of that section, the respondent has not only been denied his constitutional rights respecting his non-taxable securities, but has been subjected to greater tax burdens by reason of such ownership.

The principles announced in *National Life Ins. Co.* v. *United States, supra,* were affirmed and applied in *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U. S. 313.

Municipalities can only market their bonds through dealers. The Court will take notice of the general practice. If a special burden or disadvantage is to be imposed on borrowing to buy and carry municipal bonds, the statute clearly and unconstitutionally taxes and burdens municipalities. The effect of the statute is not only to discriminate against and burden municipal bonds in the hands of dealers like respondent, but to burden the municipalities themselves and put them to a disadvantage in marketing their obligations.

Mr. Justice McReynolds delivered the opinion of the Court.

During the year 1922, while respondent Slayton engaged in the business of buying, carrying and selling tax-exempt municipal bonds, he collected $65,720.06 as interest on securities of that character which he owned. He paid out $78,153.84 for interest on money borrowed by himself in due course for the purpose of purchasing and carrying exempt securities. In his return showing income received during that year he excluded the interest so collected; and he claimed deduction for the interest paid out on the borrowed money. The Commissioner disallowed the deduction and made a corresponding addi-

tional assessment. Respondent paid the sum demanded thereunder and, after proper preliminary action, sued to recover it.

Determination of the question involved must turn upon the validity, construction and effect of Sections 213 and 214, Revenue Act of 1921, 42 Stat. 227, 237. 238, 239. Their pertinent provisions follow.

"Sec. 213. That for the purposes of this title . . . the term 'gross income'— . . .

"(b) Does not include the following items, which shall be exempt from taxation under this title: . . . .

"(4) Interest upon (a) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; . . . .

"Sec. 214 (a) That in computing net income there shall be allowed as deductions: . . . .

"(2) All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title; . . ."

By original petition in the District Court, Northern District of Ohio, Slayton asserted that the exception found in paragraph (2), § 214 (a), conflicts with the Federal Constitution in that by necessary operation it causes discrimination against the owners of non-taxable securities and nullifies their immunity from taxation. Also that the act is discriminatory and unconstitutional in that necessary expenses incident to all other kinds of business, including interest paid for purchasing and carrying merchandise and inventories, are allowed as part of the operating cost, whereas deduction of interest paid by plaintiff upon funds borrowed to carry non-taxable securities (an ordinary operating expense) is prohibited. Also

that the act is arbitrary and unconstitutional because it discriminates against plaintiff, whose resources do not permit him to purchase tax-free securities for cash, and in favor of those whose resources permit them to purchase and carry such securities without borrowing.

The Collector unsuccessfully demurred to the petition upon the ground that it states no cause of action. Judgment went for the plaintiff and was affirmed by the Circuit Court of Appeals. Both courts were of opinion that, under the doctrine announced in *National Life Ins. Co.* v. *United States,* 277 U. S. 508, enforcement of paragraph (2), § 214 (a), would deprive respondent of rights guaranteed by the Federal Constitution.

The challenged judgment must be reversed. The case will be remanded to the District Court with instructions to enter judgment for the Collector.

The circumstances disclosed in *National Life Ins. Co.* v. *United States* were radically different from those now presented, and the doctrine upon which that cause turned does not control the present one. The respondent here was not in effect required to pay more upon his taxable receipts than was demanded of others who enjoyed like incomes solely because he was the recipient of interest from tax-free securities—a result which we found would have followed enforcement of the literal provisions of § 245 (a), Revenue Act 1921, 42 Stat. 227, 261. While guaranteed exemptions must be strictly observed, this obligation is not inconsistent with reasonable classification designed to subject all to the payment of their just share of a burden fairly imposed.

The manifest purpose of the exception in paragraph 2, § 214 (a), was to prevent the escape from taxation of income properly subject thereto by the purchase of exempt securities with borrowed money.

Under the theory of the respondent, "A," with an income of $10,000 arising from non-exempt securities, by

the simple expedient of purchasing exempt ones with borrowed funds and paying $10,000 interest thereon, would escape all taxation upon receipts from both sources. It was proper to make provision to prevent such a possibility. The classification complained of is not arbitrary, makes no improper discrimination, does not result in defeating any guaranteed exemption, and was within the power of Congress. The fact that respondent engaged in the business of buying and selling is not important. See *Willcuts* v. *Bunn, ante,* p. 216.

Reversed.

FULLERTON LUMBER COMPANY *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY.

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

No. 47. Argued January 9, 1931.—Decided February 24, 1931.

Where a carrier accepts a check for the amount of freight charges, and a loss is suffered as a result of its unjustifiable delay in presenting it, the bank in the meantime having failed, the question whether the shipper is relieved of liability depends upon the general law applicable to payment by check and not upon any provision of the Interstate Commerce Act. P. 521.

36 F. (2d) 180, reversed

CERTIORARI, 281 U. S. 709, to review a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court in favor of the railroad company in an action to recover freight charges.

Mr. Stanley S. Gillam for petitioner.

Mr. A. C. Erdall, with whom *Messrs. F. W. Root, O. W. Dynes,* and *C. O. Newcomb* were on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Chicago, Milwaukee, Saint Paul & Pacific Railroad Company brought this action in the federal court for Minnesota to recover from the Fullerton Lumber Company freight charges on a carload of coal shipped to it. The case was tried without a jury. The defence was payment. It appeared that, upon delivery of the car, the carrier had, as customary, accepted the defendant's check on a local bank for the amount of the charges; that it had delayed presenting the check for payment; and that meanwhile the bank had failed. The defendant contended that it was relieved from liability because of the carrier's unjustifiable delay in presenting the check. The trial court ruled that the Interstate Commerce Act requires that a carrier's charges be paid strictly in currency; and that since the check had not been paid, the defendant was liable even if the carrier's failure to receive the money was due wholly to its own negligence. Judgment entered for the carrier was affirmed by the Circuit Court of Appeals. 36 F. (2d) 180. This Court granted a writ of certiorari. 281 U. S. 709.

It has long been settled that payment of a carrier's charges must be made in money; and that the payment must be cash as distinguished from credit.[1] The purpose

[1] Conference Ruling No. 207 of Interstate Commerce Commission (September 15, 1906); *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467, 476; *Chicago, Indianapolis & Louisville Ry. Co.* v. *United States,* 219 U. S. 486; *Chicago & North Western Ry. Co.* v. *Lindell,* 281 U. S. 14, 16. Compare Ex parte No. 73, 57 I. C. C. 591, 596; 63 I. C. C. 375; 69 I. C. C. 351. Rules promulgated June 4, 1920, permitted the carrier to extend credit for ninety-six hours after delivery, and provided that "the mailing [within this prescribed period] by the shipper of valid checks, drafts, or money orders which are satisfactory to the carrier," should be deemed proper payment. Ex parte No. 73, Rule 5, 57 I. C. C. 596a, 596b.

of the requirement is solely to prevent rebates or unjust discrimination and to ensure observance of the tariff rates. Compare *Chicago & North Western Ry. Co.* v. *Lindell*, 281 U. S. 14, 16. The Interstate Commerce Act does not in terms prescribe that the charges shall be paid in money; that is, in coin or currency. There is no reason for denying to the parties the convenience and safety incident to making payment, in accordance with the prevailing usage of business, by means of a check payable on demand drawn on a going bank in which the drawer has an ample deposit.

Whether in the case at bar the defendant is liable depends, not upon any provision of the Interstate Commerce Act, but upon the rules of law generally applicable to payment by check. These, and other questions which have been argued, need not be considered by us.

Reversed.

UNITED STATES ET AL. *v.* ATLANTA, BIRMINGHAM & COAST RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 88. Argued January 29, 30, 1931.—Decided February 24, 1931.

1. A passage in a report of the Interstate Commerce Commission specifying the maximum amount the Commission finds may be included by a railroad company in its balance sheet statement as representing investment in newly acquired road and equipment, and notifying the company that it will be expected to adjust its accounts in accordance with the finding within 60 days from service of the report, is not an "order" of the Commission, and jurisdiction of a suit to annul it is not conferred on the District Court of three judges by the Urgent Deficiencies Act of October 22, 1913. P. 527.
2. Such a report can not be considered as an order, for purposes of attack, by reading it in connection with an earlier certificate of

public necessity and convenience, authorizing the company to acquire the property, and an order authorizing stock issues therefor, when both of these have been acted upon and neither of them is challenged. P. 529.

3. A decree setting aside an order of the Commission and remanding the matter to it for further hearing, did not operate as *res judicata* to confer jurisdiction on the court, either by original or by supplemental bill, to review further action of the Commission which was not an order but a report. P. 530.

37 F. (2d) 401, reversed.

APPEAL from a decree of the District Court of three judges, attempting to set aside part of a report of the Interstate Commerce Commission, which was attacked as an order.

Assistant to the Attorney General O'Brian, with whom *Solicitor General Thacher* and *Messrs. William G. Davis* and *Elmer B. Collins,* Special Assistants to the Attorney General, *Erwin N. Griswold,* and *Daniel W. Knowlton,* Chief Counsel, Interstate Commerce Commission, and *Edward M. Reidy,* Solicitor, were on the brief, for the United States et al.

Mr. Robert C. Alston, with whom *Messrs. F. B. Grier, Carl H. Davis,* and *John A. Hynds* were on the brief, for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In this suit, brought in the federal court for northern Georgia, under the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, the Atlanta, Birmingham & Coast Railroad Company seeks by supplemental bill to enjoin and annul an alleged order of the Interstate Commerce Commission dated October 9, 1929. No formal order was made. *Reorganization and Control of Atlanta, Birmingham & Atlantic Ry. Co.,* 158 I. C. C. 6, 14. The

action challenged as an illegal order is the following passage of the Commission's report of that date concerning entries in the carrier's books of account:

"Upon consideration of the record, as supplemented, we find and conclude that the amount to be included in the balance sheet statement of the new company representing investment in road and equipment as of January 1, 1927, may not exceed $9,261,043.87. The company will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report."

The United States and the Commission contended that the bill should be dismissed for want of jurisdiction, among other reasons, because the action complained of is not an order within the meaning of the Urgent Deficiencies Act. The District Court, three judges sitting, overruled that objection; heard the case on the merits; and entered a final decree which declared that the action of the Commission "in so far as the same fixes the amount at which the Complainant is to return its capital stock and its investment in road and equipment, be set aside . . . and that the supplemental application of the complainant on which said order was entered by the Interstate Commerce Commission stand for further hearing before said commission." 37 F. (2d) 401. The defendants appealed to this Court.

The Atlanta, Birmingham & Coast Railroad Company was incorporated in 1926 by the bondholders of the Atlanta, Birmingham & Atlantic Railway Company to take over upon foreclosure the property of the latter, consisting of 640 miles of line in Alabama and Georgia. The enterprise had been peculiarly disastrous to investors. Following long years of receivership with annual operating deficits there had been in 1915 a reorganization in which $35,000,000 in stocks and $14,500,000 in bonds were wiped out. Compare *Valuation of Atlanta, Birmingham*

& Atlantic R. Co., 75 I. C. C. 645, 703. By the reorganization of 1926, $30,000,000 more of stock was wiped out and the holders of the $8,600,000 bonds then outstanding received for them only 60 per cent of their face value in 5 per cent preferred stock of the new company. The 1926 reorganization was effected pursuant to an agreement between the bondholders' committee and the Atlantic Coast Line Railroad, under which the committee purchased at foreclosure sale all the property; transferred the same to the new company in exchange for all of its stock, being $5,180,344.07 redeemable preferred and 150,000 shares no-par common; transferred the common stock to the Atlantic Coast Line in consideration of its extinguishing the prior liens on the property, aggregating $4,080,699.80, and guaranteeing the preferred stock; and distributed the preferred stock among the bondholders. Thus, the Atlantic Coast Line acquired for $4,080,699.80 in cash and its guaranty of the preferred stock, complete ownership of the property subject only to the $5,180,-344.07 redeemable preferred stock. These two sums aggregate $9,261,043.87—the sum set forth in the passage of the report of October 9, 1929, which is challenged as an order.

The order of the Commission dated December 21, 1926, which authorized the new company to issue the preferred and common stock (117 I. C. C. 181, 439, 443), and thus made possible the 1926 reorganization, contained this provision:

"*Provided, however,* that authority to issue said stock is granted upon the express condition, that, for the purposes of the accounting, as provided in the classification of investment in road and equipment in the text of account 41, 'Cost of road purchased,' the cash value of the preferred stock issued must, in stating the transactions in the accounts, be reckoned on a basis not in excess of its

par value; and that the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor." [1] 117 I. C. C. 443.

When the books of the new company were being opened, its accountants sought to set up in its balance sheet as "Investment in road and equipment" the sum of $29,271,859 instead of the $9,261,043.87 above shown. The larger entry was contended for on the grounds that this amount (with adjustments) had, on July 20, 1923, been determined by the Commission pursuant to § 19a of the Act of March 1, 1913, c. 92, 37 Stat. 701, to be the value of the property for rate-making purposes, estimated on the basis of 1914 reproduction costs. 75 I. C. C. 645. The Director of the Bureau of Accounts refused to permit the company to set up the investment of road and equipment as being $29,271,859. Treating the preferred stock as having been paid for at par, he directed that the value of the 150,000 shares of common stock should be set up at $4,080,699.80, that being the sum of money

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[1] The classification of primary accounts referred to as Account 41, "Cost of Road Purchased" prescribes:

"This account shall include the cash cost of any road or portion thereof purchased. Where the contract of purchase includes not only road, but also equipment, securities, and other assets, the appraised value of such equipment, securities, and other assets shall be deducted from the total cash cost, and the remainder of the cash cost shall be charged to this account. Where the consideration given for the property purchased is other than cash, such consideration shall be valued on a current cash basis. . . ." See "Classification of Investment in road and Equipment of Steam Roads prescribed by Interstate Commerce Commission in accordance with Section 20 of the Act to Regulate Commerce," July 1, 1914, p. 29.

See also "Classification of Income, Profit and Loss and General Balance Sheet Accounts," *id.*, July 1, 1914, p. 50, as amended August 19, 1921,—Account 751. "Capital Stock. . . . When such certificates or receipts have no par value they shall be included in this account at the amount corresponding to the cash received, or the cash equivalent if the consideration is other than cash."

which the Atlantic Coast Line had disbursed in extinguishing the prior liens upon the property.

The new company then filed an application with the Commission requesting a hearing in support of its contention that the above quoted proviso in the order of December 21, 1926, authorized such entry of $29,271,859; and requested that oral argument be permitted. Without hearing oral argument, the Commission denied the application on April 9, 1928. The original bill in this suit was then brought to set that order aside. The court granted the relief and directed that the company's application "stand for further hearing before said commission." *Atlanta, Birmingham & Coast R. Co.* v. *United States,* 28 F. (2d) 885. The Commission granted the further hearing and thereupon, on October 9, 1929, filed the report first cited. In it, the Commission stated that the value of the property for rate-making purposes fixed in 1923, pursuant to § 19a, is not "pertinent or material evidence in the determination of investment, as that term is used in our accounting regulations." The report concluded with the passage quoted which appellee contends amounts to an order. 158 I. C. C. 6, 14.

First. The jurisdiction conferred upon district courts under the Urgent Deficiencies Act is that formerly exercised by the Commerce Court over "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." Act of June 18, 1910, c. 309, §1, 36 Stat. 539. The action here complained of is not in form an order. It is a part of a report—an opinion as distinguished from a mandate. The distinction between a report and an order has been observed in the practice of the Commission ever since its organization—and for compelling reasons. Its functions are manifold in character. In some matters its duty is merely to investigate and to report facts. See *United States* v. *Los Angeles & Salt Lake R. Co.,* 273 U. S. 299, 310. In others, to make determinations. See *Great*

Northern Ry. Co. v. *United States*, 277 U. S. 172. In some, it acts in an advisory capacity. Compare *Minneapolis & St. Louis R. Co.* v. *Peoria & Pekin Union Ry. Co.*, 270 U. S. 580, 584–5. In others in a supervisory. Even in the regulation of rates, as to which the Commission possesses mandatory power, it frequently seeks to secure the desired action without issuing a command. In such cases it customarily points out in its report what the carriers are expected to do.[2] Such action is directory as distinguished from mandatory. No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review.[3] In *Kansas City Southern Ry.* v. *United States*,

[2] See Advances in Rates, Western Case, 20 I. C. C. 307, 379; *Goldenberg* v. *Clyde S. S. Co.*, 20 I. C. C. 527, 529; *Pacific Coast Biscuit Co.* v. *S. P. & S. Ry. Co.*, 20 I. C. C. 546, 549; Proposed Schedules of Rates on Lumber, 20 I. C. C. 575. When the car service rule discussed in *United States* v. *New River Co.*, 265 U. S. 533, was first before the Commission, its report finding the rule unreasonable concluded with the statement: "We have not required that car service rules be filed as tariff schedule. We will not in this proceeding direct that the rules which we herein find to be reasonable be so filed. We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us." Referring to this statement, this Court said (p. 540–1): "The Commission refrained from making an order that the rule be filed as a tariff schedule, but announced that it expected the carriers promptly to amend their car service rules to conform with its findings." Compare *Colorado Fuel & Iron Co.* v. *Southern Pacific R. Co.*, 6 I. C. C. 488, 518, 587; *Milk Products Protective Assn.* v. *Delaware L. & W. R. Co.*, 7 I. C. C. 92, 175; *Board of Trade* v. *Nashville & St. Louis Ry. Co.*, 8 I. C. C. 503, 530; *Denison Light & Power Co.* v. *Missouri, K. & T. Ry. Co.*, 10 I. C. C. 337, 341.

[3] Where the application is for a certificate of public convenience and necessity the order issued is called a certificate. See *Chicago Junction Case*, 264 U. S. 258; *Colorado* v. *United States*, 271 U. S. 153.

231 U. S. 423, the accounting regulations which were challenged had been adopted by formal order of the Commission. Compare *Interstate Commerce Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194. There are many cases in which action of the Commission, although embodied in the form of an order, has been held by this Court not to be reviewable under the Urgent Deficiencies Act.[4]

As the District Court said in passing upon the original bill now relied upon: "Independently of the Commission's power under section 20, subsection 1 and subsection 5, to establish uniformity in and prescribe the forms of accounts of carriers, section 1, subdivision 20, authorizes the imposition of conditions upon its grant of a certificate of public convenience and necessity for the acquisition and operation of a railroad, and by necessary implication it has power to see that the condition is complied with. Disobedience to an order made to this end touching the accounts would be punishable under section 20, subsection 7, of the act as a willful failure to make a correct entry and the keeping of a record other than that approved by the Commission." 28 F. (2d) 887. The basis for such a liability should be certain. Compare *United States* v. *Fruit Growers Express Co.*, 279 U. S. 363, 369.

Second. In support of the contention that the passage in the report of the Commission of October 9, 1929, is legally an order, the Company insists that it must be

[4] *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Hooker* v. *Knapp*, 225 U. S. 302; *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 412; *United States* v. *Illinois Central R. Co.*, 244 U. S. 82, 89; *Delaware & Hudson Co.* v. *United States*, 266 U. S. 438; *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299; *New York, Ontario & Western R. Co.* v. *United States*, 14 F. (2d) 850, affirmed 273 U. S. 652; *Piedmont & Northern Ry. Co.* v. *United States*, 280 U. S. 469. See also *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172.

read in connection not only with the action of April 9, 1928, attacked by the original bill, but also with the certificate of public necessity and convenience dated October 26, 1926, authorizing the new company to acquire the property, and the order of December 21, 1926, authorizing the issue of the $5,180,344.07 preferred stock and 150,000 shares of no-par common. Neither the original bill nor the supplemental bill attacks either the certificate or the order of December 21st. The validity of the certificate and of that order is not now challenged. Moreover, the record discloses that the certificate and the order have been acted upon by the acquisition of the property and issue of the stock.

Third. The Company contends that the decree of the District Court on the original bill, in which the defendants acquiesced, is a final adjudication of the issues involved in this case. The original bill dealt with the order of April 9, 1928; the supplemental bill with the alleged order of October 9, 1929. The Commission insists that the decree on the original bill did not deal with the merits, but determined only that the company must be accorded a hearing on its application. We need not determine whether jurisdiction existed to review the action of April 9, 1928, or the scope of the issues litigated in the original suit. For a finding of jurisdiction to review that order, or acquiescence by the defendants in the decree rendered on the original bill, would not have made *res judicata* the question whether jurisdiction existed to review the later action of October 9, 1929. Compare *Cromwell* v. *County of Sac,* 94 U. S. 351; *Pell* v. *McCabe,* 250 U. S. 573, 577. The lack of power to review, because of the absence of any order, cannot be cured by bringing the suit in the form of a supplemental rather than a new bill. Jurisdiction is equally lacking in either case.

Reversed.

Syllabus.

LANGNES, OWNER OF THE DIESEL HALIBUT VESSEL "ALOHA," *v.* GREEN, CLAIMANT.

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

No. 38. Argued January 7, 8, 1931.—Decided February 24, 1931.

1. In a proceeding by a ship-owner to limit liability under R. S. §§ 4283–4285, as against a claim of damages for personal injury, the question whether the injury was occasioned with his privity and knowledge is not jurisdictional but appertains to the merits of his petition. P. 534.
2. Upon review of a decree of the Circuit Court of Appeals in an admiralty case, a respondent in certiorari, though he did not cross-petition for the writ, may seek to sustain the decree upon a ground which the court below rejected as well as upon that which it accepted. P. 535.
3. Where a ship-owner, in a petition in the District Court to limit liability under R. S. §§ 4283–4285, though alleging fear of other claims, set up none except an action for personal injuries which was then pending, on the eve of trial, in a state court, and where the nature of the accident and other circumstances of the case were such as to give rise to the presumption that no other claims existed and reflect doubt upon the allegation that others were feared, *Held:*

   (1) That the state court had jurisdiction of the action, under Jud. Code, § 24 (3), and, in the exercise of its common law powers therein, was competent to entertain a claim of the ship-owner for limitation of liability and afford him appropriate relief under the federal statute dealing with that subject. P. 539.

   (2) The District Court also had jurisdiction of the petition before it, but to be exercised in accordance with a sound discretion with regard to what was right and equitable. P. 540.

   (3) Sound discretion required that the District Court permit the action in the state court to proceed, so that the claimant's right to a common law remedy might not be destroyed, retaining, however, the petition for limited liability to be dealt with if the petitioner's right to such limitation were brought in question in the state court, or if the case otherwise assumed such form in that court as to bring it within the exclusive power of a Court of Admiralty. P. 541.

(4) In restraining the state court action and in adjudicating for itself the question of liability, the District Court committed an abuse of discretion reviewable by the Circuit Court of Appeals and by this Court. P. 541.

35 F. (2d) 447, reversed.

CERTIORARI, 281 U. S. 708, to review a decree which reversed a decree of the District Court, 32 F. (2d) 284, in a proceeding in admiralty to limit liability. The District Court adjudicated the claim against the petitioning shipowner upon the merits and in his favor. The court below directed that the petition be reversed for want of jurisdiction.

Mr. Robert E. Bronson, with whom *Messrs. Ira Bronson* and *H. B. Jones* were on the brief, for petitioner.

Mr. Winter S. Martin, with whom *Mr. Samuel B. Bassett* was on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioner, as sole owner of the fishing vessel "Aloha," on February 24, 1928, brought a proceeding in the federal district court for the western district of Washington, praying a limitation of liability under R. S., §§ 4283, 4284, 4285 (U. S. C., Title 46, §§ 183, 184, 185), which are copied in the margin.* It was stipulated by the

* Sec. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Sec. 4284. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel and her freight for the voyage, is not sufficient

parties that the vessel was of no greater value than the sum of $5,000. After setting forth that petitioner was the sole owner of the vessel and that the vessel was seaworthy in all respects, the petition alleged, among other things, that the respondent on October 11, 1927, had commenced an action in a superior court of the State of Washington against petitioner to recover damages in the sum of $25,000 for personal injuries suffered while employed upon said vessel. The petition for a limitation of liability was filed four months later while that action was pending, and, it is said and not denied, within two days before the date set for the trial in the state court. Following the filing of the petition the federal district court issued an order restraining further proceedings in the state court, and a monition to all claimants to present their claims within a time fixed. The respondent, in response to the monition, filed his claim in the amount of $25,000 for damages resulting from the personal injuries referred to above. No other claim was filed.

Thereupon, respondent moved to dissolve the restraining order upon the ground that the state court had jurisdiction of the cause; that there was only one possible

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to make compensation to each of them, they shall receive compensation from the owner of the vessel, in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.

Sec. 4285. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease.

claimant and one owner; and that petitioner, therefore, might claim and obtain the advantage and benefit of the limitation of liability statute by proper pleading in the action pending in the state court. This motion the district court denied, and the cause in respect of respondent's claim was tried. Upon the hearing the district court determined that it should first inquire whether there was any liability, and if there was, then, whether it should be limited; and, at the conclusion of respondent's evidence without taking evidence on the part of petitioner, the court held that there was no liability and entered a decree accordingly. 32 F. (2d) 284. Respondent appealed to the circuit court of appeals; and that court reversed the decree and remanded the case to the district court with directions to dismiss it for want of jurisdiction. 35 F. (2d) 447.

In the court of appeals the decree was assailed upon the grounds (1) that, there being but one possible claim and one owner, the ship owner should have sought his remedy for a limitation of liability by proper pleading in the state court; and (2) that the record disclosed the privity and knowledge of the owner in respect of the matters and things by which the injury to respondent resulted. The court rejected the first contention upon the authority of *White* v. *Island Transportation Co.*, 233 U. S. 346; but sustained the second, holding that the pleadings and evidence disclosed that the injury complained of was occasioned with the privity and knowledge of the ship owner, and consequently the district court was without jurisdiction.

We are of opinion that the second contention, upon which the decree below was predicated, did not present a jurisdictional question. The district court had jurisdiction to pass upon the sufficiency of the pleadings and to decide the question upon the evidence; and a determination thereof either way, whether right or wrong, would

have been a determination by that court upon the merits in the proper exercise of its jurisdiction. *Binderup* v. *Pathe Exchange,* 263 U. S. 291, and cases cited; *Moore* v. *N. Y. Cotton Exchange,* 270 U. S. 593, 608. In the *Binderup* case the rule was stated as follows (p. 305):

"Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit. [Citing cases.] In that event the claim of federal right under the statute is a mere pretence and, in effect, is no claim at all."

But we deem it unnecessary to consider the second contention further, since the conclusion to which we have come rests upon the first contention, in respect of which, for reasons presently to be stated, we are of opinion both courts below were in error.

The preliminary objection is urged by petitioner, that, since the decision below upon this point was against respondent and he has not applied for certiorari, the point is not open here for consideration; but the objection is without merit, as a brief review of the decisions of this court will disclose.

In *Irvine* v. *The Hesper,* 122 U. S. 256, 266, the rule was announced without qualification that an appeal in admiralty from the district court to the circuit court

vacated the decree of the former and opened the case for a trial *de novo* in the latter court. At page 267 the court said:

"We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libellants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."

In *Reid* v. *Fargo*, 241 U. S. 544, 548, in an opinion by Mr. Chief Justice White, this conclusion was reaffirmed; and attention was called to the fact that a full and convincing review of the authorities on the subject was contained in the opinion of the court of appeals for the second circuit in *Munson S. S. Line* v. *Miramar S. S. Co.*, 167 Fed. 960. In the more recent case of *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S. 146, 155, the rule was again stated in these words:

"On appeal in admiralty, there is a trial *de novo*. The whole case was opened in the Circuit Court of Appeals by the appeal of the Southern Pacific Company as much as it would have been if the Director General had also appealed."

The question then arises: What is the scope of inquiry in this court when the case is brought up by certiorari from the circuit court of appeals? It has been decided that upon writ of error from an intermediate appellate tribunal we are not limited to a consideration of the points raised by the plaintiff, but "must enter the judgment, which should have been rendered by the court below on the record then before it." *Baker* v. *Warner*, 231 U. S. 588, 593. And in *Delk* v. *St. Louis & San Francisco R. Co.*, 220 U. S. 580, 588, following *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267, it

was held that on certiorari, likewise, the entire record is before this court with power to review the action of the court of appeals and direct such disposition of the case as that court might have done upon the writ of error sued out for the review of the circuit (now district) court. In *Watts, Watts & Co.* v. *Unione Austriaca,* 248 U. S. 9, 21, it was said that, "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require"; and "the rule is the more insistent, because, in admiralty, cases are tried *de novo* on appeal." See also *Dorchy* v. *Kansas,* 264 U. S. 286, 289.

The authorities relied upon by petitioner are not to the contrary. They contain no challenge to the rule laid down in the decisions cited immediately above, but proceed upon the theory that the court is not *bound* to consider objections to the decree urged by respondent, in the absence of cross petition for certiorari. In *Warner Co.* v. *Independent Pier Co.,* 278 U. S. 85, 91, where the authorities are collected, it is said:

"Objections to the decree below were offered by counsel for respondents in their briefs and arguments here. But no application for certiorari was made in their behalf and we confine our consideration to errors assigned by the petitioner."

In *Hubbard* v. *Tod,* 171 U. S. 474, 494, the court disposed of the matter by saying:

"And as respondents did not apply for certiorari, we shall confine our consideration of the case to the examination of errors assigned by petitioner."

In *Federal Trade Comm.* v. *Pacific Paper Assn.,* 273 U. S. 52, respondents, without presenting a cross petition for certiorari, sought a reversal of a distinct portion of the decree. This court, in declining to consider the matter, said (p. 66):

"A party who has not sought review by appeal or writ of error will not be heard in an appellate court to question the correctness of the decree of the lower court. This is so well settled that citation is not necessary. The respondents are not entitled as of right to have that part of the decree reviewed. [Citing cases.] And, assuming power, we are not moved by any persuasive consideration to examine the parts of the commission's order to which respondents object."

These decisions simply announce a rule of practice which generally has been followed; but none of them deny the *power* of the court to review objections urged by respondent, although he has not applied for certiorari, if the court deems there is good reason to do so. In the present case, however, it is not necessary to consider this rule of practice because the respondent offers no objection to the decree of the court of appeals. In that court he attacked the decree of the district court upon the two grounds above stated, and the circuit court of appeals sustained the attack but upon one of such grounds only. Respondent here defends that decree upon the ground upon which it was based, and, in addition, continues to urge the rejected ground, not to overthrow the decree, but to sustain it. His right to do so is beyond successful challenge, quite apart from the fact that this is a proceeding in admiralty, and is here from an intermediate appellate court. *United States* v. *American Ry. Exp. Co.*, 265 U. S. 425, where at page 435 it is said:

"It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not

dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed."

And, obviously, the right or duty of this court to consider these additional grounds will neither be affected by their rejection in the court below, nor be made to depend upon the effect finally given to them here.

We proceed, then, to inquire what disposition the court of appeals should have made of the case in respect of the point under consideration upon the record which was before that court. Section 24 (3) of the Judicial Code, U. S. C., Title 28, § 41 (3), confers upon the district courts of the United States admiralty and maritime jurisdiction, " saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The provisions of the statute in respect of limitation of liability confer upon the owner of a vessel in a variety of cases, including the present case, when loss is occasioned without the privity or knowledge of the owner, the right to limit his liability to the value of his interest in the vessel and her freight then pending. That the action brought in the state court was authorized by the first of the statutes referred to is plain. That the petition of the owner in the present case was properly brought, and that the federal court had jurisdiction to entertain it, whether there was a plurality of claims or only one, is equally clear. *White* v. *Island Transportation Co., supra,* p. 351. The situation, then, is that one statute gave respondent the right to a common law remedy, which he properly sought in the state court; and another statute

gave petitioner the right to seek a limitation of liability in the federal district court. Needless to say that if the case for a limitation of liability assumes such a form that only a federal court is competent to afford relief, the jurisdiction of that court is exclusive and must be exerted to dispose of the entire cause; and the action in the state court may not be further prosecuted.

Here the petition alleged that petitioner feared other claims, but no other claims were filed in response to the monition; the time therefor had expired and default had been noted; and nothing appears to suggest the possibility of any other claim. On the contrary, not only does a presumption fairly arise from the nature of the accident and all the surrounding circumstances that no other claim exists, but they are such as to reflect doubt upon the good faith of the allegation that petitioner was in fear of other claims; and the fact that petitioner delayed his proceeding for four months after the commencement of the state action and until two days before the date set for the trial is confirmatory of that view. In this situation, while there is some conflict among the decisions of the lower federal courts, this court has accepted the view that, "In a state court, when there is only one possible claimant and one owner, the advantage of this section [§ 4283] may be obtained by proper pleading. *The Lotta,* 150 Fed. 219, 222; *Delaware River Ferry Co.* v. *Amos,* 179 Fed. 756." *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255, 260. See also *Steamboat Co.* v. *Chase,* 16 Wall. 522, 532–533.

Upon the present record, the necessary result of this holding is that the state court, in the action there pending and in the due course of the exercise of its common law powers, was competent to entertain a claim of the ship owner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject. Compare *Loughin* v. *McCaulley,* 186 Pa. 517. Notwith-

standing this, however, the ship owner was free to invoke the jurisdiction of the federal district court (*White* v. *Island Transportation Co., supra*); and, that having been done, the question which arose was not one of jurisdiction, but, as will later more fully appear, was whether as a matter of discretion that jurisdiction should be exercised to dispose of the cause.

The term "discretion" denotes the absence of a hard and fast rule. *The Styria* v. *Morgan,* 186 U. S. 1, 9. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

In the case now under review the problem presented to the district court by the motion of respondent was quite simple. Upon the face of the record the state court, whose jurisdiction already had attached, was competent to afford relief to the petitioner. The difference in the effect of adopting one or the other of the two alternatives presented to the district court was obvious. To retain the cause would be to preserve the right of the ship owner, but to destroy the right of the suitor in the state court to a common law remedy; to remit the cause to the state court would be to preserve the rights of both parties. The mere statement of these diverse results is sufficient to demonstrate the justice of the latter course; and we do not doubt that, in the exercise of a sound discretion, the district court, following that course, should have granted respondent's motion to dissolve the restraining order so as to permit the cause to proceed in the state court, retaining, as a matter of precaution, the petition for a limitation of liability to be dealt with in the possible but (since it must be assumed that respondent's motion was not an idle gesture but was made with full

appreciation of the state court's entire lack of admiralty jurisdiction) the unlikely event that the right of petitioner to a limited liability might be brought into question in the state court, or the case otherwise assume such form in that court as to bring it within the exclusive power of a court of admiralty. The failure to do this, in our opinion, constituted an abuse of discretion subject to the correcting power of the appellate court below and of this court.

In *The Lotta,* 150 Fed. 219, cited as authority for the rule laid down in the *Sandanger* case, Judge Brawley, a capable admiralty judge, dealt with the same question in the manner here suggested and delivered an opinion which seems to us entirely sound. In that case an action had been brought in a state court against the owner of the Lotta by an administrator to recover damages for the death of his son. The right to maintain such an action was conferred by state statute. Pending the prosecution of that action the owner of the Lotta filed a petition in the federal district court for a limitation of liability, and by an *ex parte* proceeding had the Lotta appraised, paid the appraised value into the registry of the court, and obtained an injunction restraining the prosecution of the action in the state court. After referring to the provision of law saving to suitors the right of a common law remedy, Judge Brawley said that the plaintiff had the right to pursue his remedy in the state court unless the act providing for a limitation of liability clearly deprived him of it; that where there was only a single claim there was no need for the adoption of the peculiar and exclusive jurisdiction of the admiralty court; and that an answer setting up the limitation of liability would give the ship owner the relief to which he was entitled. It appearing there, as it appears here, that only one claim had been presented, and that the time fixed by the monition had expired, the court said (p. 222–223):

"The owner of the vessel, therefore, can by answer in the state court set up as a defense that he is not liable beyond the value of the vessel, and that value may be determined as appropriately and as easily in that court as in this. In the ex parte proceedings here the vessel has been appraised by appraisers chosen by the petitioner, and, while there may be no reason to question the fairness and fullness of such appraisement, the plaintiff is entitled to be heard on that question, and in the usual course of the common-law proceeding that issue can be fairly tried.

* * * * *

"All that the petitioner can fairly claim is that he should not be subject to a personal judgment for an indefinite amount and beyond the value of his interest in the Lotta and her freight. There is no reason to doubt that this proper defense may be availed of in the state court, and if there is an ulterior purpose, and petitioner's object in invoking the jurisdiction of this court is to escape a jury trial and take the case away from the common-law jurisdiction, that purpose should receive no countenance here; for the act which gives this court its admiralty and maritime jurisdiction saves to suitors in all cases the right of the common-law remedy where the common law is competent to give it, and good faith requires that this proviso shall have its full and fair effect."

Thereupon an order was entered dissolving the injunction against the prosecution of the action in the state court, but retaining the petition for a limitation of liability, for the reason, as the court said, that "if it should hereafter appear in the course of the proceedings in the state court that a question is raised as to the right of petitioner to a limited liability, this court has exclusive cognizance of such a question . . . and the decision upon the question of the injunction is predicated upon the assumption that that question is not involved in the suit in the state court, and that the only questions to be de-

cided there are, first, whether the defendant is liable at all, and, if so, as to the value of the vessel and her freight, which is the limit of defendant's liability." See also *Delaware River Ferry Co.* v. *Amos,* 179 Fed. 756.

Disposition of the matter, so as to allow the action to proceed in the state court, finds warrant in like principles which have been applied in other kinds of cases. Admiralty courts, for example, have complete jurisdiction over suits of a maritime nature between foreigners. Nevertheless " the question is one of discretion in every case, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum." *The Maggie Hammond,* 9 Wall. 435, 457; *The Belgenland,* 114 U. S. 355, 368; *Charter Shipping Co.* v. *Bowring, Jones & Tidy,* 281 U. S. 515, 517. See also, generally, *Watts, Watts & Co.* v. *Unione Austriaca, supra;* and compare the opinion of the district court upon the point in the same case, 224 Fed. 188, 191. So, while the courts of this country have and may entertain jurisdiction of actions between nonresident foreigners for torts committed in a foreign country, they will exercise such jurisdiction in their discretion and only in special cases. *Dewitt* v. *Buchanan,* 54 Barb. 31, 34. And see also *National Telephone Mfg. Co.* v. *Du Bois,* 165 Mass. 117, 118; *Harris* v. *Pullman,* 84 Ill. 20, 27.

The decrees of both courts below must be reversed and the cause remanded to the district court for further proceedings in conformity with this opinion.

Reversed.

CONCORDIA INSURANCE COMPANY OF MILWAUKEE *v.* SCHOOL DISTRICT NO. 98 OF PAYNE COUNTY, OKLAHOMA.

ROYAL INSURANCE COMPANY, LIMITED, *v.* SAME.

NATIONAL FIRE INSURANCE COMPANY *v.* SAME.

FIRE ASSOCIATION OF PHILADELPHIA *v.* SAME.

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

Nos. 278, 279, 280, and 281. Argued January 15, 1931.—Decided February 24, 1931.

1. Upon demurrer all allegations of the complaint which are sufficiently pleaded must be taken as true. P. 550.
2. Allegations of complaint *held* sufficient to constitute waiver of, or estoppel against setting up, condition in policy requiring insured to furnish verified proofs of loss. P. 548.
3. A stipulation in a fire insurance policy, that any waiver to be effective must be written upon or attached to the policy, does not apply to a waiver, after the loss occurs, of stipulations in respect of things to be done after the loss as prerequisites to adjustment and payment. *Scottish Union & Nat. Ins. Co.* v. *Encampment Smelting Co.*, 166 Fed. 231, disapproved. P. 551.
4. Although it is well established that a federal court will follow the decisions of the highest court of a State construing a state statute, yet where, prior to the judgment of the District Court, the decisions of the highest state court are in such confusion that its view in respect of the meaning of the applicable statute can not definitely be determined, the District Court is free to construe the statute for itself. P. 552.
5. A decision of the highest court of a State construing a state statute, rendered more than a year after a judgment of a federal district court, can not be given a retroactive effect in respect of the latter so as to "make that erroneous which was not so when the judgment of that court was given." P. 553.

6. In the absence of an authoritative state decision to the contrary, there was nothing in Oklahoma Comp. Stat., §§ 5972 and 5973, which required a federal district court to depart from the rule recognized by this Court in respect of the allowance of interest; and, upon the record in these cases, suits to recover upon policies of insurance for loss and damage by fire, the allowance of interest from the date when the liability accrued was justified. P. 554.

40 F. (2d) 379, affirmed.

CERTIORARI, *post*, p. 817, to review judgments of the Circuit Court of Appeals affirming judgments in favor of the respondent in four suits brought to recover upon policies of insurance for loss by fire. The cases had been removed from a state court to the District Court on the ground of diversity of citizenship.

Mr. F. A. Rittenhouse, with whom *Mr. H. C. Thurcan* was on the brief, for petitioners.

In support of the proposition that waivers of proof of loss must be in writing under the Oklahoma standard fire insurance contract (Comp. Stats. Okla., 1921, § 6767), they cited *Northern Assurance Co.* v. *Grand View Bldg. Assn.*, 183 U. S. 308; *Imperial Fire Ins. Co.* v. *County of Coos*, 151 U. S. 452; *Riddlesbarger* v. *Hartford Fire Ins. Co.*, 7 Wall. 386; *Lumber Underwriters* v. *Rife*, 237 U. S. 695; *Penman* v. *St. Paul Fire & Marine Ins. Co.*, 216 U. S. 311; *Thompson* v. *Phoenix Ins. Co.*, 136 U. S. 287; *Scottish Union & Nat. Ins. Co.* v. *Encampment Smelting Co.*, 166 Fed. 231; *Missouri-Pacific Ry. Co.* v. *Western Assurance Co.*, 129 Fed. 610; *San Francisco Savings Union* v. *Western Assurance Co.*, 157 Fed. 695; *Bank of South Jacksonville* v. *Hartford Fire Ins. Co.*, 1 F. (2d) 43; *Harris* v. *North British & Mer. Ins. Co.*, 30 F. (2d) 94, certiorari denied 279 U. S. 852; *Hartford Fire Ins. Co.* v. *Empire Coal Min. Co.*, 30 F. (2d) 794; *People's Bank* v. *Aetna Ins. Co.*, 74 Fed. 507.

Also, among other cases, on the proposition that where a policy of insurance contains a standard provision re-

quiring that a waiver be in writing, oral evidence cannot be introduced to establish a waiver: *Northern Assurance Co.* v. *Grand View Bldg. Assn.*, 183 U. S. 308; *Lumber Underwriters* v. *Rife*, 237 U. S. 605; *New York Life Ins. Co.* v. *Fletcher*, 117 U. S. 519; *Imperial Assurance Co.* v. *County of Coos*, 151 U. S. 452.

Mr. Frank G. Anderson, with whom *Messrs. R. M. Rainey, Streeter B. Flynn*, and *Chester H. Lowry* were on the brief, for respondent.

Mr. Justice Sutherland delivered the opinion of the Court.

These cases, involving identical questions, arose in the State of Oklahoma and were removed from a state court to a federal district court where they were consolidated and tried. They were brought to recover upon separate policies of insurance issued by the petitioners, respectively, for loss and damage sustained by fire. A jury in the trial court found the issues in favor of respondent, and judgment was entered for the amount of the verdict with an additional sum for interest from the date when the liability accrued. Upon appeal to the circuit court of appeals, that court struck from the transcript the bills of exceptions, and the consolidated causes were disposed of as upon demurrers to the amended complaints. 40 F. (2d) 379.

Certiorari from this court was asked upon two grounds, (1) that the court below had construed a statute of Oklahoma, relating to the allowance of interest, contrary to the construction put upon it by the state supreme court; and (2) that there was a conflict between the decision below and one rendered by the Circuit Court of Appeals for the Eighth Circuit in respect of the contention that the requirement contained in the policies that proofs of loss must be furnished within sixty days could not be waived except in writing.

We consider these grounds in the reverse order.

First. Each of the policies provided that in case of fire immediate notice in writing of any loss should be given to the company, and within sixty days a statement should be rendered, signed and sworn to by the insured, setting forth the time and origin of the fire, the interest of insured and others in the property, the cash value of the items and amount of loss upon each, and other particulars; that the company should not be held to have waived any provision or condition of the policy by any requirement, act or proceeding on its part relating to the appraisal, or any examination provided for; that the loss should not become payable until sixty days after the notice, ascertainment, estimate, and proof of loss had been received by the company, including an award by an appraiser when appraisal had been required; that no person, unless duly authorized in writing, should be deemed an agent of the insurer in any matter relating to insurance; that no officer, agent, or other representative should have power to waive any provision or condition of the policy except such as by the terms of the policy might be the subject of agreement endorsed thereon or added thereto; and that *no waiver should be effective unless written upon or attached to the policy.*

The complaints contained pleas of waiver and estoppel, the substance of which we adopt from the opinion of the court below [p. 382]:

"The amended complaints alleged that on January 2, 1926, and within two or three hours after the fire had destroyed the building and furniture and fixtures therein, the plaintiff notified appellants' agents of the fire and the extent of the damage and destruction, with the request that they notify their companies. That within two or three days thereafter the appellants selected named persons to represent them and authorized such persons to investigate the fire and make estimates as to the value

of the property destroyed and settle for the loss; that these adjusters for the insurers visited the scene of the fire and made examinations as to the value of the property destroyed and the circumstances surrounding the fire, and had plaintiff furnish them with the items of the property destroyed, the plans and specifications of the building, which plaintiff furnished, and requested plaintiff to furnish assistance to a building contractor selected and appointed by the insurers and their adjusters, who was to make estimates of the value of the property destroyed and collect information as to its condition at the time of the loss; that thereafter on the 27th day of February, 1926, which was the 56th day after the fire, the said adjusters and the members of plaintiff's board of trustees held a meeting at the scene of the fire; that said building contractor was at said meeting; that said meeting was held for the purpose of discussing the settlement and adjustment of the loss sustained by plaintiff; that thereupon all of the insurers, acting through their said adjusters and agents, stated to plaintiff's board that they had made full and complete investigation as to the fire and the market value of the building and furniture and fixtures therein destroyed by said fire and had obtained all and the correct information thereon, that there was no question as to the loss upon the furniture and fixtures in the sum of $3,400.00 and that appellants were then and there ready to pay plaintiff that sum for its loss on the furniture and fixtures; that said insurers, through their adjusters and agents, at the same time stated that said building was overvalued and could be replaced for the sum of approximately $53,000, and then offered the sum of approximately $56,000 as full payment for all of the loss to both said buildings and furniture and fixtures destroyed; that plaintiff declined to accept said amount and requested the insurance companies, through their adjusters, to replace said building, this however the insurers refused to do;

that plaintiff's board at said meeting contended that the value of the building was $75,000; that the value of the building and its replacement cost were the only matters discussed as to which there was any disagreement; no objection was made at any time that proofs of loss had not been furnished by the plaintiff and there was no request for the same; that the insurers at said meeting, by their conduct in offering to pay the full amount of insurance upon the furniture and fixtures and in offering to pay the sum of $53,000 for the loss of the building, led the plaintiff to believe that the only matter in dispute was the market and replacement value of the building, the appellants contending on the one hand that the market and replacement value was the sum of $53,000 and the plaintiff contending that the value was $75,000, and that by reason of the facts stated appellants waived the furnishing of proofs of loss in strict accordance with the provisions of the policies and are estopped to set up and claim such failure to furnish proofs; that appellants, through the examinations and efforts of their adjusters and the assistance of plaintiff's board rendered at the request of the adjusters obtained all the information which could have been obtained had proof of loss been furnished in strict conformity to the policies and the said adjusters led the plaintiff to believe that they had all the information desired with reference to said loss."

Upon demurrer these allegations must be taken as true. And, unless the stipulation contained in the policy that any waiver to be effective must be written upon or attached to the policy stands in the way, it is clear that the facts alleged are sufficient to constitute a waiver of, or, what amounts to the same thing, an estoppel against setting up, the condition requiring verified proofs of loss to be furnished within sixty days. See *Firemen's Ins. Co.* v. *Brooks,* 32 F. (2d) 451, 452; *Continental Ins. Co.* v. *Fortner,* 25 F. (2d) 398, 401, *et seq.* Cf. *Insurance*

Co. v. *Wolff*, 95 U. S. 326, 333. That the stipulation does not stand in the way is settled by the great preponderance of federal and state decisions. The rule deducible from these authorities is that such a stipulation has reference to those provisions and conditions which constitute part of the contract of insurance, and does not apply to a waiver, after the loss occurs, of stipulations in respect of things to be done subsequent to the loss as prerequisites to adjustment and payment. It is enough to cite as examples—*Continental Ins. Co.* v. *Fortner, supra,* p. 402; *Home Ins. Co.* v. *Hightower,* 22 F. (2d) 882, 885; *Twin City Fire Ins. Co.* v. *Stockmen's Nat. Bank,* 261 Fed. 470, 476.

With some exceptions, the cases decided by this court, relied upon by petitioners (e. g., *Lumber Underwriters* v. *Rife,* 237 U. S. 605), merely apply the familiar principle that parol proof may not be received to vary the terms of a written instrument; and nothing in any of them is in conflict with the rule as above stated. *Scottish Union & Nat. Ins. Co.* v. *Encampment Smelting Co.,* 166 Fed. 231, supports petitioners' contention; and it was because of the conflict created by that case that the certiorari here was granted. We cannot accept the theory of that case. It is out of harmony with the general current of authority, and with the views we have expressed. A late decision of the Circuit Court of Appeals for the Eighth Circuit clearly indicates that if the same question were again before that court the *Scottish Union* case would not be followed. *Hartford Fire Ins. Co.* v. *Empire Coal Min. Co.,* 30 F. (2d) 794, 802.

Second. The trial court allowed interest upon the amount of the loss beginning sixty days from the last date upon which proofs of loss were due under the terms of the policies. The contention is that the allowance of interest in a case of this kind is controlled by § 5972, Compiled Oklahoma Statutes, 1921, and that that statute as

construed by the State Supreme Court does not allow interest prior to the rendition of judgment. The section referred to reads:

"Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt."

The general rule that a federal court will follow the decisions of the highest court of a state construing a state statute is, of course, well established. The difficulty here is that, prior to the judgment of the federal district court in this case allowing interest, the decisions of the Supreme Court of Oklahoma were in such confusion that the view of that court in respect of the meaning of the statute, as applied to the present case, could not definitely be determined.

In *City of Chickasha* v. *Hollingsworth,* 56 Okla. 341, it was held that interest could not be recovered upon unliquidated damages where a judgment on verdict was necessary in order to ascertain the amount; and that decision was followed in *St. Paul Fire & Marine Ins. Co.* v. *Robison,* 72 Okla. 269, where the action was under a hail insurance policy to recover for damages to a crop of cotton. On the contrary, in *City of Oklahoma City* v. *Hoke,* 75 Okla. 211, it was held that, in an action for the destruction of crops due to an overflow caused by the maintenance of a dam, damages and interest from the time of the injury must be allowed on the ground that the value of the property destroyed was susceptible of computation. And again in *Hartford Fire Insurance Co.* v. *Bernard,* 99 Okla. 44, in an action upon a fire insurance policy for unliquidated damages, it was held that, since the amount could be ascertained by calculation based on the reasonable

market value of the property insured, interest should be allowed from the time when the insurance company should have satisfied the claim. In the still later case of *Midland Valley R. Co.* v. *Price,* 127 Okla. 106, where the action was for death of cattle caused by the negligence of a common carrier, and damage for the loss was based on the market value, it was held that interest was recoverable from the date of the injury.

From an examination and comparison of these cases and others it is evident that the federal trial court could not say that the State Supreme Court definitely had so construed the statute as to deny to the insured the right to recover interest from the date when payment for the loss should have been made; and the federal court was free to construe the statute for itself.

Petitioners, however, rely upon *American Eagle Fire Ins. Co.* v. *Lively,* 142 Okla. 246, as finally having settled the question in harmony with their contention. Whether it does so is, at least, doubtful. The action there was upon a fire insurance policy, the property destroyed consisting mostly of library books and some household furniture. In disposing of the question of interest the court said [p. 247]:

"Considering the nature of the property destroyed and the difficulty in ascertaining the actual or fair value thereof, we think interest should not have been allowed until the claim was reduced to judgment."

Assuming this to be a correct exposition of the statute as applied to that case, it does not follow, in the light of some of the other decisions digested above, that the same rule would be applied to the destruction of a house, the replacement or fair value of which could be ascertained without much difficulty. But that inquiry may be put aside, since the decision was handed down on April 8, 1930, more than a year after the present judgment had been entered by the federal district court, and whatever

may be the prospective effect of this last decision it cannot be given a retroactive effect in respect of the judgment of the federal district court so as to "make that erroneous which was not so when the judgment of that court was given." *Morgan* v. *Curtenius,* 20 How. 1, 3; *Pease* v. *Peck,* 18 How. 595, 598; *Roberts* v. *Bolles,* 101 U. S. 119, 128–129; *Burgess* v. *Seligman,* 107 U. S. 20, 35; *Edward Hines Trustees* v. *Martin,* 268 U. S. 458; *Fleischmann Co.* v. *Murray,* 161 Fed. 162.

The circuit court of appeals thought that the matter of interest was controlled by § 5977, Compiled Oklahoma Statutes, 1921, which provides:

"The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon."

Here the insurance companies had admitted their liability in the sum of $3,400 for furniture and fixtures and in the sum of $53,000 for the building, the latter amount being based upon what they insisted would be the cost of replacement. The only dispute between the parties was as to the latter item. Respondent contended that the value of the building was $75,000, but expressed a willingness and desire to have petitioners make the replacement. Under the terms of the insurance contracts the companies became liable to pay the amount of the loss not later than sixty days after proof of loss, or within one hundred and twenty days in all from the date of the loss. In the light of these facts it is immaterial whether § 5972 or § 5977 be invoked. In the absence of an authoritative state decision to the contrary, there was nothing in either which required the trial court in rendering its judgment to depart from the rule in respect of the allowance of interest which this court had recognized, namely, that, even in a case of unliquidated damages, "when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include

interest or its equivalent as an element of damages." *Miller* v. *Robertson,* 266 U. S. 243, 257–259, and cases cited. See also *Standard Oil Co.* v. *United States,* 267 U. S. 76, 79; *Bernhard* v. *Rochester German Ins. Co.,* 79 Conn. 388, 397. Under the facts disclosed by the record, the principles established by these decisions fully justified the allowance of interest made by the district court in this case.

Judgment affirmed.

STORY PARCHMENT COMPANY *v.* PATERSON PARCHMENT PAPER COMPANY ET AL.

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

No. 57. Argued January 19, 20, 1931.—Decided February 24, 1931.

1. On review by certiorari, respondents, without necessity of a cross-petition, may invoke as an additional ground for sustaining the judgment of the lower court a ground which that court had found against them. P. 560.
2. In an action under the Sherman Anti-Trust Act, on an issue as to whether there was evidence of a conspiracy or combination to monopolize interstate trade, this Court, upon examination of the record, finds evidence sufficient to preclude interference with concurrent findings of courts below. P. 560.
3. Evidence held sufficient to show that petitioner in an action for damages under Sherman Anti-Trust Act was injured in its business and property as result of respondents' unlawful combination. P. 560.
4. Assumption indulged by the appellate court, that respondents' acts would have been the same if they had been acting independently of one another, rejected as unsound, in light of evidence and instruction warranting finding by jury that price-cutting and resulting lower prices were directly attributable to unlawful combination. P. 561.
5. Characterization of verdict under Sherman Act, which included damages measured by difference between amounts actually realized by petitioner and what would have been realized by it from sales at

reasonable prices except for unlawful acts of respondents, as based upon mere speculation and conjecture, *held* unwarranted. P. 562.

6. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. P. 562.
7. Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it is enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrong-doer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. P. 563.
8. Question whether acts of respondents in violation of Sherman Act or conditions apart from them constituted the proximate cause of depreciation in value of petitioner's property, *held*, upon evidence in record, for the jury. P. 566.
9. Finding of jury on question of proximate cause must be allowed to stand unless all reasonable men, exercising unprejudiced judgment, would draw an opposite conclusion from the facts. P. 566.
10. Evidence as to extent to which value of petitioner's property was diminished by acts of respondents in violation of Sherman Act *held* sufficiently certain and definite to support verdict of jury. P. 567.
11. On certiorari to review a judgment of the Circuit Court of Appeals, the entire record is before this Court with power to review the action of the appellate court and direct such disposition of the case as that court might have made of it upon the appeal from the District Court; accordingly, assignments of error made on the appeal from the District Court, which were not considered below, may be examined and disposed of here. P. 567.

37 F. (2d) 537, reversed.

CERTIORARI, 281 U. S. 711, to review a judgment of the Circuit Court of Appeals which reversed a judgment for damages recovered by the present petitioner, in an action under the Sherman Anti-Trust Act.

Messrs. Isadore Levin and *Edward O. Proctor,* with whom *Mr. Edward C. Park* was on the brief, for petitioner.

Damage may be caused by acts pursuant to an unlawful conspiracy, even though the consequences of such acts are

no different from those which might or would have occurred in the absence of a conspiracy.

It was for the jury to determine whether the conditions existing in the trade were "natural conditions," or were conditions intentionally created in order to destroy the plaintiff. They were not bound to assume that, if it were certain that in the absence of a conspiracy similar conditions would have prevailed, the actual conditions were "natural conditions," for which the defendants would be in no wise responsible. Nor had the court below the right to assume as a matter of judicial knowledge that, in the absence of a conspiracy, conditions in the trade would have been substantially similar to those actually created by the conspirators.

The evidence was sufficient to enable the jury to ascertain the amount of the plaintiff's damages with reasonable certainty. *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 379.

The plaintiff was compelled to sell its product at reduced prices, and it was for the jury to determine whether those prices were below "the market or fair price . . . under natural conditions had the combination been out of the way." *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791; *Linen Thread Co.* v. *Shaw*, 9 F. (2d) 17, 19.

"Going value" may, of course, be one element of damages. *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, 165; *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 414.

The probable earning capacity of the plant is one of the factors for the basis of a judgment as to value. *Minnesota Rate Cases*, 230 U. S. 352, 434; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 328.

Mere difficulty in ascertaining the amount of damages will not bar a recovery. If there is difficulty, it is not greater than exists in many other cases. *Rankin* v. *Asso-*

ciated Bill Posters, 42 F. (2d) 152, 155; *Pennsylvania Sugar Refining Co.* v. *American Sugar Co.,* 166 Fed. 254, 260; *Barrett Co.* v. *Panther Rubber Mfg. Co.,* 24 F. (2d) 329, 337; *Hyer* v. *Richmond Traction Co.,* 168 U. S. 471, 483.

The plaintiff was at least entitled to recover nominal damages and its costs. *United States* v. *Mock,* 149 U. S. 273. Distinguishing: *Keogh* v. *Chicago & N. W. R. Co.,* 260 U. S. 156.

The Circuit Court of Appeals had no power to order judgment for the defendants below. *Slocum* v. *New York Life Ins. Co.,* 228 U. S. 364.

Mr. Edward F. McClennen, with whom *Mr. Joseph M. Dohan* was on the brief, for respondents.

It is not enough to show that the defendants did wrong. It must appear that the injury suffered by the plaintiff was caused by that wrong. *Atchison, T. & S. F. Ry. Co.* v. *Toops,* 281 U. S. 351, 354, 357; *Jack* v. *Armour,* 291 Fed. 741, 745.

The plaintiff has suffered the consequences of attempting to enter an overcrowded industry with insufficient capital. If it was injured by a reduction of prices, this was due to its own reduction of prices and not to any combination of the defendants. There is no evidence that the plaintiff, in the effort to get trade or meet competition, would not have reduced prices just as much as it did reduce them, even if the defendants had not combined; nor that if it had not reduced prices it would have succeeded in business.

There is no evidence as to the amount of goods the plaintiff would have sold if the plaintiff had not reduced its prices.

Damages resulting from the defendants' unlawful acts and in an amount susceptible of expression in figures proved by facts from which their existence is logically and

legally inferable and not supplied by conjecture, is an essential element of a cause of private action under the Anti-Trust Acts. *Keogh* v. *Chicago & N. W. R. Co.,* 260 U. S. 156, 165, *semble; American Sea Green Slate Co.* v. *O'Halloran,* 229 Fed. 77, 80.

What larger sum the plaintiff would have made during the time it was in business, if conditions had been different from what they were, is too speculative to warrant a recovery. *Keogh* v. *Chicago & N. W. R. Co., supra; American Sea Green Slate Co.* v. *O'Halloran, supra; Sussex Land & Live Stock Co.* v. *Midwest Refining Co.,* 276 Fed. 932; *Chicago Life Ins. Co.* v. *Tiernan,* 263 Fed. 325; *McCornick* v. *U. S. Mining Co.,* 185 Fed. 748; *Central Coal & Coke Co.* v. *Hartman,* 111 Fed. 96.

The fact that one manufacturer could make profits in a given line of business is not evidence that another in the same line with equal advantages would do so. *Keystone Mfg. Co.* v. *Adams,* 151 U. S. 139. Disbelief of evidence is not proof of the contrary. *Northern Ry. Co.* v. *Page,* 274 U. S. 65, 76.

Mr. Justice Sutherland delivered the opinion of the Court.

This is an action arising under the Sherman Anti-Trust Act to recover damages resulting from an alleged conspiracy between respondents and West Carrollton Parchment Company, not joined for lack of jurisdiction, to monopolize interstate trade and commerce in vegetable parchment, exclude the petitioner therefrom, and destroy its business in such trade and commerce. A jury returned a verdict for petitioner in the sum of $65,000, but in the alternative for the respondents " if, as a matter of law, the plaintiff is not entitled to a verdict." The trial court approved the verdict and rendered judgment for treble the amount of the damages in accordance with § 7 of the act. On appeal to the circuit court of appeals,

the judgment was vacated and the case remanded to the trial court with directions to enter judgment for respondents upon the ground that petitioner had not sustained the burden of proving that it had suffered recoverable damages. 37 F. (2d) 537.

Respondents seek to sustain this judgment upon that ground and also upon the additional ground, which the lower court found against them, that there was no evidence of a conspiracy or combination to monopolize interstate trade. Because there was no cross-petition for certiorari, petitioner insists that the additional ground is not open here for consideration. But respondents do not invoke that ground in order to overthrow the judgment below, but to sustain it; and this they may do. *Langnes* v. *Green, ante,* p. 531.

The point, however, is readily disposed of. There is evidence in the record to the effect that the three companies named, prior to the time petitioner entered the field, had maintained uniform prices and enjoyed a substantial monopoly of the interstate trade in parchment paper. There is also evidence, sufficient to justify the action of the district court in submitting the issue to the jury, that after petitioner began business the three companies combined and conspired to continue this monopoly in violation of § 2 of the Sherman Anti-Trust Act, c. 647, 26 Stat. 209. The verdict of the jury and the judgment thereon of the district court have the effect of a finding in favor of petitioner upon that issue; and to that extent the verdict and judgment were sustained by the court below. There is enough evidence in the record to preclude an interference on our part with these concurrent findings. That the petitioner was injured in its business and property as a result of this unlawful combination we think also finds sufficient support in the evidence. Questions in respect of the liability of the wrongdoers to respond in damages alone remain to be considered.

The trial court submitted to the jury for consideration only two items of damages, (1) the difference, if any, between the amounts actually realized by petitioner and what would have been realized by it from sales at reasonable prices except for the unlawful acts of the respondents; and (2) the extent to which the value of petitioner's property had been diminished as the result of such acts.

The view of the court of appeals that no recovery could be had in respect of the first item apparently rests upon its conclusions that there was no basis for a reasonable inference that prices in excess of those actually realized would have prevailed if there had been no combination; and that, in any event, there was no damage which could be measured and expressed in figures not based on speculation and conjecture.

There was evidence from which the jury reasonably could have found that in pursuance of the conspiracy respondents sold their goods below the point of fair profit, and finally below the cost of production; that petitioner had an efficient plant and sales organization, and was producing a quality of paper superior to that produced by either of the three companies; and that current prices, shown in detail, were higher during a period antedating the unlawful combination and price cutting in pursuance of it than afterward. It does not necessarily follow, of course, that these higher prices would have continued except for the conspiracy, but it is fair to say that the natural and probable effect of the combination and price cutting would be to destroy normal prices; and there was evidence of the prices received by petitioner before the cut prices were put into operation, and those received after, showing actual and substantial reductions, and evidence from which the probable amount of the loss could be approximated. The trial court fairly instructed the jury in substance that if they were satisfied that the old prices were

reasonable and that they would not have changed by reason of any economic condition, but would have been maintained except for the unlawful acts of the respondents, the jury might consider as an element of damages the difference between the prices actually received and what would have been received but for the unlawful conspiracy.

Upon a consideration of the evidence we are of opinion that it was open to the jury to find that the price cutting and the resulting lower prices were directly attributable to the unlawful combination; and that the assumption indulged by the court below, that respondents' acts would have been the same if they had been acting independently of one another, with the same resulting curtailment of prices, must be rejected as unsound.

Nor can we accept the view of that court that the verdict of the jury, in so far as it included damages for the first item, cannot stand because it was based upon mere speculation and conjecture. This characterization of the basis for the verdict is unwarranted. It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. *Taylor* v. *Bradley*, 4 Abb. Ct. App. (N. Y.) 363, 366–367:

"It is sometimes said that speculative damages cannot be recovered, because the amount is uncertain; but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too

remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of.

"The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount."

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U. S. 359, 379. Compare *The Seven Brothers*, 170 Fed. 126, 128; *Pacific Whaling Co.* v. *Packers' Assn.*, 138 Cal. 632, 638. As the Supreme Court of Michigan has forcefully declared, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party. *Allison* v. *Chandler*, 11 Mich. 542, 550–556. That was a case sounding in tort, and at page 555 the court, speaking through Christiancy, J., said:

"But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover no damages (or merely nominal), because he can not show the exact amount with cer-

tainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained; but it would be the certainty of injustice.

. . . . . .

"Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit."

And again in *Gilbert* v. *Kennedy*, 22 Mich. 117, 129 *et seq.*, also a tort action, the court, through the same eminent judge, pointed out that cases will often occur in which it is evident that large damages have resulted, but where no reliable data or element of certainty can be found by which to measure with accuracy the amount. Rejecting the view that in such cases the jury should give only nominal, that is, in effect, no damages, leaving the injured party without redress, the court said (p. 130):

"To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be thus certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite depredation. Such is not, and cannot be the law, though cases may be found where courts have laid down artificial and arbitrary rules which have produced such a result."

After pointing out that there could be no just principle requiring a higher degree of certainty in the evidence upon which the damages are to be estimated than in reference to other branches of the case, the court said [p. 131] that

where from the nature of the case damages could not be measured with certainty by a fixed rule, the facts and circumstances tending to show the probable amount of such damages should be submitted to the jury to enable them to form—

"such reasonable and probable estimate, as in the exercise of good sense and sound judgment they shall think will produce adequate compensation. There is no sound reason in such a case, as there may be, to some extent, in actions upon contract, for throwing *any part* of the loss upon the injured party, which the jury believe from the evidence he has sustained; though the precise amount cannot be ascertained by a fixed rule, but must be matter of opinion and probable estimate. And the adoption of any arbitrary rule in such a case, which will relieve the wrong-doer from any part of the damages, and throw the loss upon the injured party, would be little less than legalized robbery.

"Whatever of uncertainty there may be in this mode of estimating damages, is an uncertainty caused by the defendant's own wrongful act; and justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced; . . ."

As was said by Judge Anderson in his dissenting opinion below, there are many cases in which damages are allowed where the element of uncertainty is at least equal to that in the present case—as, for example, copyright and trade mark cases, cases of unfair competition, and many cases of personal injury. See also *Straus* v. *Victor Talking Mach. Co.*, 297 Fed. 791, 802, a case very much like the present one, except that the plaintiffs were buyers and were compelled to pay higher prices for goods because of the unlawful acts of defendants, instead of being obliged, as here, to sell at lower prices. Numerous decisions are there cited in support of the statement, that "The constant tendency of the courts is to find some way

in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery."

It is not easy to reconcile the decision in the present case with what was said by the same court in *Linen Thread Co.* v. *Shaw,* 9 F. (2d) 17, 19, namely, that "The rule that damages, if uncertain, cannot be recovered, applies to their nature, and not to their extent. If the damage is certain, the fact that its extent is uncertain does not prevent a recovery."

Disposing of the second item of damages, the court below, after referring to evidence tending to show that petitioner was not in a thriving financial condition, said that petitioner was without capital to meet the situation which it faced, even if there had been no conspiracy and there had been open competition; and that its failure was inevitable either from lack of capital or inefficient management or both. The court, therefore, concluded that petitioner had not sustained the burden of proving that the depreciation in value of its plant was due in any measurable degree to any violation of the Sherman Act by the respondents. But this conclusion rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to the verdict of the jury without usurping the functions of that fact finding body. Whether the unlawful acts of respondents or conditions apart from them constituted the proximate cause of the depreciation in value, was a question, upon the evidence in this record, for the jury "to be determined as a fact, in view of the circumstances of fact attending it." *Milwaukee & St. Paul Ry. Co.* v. *Kellogg,* 94 U. S. 469, 474. And the finding of the jury upon that question must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts. *Missouri, K. & T. Ry. Co.* v. *Byrne,* 100 Fed. 359, 363; *Travelers'*

Ins. Co. v. *Melick,* 65 Fed. 178, 181; *Chicago G. W. Ry. Co.* v. *Price,* 97 Fed. 423, 429. It would be going far here to say that this qualifying exception has been met.

There was evidence to the effect that petitioner's plant had cost $235,000, of which $90,000 had been used to purchase and install a parchmentizing machine. After petitioner had been compelled to close its business, as a result, we must now assume, of the unlawful acts of the respondents, this property for the purpose of that business was abandoned. That some depreciation in the value of the plant must have resulted is obvious. The treasurer of petitioner estimated the market value of the plant after it had been closed down at $75,000. If this estimate be accepted, the depreciation was far more than the entire amount of the verdict, which included both items of damages. It is true that the treasurer was an interested witness and that he was not an expert; and the court in its charge expressly directed the attention of the jury to those facts. But it was for the jury to determine the weight of the evidence, the credit to be given the witness, and the extent to which his testimony should be acted upon. That there was actual damage due to depreciation in value was not a matter of speculation, but a fact which could not be gainsaid. The amount alone was in doubt; and, in the light of the foregoing discussion as to the first item of damages, the proof is sufficiently certain and definite to support the verdict of the jury in that respect.

Other assignments of error made on the appeal from the district court were not considered by the court below. No argument in support of these assignments has been submitted here, and respondents assume that they will be remitted for the consideration of the court below if the judgment of that court be reversed. The entire record, however, is before this court with power to review the action of the court of appeals and direct such disposition of the case as that court might have made of it upon the

appeal from the district court. *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267; *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 588. And see *Langnes* v. *Green, supra.* Accordingly, we have examined these assignments, some eight in number. One or more of them involve questions which have been disposed of by the foregoing opinion. We find nothing in any of the others of sufficient substance or materiality to call for consideration.

The judgment of the court of appeals is reversed and that of the district court affirmed.

UNITED STATES *v.* LA FRANCA.

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

No. 74. Argued January 27, 1931.—Decided February 24, 1931.

1. Failure to enter an exception to an order of the District Court overruling pleas of former jeopardy and *res judicata* does not preclude their consideration on review, where the facts were agreed to by stipulation entered of record. P. 570.
2. A tax on retail liquor dealing sought to be recovered under § 701, par. 9, of the Revenue Act of 1924, which was passed in lieu of a similar provision in the Act of 1918, repeated in the Act of 1921, is properly treated as having been imposed by an Act in force prior to the enactment of the National Prohibition Act (1919). P. 571.
3. The "tax" imposed by § 35, Title 2, of the National Prohibition Act, which provides for the assessment and collection of a "tax" in "double the amount now provided by law," upon evidence of an illegal sale under the Act, is not a true tax but a penalty. P. 572.
4. A tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction by statute as punishment. If an exaction be clearly a penalty, it cannot be converted into a tax by calling it such. *Id.*
5. A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score. P. 574.

6. In § 5 of the Willis-Campbell Act (1921), by which laws and penalties respecting taxation of and traffic in intoxicating liquor, in force when the National Prohibition Act was enacted, are continued in force, with the proviso that, where any act violates any such prior law and also the National Prohibition Act, conviction under one shall be a bar to prosecution under the other, the word "prosecution" must be construed to include a civil action to recover a penalty for an act declared to be a crime. P. 575.
7. Statutes amended are to be read, as to all subsequent occurrences, as if they had originally been in their amended form. P. 576.
8. A civil action to recover taxes imposed by R. S. § 3244 and § 701 of the Revenue Act of 1924, and the additional taxes and penalties provided by § 35, Title 2, of the National Prohibition Act, is barred, under § 5 of the Willis-Campbell Act, by a prior conviction based on the same transactions as the taxes. P. 575.

37 F. (2d) 269, affirmed.

CERTIORARI, 281 U. S. 713, to review a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court for the Government, 26 F. (2d) 706, in a suit to recover from the respondent taxes and penalties.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher* and *Messrs. John J. Byrne* and *Paul D. Miller* were on the brief, for the United States.

Mr. E. Howard McCaleb, Jr., with whom *Mr. E. Howard McCaleb* was on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Respondent was sued in a federal district court for non-payment of taxes and penalties. The petition alleged that he had sold intoxicating liquor at various times in his restaurant, and by reason thereof had become a retail liquor dealer and incurred liabilities as follows: In the sum of $37.50, retail liquor dealer's tax under R. S. § 3244 for a period of nine months, doubled under § 35,

Title 2, of the National Prohibition Act; $4.68, penalty imposed by R. S. § 3176, as amended, for failure to make and file a return as a retail liquor dealer; $1,500, special tax under § 701 of the Revenue Act of 1924 for engaging in the business of retail liquor dealer in Louisiana contrary to the law of that state, being for a period of nine months and doubled under § 35; $500, penalty, in addition to the retail liquor dealer's tax imposed by § 35.

Prior to the commencement of the action respondent had been convicted and fined upon an information filed by the United States under the National Prohibition Act, charging him with the same unlawful sales of intoxicating liquor set forth in the petition as the basis for the imposition of the taxes and penalties sought to be recovered. There is no dispute about the facts. They are alleged in the petition and, in detail, made the subject of a stipulation of the parties in the district court. Pleas of former jeopardy and of *res judicata* were overruled by the district court, a jury was waived, and judgment for the United States entered for the full amount sued for. The court of appeals reversed the judgment on the ground that the action was barred by § 5 of the Willis-Campbell Act. 37 F. (2d) 269.

The point is made that respondent failed to enter an exception to the order of the district court overruling the pleas, but, since the facts were agreed to by stipulation entered of record, the failure to note an exception to the order will not preclude their consideration. Certainly it does not appear that an exception was necessary to direct the mind of the trial court to the precise point to afford opportunity for reconsideration, which is one of the functions of an exception. *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512, 529; *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 82. And an exception is not necessary to open for our consideration a question of law apparent on the record, as it is here, where there is nothing

in the record to indicate waiver of the respondent's rights. *Denver* v. *Home Savings Bank*, 236 U. S. 101, 103–104.

By § 35, Title 2, of the National Prohibition Act, c. 85, 41 Stat. 305, 317 (U. S. C., Title 27, § 52), it is provided that the act—

"shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in [intoxicating] liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers."

Section 5 of the Willis-Campbell Act, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, § 3), so far as pertinent here provides:

"That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other."

By § 701, par. 9, of the Revenue Act of 1924, c. 234, 43 Stat. 253, 327 (U. S. C., Title 26, § 206), it is provided that every person carrying on the business of retail liquor dealer, etc., in any state, etc., contrary to the laws of such state, etc., or in any place where the carrying on of such business is prohibited by local or municipal law, shall pay in addition to all other taxes, $1,000. This section

was passed in lieu of a similar provision in the Revenue Act of 1918, repeated in the Revenue Act of 1921. The government, accordingly, treats the item sought to be recovered under § 701 as having been imposed by an act in force prior to the National Prohibition Act. With that view we agree.

Of the four items involved, two unmistakably are penalties, and are so denominated. The other two, notwithstanding they are called taxes, are in their nature also penalties. Putting aside for later consideration the item of $4.68, we consider, for the present, only the other three items.

By § 35, *supra*, it is provided that upon evidence of an illegal sale under the National Prohibition Act, a tax shall be assessed and collected in double the amount now provided by law. This, in reality, is but to say that a person who makes an illegal sale shall be liable to pay a "tax" in double the amount of the tax imposed by preëxisting law for making a legal sale, which existing law renders it impossible to make. A tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law is settled by *Lipke* v. *Lederer*, 259 U. S. 557, 561–562. See also *Regal Drug Corp.* v. *Wardell*, 260 U. S. 386. There is nothing in *United States* v. *One Ford Coupe*, 272 U. S. 321, or *Murphy* v. *United States*, 272 U. S. 630, to the contrary. The first of these cases was a proceeding to forfeit an automobile because used in violation of law; the other

was a suit in equity to enjoin the occupation and use of premises for a year because used in the commission of offenses under the National Prohibition Act, and to abate the maintenance as a nuisance. The distinction made by these four cases is that in the first two, the purpose of the proceedings was punishment; while, as to the other two, the purpose in the first case was to enforce a simple tax, not one which had been, as here, converted, by a change of its nature, into a penalty, and in the second case the purpose was prevention. *Murphy* v. *United States, supra,* p. 632. Respondent already had been convicted and punished in a criminal prosecution for the identical transactions set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule?

In *United States* v. *Chouteau,* 102 U. S. 603, a distiller and his sureties were sued upon a bond, one of the breaches of which was that the distiller had removed spirits from his distillery without first paying the tax thereon. To this it was pleaded that before the suit was brought two indictments had been found against the distiller for the same removals, and that upon the recommendation of the Attorney General the government had accepted a specified sum in compromise and satisfaction of the indictments, which were thereupon dismissed and abandoned. The court held that the compromise was the same in principle as a conviction in the criminal proceedings, and that the action was barred; and at page 611 said:

"Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The

compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offence with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offence. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless."

In *United States* v. *McKee,* 4 Dill. 128, where the defendant was indicted, convicted and punished for conspiring with others to defraud the United States by unlawfully removing distilled spirits from their distilleries without the payment of taxes, it was held by Mr. Justice Miller and Judge Dillon, sitting together, that this constituted a bar to a civil suit to recover the penalty of double the amount of the taxes of which the government had been defrauded by means of the conspiracy, the transactions in both cases being the same. To the same effect, see *United States* v. *Gates,* 25 Fed. Cas. 1263, Case No. 15,191.

In the light of these decisions it is clear that if the Willis-Campbell Act be so construed as to justify a recovery in this case, a grave question as to the constitutionality of the act will be presented. The decisions of this court are uniformly to the effect that "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401; *United States* v. *Standard Brewery,* 251 U. S. 210, 220; *Baender* v. *Barnett,* 255 U. S. 224, 226. Doubts as to the meaning of the Willis-Campbell Act, in respect of the questions here for consideration, therefore, must be resolved in accordance with this rule.

Section 5 of the act continues in force all laws in regard to taxation of, and traffic in, intoxicating liquor and penalties for violations of such laws as were in force when the National Prohibition Act was enacted; but with the proviso that a conviction for an act or offense under one shall be a bar to prosecution under the other. The question whether this proviso applies to the present case turns mainly upon the scope and meaning of the word "prosecution," since there is no doubt that respondent had been convicted under the National Prohibition Act of the offense of making the same illegal sales as those alleged as a basis for the imposition of the "taxes" and penalties sought to be recovered in the civil action. The government contends that the word implies a criminal proceeding and can not be extended to include a civil action. But an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it take the form of a civil action; and the word " prosecution " is not inapt to describe such an action. In the *McKee* case, *supra,* Mr. Justice Miller evidently held that opinion, since he used both the words "offense" and "prosecution" in characterizing the civil action there under consideration. In any event, we should feel bound to resolve a greater doubt than we now entertain in favor of that interpretation of the word so as to avoid the grave constitutional question which otherwise would arise.

We find no merit in the contention of the government that, as additional amounts resulted from doubling the taxes imposed by R. S. § 3244 and § 701 of the Revenue Act of 1924 and adding penalties, the civil action, in so far as the additional amounts are concerned, arose solely under the National Prohibition Act, and not, as the Willis-Campbell Act contemplates, under preëxisting acts. Except for these prior statutes, there would be no basis for seeking to impose a liability on respondent for the

amounts sued for in the civil action. Section 35 of the act, in effect, amended the preceding statutes in the particulars stated; and, as thus amended, these statutes now are to be read, as to all subsequent occurrences, as if they had originally been in the amended form. *Blair* v. *Chicago,* 201 U. S. 400, 475; *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 362; *Kelleher* v. *French,* 22 F. (2d) 341, 347; *Cumberland Tel. & Tel. Co.* v. *Memphis,* 200 Fed. 657, 660–661; *Farrell* v. *State,* 54 N. J. L. 421, 423–424; *Russell* v. *State,* 161 Ind. 481, 482. To hold that the acts of respondent in question were not violations of these preceding laws as amended, as well as of the National Prohibition Act, would be to give a narrow and strained application to this provision of the Willis-Campbell Act, and to raise the very doubts in respect of its constitutionality which we are bound to avoid if reasonably it can be done.

The government seeks to draw a distinction between the item of $4.68 and the other items, on the ground that the former constitutes a penalty for failure to make and file a return, and respondent was never charged with, or convicted of, an offense involving that omission. Neither the court of appeals nor the district court dealt with the question. The decisions in both courts proceeded upon the theory that all of the items were subject to the same rule; and the record plainly indicates that this was and had been the theory of the government throughout until it came to the preparation of its final brief in this court. The distinction now made was not referred to in the government's petition for certiorari, or in the brief filed in support of it. The point suggests questions which the court of appeals should have been given an opportunity to decide, that is to say, whether a second jeopardy results from the fact, if it be such, that the recovery of the penalty depends upon proof of the same criminal offense of which respondent had theretofore been convicted; and

whether requiring under penalty a return as a retail liquor dealer, amounting, as it plainly does, to an admission of criminal liability, violates the rule against compulsory self-incrimination. In this situation we do not now feel called upon to consider or decide the point. If the government, in view of the foregoing and of our decision upon the questions in respect of which the writ of certiorari was granted, shall still desire to press its contention, it will be given an opportunity to do so by first presenting it to the trial court.

The judgment of the court of appeals will be affirmed and the cause remanded to the district court for further proceedings in conformity with this opinion, without prejudice to the further consideration and determination by the district court of the question of liability in respect of the item of $4.68.

Affirmed.

VARIOUS ITEMS OF PERSONAL PROPERTY ET AL. *v.* UNITED STATES.

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

No. 114. Argued January 27, 1931.—Decided February 24, 1931.

1. There is no constitutional objection to the forfeiture of property used in defrauding the United States of the exaction provided by § 600 (a) of the Revenue Act of 1918, as amended (which imposes a "tax," greater than and including the basic tax, on all distilled spirits diverted to beverage purposes), whether such exaction be a true tax or a penalty, or partly one and partly the other. P. 579.
2. Where a diversion was accomplished by the withdrawal of pure alcohol, which was then specially denatured and in that condition sold, to the contemplated end that, after it had passed into the hands of purchasers, it would be "cleaned" and finally used for beverage purposes, it was a diversion of distilled spirits to beverage purposes under § 600 (a). P. 580.

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3. Proceedings under R. S. §§ 3257 and 3281, to forfeit a distillery used in defrauding the United States of the tax on spirits imposed by § 600 (a), Revenue Act of 1918, are not barred, under § 5 of the Willis-Campbell Act or the Fifth Amendment, by the prior conviction of the owner of a conspiracy to violate the National Prohibition Act involving the transactions set forth in the libel. P. 580.
4. The Court is not required to go outside the record to consider a question not considered by the court below nor referred to in the application for certiorari, and in respect of which no instructions to the jury were asked or given. P. 582.

40 F. (2d) 422, affirmed.

CERTIORARI, *post*, p. 818, to review a judgment affirming a judgment of the District Court declaring a forfeiture of premises to the Government in a proceeding under R. S. §§ 3257 and 3281.

Mr. Lewis Landes for petitioners.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher* and *Messrs. John J. Byrne* and *Paul D. Miller* were on the brief, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This was a proceeding, under R. S. §§ 3257 and 3281, by the United States to forfeit a distillery, warehouse and denaturing plant of the Waterloo Distilling Corporation on the ground that the corporation had conducted its distilling business upon the premises with intent to defraud, and had defrauded, the government of the tax on the spirits distilled, in consequence of which the premises had become forfeited to the government. The fraud alleged was the withdrawal of alcohol ostensibly for non-beverage but in reality for beverage purposes, without payment of the tax on spirits diverted to beverage purposes imposed by § 600 (a) of the Revenue Act of 1918 as amended. The corporation denied any violation of law.

Evidence was introduced by the government tending to support the libel. The government admitted that, prior to the filing of the libel, the corporation and others had been indicted and convicted for conspiring to violate provisions of the statute, involving the transactions set forth in the libel as a basis for the forfeiture. A motion to dismiss the libel on the ground that the forfeiture proceedings were therefore barred was denied by the district court. There was a verdict for the government and judgment declaring a forfeiture of the premises to the government. This judgment was affirmed by the court below. 40 F. (2d) 422.

The only questions arising upon the record which we deem it necessary to consider are two in number: (1) whether under § 600 (a) of the Revenue Act of 1918, as amended, there was a diversion of distilled spirits to beverage purposes; (2) whether a conviction of a conspiracy to violate § 600 (a) barred the proceedings to forfeit the premises.

First. By § 600 (a), as amended, U. S. C., Supp. III, Title 26, § 245 (4), it is provided:

"On and after February 26, 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph."

Included in the $6.40 is the basic tax of $2.20, which is not a penalty but a true tax. Only the remaining part of the $6.40 may be regarded as a penalty; but, whether

the exaction be a tax or a penalty or partly one and partly the other, there is no constitutional objection to enforcing it by forfeiture of the offending property. See *United States* v. *One Ford Coupe,* 272 U. S. 321, 328–329.

The alleged diversion was accomplished by the withdrawal of pure alcohol, which was then specially denatured and made unfit to drink, and in that condition was sold. Petitioners contend that this was a diversion not of distilled spirits, but of denatured alcohol, and, therefore, not within the reach of § 600 (a). But upon the evidence and the instructions of the court it was open to the jury to find that the alcohol was specially denatured to the contemplated end that, after it had passed into the hands of purchasers, it would be "cleaned" and finally used for beverage purposes. In that view it is entirely accurate to say that the alcohol was diverted to beverage purposes, the special denaturing being only an intervening step.

Second. In *United States* v. *La Franca, ante,* p. 568, we hold that, under § 5 of the Willis-Campbell Act, a civil action to recover taxes, which in fact are penalties, is punitive in character and barred by a prior conviction of the defendant for a criminal offense involving the same transactions. This, however, is not that case, but a proceeding *in rem* to forfeit property used in committing an offense. At common law, in many cases, the right of forfeiture did not attach until the offending person had been convicted and the record of conviction produced. But that doctrine did not apply, as this court in an early case pointed out, where the right of forfeiture was "created by statute, *in rem,* cognisable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be *malum prohibitum,* or *malum in se.*" *The Palmyra,* 12

Wheat. 1, 14. In that case the forfeiture was of a vessel in admiralty. But in *Dobbins's Distillery* v. *United States,* 96 U. S. 395, the property seized was a distillery in the hands of a lessee. The acts or omissions of the lessee with intent to defraud the revenue were unknown to the owner. Nevertheless, it was held that the distillery was subject to forfeiture. The court after referring to *The Palmyra, supra,* and to the statute which provided for the forfeiture of the property in consequence of the unlawful acts of the distiller with intent to defraud, said (p. 401):

"Nothing can be plainer in legal decision than the proposition that the offence therein defined is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery."

To the same effect, see *Goldsmith-Grant Co.* v. *United States,* 254 U. S. 505, 510–512; *United States* v. *Five Boxes of Asafoetida,* 181 Fed. 561, 564. And compare *Murphy* v. *United States,* 272 U. S. 630, 632.

A forfeiture proceeding under R. S. 3257 or 3281 is *in rem.* It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the punishment for the criminal offense. *Origet* v. *United States,* 125 U. S. 240, 245–247. The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply. *United States* v. *Three Copper Stills,* 47 Fed. 495, 499; *United States* v. *Olsen,* 57 Fed. 579, 582 *et seq.; Sanders* v. *Iowa,* 2 Iowa (Clarke ed.) 230, 278.

It is said that included in the decree of forfeiture is an island not "bonded" or used as a means of ingress or egress to, but entirely separate from, the distilling premises. Our attention, however, is called to nothing in the record which appears to verify these statements. No instructions to the jury were asked or given on the subject, nor was it considered by the court below or referred to in the application for certiorari. In these circumstances it is unreasonable to expect us to consider the question.

We have not overlooked other contentions made by petitioner, but, in so far as they are not met by what already has been said, we find it unnecessary to consider them for lack of substance.

Judgment affirmed.

COOLIDGE ET AL., TRUSTEES, *v.* LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF MASSACHUSETTS.

APPEAL FROM THE PROBATE COURT OF NORFOLK COUNTY, MASSACHUSETTS.

Nos. 33 and 34. Argued December 8, 1930.—Decided February 24, 1931.

By voluntary deeds of trust, a husband and wife transferred real and personal property, owned by them severally in certain proportions, to trustees, in trust to pay the income in those proportions to the settlors during their joint lives and then the entire income to the survivor of them, and upon the death of the survivor to divide the principal equally among the settlors' five sons, provided that, if any of the sons should predecease the survivor of the settlors, the share of that son should go to those entitled to take his intestate property under the statute of distribution in force at the death of such survivor. The deeds reserved no power of revocation, modification or termination prior to the death of the survivor of the settlors. After both settlors had died, the State imposed succession taxes upon the remainder interests of the sons, under a statute passed before the deaths of the settlors but after the creation of the trusts (Gen. Laws

Mass., 1921, c. 65, § 1,) which provides that all property within the jurisdiction of the State which shall pass by deed, grant or gift, (except in cases of *bona fide* purchase for full consideration in money or money's worth,) made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust, shall be subject to a tax. The court below decided that the tax was valid as an excise on the succession. *Held:*

1. The trust deeds are contracts within the meaning of the Federal Constitution. The State can not by subsequent legislation alter their effect or impair or destroy rights that had vested under them. P. 595.

2. Under the due process clause of the Fourteenth Amendment, a gift can not be taxed by a State under a law that was enacted after the gift was fully consummated. P. 595.

3. When the jurisdiction of this Court is invoked to determine whether a state law impairs the rights of the litigant under a prior contract, or whether the State is depriving him of his property without due process of law and the question turns upon the existence and terms of a contract, this Court is bound to determine for itself whether there is a contract and to ascertain its true meaning and effect. P. 597.

4. The succession of each son was complete when the trust deeds took effect, and the enforcement of the statute imposing the excise would be repugnant to the contract clause of the Constitution and the due process clause of the Fourteenth Amendment. Pp. 597–605.

By the deed of each grantor one-fifth of the remainder was vested in each of the sons, subject to be divested only by his death before the death of the survivor of the settlors. It was a grant *in praesenti*, to be possessed and enjoyed by the sons upon the death of such survivor. The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment. The deaths of the settlors were not a generating source of any right in the remaindermen; nothing moved from them, or either of them, or from their estates, when either of them died. The succession, when the time came, did not depend upon any permission or grant of the State. While the sons, if occasion should arise, might by suit require the trustees to account, the property was never in the custody of the law or of any court, and the State was powerless to condition the possession or enjoyment of what had been conveyed to them by the deeds. The fact that each son was liable to be divested of the

remainder by his own death before that of the survivor of the grantors, does not render the succession incomplete. The vesting of actual possession and enjoyment depended upon an event that must inevitably happen by the efflux of time, and nothing but his failure to survive the settlors could prevent it. Succession is effected as completely by a transfer of a life estate to one and remainder over to another, as by a transfer in fee. No Act of Congress has been held by this Court to impose a tax upon possession and enjoyment, the right to which had fully vested prior to the enactment, nor has this Court sustained any state law imposing an excise upon mere entry into possession and enjoyment of property, where the right to such possession and enjoyment upon the happening of a specified event had fully vested before the enactment.

268 Mass. 443; 167 N. E. 757, reversed.

APPEALS from final decrees sustaining inheritance taxes. The decrees were entered by the Probate Court upon rescripts from the Supreme Judicial Court.

Mr. Robert G. Dodge, with whom *Mr. Harold S. Davis* was on the brief, for appellants.

If rights granted by a deed are so vested that interference with them impairs the obligation of the contract embodied in the deed, it necessarily follows that such interference deprives the grantee of his property without due process of law. The converse is equally true. Unless the tax can be sustained as an excise, it must fail altogether; if the statute were construed as imposing a property tax, it would be repugnant to the Constitution of Massachusetts. *Minot* v. *Winthrop,* 162 Mass. 113.

The case presents a situation which has arisen many times in different state courts and as to which the decisions, other than that now under review, are all to the effect that the attempt to impose an excise constitutes an unwarranted interference with vested rights. *Hunt* v. *Wicht,* 174 Cal. 205; *Lacey* v. *State Treasurer,* 152 Iowa 477; *State* v. *Probate Court,* 102 Minn. 268; *Matter of Pell,* 171 N. Y. 48; *Matter of Craig,* 97 App. Div. 289,

affirmed 181 N. Y. 551; *Houston's Estate,* 276 Pa. St. 330; *Commonwealth* v. *Wellford,* 114 Va. 372.

As is pointed out in these cases, the vital question is as to when the succession to the property takes place, because the succession is the subject of the tax. If the succession is complete before the tax law is enacted, the effect of the law, if construed as applying to such a case, is to impose an excise with respect to a past transaction and this, it is very clear, cannot be done. *Untermyer* v. *Anderson,* 276 U. S. 440; *Blodgett* v. *Holden,* 275 U. S. 142; *Nichols* v. *Coolidge,* 274 U. S. 531.

A comprehensive statement of the principle is found in the opinion of Mr. Justice Holmes in *Chanler* v. *Kelsey,* 205 U. S. 466, at p. 480.

If the owner of property conveys it to trustees to pay the income to himself for life and on his death to distribute the principal among specified individuals, these individuals succeed to the property upon the execution of the trust instrument. It is the shifting of the power to control the devolution of the property, and not the change in actual possession or enjoyment, that constitutes the essence of "succession." *Chase Nat. Bank* v. *United States,* 278 U. S. 327; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *May* v. *Heiner,* 281 U. S. 238.

Hence, as is held in *Hunt* v. *Wicht,* 174 Cal. 205, and the other cases in the group cited above, an excise with respect to the succession cannot be imposed by an act passed after the trust instrument is delivered. It was not suggested that the statute, as applied to the present situation, could be sustained on the theory that it was designed to prevent evasion of the tax upon testamentary dispositions, since there was no such tax at the time when the trust was established. Neither was it attempted to uphold the tax on the ground that the transfer was in contemplation of death; the facts furnish no foundation for any such contention. Since the settlors retained no right

of revocation and no power to control the devolution of the property in any way, there was no basis for distinction in that respect. Emphasis was, however, laid on the fact that the interest of each son, while vested, was subject to be divested in favor of his next of kin if he should die before the survivor of the settlors and it was said that the succession therefore took place when the survivor of the settlors died.

The same facts in substance were presented, however, in several of the cases cited by appellants from other States and the element of defeasibility was expressly held immaterial. *Matter of Pell, supra; Matter of Craig, supra; Lacey* v. *State Treasurer, supra; In re Houston's Estate, supra.* Distinguishing *Carter* v. *Bugbee,* 92 N. J. L. 390; *People* v. *Carpenter,* 264 Ill. 400.

The significance of such a weight of authority was remarked upon in *Haddock* v. *Haddock,* 201 U. S. 562, at p. 585.

The conclusion reached by the Court of Appeals of New York and by the other courts which have taken the same view is the only one consistent with the opinions of this Court. Indeed, the recent decision in *May* v. *Heiner,* 281 U. S. 238, is in itself almost enough to settle the whole matter. As was recognized in that case, succession *ex vi termini* is a bilateral affair. There can be a succession in ownership only as one person succeeds to another as owner. In a case like the present the beneficiaries succeed to the settlors at the execution of the trust instrument; the respective rights of the settlors and beneficiaries in the property are irrevocably fixed at that time. The only persons to whom the sons could be said on any theory to have succeeded on the death of the surviving settlor were their respective next of kin, but it is obvious that there was no succession here; the title was vested in the sons and the mere fading out of the contingent rights of the next of kin (who had no power in any way to deprive the

sons of their title) no more constituted "succession" by the sons than would, for example, the lapsing of an attachment through the entry of judgment for the defendant constitute a succession by the owner of the attached property to the attaching creditor. The vital element of a relinquishment of rights by one person in favor of another was altogether lacking.

An analysis of the grounds upon which succession taxes have been upheld by this Court confirms this conclusion. Such a tax is valid, if at all, because it relates to the exercise of some privilege which the State may grant or withhold at pleasure. This was settled long ago as to property passing by will or by the laws of intestate succession. *United States* v. *Perkins,* 163 U. S. 625, 628; *Mager* v. *Grima,* 8 How. 490, 494.

A tax upon transfers by deed or otherwise *inter vivos* may sometimes be justified as a means of preventing evasion of the tax on testamentary dispositions. Again, the settlor may in connection with such a transfer reserve for his life a right to revoke the grant or to affect the devolution of the trust property in some other way; in such a case the instrument is really a species of will, so that the basis for imposing a tax at the settlor's death is the same as that for imposing such a tax at the death of a testator. Apart from these considerations, neither of which, as shown above, is relevant to the present cases, the only sufficient basis of an excise tax with respect to the ripening of interests created by deed is the fact that the creation of future interests is not one of the rights inherent in every property owner but is, like the creation of rights by will, a privilege which the State may withhold or confer as it sees fit. *Keeney* v. *New York,* 222 U. S. 525, 533.

It may be conceded that, when the present trust instrument was executed, the settlors, in creating the various interests for which it provides, and the beneficiaries in acquiring these interests, were exercising a privilege

granted by the State and that, as a condition of the exercise of this privilege, the State might have provided that a tax be paid when the survivor of the settlors should die. But having granted without restriction the privilege of creating and acquiring these interests, it was not competent for the State afterwards to attach conditions. After the remainders were once vested, the State had no more power to disturb them than it would have had to disturb an estate in actual possession. If, after the present trust was created, the legislature had assumed to pass an act which in any way interfered with the deed's taking effect according to its tenor, or prevented the beneficiaries from coming into the enjoyment of all the privileges which it purported to confer upon them, the invalidity of the act would have been too plain for argument. *Aetna Life Ins. Co.* v. *Hoppin,* 214 Fed. 928; *Gilpin* v. *Williams,* 25 Oh. St. 283; *Bright* v. *Supreme Council of Catholic Knights,* 183 Ky. 388; *Albertson* v. *Landon,* 42 Conn. 209.

Rights like those of the sons now in question are far less tenuous than an estate by curtesy initiate, which, as is well settled, cannot be impaired by legislation. *Jackson* v. *Jackson,* 144 Ill. 274; *Rose* v. *Rose,* 104 Ky. 48; *Clay* v. *Mayr,* 144 Mo. 376; *Wyatt* v. *Smith,* 25 W. Va. 813.

These principles are fully recognized in Massachusetts; it has been held, for example, that the common law interest of a husband in a remainder in personal property bequeathed to his wife upon the contingency of her surviving the life tenant, cannot be impaired by a statute passed before the happening of the contingency. *Dunn* v. *Sargent,* 101 Mass. 336.

The present tax must rest on the assumption that whenever anything happens to the advantage of an individual, even though it comes to pass through circumstances over which neither he nor anybody else has control, this may be made the subject of an excise. The limitless field thus opened for the imposition of excises is manifest.

The Supreme Judicial Court maintains, indeed, that this anomalous theory is sanctioned by this Court, but an examination of the four cases cited in the opinion shows otherwise. Distinguishing *Cahen* v. *Brewster,* 203 U. S. 543; *Chanler* v. *Kelsey,* 205 U. S. 466; *Nickel* v. *Cole,* 256 U. S. 222; *Saltonstall* v. *Saltonstall,* 276 U. S. 260. Cf. *State* v. *Brooks,* decided September 26, 1930, by the Supreme Court of Minnesota.

The statute as construed below denies to petitioners and those claiming under them the equal protection of the laws.

Mr. James S. Eastham, Special Assistant Attorney General of Massachusetts, with whom *Mr. Joseph E. Warner,* Attorney General, was on the brief, for appellee.

The statute, as construed below, is valid as a succession tax upon the exercise of the privilege of receiving in 1925 property passing dependently upon the death of the settlors under a trust created in 1907. *Saltonstall* v. *Saltonstall,* 276 U. S. 260, is clearly decisive of the validity of the excise.

Since the excise is on the succession to property by the beneficiaries, it makes no difference when the trust was executed under which the succession takes place. As long as the statute imposing the excise is enacted prior to the receipt by the beneficiaries of the property, a valid excise may be imposed upon such receipt. Cf. *Magee* v. *Commissioner of Corporations,* 256 Mass. 512.

The excises are not imposed on the transfers of 1907 or 1917, prior to the enactment of the 1920 taxing statute, but on the receipt of the property in 1925, five years after the enactment of the 1920 statute. They are by no means retroactive taxes. Further, the remainders over were not independent of, but clearly dependent upon, the deaths of the settlors. And this is true although there was no power of revocation reserved in the original trust instrument,

and although in April, 1917, the settlors gave up their rights to the income.

The tax is valid even though, after the 1917 assignment, and therefore at the time of the deaths of the settlors in 1921 and 1925, respectively, the trust might fairly be said to be a trust to trustees to pay the income to the children during the lives of the settlors, and the survivor, and then to the children absolutely; with the provision that " if any of the Coolidge children should die before the time for distribution the heirs of any deceased child should take the parent's share."

The dependence of the interest of the remaindermen upon the deaths of the settlors was clearly shown when this trust was before the Massachusetts court in *Coolidge* v. *Loring,* 235 Mass. 220, where a demand on the trustees for an immediate distribution of the fund was refused by reason of the " possible claim of a contingent interest on behalf of wives and children of sons predeceasing " the settlors. The Massachusetts court refused to reform the instrument.

A succession tax is validly imposed where the property does not pass independently of the death of the original settlor.

The language of the Massachusetts cases shows that the time of passage is not so important as the nature of the passage. It is not necessary that the property pass immediately in point of time upon the death of the settlor. It is only necessary that the passage of the property have a dependent relation to the death of the grantor.

The deaths of the settlors were the " generating source " from which the authority to impose the excises came into being.

The imposition of such an excise here does not deny to appellants the equal protection of the laws nor deprive them of property without due process of law nor impair

the obligation of a contract under the Constitution of the United States. *Crocker* v. *Shaw,* 174 Mass. 266.

The succession to property by reason of death has been recognized for many years by the Massachusetts court as a commodity which rightly may be made subject to an excise. [Citing many Massachusetts cases.]

A State may impose an excise upon the privilege of the donee to succeed to property in possession and enjoyment upon the death of the grantor, as well as upon the privilege of the grantor so to transfer it, whether occasioned by death—*Stebbins* v. *Riley,* 268 U. S. 137—or effected by deed, *Keeney* v. *New York,* 222 U. S. 525; *Chanler* v. *Kelsey,* 205 U. S. 466; *Nickel* v. *Cole,* 256 U. S. 222; *Tyler* v. *United States,* 281 U. S. 497; *Cahen* v. *Brewster,* 203 U. S. 543; *Carpenter* v. *Pennsylvania,* 17 How. 456; *Orr* v. *Gilman,* 183 U. S. 278; *Moffitt* v. *Kelly,* 218 U. S. 400, 405; *Wachovia Bank & T. Co.* v. *Doughton,* 272 U. S. 567, 573; *Saltonstall* v. *Saltonstall,* 276 U. S. 260.

The principle that an excise may be imposed upon the privilege of succession at any time before that privilege is fully exercised extends to an excise imposed by an act passed after the interest has vested in law but before it has taken effect in possession and enjoyment. *Carpenter* v. *Pennsylvania, supra; Cahen* v. *Brewster, supra; Moffitt* v. *Kelly, supra; Nickel* v. *Cole, supra; Saltonstall* v. *Saltonstall, supra.* Distinguishing *Nichols* v. *Coolidge,* 274 U. S. 531; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339.

This Court, in the *Reinecke* and *Coolidge* cases was dealing with the federal estate tax, a tax upon the right to transfer. In the consideration of such a tax it is of the utmost importance to determine whether or not the power of control is left with the transferor. This distinction between the underlying theories of the federal and Massachusetts taxes was made plain in *Saltonstall* v.

Saltonstall, 276 U. S. 260. See also, *Chase Nat. Bank* v. *United States,* 278 U. S. 327.

We are here concerned with taxes upon the right to receive. If the property which was received by the children on November 10, 1925, came from the settlors originally, and if the beneficiaries, upon the death of the settlors, received something, then the Massachusetts succession taxes are properly and constitutionally imposed. It is not essential to a succession tax that the transferor shall have retained any interest or the power to control. It is essential only that the beneficiaries shall have received something which came originally from the settlors in connection with whose death the tax is assessed.

Transfer taxes rather than succession taxes were involved in many of the decisions cited in the brief of appellants, including among others: *May* v. *Heiner,* 281 U. S. 238; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *Chase Nat. Bank* v. *United States,* 278 U. S. 327; *Untermyer* v. *Anderson,* 276 U. S. 440; *Blodgett* v. *Holden,* 275 U. S. 142; *Nichols* v. *Coolidge,* 274 U. S. 531. Such cases are not in point here, where a succession tax has been imposed.

The theory of the appellants seems to be that, except where there is an attempted evasion of the tax or except where there is a power to revoke, the only basis for an excise tax on property passing under a deed is that the creation of future interests is a privilege which the State may withhold or confer as it sees fit. The appellee does not accept that theory. Something more is involved than the mere creation of future interests. The appellee's theory of a death excise is that it can constitutionally be imposed as long as the property passing by reason of the death has not reached its final resting place.

The taxes are not discriminatory and do not deny equal protection of the laws.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Each of these appeals brings here for review a decree of the probate court of Norfolk county, Massachusetts, entered in accordance with a rescript from the supreme judicial court of the Commonwealth. 268 Mass. 443; 167 N. E. 757. In each appellants presented to the probate court an application for the abatement of an inheritance tax assessed under § 1, c. 65, General Laws. There was drawn in question the validity of the statute on the ground of its being repugnant to the contract clause of the Federal Constitution and the due process and equal protection clauses of the Fourteenth Amendment. The probate court reserved for the consideration of the supreme judicial court all questions of law and the matter of what decrees should be entered. That court held the statute valid and sustained the taxes.

The opinion states the facts as follows:

"The petitioners [appellants here] are trustees, under a deed and declaration of trust executed on July 29, 1907, by J. Randolph Coolidge and Julia Coolidge and the petitioners.

"By that deed a large amount of real and personal estate was transferred to the trustees by the settlors voluntarily and not as a bona fide purchase for full consideration in money or in money's worth. The trustees were given extensive powers of management, investment and reinvestment with the right to determine finally what receipts and payments should be credited to income or principal. The part of the trust fund furnished by J. Randolph Coolidge was four-sevenths, and the part furnished by Julia Coolidge was three-sevenths.

"By the terms of the trust the income was to be paid in these proportions to each of the settlors during their joint lives and then the entire income to the survivor, and,

upon the death of the survivor, the principal was to be divided equally among their five sons, provided that, if any of the sons should predecease the survivor of the settlors, his share should go to those entitled to take his intestate property under the statute of distributions in force at the death of such survivor, with a further provision to the effect that in no event should a widow of such deceased son take as distributee more than half of such share.

"There was in the declaration of trust no power of revocation or modification or termination prior to the death of the survivor of the settlors. *Coolidge* v. *Loring*, 235 Mass. 220.

"By instrument executed on April 6, 1917, the settlors assigned their interest in the trust to the five sons, all of whom eventually survived the termination of the trust.

"Julia Coolidge died in January, 1921, and J. Randolph Coolidge on November 10, 1925, both being residents of this Commonwealth.

"The defendant determined that the petitioners were subject to excise taxes under G. L. c. 65, § 1, as amended, upon the four-sevenths and upon the three-sevenths of the trust estate furnished respectively by each settlor as of November 10, 1925."

When the declaration of trust was executed, no statute was in effect under which the succession to the trust property could have been subjected to this tax. The statutes then in force provided for the imposition of an excise only where the succession was to collateral relatives and strangers. The first relevant statute was approved June 27, 1907 (St. 1907, c. 563) and took effect September 1, about five weeks after the date of the declaration of the trust. It did not apply to property passing by deed, grant, sale or gift made prior to its effective date. But by § 3, c. 678, St. 1912, it was made applicable "to all property passing by deed, grant or gift . . . made or intended to

take effect in possession or enjoyment after the death of the grantor or donor, if such death occurs subsequent to the passage hereof." And see § 1, c. 563, St. 1914.

Chapter 65, General Laws, effective since January 1, 1921, provides:

§ 1. "All property within the jurisdiction of the commonwealth . . . which shall pass by . . . deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth . . . made or intended to take effect in possession or enjoyment after his [grantor's] death . . . to any person, absolutely or in trust, . . . shall be subject to a tax. . . ."

§ 36. " This chapter shall apply only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty . . ."

The supreme judicial court sustained the exaction as an excise. It held that possession or enjoyment upon the death of the survivor of the settlors was a taxable commodity under the statute enacted after the creation of the trust.

The trust deeds are contracts within the meaning of the contract clause of the Federal Constitution. They were fully executed before the taking effect of the state law under which the excise is claimed. The Commonwealth was without authority by subsequent legislation, whether enacted under the guise of its power to tax or otherwise, to alter their effect or to impair or destroy rights which had vested under them. *Appleby* v. *City of New York,* 271 U. S. 364. *Fletcher* v. *Peck,* 6 Cranch 87, 136. *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 624, 656. *Farrington* v. *Tennessee,* 95 U. S. 679, 683. *Carondelet Canal Co.* v. *Louisiana,* 233 U. S. 362, 373, 378.

This court has held that the Revenue Act of 1914, §§ 319–324, in so far as it undertook to impose a tax on gifts fully consummated before its provisions came before

Congress (*Blodgett* v. *Holden,* 275 U. S. 142) or before its passage (*Untermyer* v. *Anderson,* 276 U. S. 440) was arbitrary and repugnant to the due process clause of the Fifth Amendment. In *Nichols* v. *Coolidge,* 274 U. S. 531, we considered the trust deed of Mrs. Coolidge that is now before us. The question in that case was whether the value of the property so conveyed prior to the enactment should be included in her estate for the purpose of ascertaining the federal estate tax thereon. We said (p. 542):

"This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushaber* v. *Union Pacific R. R.,* 240 U. S. 1, 24; *Barclay & Co.* v. *Edwards,* 267 U. S. 442, 450. See also *Knowlton* v. *Moore,* 178 U. S. 41, 77. And we must conclude that section 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

See *Levy* v. *Wardell,* 258 U. S. 542, 544. The States are similarly restrained by the due process clause of the Fourteenth Amendment.

In its opinion, the state court suggests that the federal estate tax was upon property of the deceased transferred at his death and that it was levied upon a subject "quite different from the succession to property by a beneficiary, which is the subject of the present excise." Undoubtedly the State has power to lay such an excise upon property so passing after the taking effect of the taxing Act. The fundamental question here is whether rights had so vested prior to the taking effect of the tax statute that there was thereafter no occasion in respect of which the excise might constitutionally be imposed. The state court held that

the succession was not complete until the death of the survivor of the grantors and that therefore the tax is valid. It is well understood that, when the jurisdiction of this court is invoked to determine whether a state law impairs the rights of the litigant under a prior contract, or whether the State is depriving him of his property without due process of law in violation of the Fourteenth Amendment and the question turns upon the existence or terms of a contract, this court is bound to determine for itself whether there is a contract and to ascertain its true meaning and effect. That rule is necessary in order that this court may properly enforce these provisions of the Constitution. *Railroad Commission* v. *Eastern Texas R. Co.*, 264 U. S. 79, 86, and cases cited.

By the deed of each grantor one-fifth of the remainder was immediately vested in each of the sons subject to be divested only by his death before the death of the survivor of the settlors. It was a grant *in praesenti* to be possessed and enjoyed by the sons upon the death of such survivor. *Blanchard* v. *Blanchard,* 1 Allen 223. *Clarke* v. *Fay,* 205 Mass. 228. *McArthur* v. *Scott,* 113 U. S. 340, 379, and cases cited. And see *United States* v. *Fidelity Trust Co.,* 222 U. S. 158. *Henry* v. *United States,* 251 U. S. 393. The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment. The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust. *Coolidge* v. *Loring, supra,* 223. Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries. Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen. *Knowlton* v. *Moore,* 178 U. S. 41, 56. Nothing moved from her or him or from the estates of either when she or he died. There was no transmission

then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlors. The succession, when the time came, did not depend upon any permission or grant of the Commonwealth. While the sons if occasion should arise might by appropriate suit require the trustees to account, it is to be borne in mind that the property was never in the custody of the law or of any court. Resort might be had to the law to enforce the rights that had vested. But the Commonwealth was powerless to condition possession or enjoyment of what had been conveyed to them by the deeds. *Barnitz* v. *Beverly,* 163 U. S. 118, and cases cited.

The fact that each son was liable to be divested of the remainder by his own death before that of the survivor of the grantors does not render the succession incomplete. The vesting of actual possession and enjoyment depended upon an event which must inevitably happen by the efflux of time, and nothing but his failure to survive the settlors could prevent it. *Blanchard* v. *Blanchard, supra. Moore* v. *Lyons,* 25 Wend. 119, 144. Succession is effected as completely by a transfer of a life estate to one and remainder over to another as by a transfer in fee. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 347–348. The recent case of *Saltonstall* v. *Saltonstall,* 276 U. S. 260, furnishes a good illustration of incomplete succession. There the remainder was liable at any time during the settlor's life to be divested through the exertion of the power of alteration and revocation that was reserved in the instrument creating the trust. The decision sustaining a transfer tax went upon the ground that "the gift taxed is . . . one which never passed to the beneficiaries beyond recall until the death of the donor. . . . A

power of appointment reserved by the donor leaves the transfer, as to him, incomplete and subject to tax. . . . The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another." P. 271. See also *Chase Nat. Bank* v. *United States,* 278 U. S. 327, 335, 338.

No Act of Congress has been held by this court to impose a tax upon possession and enjoyment, the right to which had fully vested prior to the enactment.

Tyler v. *United States,* 281 U. S. 497, held constitutional §§ 201 and 202 of the Revenue Acts of 1916, 39 Stat. 756, 777–778, and of 1921, 42 Stat. 227, 277–278, which included in the gross estate the value of an interest held by decedent and any other person as tenants by the entirety. In each case, the estate was created after the passage of the applicable Act; and none of the property constituting it had prior to its creation ever belonged to the surviving spouse. The court held that the Acts did not impose a direct tax because, putting aside a common law fiction and having regard to substance, the death of one of the parties was in fact the generating source of important and definite accessions to the property rights of the other. It held that the provisions were intended to prevent an avoidance of the estate tax by the creation of such tenancies and were obviously neither arbitrary nor capricious and so not violative of the Fifth Amendment.

Clapp v. *Mason,* 94 U. S. 589, and *Mason* v. *Sargent,* 104 U. S. 689, arose under the succession tax Act of June 30, 1864, §§ 124 *et seq.,* 13 Stat. 285. *Vanderbilt* v. *Eidman,* 196 U. S. 480, and *Hertz* v. *Woodman,* 218 U. S. 205, arose under a similar Act of June 13, 1898, §§ 29 and 30, 30 Stat. 464. In all these cases, the property vested in interest after the Acts took effect, and the decisions went on the ground that the right to impose the excises did not accrue until the subsequent vesting in possession and enjoyment. Under these Acts, the mere

passage of title was not sufficient; possession and enjoyment were also required. *Wright* v. *Blakeslee,* 101 U. S. 174, 177, went upon the ground that, up to the moment of the life tenant's death, "her children had no interest in the land except a bare contingent remainder expectant upon her death and their surviving her. At her death, it came to them as an estate in fee in possession absolute."

This court has not sustained any state law imposing an excise upon mere entry into possession and enjoyment of property, where the right to such possession and enjoyment upon the happening of a specified event had fully vested before the enactment.

In *Cahen* v. *Brewster,* 203 U. S. 543, the testator died May 26, 1904, the will was probated May 30, and a special inheritance tax law was passed June 28. It imposed a tax upon all inheritances and legacies, and provided that the tax should not be enforced when the property had borne its just proportion of taxes prior to the time of the inheritance and that the tax should be collected on all successions not finally closed. The enactment was assailed as repugnant to the due process and equal protection clauses of the Fourteenth Amendment. This court held that the State, without unconstitutional deprivation, could exercise its power to impose inheritance taxes at any time while it holds the property from the legatee, p. 551; and, dealing with the contention that taxing successions not closed and exempting those that had been closed operated to deny equal protection, the court said (p. 552): "It was certainly not improper classification to make the tax depend upon a fact without which it would not have been valid." As the court said in *United States* v. *Jones,* 236 U. S. 106, 112, "It hardly needs statement that personal property does not pass directly from a decedent to legatees or distributees, but goes primarily to the executor or administrator, who is to apply it, so far as may be necessary, in paying debts

of the deceased and expenses of administration, and is then to pass the residue, if any, to legatees or distributees." See also *Carpenter* v. *Pennsylvania,* 17 How. 456, 462.

In *Moffitt* v. *Kelly,* 218 U. S. 400, Moffitt married in California in 1863 and resided there with his wife until his death in 1906. By his will, he gave to her and their children as if he had died intestate. A state law passed in 1905 imposed a tax upon property so descending. The state court sustained the tax upon the wife's share in the community property. This court held that the nature and character of her right was a local question and that the tax was not violative of the contract clause of the Constitution or the due process or equal protection clause of the Fourteenth Amendment. In *United States* v. *Robbins,* 269 U. S. 315, this court considered the character of the wife's estate during the existence of the community, and said (p. 326): "We can see no sufficient reason to doubt that the settled opinion of the Supreme Court of California, at least with reference to the time before the later statutes, is that the wife had a mere expectancy while living with her husband. The latest decision that we have seen dealing directly with the matter explicitly takes that view, says that it is a rule of property that has been settled for more than sixty years . . ." See also *Poe* v. *Seaborn,* 282 U. S. 101, 116. Cf. *Nickel* v. *Cole,* 256 U. S. 222, 225.

Chanler v. *Kelsey,* 205 U. S. 466, arose under the New York inheritance tax law of 1897. Prior to its enactment, a father conveyed property to trustees to pay the income to his daughter for life with remainder to her issue in fee or in default of issue to her heirs in fee, and gave her power by will to appoint the remainder among her issue or heirs in such manner and proportions as she might determine. She died in 1902 and by her will exercised the power. The tax law deemed such appointment a transfer and made it taxable. It was attacked as repugnant to the

due process clause of the Fourteenth Amendment and the contract clause. This court held that without such appointment the estates in remainder would have gone to all in the class named in the deeds; that, by the exercise of the power, some were divested of their estates and the same were vested in others, and that it was only on the exercise of the power that the estates of the appointees became complete. And it sustained the tax. Justices Holmes and Moody, dissenting, insisted that the succession was complete when the father's deeds took effect, and that "the execution of the power did not depend in any way upon the continued coöperation of the laws of New York by way of permission or grant." P. 481.

The overwhelming weight of authority sustains the conclusion that the succession in the present case was complete when the deed took effect.

In *Matter of Pell*, 171 N. Y. 48, the testator's will gave a life estate in his property to his widow with remainders over at her death to his nephews and nieces and the issue of any deceased nephew or niece together with a share to his sister. He died in 1863. The life tenant died December 20, 1899, and at that time all the estates in remainder came into actual possession and enjoyment of the beneficiaries. The Act of March 10, 1899 (c. 76, Laws of that year) provided:

"All estates upon remainder . . . which vested prior to June 30th, 1885, but which will not come into actual possession or enjoyment of the person . . . beneficially interested therein until after the passage of this act, shall be appraised and taxed as soon as the person . . . beneficially interested therein shall be entitled to the actual possession or enjoyment thereof."

The court said (p. 55):

"This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of suc-

cession. It, therefore, follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of the life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the Transfer Tax Act there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract and take private property for public use without compensation."

Matter of Craig, 97 App. Div. 289 (affirmed, 181 N. Y. 551), involved a similar state of facts. The court said (p. 296):

"The underlying principle which supports the tax is that such right [the right of succession] is not a natural one but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the character in question, and when the right is conferred by a lawfully executed grant or contract it is property and not privilege, and as such is protected from legislative encroachment by constitutional guaranties."

In *Hunt* v. *Wicht,* 174 Cal. 205, the court held that a deed delivered by grantor to a third person in escrow to be delivered to grantee on the death of the grantor passed a present title to the grantee, the grantor retaining only a life estate; and that the legislature was without power subsequently to impose a succession tax accruing at the termination of the grantor's life estate, simply because the

grantee was during the intervening life estate without immediate possession of the property conveyed. The court said (p. 209): "It is the vesting in interest that constitutes the succession, and the question of liability to such a tax must be determined by the law in force at that time. . . . What we have said appears perfectly clear on principle, and is sustained by practically all of the authorities in other states where the question has arisen."

In *Lacey* v. *State Treasurer,* 152 Iowa 477, a contract created a vested interest in real estate subject only to postponement of the right of possession and enjoyment until the death of the grantor. The court held that there was a transfer of a present interest and that its character was not affected by a condition therein, that might subsequently reduce the share of each grantee. It was also held (pp. 483–484):

"Even though the remainder is so far conditional that it may have to be opened up to let in afterborn children, and, on the other hand, may be divested by death without issue of the person named, nevertheless it constitutes a vested interest, not subject to a subsequent collateral inheritance tax statute, passed before the termination of the life estate. *In re Seaman,* 147 N. Y. 69. Any attempted legislation imposing a collateral inheritance tax upon interests in remainder, which have become vested by the taking effect of the will creating them, would be unconstitutional. *In re Pell,* 171 N. Y. 48."

In *Houston's Estate,* 276 Pa. 330, a deed irrevocably conveyed property in trust to pay income to the settlor for life and at her death to a remainderman. The statute then in force imposed a five per cent. tax on transfers intended to take effect in possession or enjoyment at or after death. The life tenant died after the taking effect of legislation which increased the rate to ten per cent. The court held the estate passing to the remainderman

taxable at five per cent. and not at the higher rate fixed by the later statute. The opinion of the Orphans' Court, adopted by the Supreme Court, said (p. 331):

"Nor can it be successfully argued that the tax is not on the transfer of title to the property, but on the transfer of enjoyment, for, as it seems to us, the act means by this the right of enjoyment, and this was vested under the deed. If the tax is imposed when enjoyment is perfected by actual possession, and this theory is carried to its logical conclusion, it would seem that if, during the administration of an estate, delays occur, as they necessarily must, and if, before actual distribution is made, the rate of taxation is changed, a legacy would be taxed at the changed rate, which would appear to be a *reductio ad absurdum.*"

In *State ex rel. Tozer* v. *Probate Court,* 102 Minn. 268, an owner of much property organized a corporation and, his wife joining, conveyed practically all to the corporation. It issued its shares to him and he gave one-third to her. Then they transferred the stock to their four children who leased two-thirds to the father for his life and one-third to the mother for her life. The father died in 1905 after the taking effect of an inheritance tax law enacted in that year. The court held that the leases vested in each parent a life estate in the stock and reserved to the children estates in reversion which were beyond the control of the life tenants; and that the interests of the children vested when the leases were made, came into possession upon the termination of the life estates and that the inheritance tax could not be collected thereon. See also *Commonwealth* v. *Wellford,* 114 Va. 372.

We conclude that the succession was complete when the trust deeds of Mr. and Mrs. Coolidge took effect and that the enforcement of the statute imposing the excise in question would be repugnant to the contract clause of the Constitution and the due process clause of the Four-

teenth Amendment. We need not consider whether it would also conflict with the equal protection clause.

Reversed.

MR. JUSTICE ROBERTS, dissenting.

The Supreme Judicial Court of Massachusetts has construed and applied the statute as one taxing the taking of possession of property by a remainderman whose interest, acquired before the death of the donor, vested in possession and enjoyment, and free of a contingent gift over, on the donor's death. That court said:

"The . . . statute . . . is designed to include within its sweep all methods of succession to property to take effect in possession or enjoyment after the death of the grantor or donor . . . Whenever property is conveyed upon such limitation that it will vest in interest, possession or enjoyment by reason of the death of the grantor or donor, such succession falls within the descriptive words of the statute. The succession to any of these attributes of property occurring as the result of the death of the grantor or donor constitutes the taxable commodity."

And also said:

"The tax authorized by the statutes is a tax upon 'succession,' which includes the 'privileges enjoyed by the beneficiary of succeeding to the possession and enjoyment of property.' . . .

"The present tax is not laid on the donor, but on the beneficiary; the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor . . . So long as the privilege of succession has not been fully exercised it may be reached by the tax."

We are bound by the state court's determination as to the meaning of the statute, *Nickel* v. *Cole*, 256 U. S. 222; *Saltonstall* v. *Saltonstall*, 276 U. S. 260; and its applica-

tion, *Stebbins* v. *Riley,* 268 U. S. 137; *Cahen* v. *Brewster,* 203 U. S. 543; *Saltonstall* v. *Saltonstall, supra.*

The application of the statute, thus defined, is held by this Court to be a denial of due process, and an impairment of the obligation of a contract, on the sole ground that the remainder vested before the adoption of the taxing statute, although the enjoyment in possession of the property, and the termination of the possibility of the contingent gift over, both followed its enactment.[1]

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[1] The importance of the question is shown by the fact that forty-one states and territories have statutes containing provisions substantially similar to those of the Massachusetts acts involved in this appeal. Alaska, c. 60, S. L. 1919. Arizona, c. 26, 26A, S. L. 1922. Arkansas, Act 106, p. 526, Laws 1929. California, c. 821, Laws 1921, § 2; c. 844, Laws 1929, § 2. Colorado, c. 144, S. L. 1921, § 2; c. 114, S. L. 1927, § 2. Connecticut, c. 190, P. A. 1923, § 1; c. 209, P. A. 1929, § 2 (d). Delaware, c. 6, R. C. 1915; 29 Del. Laws, c. 7, Laws 1917; 36 Del. Laws, c. 7, Laws 1929. Hawaii, c. 96, Rev. Laws 1915, § 1323; Act 223, S. L. 1917; Act 195, S. L. 1923. Idaho, c. 148, Comp. St. 1919, § 3371; c. 243, S. L. 1929. Illinois, Laws 1909, p. 311; Smith-Hurd (1929), c. 120, § 375, p. 2436. Indiana, c. 65, Acts 1929, p. 186. Iowa, c. 351, § 7307, Code 1927. Kansas, c. 79, Art. 15, R. S. 1923. Kentucky, Art. XIX, § 4281a–1 (Carr. Ky. Stat. 1930). Maine, c. 266, Laws 1917; c. 187, Laws 1919. Michigan, Act No. 188, Laws 1899; Act No. 380, P. A. 1925. Minnesota, § 2292, *et seq.,* 1927 Minn. Stat. (Mason), Vol. 1. Mississippi, c. 134, G. L. 1924, § 5 (f). Missouri, Art. XXI, § 558 *et seq.,* R. S. 1919. Montana, c. 57, § 10377.1, C. C. P. (1927). Nebraska, Art. 22, c. 77, § 2201, Comp. Stat. 1929. New Hampshire, c. 73; P. L. 1925. New Jersey, c. 228, Laws 1909; c. 144, Laws 1929. New York, c. 61, § 249–b, Cons. L. 1930. North Carolina, c. 101, P. L. 1925; c. 80, P. L. 1927. North Dakota, c. 267, Laws 1927. Ohio, § 5331, Gen. Code. Oklahoma, c. 84, Art. XVIII, § 9856, Comp. St. 1921. Oregon, c. VI, § 10–601, Ann. Code 1930. Pennsylvania, Act May 6, 1887, P. L. 79; Act June 20, 1919, P. L. 521. Rhode Island, c. 1339, P. L. 1916; c. 2311, P. L. 1923; c. 1355, P. L. 1929. South Carolina, Acts 1922, p. 800; Acts 1925, p. 201. South Dakota, c. 11, § 6827, Comp. L. 1929 Tennessee, c. 46, P. A. 1919; c. 64, P. A. 1925. Texas, c. 5, Art. 7117, 1928 Stat. Utah, § 3185 Comp. L. 1917; c. 64, Laws 1919. Virginia, § 44 Code (App.) 1924; c. 45, Acts 1928, p.

This is to deny to the Commonwealth the power to distinguish, in laying its tax, between the vesting of a defeasible future interest which carries to the beneficiary no assurance of future possession or enjoyment, and the later vesting of that interest by death in possession and enjoyment of the tangible property, without possibility of being divested. It is to assert that the succession is so complete upon the mere creation of the future interest that the State must tax the future estate when that interest comes into being, or thereafter abstain entirely from taxing it.

This position seems to me untenable. It is founded on the premise that the only privilege enjoyed by the holder of a future interest in property is the dry legal abstraction of owning that particular interest—that if it vested years ago, to tax the owner later, on the occasion of his coming into actual possession, control and enjoyment of the property, is in fact to tax him presently for the exercise of a privilege long since enjoyed.

In weighing the argument it is essential that the nature of the challenged tax be kept clearly in mind.

Excises laid in respect of the privilege of transmitting property rights at death, and those laid on the correlative privilege of acquiring the same rights, are common. The phrases " transfer," " estate " and " succession " taxes, and " death duties," are somewhat indiscriminately used to designate the two wholly different forms of tax. It will tend to clarity to employ the more usual phraseology and refer hereafter to the excise on the privilege of transmission as a transfer tax, and that on the privilege of reception as a succession tax.[2]

35; Tax Code, c. 9, § 98. Washington, § 7051, Pierce 1929 Code. West Virginia, c. 33 Barnes Code 1923; c. 57, Acts 1929. Wisconsin, c. 72, Stat. 1923; c. 237, Stat. 1925. Wyoming, c. 78, S. L. 1925.

[2] Both transfer and succession taxes have been imposed by the United States, the former by the existing estate tax law, the latter by the Act of 1864 (c. 173, §§ 124, 127; 13 Stat. 285, 287) and the Act of 1898 (c. 448, § 29; 30 Stat. 464).

Since no one has the natural right either to own property or to transfer it to others at his death, but derives the power so to do solely from the State, the sovereign may tax the owner for the privilege of transmission conferred by law. *United States* v. *Perkins,* 163 U. S. 625, 628. The right to receive and enjoy that which was formerly owned by another is similarly derived, and upon like principles the sovereign may tax the taker for the privilege accorded. *Mager* v. *Grima,* 8 How. 490, 494; *Plummer* v. *Coler,* 178 U. S. 115, 130–132. So distinct are these privileges that either or both may be taxed as respects the same property. *Stebbins* v. *Riley, supra; Saltonstall* v. *Saltonstall, supra.*

The one is collected on the transfer of his estate by a decedent; it taxes not that to which some person succeeds upon a death, but that which ceased by reason of death. *Nichols* v. *Coolidge,* 274 U. S. 531, 537; *Edwards* v. *Slocum,* 264 U. S. 61, 62. The other is laid on the right to become beneficially entitled to property on the death of its former owner. *Keeney* v. *New York,* 222 U. S. 525, 533; *Nichols* v. *Coolidge,* 274 U. S. at p. 541.

The latter type of excise has existed in Massachusetts for years, and the courts of that Commonwealth have consistently construed the statutes as they did in this case.[3]

Though the settlors' children took a vested interest by the delivery of the deed of trust in 1907, it was subject to be divested, as to any child, by his death prior to that of the survivor of the settlors. Until the parents died it could not be known whether a child ever would possess or enjoy the trust property. Until then he had none of the rights of an owner in fee. He could not obtain

[3] St. 1891, c. 425. St. 1907, c. 563. *Minot* v. *Winthrop,* 162 Mass. 113. *Callahan* v. *Woodbridge,* 171 Mass. 595. *Crocker* v. *Shaw,* 174 Mass. 266. *Attorney General* v. *Stone,* 209 Mass. 186. *Magee* v. *Commissioner of Corporations,* 256 Mass. 512.

possession; that was in the trustees. He could neither spend the income nor direct its expenditure; the provisions of the deed of trust governed these matters.

In 1917 the parents conveyed their life estates to the children. The latter, conceiving that this entitled them, as sole owners, to the possession and enjoyment of the property, demanded of the trustees delivery of the corpus. This was refused. The settlors then filed a bill to reform the trust instrument so that it should provide that by surrender of the parents' life interests to the children the trust should terminate. They alleged that it was the true intent of the parties that the contingent remainders in the next of kin of the children should not vest if the interest of the settlors was released previous to the death of the survivor, and that appropriate language to express this intent had by mistake been omitted from the deed. The court held that no case had been made for the reformation of the deed, and refused relief. The trust property remained in the control and under the administration of the trustees. *Coolidge* v. *Loring,* 235 Mass. 220.

The appellants, nevertheless, assert that while the children may have required the State's aid at the time of the delivery of the deed of trust, they never again had occasion to rely on the State's assistance; that the transfer to and into the beneficiaries was then complete; that they needed to do nothing more to become possessed of and enjoy their property; that merely to sit still and await the deaths of their parents did not constitute the doing of anything; that the vesting of their remainder interests in 1907 covers and includes its consequence, namely, their acquirement of tangible property and the enjoyment thereof at their parents' death. In short, appellants insist that the beneficiaries did not have to look to the laws of Massachusetts for the right of possession or enjoyment; and that consequently an alleged taxing of the

succession on the occasion of their acquiring such possession and enjoyment is but a thinly veiled attempt retroactively to tax the acquisition of an interest which vested in 1907.

But it is obvious that the children did rely on the law of Massachusetts for their right to receive the trust property from the trustees; and it might well have been they would have had to resort to her courts to obtain possession. All the law applicable to the administration of trusts, regulating the acts of trustees, giving remedies for trustees' defaults, providing for their compensation, and requiring the full execution of their fiduciary duties, was available to appellants. Without it their future interest, by way of remainder, might have been the merest shadow.

In spite of this, it is said that the succession is one and entire; that it must be taxed at its inception or not at all; that it is wholly out of the ordinary to tax it on the occasion of its fruition in possession; and that this Court has held the attempt so to do violative of the Constitution. The converse of these propositions is true. This Court has repeatedly approved the selection of the event of possession and enjoyment as the proper occasion for the imposition of an excise; and every applicable decision of the Court sustains the validity of the tax and supports the judgment of the Supreme Judicial Court of Massachusetts.

First. In laying succession taxes the United States has chosen as the occasion therefor not the acquirement of a mere technical legal interest in property, but the coming into actual possession and enjoyment; and this fact has been recognized by this Court.

By the act of June 30, 1864, § 124, a tax was imposed on legacies and distributive shares arising from personal property ". . . passing, after the passage of this act, from any person possessed of such property, either by

will or by the intestate laws . . . or any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor . . ."

Section 127 provided that "every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person dying after the passage of this act," should constitute the person so taking a successor and make him liable to a tax.

In *Clapp* v. *Mason*, 94 U. S. 589, a testator, who died in 1867, devised real estate to his widow for life, with remainder to her children. She died in 1872, and the children's interests then took effect in enjoyment. The tax was assessed in 1873. It was paid under protest because the act of June 30, 1864, had been repealed by act of July 14, 1870, on all legacies and successions after August 1, 1870. In an action against the collector to recover the amount paid, he defended on the ground that the tax accrued on creation of the remainder in 1867. The devisees in remainder contended that it did not accrue until they came into possession, which was subsequent to the repeal of the taxing act. This Court held that the occasion of the tax was not the vesting of the remainder, but the coming into possession by the successor. The corollary seems clear enough that if a remainderman had died during the life estate the statute would not have justified a tax upon him measured by the clear value of the property in which he owned only a future interest.

The case was followed in *Mason* v. *Sargent*, 104 U. S. 689, which involved a trust of personal property created by the same will. Testator's daughter was entitled to the income of the trust for life, and on her death the

principal was to be paid to her children. It was held that no tax was due until the termination of the life trust, for until then the children had neither possession nor enjoyment.[4]

By act of June 13, 1898, c. 448, § 29 (30 Stat. 448, 464) an excise was imposed relating first to legacies or distributive shares passing by death and arising from personal property, and secondly to any personal property or interest therein transferred by deed, grant, bargain, sale or gift to take effect in possession or enjoyment after the death of the grantor or bargainor, in favor of any person or persons, in trust or otherwise. In *Vanderbilt* v. *Eidman,* 196 U. S. 480, 492, this Court said:

"As to this second class, the statute specifically makes the liability for taxation depend, not upon the mere vesting in a technical sense of title to the gift, but upon the actual possession or enjoyment thereof. By any fair construction the limitation as to possession or enjoyment expressed as to one class must be applied to the other, unless it be found that the statute, whilst treating the two as one and the same for the purpose of the imposition of the death duty, has yet subjected them to different rules."

After analyzing the words of the statute in order to arrive at its intent, the Court said [p. 495]:

"In view of the express provisions of the statute as to possession or enjoyment and beneficial interest and clear value, and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment was subordinated to an uncertain contingency, it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached."

[4] See, also, *United States* v. *Hazard,* 8 Fed. 380; *United States* v. *Rankin,* 8 Fed. 872.

While there was no question of retroactivity in that case, for the reason that the statute antedated the creation of the trust, there was an attempt to tax vested interests subject to be divested prior to the time when it could be ascertained whether they would ever take effect in actual possession or enjoyment, and this the Court held could not be done in view of the language of the statute.[5]

In *Hertz* v. *Woodman*, 218 U. S. 205, *Vanderbilt* v. *Eidman* was followed. There a repealing act had been passed between the time of a decedent's death and the time for payment of a legacy under his will in accordance with the rules of administration. The Court held that as the legatee had become fully entitled to possession prior to the passage of the repealer he was liable for the tax. The dissenting justices, while not differing from the majority in the view that the tax was laid upon the coming into beneficial enjoyment and possession, were of opinion that until actual payment of the legacy the tax was not due, and therefore the repealing act had abolished it prior to the time fixed for its incidence upon the succession.

The foregoing cases are cited, not because they involve any constitutional questions, but because they answer in no uncertain terms the appellants' insistent argument that here the succession consists of but a single item,—the creation of a future interest,—and that upon the coming into being of that interest the succession is so complete as to prohibit the sovereign's imposing its excise as of the occasion of enjoyment and possession by the successor. They constitute a complete demonstration of the fallacy of the argument that a privilege tax which ignores the creation of the mere technical future interest and reaches

[5] See, also, *Brown* v. *Kinney*, 137 Fed. 1018; *Ward* v. *Sage*, 185 Fed. 7; *Rosenfeld* v. *Scott*, 245 Fed. 646.

the possession and enjoyment of property pursuant to such interest is unheard of or in any wise out of the ordinary.

Second. The sanction of this Court has been given to the collection of a like excise by the United States, under a statute similar to that here in question, and in circumstances like those in the case at bar.

A testator who died in 1846 devised real estate to his daughter for life, with remainder in fee to her son should he survive her. The daughter died in 1865. The collector's demand that the remainderman make return of his remainder for taxation under the act of 1864, above cited, was refused. The tax was assessed with penalty; payment was made under protest; and suit brought to recover the amount paid. Judgment for the collector was affirmed as to the tax, but, on grounds here immaterial, was reversed as to the penalty. *Wright* v. *Blakeslee,* 101 U. S. 174.[6]

The remainder was contingent, but it was urged that it was a form of future estate known to the law, which had vested in the son in 1846 and must be taxed, if at all, as of that date. But this Court was clear that the tax was laid on the event which occurred in 1865, quoting the words of the act to show that there was a "past" "disposition of real estate by will" "by reason whereof" the life tenant's children became "beneficially entitled, in possession" to the property devised "upon the death of [a] person dying after the passage of this act." The brief for appellant shows he argued that the phrase "past disposition" must be construed only to cover the case of a deed or will executed prior to the passage of the law, but legally operative thereafter, in order to avoid a retroactive effect of the statute and interference with vested

[6] A similar result had been reached in like circumstances in *Blake* v. *McCartney,* 4 Clifford 101, where apparently no attack was made on the constitutionality of the tax.

rights. He also insisted that the construction placed upon the act by the collector brought about an arbitrary result. So little did this Court regard the argument that it does not even notice it in its opinion. The Fifth Amendment obviously applied in that case, if the Fourteenth applies in the present.

Third. In cases involving the application of state laws imposing succession taxes, in circumstances such as are here found, this Court has overruled the contentions here made, and sustained the tax. The facts involved in some of these cases were more favorable to the appellants' contentions than those in the case at bar.

In *Cahen* v. *Brewster,* 203 U. S. 543, the decedent, a resident of Louisiana, died May 26, 1904; his will was probated May 30; a final accounting was made and tableau of distribution submitted to the Probate Court on August 3. These were approved and distribution ordered by a judgment of August 16. On October 16, the universal legatees petitioned the Probate Court for the delivery of the residuary estate to them. The executors answered that a tax was due on the legacies which they were bound to withhold. On June 28, 1904, a statute had been passed which imposed a tax applicable to all successions not finally closed at the date of its passage and all that should thereafter be opened. There were no forced heirs, and under the statutes of Louisiana the universal legatees were vested by law at the moment of death with full title to the property without taking any step whatever to put themselves into possession, without demanding delivery, or signifying their assent to accept the property bequeathed. The statutes are quoted in the margin, 203 U. S. 549.

The petitioners argued that the taxing act as applied to them was violative of the Fourteenth Amendment because retroactive and arbitrary. The Supreme Court of Louisiana sustained the tax. This Court affirmed, hold-

ing that the State was at liberty to decide at what point it would impose the tax, provided such imposition was prior to the legatees' actual possession of the property.[7]

Appellants' attempt to distinguish this case is unconvincing. They say that it merely decided that the State had the power to lay the tax so long as the property was under the control of its courts for administration. They overlook the fact that in the instant case the possession of the trustees of the Coolidge trust did not cease until the death of the survivor of the settlors. During all that time the trust property was under the control of the Massachusetts courts. Not until those trustees had settled their trust and made distribution in accordance with the law of Massachusetts could the remaindermen come into possession and enjoyment of the property. And obviously the operation of the law of Massachusetts as to credits for expenses and commissions, and as to the duties of the trustees, and as to delivery of the trust property, might all be invoked before the beneficiaries could get actual possession and enjoyment. It is certainly an immaterial difference that in the one case the fiduciaries were called executors and in the other trustees. Both were subject to the law of the State, which defined and protected the rights of beneficiaries in both cases. The Coolidge children could not obtain possession or control of the corpus despite their parents' release of all interest in it. The trustees still had duties to perform. *Coolidge* v. *Loring, supra. Cahen* v. *Brewster* presents a more extreme case than this, because it involved no such contingency of divestment as is here involved; the executors

[7] *Carpenter* v. *Pennsylvania,* 17 How. 456 dealt with a similar situation and the tax was sustained. It was decided prior to the adoption of the Fourteenth Amendment; but in *Orr* v. *Gilman,* 183 U. S. 278, 286, it was said that the grounds on which it went were pertinent under the amendment.

there having completed their administration, the act of physical delivery only remained to be performed by them.[8]

In *Chanler* v. *Kelsey,* 205 U. S. 466, one Astor, in 1844, 1848, 1849 and 1865, made deeds to trustees, which provided that the income should go to his daughter Laura for life, with remainder to her issue in fee, or in default thereof, to her heirs in fee, with power of appointment amongst her issue in such amounts and proportions as she should,—by instrument in its nature testamentary, to be acknowledged by her as a deed in the presence of two witnesses, or published by her as a will,—appoint. She died in 1902 and by will exercised the power. An act of 1897 imposed a succession tax, and under its provisions the authorities sought to collect, from the appointees under the daughter's will. The argument made on behalf of the beneficiaries was that the gift was completed when Astor made his deeds. It will be noted that the remainders were in that case vested, subject to be divested by the daughter's exercise of the power. The argument was strongly pressed that in the case of a power of appointment title passes under the creating instrument, and does not pass from the donee by virtue of his act of appointment. That this is sound law is undisputed. On this doctrine the beneficiaries founded their argument, that to tax the succession upon the occasion of their coming into possession and enjoyment was to tax something which had in fact occurred years before at the date of the delivery of the deeds by Astor. This is the same argument appellants now urge upon facts which present no significant legal difference from those in the *Chanler* case. The Court of Appeals of New York

[8] In *Stauffer's Succession,* 119 La. 66, it was held that where the executors had actually delivered the property to the legatee prior to the passage of the act the tax could not be collected, because the seisin in right had merged into a seisin in fact, and that to apply the statute would be to give it a retroactive effect; and reference was made to the *Cahen* case.

held the tax not offensive to any constitutional principle. This Court affirmed. In so doing, it disregarded the technical situation and looked to the substance of the matter.[9] At p. 473 it used the following language:

"However technically correct it may be to say that the estate came from the donor and not from the donee of the power, it is self-evident that it was only upon the exercise of the power that the estate in the plaintiffs in error became complete. Without the exercise of the power of appointment the estates in remainder would have gone to all in the class named in the deeds of William B. Astor. By the exercise of this power some were divested of their estates and the same were vested in others. It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others." [10]

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[9] See also, to the same effect, *Orr* v. *Gilman, supra.*

[10] Taxes have been sustained where a statute passed after the creation of a future interest imposed a tax on the occasion of the acquisition of possession and enjoyment due to the failure to exercise a power of appointment, the exercise of which would have divested such future interest. *Saltonstall* v. *Saltonstall,* 276 U. S. 260, *infra; Minot* v. *Treasurer,* 207 Mass. 588; *Manning* v. *Board,* 46 R. I. 400; *Montague* v. *State,* 163 Wis. 58; *State* v. *Brooks,* (Minn.), 232 N. W. Rep. 331. Such cases are authority against appellants' contention. The "estate" or "interest" of the beneficiary is just as truly vested in such a case as here; it is equally true that he has to do nothing but wait to come into possession and enjoyment. In both instances some future event, either a voluntary act of the donor or the holder of the power, or an event certain to happen but uncertain as to the time of its happening, may deprive him of the possibility of possession and enjoyment. See *contra, Re Lansing,* 182 N. Y. 238; *Re Chapman,* 117 N. Y. S. 679. The courts of New York thus hold that possession and enjoyment due to the exercise of a power of appointment is taxable though the legal estate springs from the original instrument which antedated the taxing statute, while that due to non-exercise of the power is not.

In *Moffitt* v. *Kelly*, 218 U. S. 400, the facts were these: Moffitt married in California in 1863 and resided there with his wife until his death in 1906. By his will he gave his estate to his wife and children as if he had died intestate. The probate court held that his widow's interest in the marital community was within the provisions of a law passed in 1905 taxing all devolutions of property by will or intestacy. The question was, therefore, whether a surviving wife was liable for a tax, which, as applied, could only be incident to her coming into untrammeled possession and enjoyment of what she had technically owned prior to the passage of the taxing statute. The Supreme Court of California held the tax valid against her insistence that this was a violation of the contract clause, the due process clause, and the equal protection clause of the Federal Constitution. This Court sustained the judgment, and said [p. 403]:

"But in every conceivable aspect this proposition must rest upon one or both of two theories, either that the nature and character of the right or interest was such that the State could not tax it without violating the Constitution of the United States, or that if it could be generically taxed without violating that instrument, for some particular reason the otherwise valid state power of taxation could not be exerted without violating the Constitution of the United States. The first conception is at once disposed of by saying that it is elementary that the Constitution of the United States does not, generally speaking, control the power of the States to select and classify subjects of taxation, and hence, even although the wife's right in the community property was a vested right which could not be impaired by subsequent legislation, it was, nevertheless, within the power of the State, without violating the Constitution of the United States, in selecting objects of taxation, to select the vesting in complete possession and enjoyment by wives of their shares in community

property consequent upon the death of their husbands, and the resulting cessation of their power to control the same and enjoy the fruits thereof. And this also disposes of the second conception, since if the State had the power, so far as the Constitution of the United States was concerned, to select the vesting of such right to possession and enjoyment as a subject of taxation, clearly the mere fact that the wife had a preëxisting right to the property created no exemption from taxation if the selection for taxation would be otherwise legal. It follows, therefore, that the mere statement of the contention demonstrates the mistaken conception upon which, in the nature of things, it rests.

"It is said, however, that the reasoning just stated, while it may be abstractly sound, is here inapplicable, because the thing complained of in this case is that the State of California has imposed an inheritance tax upon the share of the wife in the community and thereby taxed her as an heir of her husband, when if the laws existing at the time of the celebration of the marriage be properly construed and be held to be contractual she took her share of the property on her husband's death, not as an heir to property of which he was the owner, but by virtue of a right of ownership vested in her prior to the death of the husband, although the right to possess and enjoy such property was deferred and arose only on his death. But for the purpose of enforcing the Constitution of the United States we are not concerned with the mere designation affixed to the tax which the court below upheld, or whether the thing or subject taxed may or may not have been mistakenly brought within the state taxing law. We say so because in determining whether the imposition of the tax complained of violated the Constitution of the United States, we are solely confined to considering whether the State had the lawful power, without violating the Constitution of the United States, to

levy a tax upon the subject or thing taxed. This being true, as it clearly results from what we have said that the vesting of the wife's right of possession and enjoyment arising upon the death of her husband was subject to be taxed by the State, so far as the Constitution of the United States was concerned, it follows that whether the tax imposed was designated or levied as an inheritance tax or any other is a matter with which we have no concern."

Whatever may be said of the nature of the wife's interest in community property, this decision assumes the wife's vested interest in her half thereof; and that its free and unencumbered enjoyment only was postponed to the husband's death. There can be no difference in legal effect between that situation and one presented by the division of the total interests in a given property into a life tenancy and a remainder.

The authority of the cases just noted has not heretofore been questioned in this court, and for years they have stood unqualified in the vindication of the constitutional validity of just such a tax as is now under attack.

Fourth. In all its decisions touching death duties, whether on successions or on transfers, this Court has enunciated principles which sustain the validity of the tax.

The most recent expression with respect to a succession tax concerned the very laws of Massachusetts the application of which is here called in question.

In *Saltonstall* v. *Saltonstall,* 276 U. S. 260, one Brooks, on various dates between 1905 and 1907, executed deeds to trustees, which provided that the income should be paid to the settlor for life, or, if he elected, should be accumulated, and that upon his and his wife's deaths the income should be paid to his children in spendthrift trust, with gifts over. The instruments reserved to the grantor

certain powers of management of the trust and also provided that their terms might be changed by him with the concurrence of one trustee. Brooks died in 1920, having three times changed the trusts,—the last time in 1919. At the time the deeds were executed there was no statute taxing the succession to children of a decedent. But prior to Brooks' death the act of 1907, which is involved in the present case, had been passed, and had been amended by an act of 1909 taxing the acquisition of possession and enjoyment of property by virtue of the exercise of a power of appointment or by reason of the failure to exercise it. The Supreme Judicial Court of Massachusetts held that the power of revocation reserved to Brooks was equivalent to the creation of a power of appointment in him, and that since the beneficiaries could not be certain of taking until his death, the gift was one made or intended to take effect in possession or enjoyment after his death; and that the tax was on the succession, which includes the "privileges enjoyed by the beneficiary of succeeding to the possession and enjoyment of property." There as here it was claimed that the beneficiaries had vested interests subject to be divested by a future event (in that case, the exercise of the power), which never happened, and they argued that the tax law was retroactive in its operation if applied to their interests, and hence violated the due process clause, the equal protection clause, and probably Art. I, § 10 of the Constitution. There as here it was insisted that the remaindermen needed nothing from the Commonwealth of Massachusetts subsequent to the vesting of their remainders.

After pointing out that the excise was not on the privilege of transmission, as was the Federal estate tax dealt with in *Nichols* v. *Coolidge,* but was upon the privilege of succession, which might constitutionally be subjected to a tax by the State, whether occasioned by death or

effected by deed, and after calling attention to the fact that the tax was imposed not on the donor, but on the beneficiary, this Court said [p. 271]:

" . . . the gift taxed is not one long since completed, but one which never passed to the beneficiaries beyond recall until the death of the donor; and the value of the gift at that operative moment, rather than at some later date, is the basis of the tax."

The Court further stated that,

"So long as the privilege of succession has not been fully exercised it may be reached by the tax."

Again the Court said [p. 271]:

" . . . in determining whether it has been so exercised technical distinctions between vested remainders and other interests are of little avail, for the shifting of the economic benefits and burdens of property, which is the subject of a succession tax, may even in the case of a vested remainder be restricted or suspended by other legal devices."

One of such other "legal devices" is a provision "divesting" a remainder which is "vested."

As the above quotation shows, the essential question in all such cases is whether the succession has become complete by actual possession and enjoyment, prior to the passage of the taxing act.

Notwithstanding the distinction between a transfer tax and a succession tax, the decisions under the Federal estate tax statutes (transfer tax laws) are convincing on the matter of substantiality as against technicality. The Court has uniformly disregarded the technical aspect of a transfer and looked at the reality and substance of the transaction. There is, in this aspect, no logical distinction between the two kinds of excise.

In *Chase National Bank* v. *United States*, 278 U. S. 327, where the beneficiaries' interests were admittedly vested, the Court reiterated the principle stated in *Salton-*

stall v. *Saltonstall,* that the test of constitutionality is the incidence of the tax on the shifting of economic benefit, and not on the passage of a mere technical legal title. Thus it said [p. 338]:

"Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax, *Chanler* v. *Kelsey,* 205 U. S. 466."

In *Tyler* v. *United States,* 281 U. S. 497, the Court considered the estate tax provisions of the Revenue Acts of 1916 and 1921. Both acts contained a provision that upon the death of one of two tenants by the entireties there should be included in the amount of the decedent's estate, for the purpose of measuring the tax, the value of the joint estate property, "except such part thereof as may be shown to have originally belonged to" the surviving joint tenant, "and never to have belonged to the decedent." Under this provision the United States assessed a tax against the estates of Pennsylvania and Maryland decedents. Collection was resisted on the ground that, by the common law of those States, tenants by the entireties are seised of the whole and of every part of the joint estate, and that the survivor had a vested estate long prior to the passage of the acts.

It was conceded that at the death of one, nothing descends to the survivor; the latter has, in the eye of the law, no more and no less than he or she had before—technically speaking there is no succession.

But Congress expressed a purpose to tax the passage of something from the decedent at death; just as here the Massachusetts legislature showed its intent to tax the

acquisition of something which accrued to the beneficiaries at the death of the settlor. In the instant case the so-called vested estate of the beneficiaries was subject to be divested by their death prior to that of the survivor of the grantors. In the *Tyler* case the estate was absolutely vested; not only so, but it was in law as large *qua* the survivor after the death of his co-tenant as it had been when both were alive; it could not be divested by the act of either party; it could not be taken in execution of a judgment against either party; the survivor needed to make no demand upon anyone for possession.

The taxpayers argued in the *Tyler* case, on precisely the same ground as appellants now urge, that the survivor's interest had vested long prior to the adoption of the Revenue Acts; that no transfer of title or interest in property occurred on the death of one of the tenants by the entireties, and consequently the tax was arbitrary and in violation of the Fifth Amendment, because the subject or event on which the tax must be predicated was wanting. But the Court had no difficulty in holding that what happened at the death of one of the tenants was a transfer from the decedent of something which was the legitimate subject of an excise. The Court said (p. 503):

"The question here, then, is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights."

Language more closely descriptive of the situation presented in the present case could not be employed. Again the Court said (pp. 503–504):

"According to the amiable fiction of the common law, adhered to in Pennsylvania and Maryland, husband and wife are but one person, and the point made is, that by the death of one party to this unit no interest in property held by them as tenants by the entirety passes to the other. This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law. See *Nicol* v. *Ames,* 173 U. S. 509, 516; *Saltonstall* v. *Saltonstall, supra,* p. 271.

" Taxation, as it many times has been said, is eminently practical, and a practical mind, considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants in each of these cases did not have the effect of passing to the survivor substantial rights, in respect of the property, theretofore never enjoyed by such survivor. Before the death of the husband (to take the *Tyler* case, No. 428,) the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus

the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax. And in that view the resulting tax attributable to such property is plainly indirect."

Every word of the above quotation applies with as great force to the beneficiaries of the Coolidge trust as it applied in that case to the surviving tenant.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, a testator who died in 1922 had, in the period between 1903 and 1919, while not in contemplation of death, executed seven trust indentures. Two of these provided that the income should be paid to the settlor for life; and after his death to named persons, with remainders over. These deeds reserved a power of revocation to the settlor alone. The remaining five provided for life incomes to certain persons, terminable five years after the settlor's death, or upon the death of the life tenants, whichever should first happen, with remainders over. Powers of amendment were reserved in these, not to the settlor alone, but jointly to the settlor and certain beneficiaries. One of the seven trusts was modified in a matter immaterial to the decision and the others were not modified or revoked. In calculating the amount of the Federal estate tax the United States sought to include the property embraced in all seven of the trusts. It was held that as to the two trusts in which the settlor had unrestricted power of revocation the transfer was not complete until his death. As to the five trusts in which the settlor did not have such power in himself alone, but had power of amendment jointly with bene-

ficiaries, it was decided that the property had for all practical purposes passed completely from his control. It was pointed out that the reservation of powers of management in the settlor, as distinguished from the right to revoke or change the beneficiaries of the trust, was insignificant, and that the essential test was the passage of the economic benefit or enjoyment of the property. Thus it was said [p. 346]:

"Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax."

Repeatedly throughout the opinion the passage of the control, possession and enjoyment of the property is referred to as the touchstone of the incidence of the tax. If that be the test when the privilege of the transferor is under investigation, no reason is apparent why the same yardstick should not be used when we are considering acquisition of rights by the beneficiary.

Thus the *Reinecke* case is a full authority for the disregard of mere legal interests as distinguished from substantial rights of control or enjoyment. Technically speaking, the remainders to the beneficiaries in that case were vested subject only to be divested by the exercise of a power of revocation reserved to the grantor. It has been argued in the instant case that the vested estates created by the deed of 1907 never were divested; that

the event which could work a divestiture never occurred. That was equally true in the *Reinecke* case.

It might well have been argued in the *Reinecke* case that the right of revocation reserved by the grantor did not constitute an interest in the property; was not a property right, and therefore the grantor having parted with all legal interest his estate could not be taxed as upon the transfer of any property or any interest recognized by the law. Such an argument would have been technically sound under *Jones* v. *Clifton,* 101 U. S. 225, 230, where it was said of such a power:

"The title to the land and policies passed by the deeds; a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will. . . . Nor is the power a chose in action."

The reasoning in the *Reinecke* case shows that such an argument would have been of no avail. No more ought the argument of appellants, based upon the so-called vesting of the future interest at the execution of the deed, prevail in this case.

It is said that the death of the settlors has no necessary relation to the benefits received by the remaindermen; that any other event might as well have been chosen as the occasion for the commutation of the children's future interests into interests in fee simple in possession; and that this in itself makes the tax arbitrary and unreasonable because the incident which occasions its imposition is irrelevant. This Court has negatived this contention. In *Keeney* v. *New York, supra,* it was said [p. 536]:

"There can be no arbitrary and unreasonable discrimination. But when there is a difference it need not be great or conspicuous in order to warrant classification. In the present instance, and so far as the Fourteenth Amendment is concerned, the State could put transfers intended to take effect at the death of the grantor in a

class with transfers by descent, will or gifts in contemplation of the death of the donor, without, at the same time, taxing transfers intended to take effect on the death of some person other than the grantor, or on the happening of a certain or contingent event."

And in the same case it was said [p. 535]:

"Where the grantor makes a transfer of property to take effect on the death of a third person, it might . . . be taxed as a devolution or succession." [11]

And in *Chase National Bank* v. *United States, supra,* the same principle was announced at page 338.[12]

Appellants rely on *Nichols* v. *Coolidge, supra; Blodgett* v. *Holden,* 275 U. S. 142; *Untermyer* v. *Anderson,* 276 U. S. 440; *Chase National Bank* v. *United States, supra;* and *Reinecke* v. *Northern Trust Co., supra,* as in principle supporting their position. The *Reinecke* case and the *Chase National Bank* case have already been analysed. It is evident from what has been said that appellants can derive no comfort from those decisions.

Of course the test to be applied in cases arising under the Federal estate tax law is whether the transferor has parted with every vestige of control over the beneficial enjoyment and possession of the property, and not whether the beneficiary has received it. *Nichols* v. *Coolidge* dealt,

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[11] See also *Blake* v. *McCartney,* 4 Clifford, 101, where under a bequest in trust effective in 1847, two successive life estates were created, the second of which took effect in possession in 1867, and it was held the beneficiary was liable for tax under the act of 1864. The court said: "The argument for the plaintiff is, that the tax can only be imposed by virtue of the section in question, where the death of the predecessor is the cause of the successor's being entitled to possession of the real estate, and not where it is merely the occasion, as in this case; but the proposition finds no support in the language of the provision, and the rule in the Exchequer Court of England is well settled the other way."

[12] See *Boston Safe Dep. & T. Co.* v. *Commissioner,* (Mass.), 166 N. E. 729.

under the Federal estate tax law, with the same trust involved in this case, and the inquiry there necessarily was whether prior to the passage of the estate tax act the grantors had so fully divested themselves of all right of control and enjoyment of the property that nothing remained to pass out of them at death. The facts were held to make an affirmative answer imperative. Here, on the other hand, we inquire, not whether the grantor has parted with title, control and enjoyment, but whether the grantee has fully acquired them prior to the passage of the law.

In *Blodgett* v. *Holden* and *Untermyer* v. *Anderson* the Court had under consideration a transfer tax laid on the donor in respect of gifts made *inter vivos*. The gifts in those cases were complete prior to the passage of the taxing statute, and, as in *Nichols* v. *Coolidge*, technical title, power to recall, and beneficial use and enjoyment had all passed from the donor prior to the legislative attempt to tax the gift. These circumstances demonstrate that neither case is an authority for holding a succession tax invalid if levied on the occasion of the acquisition of possession and enjoyment of property by the donee.

Finally, appellants cite *Matter of Pell*, 171 N. Y. 48, and certain cases in state courts which have followed it. That case adopts the views urged by appellants. It was followed in *Hunt* v. *Wicht*, 174 Cal. 205.

Houston's Estate, 276 Pa. 330, involved no constitutional question. The statute in that case was construed to apply only to interests thereafter created.

In *Lacey* v. *State Treasurer*, 152 Ia. 477, and *Commonwealth* v. *Wellford*, 114 Va. 372, the statutes were construed as affecting only interests thereafter arising, though in both there were *dicta* to the effect that a contrary construction would render them unconstitutional. The *dic-*

tum in the *Lacey* case is repugnant to the later decision in *Brown* v. *Gulliford,* 181 Ia. 897.

State v. *Probate Court,* 102 Minn. 268, is not only distinguishable on its facts, as later held by the same court (*State* v. *Brooks,* 232 N. W. 331, 334), but the constitutional question here raised was not discussed.

In a well considered case, involving precisely the same question as *Cahen* v. *Brewster, supra,* the tax was sustained. *Gelsthorpe* v. *Furnell,* 20 Mont. 299.

It cannot, therefore, be said, as appellants contend, that there is any considerable body of state decisions in their favor.

The reasoning of the state court cases which have held the tax invalid is flatly contrary to the decisions of this Court in the cases above discussed; and, in view of that fact, it should not prevail here.

The Massachusetts court described the tax as one on the succession, and we have dealt with it on that basis; but it is neither necessary to sustain it nor permissible to defeat it by applying to it any particular descriptive language. See *Macallen Co.* v. *Massachusetts,* 279 U. S. 620, 625, 626; *Educational Films Corp.* v. *Ward, ante,* p. 379. *Moffitt* v. *Kelly, supra; Tyler* v. *United States, supra.* A State's power to tax property is plenary. The power to tax it as a whole necessarily embraces the power to tax any of its incidents, or the use or enjoyment of them,—provided only that the taxable occasion does not antedate the taxing statute so as to render it invalid because retroactive. If the property itself may constitutionally be taxed, obviously it is competent to tax the use of it, *Billings* v. *United States,* 232 U. S. 261; *Hylton* v. *United States,* 3 Dall. 171; or a sale of it, *Thomas* v. *United States,* 192 U. S. 363, 370; *Nicol* v. *Ames,* 173 U. S. 509; or the gift of it, *Bromley* v. *McCaughn,* 280 U. S. 124. And if the gift of it may be taxed, it is difficult

to see upon what constitutional grounds the power to tax the receipt of it, whether as the result of inheritance or otherwise, may be denied to a State, whatever name may be given the tax, and even though the right to receive it, as distinguished from its actual receipt at a future date, antedated the statute. Receipt in possession and enjoyment is as much a taxable occasion as the enjoyment of any other incident of property. A levy upon the taking possession of property acquired by inheritance is one of the most ancient forms of tax known to the law. It existed on the European continent and in England prior to the adoption of our Constitution.[13]

A tax laid upon the succession after the future interest has been created and the right accrued, but before the actual enjoyment in possession of the property, is no more a denial of due process than a tax laid upon income accrued prior to the adoption of the taxing statute but received after its passage. The constitutionality of the latter form of tax is now beyond question, *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 20; *Lynch* v. *Hornby*, 247 U. S. 339, 343; *Taft* v. *Bowers*, 278 U. S. 470, 483, 484; *Cooper* v. *United States*, 280 U. S. 409, 411.

The contention that taxation of a property right or an incident of ownership previously created by a deed or contract impairs the obligation of the contract is not new. But it must be denied both on reason and on authority. The present tax has no reference to the contract or its obligation save to recognize and observe the existence of both. It would serve no useful purpose at this late day to elaborate the doctrine, long since settled, that to be obnoxious to the contract clause, a statute must

[13] *Nielsen* v. *Johnson*, 279 U. S. 57, 53; Gleason and Otis, "Inheritance Taxation" (4th ed.) 243. As shown by Digby, "History of the Law of Real Property" (5th ed.) p. 40, feudal "relief" was a payment made by an heir for the privilege of admission as tenant of the land in his ancestor's place.

act upon the contract so as to interfere with the right of enforcement. All of the cases cited as supporting the conclusion of the Court deal with such a situation. None of them even remotely bears on the question here raised whether a tax levied in respect of the future enjoyment of property which chanced to be acquired under an earlier contract impairs the contract. That question, often raised, has always been answered here in the negative.

In *Orr* v. *Gilman, supra,* it was claimed that a succession tax law enacted after the original deed granting a power of appointment, and construed as taxing the beneficiary of the power, violated Art. I, § 10 of the Constitution. The argument was rejected.

A similar contention made in *Chanler* v. *Kelsey, supra,* was disposed of in these words [p. 478]:

"Nor do we perceive that the effect has been to violate any contract right of the parties. It is said that this is so, because instead of disposing of the entire estate, ninety-five per cent of the property included in the power has been transferred and five per cent taken by the State; but as there was a valid exercise of the taxing power of the State, we think the imposition of such a tax violated no contract because it resulted in the reduction of the estate."

Justice White, in *Moffitt* v. *Kelly, supra,* said of a similar contention:

"1. *The alleged violation of the contract clause.*—Considered merely subjectively, the contention is that the rights vested in the wife as a partner in the community existing by virtue of the constitution and laws of the State of California governing at the time of the marriage were contractual rights of such a character that they could not be essentially changed or modified by subsequent legislation without impairing the obligations of the contract, and thereby violating the Constitution of the United States. But even although this theoretical proposition be

fully conceded, for the sake of the argument, it is apparent that it is here a mere abstraction, and is therefore irrelevant to the case to be decided. We say this because there is no assertion of the giving effect to any law enacted subsequent to the contracting of the marriage which purports to essentially modify the rights of the wife in and to the community, as those rights existed at the time the marriage was celebrated. This is so because the state law, the enforcement of which it is asserted will impair the obligation of the contract, is merely a law imposing a tax." (218 U. S., pp. 402–403.)

The foregoing cases constitute only one application of a principle which has been repeatedly applied not only to rights derived under deeds in their aspect as contracts, but to rights derived pursuant to all sorts of contracts. It was said in *North Missouri R. Co.* v. *Maguire,* 20 Wall. 46, 61:

"Authorities from numerous sources are cited by the plaintiffs, but none of them show that a lawful tax on a new subject, or an increased tax on an old one, interferes with a contract or impairs its obligation, within the meaning of the Constitution, even though such taxation may affect particular contracts, as it may increase the debt of one person and lessen the security of another, or may impose additional burdens upon one class and release the burdens of another, still the tax must be paid unless prohibited by the Constitution, nor can it be said that it impairs the obligation of any existing contract in its true legal sense."

With respect to deeds and grants, this Court said in *Providence Bank* v. *Billings,* 4 Pet. 514, 562:

"Land, for example, has, in many, perhaps in all the states, been granted by government since the adoption of the constitution. This grant is a contract, the object of which is that the profits issuing from it shall enure to the benefit of the grantee. Yet the power of taxation

may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all; and the proposition appears so extravagant, that it is difficult to admit any resemblance in the cases."

In *Kehrer* v. *Stewart,* 197 U. S. 60, it was contended that a statute levying a tax upon all agents of packing houses doing business in the State, of $200, in each county where such business was carried on, impaired the obligation of the contract which an agent had entered into with a packing house. With respect to this contention this Court said [p. 70]:

"The argument that the tax impairs the obligation of a contract between the petitioner and Nelson Morris & Company is hardly worthy of serious consideration. The power of taxation overrides any agreement of an employé to serve for a specific sum."

With respect to a tax upon income, it was said in *Murray* v. *Charleston,* 96 U. S. 432, 446:

"A tax on income derived from contracts, if it does not prevent the receipt of the income, cannot be said to vary or lessen the debtor's obligation imposed by the contracts."

In *Clement National Bank* v. *Vermont,* 231 U. S. 120, the claim was that a state statute which levied a tax on bank deposits collectible from the depositor, and which had to be deducted by the bank from the interest paid to the depositor, impaired the obligations of the prior contracts of depositors with the bank. This Court overruled the objection, saying [p. 143]:

"But this is clearly untenable. The statute did not act upon such contracts; it imposed a tax upon the property of depositors in the exercise of a power subject to which the deposits were made."

In *Lake Superior Mines* v. *Lord,* 271 U. S. 577, the obligation of an outstanding contract for the receipt of

royalties on minerals mined was held not to be impaired by a later state statute taxing the proceeds of the contract. The Court said [p. 581]:

"Titles to all the lands and leases were obtained subject to the State's power to tax. If the statute now in controversy is within that power, it cannot impair the obligation of appellants' contracts; if beyond, it is, of course, invalid. Accordingly, there is no occasion further to discuss the application of Article I, Section 10."

In short, it is evident from the authorities cited, and many more which might be quoted, that the power to tax property, or a right, or a status, or a privilege, acquired or enjoyed by virtue of a contract, is in no wise hindered or impeded by the fact of the existence of the contract whether it antedates or follows the effective date of the taxing act. No exercise of a governmental power, whether it be that of taxation, police, or eminent domain, though it make less valuable the fruits of a private contract, can be said to impair the obligation thereof.

I think the judgment should be affirmed.

MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS, and MR. JUSTICE STONE concur in this opinion.

V. LOEWERS GAMBRINUS BREWERY COMPANY *v.* ANDERSON, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE.

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

No. 352. Argued January 22, 1931.—Decided February 24, 1931.

In calculating its net income and profits taxes for the years 1918 and 1919, a brewing company was entitled, under § 234 (a) (7) of the Revenue Act of 1918, to a reasonable allowance for obsolescence of

its buildings resulting from the imminence and taking effect of prohibition. *Clarke* v. *Haberle Brewing Co.*, 280 U. S. 384, distinguished. P. 641.

42 F. (2d) 216, reversed.

District Court affirmed.

CERTIORARI, *post*, p. 823, to review a judgment of the Circuit Court of Appeals which reversed a judgment for the Brewery Company in the District Court in its action to recover money illegally collected as income and profits taxes.

Mr. Arthur B. Hyman, with whom *Mr. Karl D. Loos* was on the brief, for petitioner.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Sewall Key, J. Louis Monarch* and *John MacC. Hudson,* Special Assistants to the Attorney General, *Paul D. Miller,* and *Clarence M. Charest,* General Counsel, Bureau of Internal Revenue, were on the brief, for respondent.

Messrs. Frank S. Bright and *H. Stanley Hinrichs,* by special leave of Court, filed a brief as *amici curiae.*

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner sued respondent in the District Court for the Southern District of New York and obtained judgment for $22,091.01 on account of income and profits taxes for 1918 and 1919 erroneously exacted. The Circuit Court of Appeals reversed; and, as the right of petitioner to recover $4,128.85 was not contested, ordered that it have judgment for that amount. 42 F. (2d) 216. This court granted petitioner's application for a writ of certiorari, limited to the question whether petitioner is entitled under § 234 (a) (7) of the Revenue Act of 1918

to any deduction for obsolescence of its tangible property in such years.

Revenue Act of 1918, c. 18, 40 Stat. 1077, 1078, provides:

"Sec. 234. (a) That in computing the net income of a corporation . . . there shall be allowed as deductions . . . (7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence; . . . "

A jury having been waived in writing, the case was tried by the court without a jury. The court found:

Plaintiff, from 1879 until October 29, 1919, was engaged at New York City in the business of manufacturing and selling beers, ales and porter and for that purpose erected and installed suitable buildings and equipment. January 31, 1918, it had become common knowledge and was known to plaintiff that prohibition would become effective and that as a result plaintiff and others engaged in that business would suffer obsolescence in the value of their capital assets. Prohibition did become effective January 16, 1920. As found by the Commissioner of Internal Revenue, the depreciated cost of plaintiff's buildings as of that date was $153,932.18. The buildings were constructed especially for the purposes of such manufacture and were not commercially adaptable for any other use. They had no salvage value. As a result of prohibition and beginning January 31, 1918, and ending January 16, 1920, plaintiff suffered obsolescence of such buildings equal to such depreciated cost which should be rateably apportioned over that period. After making provision for allowances for such obsolescence, plaintiff had no net income for 1918 or 1919.

And at defendant's request the court found: With the advent of prohibition it became illegal to manufacture beers, ales and porter having an alcoholic content in excess of one-half of one per cent. Accordingly such man-

ufacture was discontinued by the plaintiff when the prohibitory law became effective. Subsequently plaintiff to a small extent continued the manufacture of beers, ales and porter having an alcoholic content not in excess of one-half of one per cent. and it still continues to manufacture such beverages to a small extent.

The sole question for decision is whether, in calculating its taxes for 1918 and 1919, plaintiff was entitled to any allowance for obsolescence of its buildings resulting from the imminence and taking effect of the prohibitory laws.

The language of § 234 (a) (7) is broad enough to include all obsolescence from whatever cause. But the Government maintains that Congress did not intend to provide compensation in any form for losses caused by prohibition legislation, and that consequently there can be no deduction for obsolescence here even upon the facts found by the District Court. It relies on *Clarke* v. *Haberle Brewing Co.,* 280 U. S. 384, and *Renziehausen* v. *Lucas,* 280 U. S. 387.

The case at bar was decided in the District Court before our decision in the *Haberle* case and on the authority of that decision the Circuit Court of Appeals held plaintiff not entitled to any allowance for obsolescence of its buildings. But the sole question presented to us in that case was whether a brewing company making its tax return for 1919 under the Act now before us and whose business would be destroyed by the taking effect of prohibition was entitled to deduct anything on account of exhaustion or obsolescence of its good will. The court said (p. 386): "We shall not follow counsel into the succession of regulations or the variations in the law before the date of the Act that we have to construe. In our opinion the words now used cannot be extended to cover the loss in this case and it is needless to speculate as to

what other cases it might include." When regard is had to the issue between the parties and the point decided, it is clear that there is nothing in our construction of the statute or in the reasons adduced to support the conclusion reached, that is decisive of the question now under consideration, or that suggests that, in respect of allowances for obsolescence of tangible property, the statute does not apply to brewers and their buildings just as it does to others and their tangible property. Indeed the language used definitely limits the opinion to obsolescence of good will.

In *Renziehausen* v. *Lucas* the taxpayer was a distiller. His claim for obsolescence of good will, under § 214 (a) (8) applicable to individuals and in the same words as § 234 (a) (7), was denied on the authority of the *Haberle* case. He also claimed allowances for obsolescence resulting from prohibition to his plant, equipment and bonded warehouses. That claim was denied by the Commissioner but it was allowed by the Board of Tax Appeals, 8 B. T. A. 87, and that decision was affirmed in the Circuit Court of Appeals. 31 F. (2d) 675. The taxpayer insisted here that the allowance for obsolescence of his warehouses was inadequate. The Government opposed the increase but did not challenge either the propriety of an allowance or the amount fixed below. Dealing with the case on the assumption that the statute applied to obsolescence due to prohibition just as it does to that resulting from other causes, we held that the taxpayer had "no reason to complain of the allowance for obsolescence of the warehouses." That case makes against rather than for the Government's present contention.

The tangible property by which a business is carried on is plainly distinguishable from the element of good will inhering therein. The cost of plant depreciation, *i. e.*, exhaustion, wear, tear and obsolescence, is a part of oper-

ating expenses necessary to carry on a manufacturing business. The gain or loss in any year cannot be rightly ascertained without taking into account the amount of such cost that is justly attributable to that period of time.

The history of § 234 (a) (7) discloses a legislative purpose that the amount reasonably attributable to each year on account of obsolescence of tangible property used in the taxpayer's business is to be taken into account in ascertaining his taxable income. The excise tax act of 1909 permitted the deduction of "a reasonable allowance for depreciation of property, if any." [1] Regulations of the Treasury Department construed the provision to mean the loss in value "that arises from exhaustion, wear and tear, or obsolescence out of the uses to which the property is put." [2] The Revenue Act of 1913 provided for a "reasonable allowance for depreciation by use, wear and tear of property if any." [3] The Regulations provided for a deduction for depreciation in the value of the property "that arises from exhaustion, wear and tear, or obsolescence out of the uses to which the property is put." [4] The Revenue Act of 1916 dropped the word depreciation and permitted "a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade." [5] Under that provision no deduction on account of obsolescence was allowed except for the "withdrawal from use of the obsolete property." [6] The House draft of the Act of 1918 provided for an allowance for exhaus-

[1] Section 38, 36 Stat. 112.
[2] Regulations 31, Art. 4.
[3] Section II G (b), 38 Stat. 172.
[4] Regulations 33, Art. 129.
[5] Section 12 (a), 39 Stat. 767.
[6] Regulations 33 Revised, Art. 178.

tion, wear and tear. It did not expressly refer to depreciation or obsolescence. The Senate amended by substituting "depreciation" for "exhaustion, wear and tear." In conference that word was taken out and the provision was made to read as it now stands, "a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

None of the Acts made any classification based on the causes from which obsolescence results. And, as the sole purpose is to arrive at the net income subject to taxation, it is clear that such a discrimination could not reasonably or justly be made. Section 234 (a) (7) and other provisions of the same substance have been generally, if not uniformly, held to apply to obsolescence of tangible property, whatever its cause, where the amount fairly attributable to the tax year has been shown.[7] There is nothing in the language of the statute or the circumstances of its enactment to suggest that Congress intended that the taxable incomes of brewers should not be arrived at according to the rules that govern taxable incomes of others.

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[7] *Dean* v. *Hoffheimer Bros. Co.*, 29 F. (2d) 668; *Kansas City Title & Trust Co.* v. *Crooks*, 35 F. (2d) 351; *National Ind. Alcohol Co.* v. *Commissioner*, 38 F. (2d) 718; Michigan Lithographing Co., 1 B. T. A. 989; Robert H. McCormick, 2 B. T. A. 430; Dilling Cotton Mills, 2 B. T. A. 127; Annie L. Dean, 3 B. T. A. 896; Northern Hotel Co., 3 B. T. A. 1099; American Valve Co., 4 B. T. A. 1204; Auditorium Co., 5 B. T. A. 163; Northeastern Oil & Gas Co., 5 B. T. A. 332, 337; Corsicana Gas & Elec. Co., 6 B. T. A. 565; Balaban & Katz Corporation, 6 B. T. A. 610; Manhattan Brewing Co., 6 B. T. A. 952; Mary M. Dowling, 6 B. T. A. 976, 979; Star Brewing Co., 7 B. T. A. 377; National Industrial Alcohol Co., 7 B. T. A. 1241; Konrad Schreier Co., 9 B. T. A. 407; George Wiedemann Brewing Co., 9 B. T. A. 792; J. Chr. G. Hupfel Co., 9 B. T. A. 944; Milwaukee-Waukesha Brewing Co., 15 B. T. A. 579.

The Government also insists that in any event there was no obsolescence in plaintiff's buildings in 1918 or 1919 because, from its very nature, obsolescence begins only when there is a reasonable certainty that the property will become obsolete.

The statute contemplates annual allowance for obsolescence just as it does for exhaustion, wear and tear. That is necessary in order to determine true gain or loss because postponement of deductions to cover obsolescence until the property involved became obsolete would distort annual income. It is well understood that exhaustion, wear, tear or obsolescence cannot be accurately measured as it progresses and undoubtedly it was for that reason that the statute authorized "reasonable" allowances to cover them in order equably to spread that element of operating expenses through the years. The findings of fact show that the imminence of prohibition became known in January of 1918 and that it took effect in January of 1920. The court found that, although they were subsequently used to a small extent in the manufacture of non-intoxicating beverages, plaintiff's buildings had no salvage value when prohibition took effect. Undoubtedly it was obvious from the beginning of that period that buildings not commercially adaptable to any use other than brewing intoxicating liquor would suffer obsolescence because of the destruction of that business.

Under the order granting the writ there is before us no question as to the propriety of the amount of the allowance or its allocation between the tax years in question.

Judgment of the Circuit Court of Appeals reversed.

Judgment of the District Court affirmed.

MR. JUSTICE STONE concurs in the result.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* NATIONAL INDUSTRIAL ALCOHOL COMPANY, INCORPORATED.

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

No. 109. Argued January 21, 22, 1931.—Decided February 24, 1931.

Under § 234 (a) (7) of the Revenue Act of 1918, a brewing company was entitled to a reasonable allowance for obsolescence of tangible property caused by prohibition legislation. *Gambrinus Brewery Co.* v. *Anderson, ante,* p. 638. P. 647.

38 F. (2d) 718, affirmed.

CERTIORARI, 281 U. S. 717, to review a judgment of the Court of Appeals of the District of Columbia, which reversed a decision of the Board of Tax Appeals, 7 B. T. A. 1241, affirming a determination of deficiencies in income and excess profits taxes.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, J. Louis Monarch* and *John MacC. Hudson,* Special Assistants to the Attorney General, and *Clarence M. Charest,* General Counsel, Bureau of Internal Revenue, and *Robert L. Williams,* Special Attorney, were on the brief, for petitioner.

Mr. R. M. O'Hara for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The Board of Tax Appeals affirmed the Commissioner's determination of deficiencies in respondent's income and profits taxes for fiscal years ending May 31, 1919, and 1920. The taxpayer claimed allowances for obsolescence, resulting from prohibition legislation, of a part of a build-

ing. It was denied. 7 B. T. A. 1241. The Court of Appeals reversed. 38 F. (2d) 718.

The taxpayer, a Louisiana corporation organized in 1911, was engaged in making and selling beer. November 3, 1919, it abandoned that business and commenced the manufacture of near beer which it continued until 1923. For the manufacture of beer the taxpayer had a brewery building and a cellar building having three floors. After prohibition the brewery building and one floor of the cellar building were used in the production of near beer. Two floors of the cellar building and certain steel and wooden vats thereon formerly used for aging beer were not needed and their use was discontinued on November 3, 1919. The Board found that the vats had no salvage value and held their depreciated cost deductible as obsolescence over the period from December 18, 1917, the date of the submission of the Eighteenth Amendment, to January 16, 1920, the date that prohibition took effect. But it denied any allowance for obsolescence of the two floors on the ground that, while the taxpayer ceased to use them, there was nothing in the record to indicate that the structure was obsolete or becoming so. The Court of Appeals held the evidence ample to support the taxpayer's contention that after abandonment the two floors possessed no residual or salvage value. The Government has raised here only the question whether under the Revenue Act of 1918, § 234 (a) (4) or (a) (7) a deduction may be allowed for loss or obsolescence of tangible property caused by prohibition legislation, and concedes that it is not in position to contend that the evidence was not sufficient to establish obsolescence of the two floors.

The Government relies on *Clarke* v. *Haberle Brewing Co.*, 280 U. S. 384, and *Renziehausen* v. *Lucas*, 280 U. S. 387. But we have held in the *Gambrinus* case just decided that under § 234 (a) (7) a brewing company is

entitled to allowance for obsolescence of its building that was caused by the imminence and taking effect of prohibition. That case rules this one.

Judgment affirmed.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* NIAGARA FALLS BREWING COMPANY ET AL.

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

No. 61. Argued January 21, 1931.—Decided February 24, 1931.

1. Under § 234 (a) (7) of the Revenue Act of 1918, a brewing company was entitled to a reasonable allowance for obsolescence of tangible property caused by prohibition legislation. *Gambrinus Brewery Co.* v. *Anderson, ante,* p. 638. P. 651.
2. The Court takes judicial notice that, prior to the submission of the Eighteenth Amendment in 1917, more than thirty States had enacted prohibitory laws; that a federal war measure, effective August 10, 1917, required the reduction of the alcoholic content of beer; that the proposed Amendment was ratified by twelve States in the first six months of 1918 and by three more before the expiration of that year; that twenty-one States ratified it in the early part of January, 1919; that in that month the Amendment became a part of the Constitution and that it took effect one year later, January 16, 1920. P. 651.
3. Obsolescence is not necessarily confined to particular elements or parts of a plant, but may affect the whole of it; and it may result from laws regulating or forbidding the particular use to which the property has been put as well as from other causes. P. 653.
4. The purpose of the statute in allowing deductions for obsolescence, § 234 (a) (7), *supra,* is to guide the ascertainment of taxable income each year; and, like other tax laws, it should be construed liberally in favor of the taxpayer. P. 654.
5. The burden of proving the existence and amount of obsolescence may be sustained by such weight of evidence as would reasonably support a verdict for the plaintiff in an ordinary action for money. P. 654.

6. A reasonable approximation of the amount that fairly may be included in the accounts of any year is all that is required. P. 655.
7. In determining the deduction for obsolescence, the amount probably recoverable from the property, at the end of its service, by putting it to another use or by selling it as scrap or otherwise, is to be considered. There is no hard and fast rule that the taxpayer must show that it will be scrapped or cease to be used or useful for any purpose, before an allowance may be made for obsolescence. P. 655.
8. The facts found in this case show that obsolescence of the taxpayer's brewing plant commenced at about the beginning of 1918 and was complete upon the taking effect of prohibition in January 1920, the taxpayer having been unable to find any profitable use of the property, in the manufacture of near-beer or otherwise, and the sums received as rents and from a sale constituting mere salvage. P. 656.

38 F. (2d) 217, affirmed.

CERTIORARI, 281 U. S. 712, to review a judgment of the Circuit Court of Appeals which reversed a decision of the Board of Tax Appeals, 13 B. T. A. 1040, sustaining disallowances in tax returns.

Mr. Claude R. Branch, Special Assistant to the Attorney General, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Sewall Key, J. Louis Monarch* and *John MacC. Hudson,* Special Assistants to the Attorney General, and *Clarence M. Charest,* General Counsel, Bureau of Internal Revenue, were on the brief, for petitioner.

The Revenue Act of 1918 does not authorize a deduction, either as obsolescence or as a loss, for the decline in value of property, whether tangible or intangible, resulting from the imminence and incidence of national prohibition legislation. *Clarke* v. *Haberle Brewing Co.,* 280 U. S. 384.

There was no obsolescence in fact. To sustain the claim it must appear that the taxpayer foresaw with reasonable certainty that the property would not be useful

in his business or any other business, at some definite time in the future, when the property would have to be abandoned. There is no finding that this occurred during 1918 or 1919. Obsolescence results from a lack of usefulness and not from a lack of use. The taxpayer commenced to manufacture near-beer in 1917, using the same property and equipment as was used to manufacture beer. The imminence of prohibition legislation did not justify the conclusion that it would affect the manufacture and sale of near-beer or shorten the useful life of the property. After the adoption of national prohibition, the taxpayer continued the manufacture and sale of near-beer. Its failure to use the property to as great an extent as before was due not to any lack of usefulness but solely to an absence of a large demand for the product.

There was no sale or abandonment of the property until 1928, and consequently there is no basis for an alternative claim to the deductions of 1918 and 1919 as a business loss in those years.

Mr. Basil Robillard for respondents.

Mr. Justice Butler delivered the opinion of the Court.

In making its tax returns for 1918 and 1919 the brewing company, because of approaching prohibtion, made deductions for obsolescence of its buildings, machinery and equipment. The Commissioner disallowed the deductions on the ground that after prohibition the taxpayer continued to use his property to make and sell near beer and other non-intoxicating beverages. The Board of Tax Appeals sustained the Commissioner. 13 B. T. A. 1040. The Circuit Court of Appeals reversed. 38 F. (2d) 217.

The pertinent words of the statute, Revenue Act of 1918, § 234 (a) (7) are: "A reasonable allowance for the

exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

The Government contends that this statute did not authorize a deduction for obsolescence of tangible property resulting from the imminence of prohibition. But in the *Gambrinus* case just decided we hold the contrary.

The Government also maintains that on the facts of this case no allowance for obsolescence should be made.

We take judicial notice of the following: Prior to the submission of the Eighteenth Amendment in 1917, more than 30 States had enacted prohibitory laws. A war measure, effective August 10, 1917, required the reduction of the alcoholic content of beer. The proposed amendment was ratified by 12 States in the first six months of 1918 and by three more before the expiration of that year; 21 States ratified in the early part of January, 1919, and in that month the Amendment became a part of the Constitution and took effect one year later, January 16, 1920.

There is no controversy as to facts found by the Board of Tax Appeals:

The brewing company from 1902 until October, 1919, was engaged in making and selling beer. Its sales from 1912 to 1917 inclusive ranged from 30,681 to 37,176 barrels per year. Due to war-time prohibition, its sales fell off in 1918 to 30,204 barrels, about 19 per cent. less than the sales of the preceding year, and in 1919 to 17,823 barrels, about 40 per cent. less than in 1918.

At the end of 1917 the depreciated cost, and actual value, of the company's land, buildings and equipment was $477,054.60. After deducting the allowances in 1918 and in 1919 for exhaustion, wear and tear of its plant and for obsolescence of property used for making beer, the book value of such property was reduced to $279,117.08.

But due to prohibition laws its actual value at the end of 1919 was only $90,475. That is $188,642.08 less than the book value after such deductions.

Its buildings, machinery and equipment were designed and constructed for the brewing and selling of beer and were not available or readily adaptable to other uses. The buildings were damp, the floor levels uneven; there were few openings for light and no elevators, and the property was located in a manufacturing zone. Much of the machinery could not be removed without dismantling or tearing out the walls of the building and some of it could not be removed except by tearing out a side of the building. The company's officers considered selling or converting its buildings and machinery into a plant for a dairy, cold storage, ice cream manufacturing, dry storage, ice manufacture, fruit storage, semicold storage, machine shop, or chemical plant. They could find no use for the property except for the purpose of making near beer and other soft drinks.

In 1917 the company began to manufacture near beer and for that purpose used the machinery and processes employed in the making of beer. An additional process for dealcoholizing was necessary. It sold 16 barrels in that year, 327 in 1918, 8 in 1919, 7,921 in 1920 and 2,852 in 1921.

In 1918 it began the manufacture of other soft drinks by use of machinery not here involved. In October, 1919, because of prohibition, the company discontinued the making of beer. It abandoned the lower floor of one of its buildings which had been devoted to storing and aging beer. That process is not involved in making near beer. Thereafter a part of another building with the equipment therein which had been used three or four times a week in making and bottling beer was used only once in about two weeks in making near beer. Apparently the rest of the property was used in connection with

the making of such near beer and other soft drinks as were made by the company prior to its going out of business.

The company could not operate at a profit after prohibition and the corporation was voluntarily dissolved in December of 1921. Its affairs were administered by its former directors acting as trustees. In January, 1922, they leased all the property, including equipment that had been added for the making of soft drinks, for a term of three months with privilege of renewal by the lessee. The lease was still in effect at the time of the hearing before the Board in 1927. The rent was at the rate of $5,000 per year plus taxes, insurance and repairs.

The difference between the depreciated cost (found to be actual value) December 31, 1917, and the value of the property in 1918 and 1919 was due to the imminence and incidence of war-time and permanent prohibition. There was no material change in the value of land and buildings in the vicinity used for purposes other than brewing. In December, 1921, the company sold certain of its land, free from buildings, for $20,000. Up to the time of the hearing the highest offer for the remaining property that the company was able to secure was $35,000.

The Government argues that obsolescence is the state of becoming obsolete, that property is obsolete when it is no longer useful for the purpose for which it was acquired and cannot be used for any other purpose and that obsolescence begins only when there is a reasonable certainty that the property will become obsolete. And further, that there is no finding that at any time during the taxable years in question it became apparent that the property would become obsolete and that no inference to that effect can properly be drawn from the facts found.

In the solution of the problem here presented, no general or comprehensive definition of "obsolescence" is necessary. The word is much used and its meaning de-

pends upon and varies with the connections in which it is employed. It has been said to be "the condition or process by which units gradually cease to be useful or profitable as a part of the property, on account of changed conditions." * Obsolescence is not necessarily confined to particular elements or parts of a plant; the whole may become obsolete. Obsolescence may arise as the result of laws regulating or forbidding the particular use of the property as well as from changes in the art, the shifting of business centers, loss of trade, inadequacy or other causes.

We are here concerned with the meaning of obsolescence as used in the above quoted clause of the taxing Act. Clearly the statute contemplates that, where warranted by the facts, the taxpayer shall have the benefit of, and in making his return may deduct in each year, a reasonable allowance to cover obsolescence of the tangible property. And that is in accord with sound principles of accounting. Cf. *Kansas City So. Ry.* v. *United States,* 231 U. S. 423, 451. *Pacific Gas Co.* v. *San Francisco,* 265 U. S. 403, 415. The provision is general and applied alike to all taxpayers; its purpose is to guide the ascertainment of taxable income in each year. It is a familiar rule that tax laws are to be liberally construed in favor of taxpayers. *Farmers Loan & T. Co.* v. *Minnesota,* 280 U. S. 204, 212. *Bowers* v. *N. Y. & Albany Co.,* 273 U. S. 346, 350. *United States* v. *Merriam,* 263 U. S. 179, 188. *Shwab* v. *Doyle,* 258 U. S. 529, 536. *Eidman* v. *Martinez,* 184 U. S. 578, 583.

It would be unreasonable and violate that canon of construction to put upon the taxpayer the burden of proving to a reasonable certainty the existence and amount of obsolescence. Such weight of evidence as would reasonably support a verdict for a plaintiff in an ordinary action for the recovery of money fairly may be deemed sufficient.

* Transactions, Am. Soc. C. E., Vol. 81, p. 1527.

Neither the cost of obsolescence nor of accruing exhaustion, wear and tear that is properly chargeable in any period of time can be measured accurately. A reasonable approximation of the amount that fairly may be included in the accounts of any year is all that is required. In determining the proper deduction for obsolescence there is to be taken into consideration the amount probably recoverable, at the end of its service, by putting the property to another use or by selling it as scrap or otherwise. There is no hard and fast rule, as suggested by the Government, that a taxpayer must show that his property will be scrapped or cease to be used or useful for any purpose, before any allowance may be made for obsolescence.

There is no claim that, if allowable at all, the amounts deducted were excessive or that they were not properly allocated as between the two years in question. The rapid advance toward prohibition prior to and in 1917 was sufficient to warn one engaged in brewing beer that his business would probably be brought to an end at an early date. In January, 1919, before the tax return for 1918 was due, prohibition was established to take effect one year later. The facts found show that in the early part of 1918 the company was abundantly justified in concluding that upon the taking effect of prohibition it must cease to use its brewery for making beer.

It was then warranted in concluding that the period of obsolescence commenced about the first of 1918 and would end upon the taking effect of prohibition. The fact that prohibition would put all the breweries out of business is enough to show that it would be practically impossible to sell such properties or find other uses to which they profitably could be put. Due to prohibition the diminution in value of the company's property in 1918 and 1919 was about twice as much as the total of all sums deducted to cover obsolescence in those years. In that period over 80

per cent. of the 1917 value of its lands, buildings and equipment disappeared. Notwithstanding diligent efforts, the property could not be put to any profitable use or sold for more than a fraction of its value in 1917. The rents realized under a short term lease renewed from time to time for more than five years amounted to less than one and one-half per cent. of such value.

The facts found clearly show that obsolescence commenced about the beginning of 1918 and that the property became obsolete upon the taking effect of prohibition in January, 1920. The company was unable to find any profitable use to which the property could be put. The sums received on the sale and as rents constituted mere salvage.

Judgment affirmed.

UNITED STATES *v.* MICHEL.

SAME *v.* KRIEGER.

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

Nos. 79 and 80. Argued January 28, 1931.—Decided February 24, 1931.

1. Under R. S. § 3226, as amended, a suit against the United States to recover an internal revenue tax will not lie if not commenced within five years after payment of the tax or within two years after disallowance by the Commissioner of Internal Revenue of the taxpayer's claim for refund. P. 658.
2. Notwithstanding the provision of this statute directing the Commissioner within 90 days after any disallowance to notify the taxpayer thereof by mail, the two-year limitation on suit begins on disallowance and not on the giving of notice by the Commissioner. P. 658.
3. Suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued. P. 659.

37 F. (2d) 38, reversed.

CERTIORARI, 281 U. S. 714, to review two reversals of judgments dismissing the complaints in suits to recover money collected as taxes.

Assistant Attorney General Youngquist, with whom *Attorney General Mitchell* and *Messrs. Claude R. Branch, Sewall Key* and *John H. McEvers,* Special Assistants to the Attorney General, and *Erwin N. Griswold* were on the brief, for the United States.

Mr. Donald Horne, with whom *Mr. Mortimer J. Wohl* was on the brief, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

These actions were brought in the District Court for the Southern District of New York. Each respondent sued to recover income taxes incorrectly determined for 1919 and paid in 1920. On defendant's motion in the nature of a general demurrer that court dismissed. The Circuit Court of Appeals reversed. 37 F. (2d) 38.

The sole question is whether the actions were commenced within the time allowed by R. S., § 3226, as amended. 26 U. S. C., § 156.

In 1924, Michel on February 7, and Krieger on September 15, filed a claim for refund. The Commissioner of Internal Revenue by a letter dated August 17, 1925, advised Michel that his claim would be rejected and that the rejection would officially appear on the next schedule to be approved by him. The claim was rejected September 2. The Commissioner, April 2, 1925, sent a like letter to Krieger, and his claim was rejected April 20. The Commissioner did not give notice to either of them that his claim had been disallowed or of the date of disallowance until June 27, 1928. The suits were subsequently brought more than two years after the rejections and less than two years after the notices.

Section 3226 as amended provides:

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue . . . No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax . . . unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

By this statute the United States waived its sovereign immunity from suit. The permission to sue is conditioned on the filing of a claim and the lapse of six months or the disallowance of the claim within that period, and is limited to not more than five years after payment of the tax unless the claim has been disallowed and the action is commenced within two years from the disallowance.

Neither of these claims was rejected within six months after filing. And in each case more than two years elapsed after rejection before the Commissioner sent notice that the claim had been disallowed. Neither action was commenced within five years after payment of the tax or within two years after disallowance of the claim. The taxpayers contend, and the Circuit Court of Appeals held, that the permission to sue continues for two years after notice that the claims had been disallowed and that therefore these actions were commenced within time.

As the Commissioner did not act within six months, permission to sue did not depend upon the rejection of

the claim or upon the giving of the notice. By the terms of the statute the period within which the Government consented to be sued commenced at the expiration of such six months and continued uninterruptedly through the five-year period following the date of payment and until "two years after the disallowance." While the statute declares that the Commissioner within a specified time shall notify the taxpayer that his claim has been disallowed, it is nowhere stated that the Commissioner's failure to give the notice will in any event operate to extend the time for bringing suit. An implication to that effect cannot prevail against the rule expressly stated. It is clear that where the Commissioner renders no decision within six months the section contemplates that before commencing his suit the taxpayer will ascertain by inquiry whether the Commissioner has acted. This at least suggests that it may be the intention of the Act to leave a like burden upon claimants in all cases.

Provisions in tax laws limiting the time within which the United States may enforce the payment of taxes by distraint or suit are to be interpreted liberally in favor of the taxpayers. *Bowers* v. *N. Y. & Albany Co.,* 273 U. S. 346. *United States* v. *Updike,* 281 U. S. 489. But it is also well established that suit may not be maintained against the United States in any case not clearly within the terms of the statute by which it consents to be sued. *Eastern Transp. Co.* v. *United States,* 272 U. S. 675, 686. *Price* v. *United States,* 174 U. S. 373, 375–376. There is nothing in the legislative history of the provision to indicate an intention that the two-year period should not commence upon the disallowance of the claim or that it should be extended by the failure of the Commissioner to give the specified notice.*

* Senate Report No. 1137, 67th Congress, 4th Session, p. 5. House Report No. 1757, 67th Congress, 4th Session, p. 3.

Having regard to the rule of strict construction to be applied to waivers by the United States of its sovereign immunity from suit, the clause reasonably may be read merely as a direction to the Commissioner to send the notice to claimant without making the failure so to do have the effect of enlarging the period for suing as otherwise definitely prescribed.

The permission to each of the plaintiffs to bring suit expired two years after his claim was disallowed.

Judgments reversed.

CONNECTICUT *v.* MASSACHUSETTS.

No. 12, Original. Argued January 5, 6, 1931.—Decided February 24, 1931.

1. This Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence. P. 669.
2. The burden of proof in such cases is much greater than that generally imposed on a private party seeking to enjoin another. P. 669.
3. Pursuant to Acts of her legislature, and subject to limitations fixed by the Secretary of War, Massachusetts proposes to divert water from streams within her territory, the Ware and Swift Rivers, which are tributaries of the Connecticut, a navigable river flowing through Massachusetts and thence through the State of Connecticut. The diverted water will be conducted out of the Connecticut River watershed, to the Boston district, where it will be used for drinking and other domestic purposes. That district will be faced by a water shortage in the near future and the tributaries referred to were selected, after elaborate research, as the source of new supply, rather than sources in the eastern part of Massachusetts which are polluted or liable to become so. Connecticut sought to enjoin the diversion, for herself and as *parens patriae*. *Held*, upon the facts as found by a Master and accepted by the Court:

(1) The controversy is not necessarily to be determined by the common law of riparian rights, which prevails in both States. P. 669.

(2) Suits of this kind are to be determined on the basis of equality of right, which means, not that there must be an equal division of the waters of the stream among the States through which it flows, but that the principles of right and equity shall be applied, having regard to the constitutional equality of the States, and that, upon a consideration of the pertinent laws of the contending States, and all other relevant facts, this Court will determine what is an equitable apportionment of the use of such waters. P. 670.

(3) The facts do not show that any real or substantial injury or damage will presently result to Connecticut from the proposed diversions. P. 672.

(4) The possibility that hydro-electric works in Connecticut, which, as now existing, will not be affected by the proposed diversions, might be enlarged in the future so as to use the whole capacity of the river, is not ground for enjoining the diversions. P. 673.

(5) The proposed diversions by Massachusetts should not be enjoined. P. 673.

(6) Inasmuch as the diversions intended by Massachusetts are limited to the tributaries in question, Connecticut has no occasion to ask for an injunction against future diversions from other tributaries. P. 673.

(7) Connecticut's bill will be dismissed without prejudice to her right to maintain a suit against Massachusetts whenever it shall appear that substantial interests of Connecticut are being injured through a material increase of the amount of the waters of the Ware and Swift diverted by or under the authority of Massachusetts over and above the quantities authorized by the Acts of the legislature as heretofore limited by the War Department. P. 674.

FINAL HEARING of an original suit upon exceptions to the report of the Special Master.

Messrs. Ernest L. Averill, Deputy Attorney General of Connecticut, and *Benedict M. Holden,* with whom *Mr. Benjamin W. Alling,* Attorney General, was on the brief, for complainant.

Mr. Bentley W. Warren, Special Assistant Attorney General of Massachusetts, with whom *Messrs. Joseph E. Warner,* Attorney General, *Gerald J. Callahan, R. Ammi Cutter,* and *Manley O. Hudson* were on the brief, for defendant.*

MR. JUSTICE BUTLER delivered the opinion of the Court.

The State of Connecticut brought this suit against the Commonwealth of Massachusetts to enjoin her from diverting waters from the watershed of the Connecticut river to provide water for Boston and neighboring cities and towns.

Legislation of Massachusetts authorizes diversion into the Wachusett reservoir of the flood waters of the Ware river, c. 375, Laws 1926, and of certain waters of the Swift river, c. 321, Laws 1927. The watersheds of these rivers are about midway between the Boston district and the westerly boundary of the Commonwealth. They are tributaries of the Chicopee; all are non-navigable streams wholly within Massachusetts. The Chicopee empties into the Connecticut just above Springfield. The latter rises in Canada and northern New Hampshire. It flows between New Hampshire and Vermont through Massachusetts and Connecticut into Long Island Sound. It is about 345 miles long and drains 11,300 square miles of which 1,385 are in Connecticut.

The complaint alleges:

Connecticut and Massachusetts recognize the common law doctrine that riparian owners have the right to the undiminished flow of the stream free from contamination or burden upon it. Connecticut appears as owner of riparian lands and of the bed of the river and as *parens*

* The interesting and elaborate arguments in this case were much concerned with the facts, and could not be faithfully represented here without exceeding space limits.

patriae. The proposed diversion will take water tributary to the Connecticut entirely out of its watershed, will impair navigability of that stream, will take flood waters and thereby cause damage to agricultural lands that are subject to yearly inundation. The Connecticut is now heavily burdened with offensive matter put into the river in Massachusetts and requires all the water that naturally comes down the river to prevent it from becoming a nuisance and menace to public health. The diversion will destroy property of Connecticut and of its inhabitants without due process of law and cause injury for which there is no adequate remedy at law. The diversion presently proposed is only a portion of that covered by the plan adopted by Massachusetts which includes the acquisition of the waters of other tributaries of the Connecticut.

By its answer and amendments thereto Massachusetts denies that the proposed diversion will cause any injury or damage, and avers that the amount of water to be taken is negligible when compared with the flow of the river where it enters Connecticut, that an emergency exists in Massachusetts constituting a justification for a reasonable use of such waters, that the serious injury to the people of the Commonwealth if diversion be prohibited compared to the trivial damage possibly caused to Connecticut and its people if diversion be permitted should lead a court of equity to give substitutional relief rather than that specifically prayed, that Connecticut's contention that the diversion will interfere with navigation is not open in the absence of proof that Massachusetts has diverted or actually proposes to divert more water than is permitted by the War Department, that the proposed diversion is in all respects a reasonable use of the waters in question and that the project will stabilize the flow of the river and result in benefit to Connecticut and the lower riparian owners.

By its reply, Connecticut denies Massachusetts' affirmative allegations and alleges that there is no necessity for the diversion and that there is an adequate supply of water in the eastern part of Massachusetts.

The Court appointed Charles W. Bunn of Minnesota as special master and authorized him to take and report to the Court the evidence together with his findings of fact, conclusions of law and recommendations for a decree. The master filed his report and the evidence introduced by the respective parties. It shows that he heard arguments in their behalf, and sets forth his findings and conclusions with a recommendation that the bill be dismissed and that (if it be held that lack of present purpose further to develop power at King's Island does not warrant denial of injunction on that ground) the decree contain a provision for the protection of the owner of the dam and power at that place. Connecticut filed numerous exceptions. Massachusetts made no objection to the report. The Court has heard the arguments of counsel and considered their briefs for and against the exceptions and upon the final submission of the case.

The report shows that Connecticut sought to prove that any subtraction from the flow of the Connecticut river through that State will cause serious damage to the State and its people in that it will impair the navigability of the stream, lessen productivity of river bottom lands by diminution of inundation during times of high water in each year, diminish the power capable of development at King's Island, diminish the run of shad in the river and decrease its capacity to discharge and destroy sewage.

The brief substance of the master's findings of fact follows:

Boston and the surrounding metropolitan area are faced with a serious water shortage in the near future and there is need for a large quantity of additional water. That district includes 35 cities and towns having a population

of 1,900,000. Other nearby cities and towns are likely in the future to depend on that district for water supply. The total population concerned is now 2,860,000 and it is estimated that it will reach 4,572,000 within forty years. There is no serious dispute about the need of the region to provide presently for additional water.

Massachusetts applied to the Secretary of War (Act of March 3, 1899, § 10, 30 Stat. 1151) for authority to make the proposed diversions. After hearing both sides and examining the facts, the Secretary permitted diversion of the flood waters of the Ware in excess of 85 million gallons per day between October 15 and June 15 and prohibited the taking of any water except during that period. He permitted diversion of all waters of the Swift except enough to maintain a flow therein of 20 million gallons per day; but he required that, during the period from June 1 to November 30 there shall be released from the impounding dam 110 cubic feet per second (71 million gallons per day) whenever the flow of the Connecticut at Sunderland, Massachusetts (a town 20 miles north of the confluence of the Chicopee and Connecticut) is 4650 cubic feet per second or less, and 70 cubic feet per second (45 million gallons per day) when the flow is more than 4650 and less than 4900 cubic feet per second. The Secretary found that the discharge at Sunderland of 4650 cubic feet per second corresponds to an average gauge height at Hartford of two feet and that a discharge of 4900 cubic feet per second corresponds to 2.1 gauge height at Hartford.

The annual flow of the Connecticut at the Massachusetts-Connecticut boundary is about 17,000 cubic feet per second, approximately 11,000 million gallons a day. The watershed above that boundary is 9,915 square miles. The drainage of the Ware at the point of diversion on that river is 98 square miles and that of the Swift at the point of diversion is 186 square miles. The diversion permitted

by the Secretary will furnish about 191 million gallons per day. The Massachusetts Acts do not authorize the diversion of any waters other than the Ware and Swift and as to these the record shows that (as far as counsel can commit it) Massachusetts proposes to abide by the War Department requirements and restrictions.

The total area subject to such diversions is 2.93 per cent. of the watershed above Connecticut. The permitted diversions represent an average yearly subtraction from the flow of the Connecticut at the state line of about two per cent; but 94 per cent. of this occurs when the Hartford gauge reads above 3.5 feet which means 11.5 feet depth of water. The Government has heretofore sought to maintain 10 feet of water below Hartford. A War Department project contemplates a 12 foot channel. (On that bottom level, 3.5 feet on the gauge would mean 13.5 feet of water.)

Dredging is required every year to maintain a channel of 10 feet over numerous bars below Hartford. Navigation is difficult when the depth falls below 10 feet. There is no difficulty when there is 12 or even 11 feet. The required release of water from the Swift river reservoir during periods of low water will somewhat benefit navigation. The maximum diversions are at high water and lessen depth five to six inches. At medium stages the diversion is less and at very low stages the flow is increased. The diversion will not perceptibly or materially interfere with navigation.

The height of floods will be lessened from one to six inches. Because of the diversion, small pieces of hay land will fail to receive flood waters. It is impossible to determine from the evidence to what extent that will occur. The lessening of spring floods will have its advantages and disadvantages; it will reduce some damages and increase others. The damage to the hay land is not shown to be of serious magnitude; and, far from being

established by clear and convincing evidence, it is not shown by evidence making it possible of computation or proving that it is large.

There is shown one possible development of power. It is at King's Island in Connecticut where 4,000 horsepower is now produced. The owner has been authorized by the Federal Power Commission to build a higher dam to develop approximately 50,000 horsepower. It is not shown that the company has determined so to do, or that the necessary capital has been arranged for. The present use of the water for power purposes will not be disturbed by the diversion. If waterpower shall be developed to the extent of 50,000 horsepower, the diversion will cause an injury of $80,000.

Connecticut failed to establish that the taking of flood waters will be materially injurious to the shad run or that the diversion will perceptibly increase the pollution of the river.

The legislative determination to use the waters of the Ware and Swift was made and the Acts of 1926 and 1927 were passed as the result of long-continued and careful study. Connecticut submits two plans to show that the northeastern part of Massachusetts has abundant supplies of water for the Boston district.

The first involves combining water from 15 watersheds on the Assabet, Sudbury, Shawsheen and Ipswich rivers. The plan involves pumping and also treatment of the water for its purification. From an engineering standpoint it is inferior to that adopted for the Ware-Swift development. And, while a considerable amount of water from these sources may be made available, most of it is of a quality much inferior to the waters of the Ware and Swift. And the amount would be inadequate and constitute only a part of the needed supply. The operation of the plan would be of uncertain duration and might have to be abandoned.

The second plan is based on the taking of water from the Merrimack. That stream drains a large watershed mainly in New Hampshire. It is polluted and the pollution is practically beyond the control of Massachusetts. There is no certainty of its improvement or that it will not become worse. Unquestionably, polluted water may be made wholesome by proper treatment. A considerable amount of industrial waste from mills, cellulose plants, tanneries, rendering works and gas works, of which there are many in New Hampshire, is peculiarly difficult to eliminate from water. The necessary treatment of waters so polluted involves several processes—storage for 30 to 90 days in a large reservoir, aeration, filtration, chlorination. These introduce a human element subject to weaknesses and failures of human nature. Instances of breakdowns are given. There is a small element of danger involved in every elaborate system of water purification. With a single exception, all the witnesses expressed preference for a supply of originally pure water over a purified polluted one. Lawrence is the only city in Massachusetts using Merrimack water for drinking. It consumes an extraordinary amount of bottled water the cost of which in 1916 was about 55 per cent. of the amount paid for public water for all purposes. The plan contemplates the taking of 200 million gallons per day from the Merrimack at Tyng's Island, just below the New Hampshire line. That is about one-quarter of its flow. Factories below the proposed takeout would be liable to suffer damage from the diversion. The stream is navigable below Haverhill and it is not certain whether the taking of that amount would be permitted by the Government. The master says: "I find the taking from the Merrimack ought not to be imposed upon the Boston District. Because first the water is a polluted water and Massachusetts has no adequate control of the pollution or adequate remedy to cure it; that the water is of quality

much inferior to the Ware and Swift and the proposed project inferior from an engineering standpoint to the reservoir and tunnel which the Ware and Swift development involves."

The Massachusetts legislation confines itself to the taking of certain waters of the Ware and Swift. The Secretary of War has imposed additional limitations. Massachusetts declares that she intends to divert no more water than the Secretary of War permits and that she will in every way follow the conditions he imposes.

The exceptions filed by Connecticut need not be set forth or considered in detail. The governing rule is that this Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence. *New York* v. *New Jersey,* 256 U. S. 296, 309. *Missouri* v. *Illinois,* 200 U. S. 496, 521. The burden on Connecticut to sustain the allegations on which it seeks to prevent Massachusetts from making the proposed diversions is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties. *North Dakota* v. *Minnesota,* 263 U. S. 365, 374. There has been brought forward no adequate reason for disturbing the master's findings of fact. They are amply sustained by the evidence and are adopted by the Court.

Connecticut suggests that, under the common law in force in both States, each riparian owner has a vested right in the use of the flowing waters and is entitled to have them to flow as they were wont, unimpaired as to quantity and uncontaminated as to quality. It maintains that the taking of waters from the Ware and Swift infringes vested property rights in that State which cannot be taken without its consent against the will of the owners. And it insists that this Court, following the law enforced by each of the States within its own boundaries,

should grant injunction against any diversion from the watersheds of these rivers.

But the laws in respect of riparian rights that happen to be effective for the time being in both States do not necessarily constitute a dependable guide or just basis for the decision of controversies such as that here presented. The rules of the common law on that subject do not obtain in all the States of the Union, and there are variations in their application. The doctrine of appropriation prevails in some States. And every State is free to change its laws governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 702.

For the decision of suits between States, federal, state and international law are considered and applied by this Court as the exigencies of the particular case may require. The determination of the relative rights of contending States in respect of the use of streams flowing through them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such States for the solution of similar questions of private right. *Kansas* v. *Colorado,* 185 U. S. 125, 146. And, while the municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight. As was shown in *Kansas* v. *Colorado,* 206 U. S. 46, 100, such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the States through which it flows. It means that the principles of right and equity shall be applied having regard to the " equal level or plane on which all the States stand, in point of power and right, under our constitutional system " and that, upon a consideration of the pertinent laws

of the contending States and all other relevant facts, this Court will determine what is an equitable apportionment of the use of such waters. *Wyoming* v. *Colorado,* 259 U. S. 419, 465, 470.

The development of what Mr. Justice Brewer, speaking for the Court in *Kansas* v. *Colorado,* 206 U. S. 46, 98, refers to as interstate common law is indicated and its application for the ascertainment of the relative rights of States in respect of interstate waters is illustrated by *Missouri* v. *Illinois,* 200 U. S. 496; *Kansas* v. *Colorado, supra; Wyoming* v. *Colorado, supra,* and *Wisconsin* v. *Illinois,* 278 U. S. 367; 281 U. S. 179. Two of these cases are much like the one at bar.

Kansas v. *Colorado* was a suit to prevent the latter from withholding waters of the Arkansas river from flowing as they were wont through Kansas. The common law rule as to riparian ownership was then generally recognized in Kansas while in Colorado the doctrine of appropriation prevailed. The Court held that the upper State was not entitled to use the waters of the Arkansas flowing therein as it chose regardless of resulting conditions or impairment of the right to the use of such waters in the lower State. It was shown that, without diversion from the watershed, the waters of the Arkansas in Colorado were and for many years had been used to irrigate and make productive what theretofore had been barren lands. It was found that the resulting diminution of the flow of the river caused perceptible injury to a portion of the valley in Kansas but that it had been of little, if any, detriment to the great body of the valley. The Court held (206 U. S. at p. 114) that the rule of equality of right forbade interference with the existing withdrawals of water in Colorado.

In *Wyoming* v. *Colorado* the former sued to prevent a diversion of the waters of the Laramie river which rises

in Colorado and flows into Wyoming. Both States are in the arid region and apply the doctrine of appropriation. Wyoming objected on the ground that the diversion was to another watershed. The Court held (p. 467) that: "The principle of such diversions being recognized in both States, its application to this interstate stream does not in itself afford a ground for complaint, unless the practice in both be rejected in determining what, as between them, is reasonable and admissible as to this stream, which we think should not be done." The problem there presented was expressed as follows (p. 467): "We are thus brought to the question of the basis on which the relative rights of these States in the waters of this interstate stream should be determined. Should the doctrine of appropriation, which each recognizes and enforces within her borders, be applied? Or is there another basis which is more consonant with right and equity?" After an elaborate discussion of the facts, the Court said (p. 470): "We conclude that Colorado's objections to the doctrine of appropriation as a basis of decision are not well taken, and that it furnishes the only basis which is consonant with the principles of right and equity applicable to such a controversy as this is."

It is very clear that, under earlier decisions here, the strict rules for which Connecticut contends are not necessarily controlling in this case. There is nothing in the master's findings of fact to justify an inference that any real or substantial injury or damage will presently result to Connecticut from the diversions by Massachusetts authorized by the Acts of 1926 and 1927 as limited and defined by the Secretary of War. No discussion is required as to the effect of the proposed diversion upon the navigability of the river, agriculture, fish life or pollution in Connecticut.

The proposed taking of the waters of the Swift and Ware will not affect the present dam, works or production of power at King's Island. While the owning company has secured authority to build the higher dam, it has not resolved so to do. It is not found and there is nothing to show that it intends to construct any dam or works of a kind or capacity that, if now in use, would be injuriously affected by such diversion. At most there is a mere possibility that at some undisclosed time the owner, were it not for the diversion, might construct additional works capable of using all of the flow of the river including the waters proposed to be taken by Massachusetts. Injunction will not issue in the absence of actual or presently threatened interference. The facts disclose no basis for relief in respect of that property. *New York* v. *Illinois,* 274 U. S. 488. *New Jersey* v. *Sargent,* 269 U. S. 328, 331, 338.

Drinking and other domestic purposes are the highest uses of water. An ample supply of wholesome water is essential. Massachusetts, after elaborate research, decided to take the waters of the Ware and Swift rather than to rely on the sources in the eastern part of the Commonwealth where all are or are liable to become polluted. We need not advert to other considerations, disclosed by the evidence and findings, to show that the proposed use of the waters of the Ware and Swift should not be enjoined.

Connecticut maintains that the presently proposed diversion will not be adequate for the future needs of the Boston district and that the size and character of the works as well as legislative reports and other circumstances disclose an intention on the part of Massachusetts, when the need shall arise, to draw from other rivers—Millers, Deerfield, Quaboag and Westfield—tributary to the Connecticut and insists that the decree should

restrain Massachusetts forever from increasing its diversion to an amount in excess of what the Secretary of War has already indicated would cause no damage to the navigation of the Connecticut.

The scope of the project is that shown by the Acts as limited by the determination of the War Department. It involves no diversion from streams other than the Ware and Swift. Massachusetts declares that she intends to and must obey these findings of the War Department. Her statements before the master and here clearly negative any threat, intention or purpose to make any diversion of water in excess of that specified or otherwise than as set forth in the determinations of the War Department. Injunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future. *New York* v. *Illinois, supra. New Jersey* v. *Sargent, supra.*

Connecticut's bill of complaint will be dismissed without prejudice to her right to maintain a suit against Massachusetts whenever it shall appear that substantial interests of Connecticut are being injured through a material increase of the amount of the waters of the Ware and Swift diverted by or under the authority of Massachusetts over and above the quantities authorized by the Acts of 1926 and 1927 as heretofore limited by the War Department. Each party will pay its own costs, one-half of the expenses incurred by the special master and one-half the amount to be fixed by the Court as his compensation.

Counsel for Massachusetts will prepare a form of decree in consonance with this decision and furnish a copy to counsel for Connecticut within fifteen days; and, within ten days after such submission, the draft decree together with suggestions in behalf of Connecticut, if any, will be submitted to the Court.

Syllabus.

PRUSSIAN *v.* UNITED STATES.

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

No. 448. Argued January 6, 7, 1931.—Decided February 24, 1931.

1. A forged endorsement of the payee's name on a genuine government draft is not a forgery of an "obligation of the United States," within the meaning of § 148 of the Criminal Code, (R. S. § 5414). P. 677.

   So held in view of the rule of strict construction applicable to criminal statutes; the restrictive effect of Criminal Code, § 147, which defines obligations of the United States as including checks and drafts but is silent as to endorsements; history of the legislation, and the fact that Congress has specifically punished forgery of endorsements on pension checks and money orders.
2. Section 29 of the Criminal Code, which punishes the forgery of "any deed, power of attorney, order, certificate, receipt, contract, *or other writing,*" for the purpose of obtaining or receiving from the United States, or any of its officers or agents, any sum of money, applies to the act of forging an endorsement of the payee's name on a genuine government draft. P. 679.
3. As the writings specified in § 29 have no common characteristic from which may be inferred a purpose to restrict the statute to any particular class of writings, the addition of the words "other writing" to the enumeration must be taken as intending to include all writings of every class if forged for the purpose of obtaining money from an officer of the United States. P. 679.
4. An indictment under § 29 charging forgery of an endorsement on a government draft for the purpose of obtaining and receiving a sum of money from the officer of the United States on whom it was drawn, need not allege in addition an intent to defraud the United States. P. 680.
5. An indictment for a single act under one penal provision is not rendered defective for uncertainty or repugnancy by alleging, erroneously, that the act violated another provision also. P. 680.

42 F. (2d) 854, affirmed.

CERTIORARI, *post,* p. 824, to review a judgment sustaining an indictment under which the petitioner was convicted in the District Court for forgery.

Mr. Harold L. Turk, with whom *Messrs. Sam Rosenwein, P. F. Seigenfeld,* and *Walter B. Milkman* were on the brief, for petitioner.

Assistant Attorney General Sisson, with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch* and *James A. Wharton,* Special Assistants to the Attorney General, *W. Marvin Smith,* and *Paul D. Miller* were on the brief, for the United States.

Mr. Justice Stone delivered the opinion of the Court.

Prussian, the petitioner, was convicted in the District Court for Eastern New York of forging an endorsement purporting to be that of a payee of a government draft. At the trial, by motions to dismiss and in arrest of judgment, the sufficiency of the indictment was challenged on the ground that the offense charged was the forging of an obligation of the United States in violation of § 148 of the Criminal Code, U. S. C., Title 18, § 262, and that the endorsement alleged to have been forged was not such an obligation. The Court of Appeals for the Second Circuit affirmed the judgment, holding that the indictment sufficiently charged a violation of that section. 42 F. (2d) 854.

Certiorari was asked on the ground, among others, that the decision below conflicted with decisions of the Court of Appeals for the Eighth Circuit, *Gesell* v. *United States,* 1 F. (2d) 283; *Lewis* v. *United States,* 8 F. (2d) 849. See also *White* v. *Levine,* 40 F. (2d) 502. In accord with the decision below are *Hamil* v. *United States,* 298 Fed. 369, and *Alvarado* v. *United States,* 9 F. (2d) 385; cf. *United States* v. *Jolly,* 37 Fed. 108; *DeLemos* v. *United States,* 91 Fed. 497. Because of the conflict the petition was not opposed by the government, although it suggested that the indictment might also be upheld as charging a forgery of a " writing, for the purpose of obtaining . . . from the

United States . . . any sum of money" under § 29 of the Criminal Code, U. S. C., Title 18, § 73. This Court granted the petition, limiting review to the question whether the indictment stated an offense under the Criminal Code.

The indictment charged the forging by petitioner of "a certain obligation of the United States," described as the endorsement on a draft, drawn by a disbursing clerk of the United States Treasury upon the Treasurer of the United States and issued to the payee, "by falsely making and forging the name of the payee . . . on the back of said draft." It set out a copy of the draft and the endorsement, and alleged that together they constituted a forged obligation of the United States. The indictment also set up that the endorsement was "for the purpose of obtaining and receiving from the Treasurer of the United States a sum of money," and was stated to be in violation of both §§ 29 and 148 of the Criminal Code.

Under § 148, "whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States" is guilty of a criminal offense. Section 147 provides: "The words 'obligation or other security of the United States' shall be held to mean all . . . checks, or drafts for money drawn by or upon authorized officers of the United States." It is apparent that the draft drawn on the Treasurer by an authorized officer is an "obligation . . . of the United States" both in common parlance and by the express definition of § 147. But to extend the meaning of that phrase so as to embrace the endorsement on the government draft is to enlarge the statutory definition, and would be possible only by a strained construction of the language of §§ 147 and 148, inadmissible in the interpretation of criminal statutes, which must be strictly construed. See *Fasulo* v. *United States,* 272 U. S. 620; *United States* v. *Salen,* 235 U. S. 237.

The writing described in the indictment, when issued by the drawer, was a check or a draft. The added endorsement was in itself neither a check nor a draft. We need not stop to consider the argument advanced that the obligation upon the draft does not become complete until it is endorsed, see *Hamil* v. *United States, supra,* p. 371 for it overlooks the circumstance that the meaning of "obligation" in § 148 is narrowed by the definition in § 147 to specifically enumerated written instruments, including checks or drafts for money, which are complete, as such, within the statutory definition and in common understanding, at least when issued to the payee by an authorized officer of the government. The endorsement was at most the purported obligation of the endorser, not of the United States, and a purported transfer of the title of the draft to the endorsee. In neither aspect was the endorsement itself an obligation of the United States as defined by § 147, or such a part of the draft as to constitute the forging of the endorsement a forgery of the draft.

If the point were doubtful, the doubt would be resolved by a consideration of the purpose and history of the Act of which § 148 is a part, and a comparison of it with related provisions of the Criminal Code. Its purpose has been declared by this Court to be the protection of the bonds or currency of the United States, and not the punishment of any fraud or wrong on individuals. *Dunbar* v. *United States,* 156 U. S. 185, 193; cf. *United States* v. *Turner,* 7 Pet. 132, 136; *United States* v. *Stewart,* 4 Wash. C. C. 226. Section 148 is a reënactment of § 18 of the Act of April 10, 1816, 3 Stat. 266, 275, which made punishable the forgery of bills, notes, orders or checks of the Bank of the United States. The legislation took substantially its present form in the Act of June 30, 1864 (c. 172, 13 Stat. 218, 221, 222), § 10 of which (later R. S. § 5414) extended its penal provisions to the forgery of "any obli-

gation or security of the United States," and § 13 of which (later R. S. § 5413) defined obligations of the United States substantially as in the present § 147. Before the enactment of the 1864 prototype of § 148, the purpose of the 1816 act had been declared, in *United States* v. *Turner, supra,* to be " to guard the public from false and counterfeit paper, purporting on its face to be issued by the bank "; and it had been held to be inapplicable to a forged endorsement upon a genuine post note of the Bank. *United States* v. *Stewart, supra.* In the light of this history, the omission of any reference to endorsements in § 148 is not without significance; and it is worthy of note that Congress later enacted laws specifically punishing forgery of endorsements on pension checks and money orders. Title 38, U. S. C., § 128; Title 18, U. S. C., § 347.

But we think the indictment is to be sustained as charging an offense under § 29 of the Criminal Code, which punishes the forgery of " any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving . . . from the United States, or any of their officers or agents, any sum of money." The indictment alleges specifically and with certainty the forgery of the endorsement on the draft, for the purpose of obtaining a sum of money from the Treasurer of the United States, and charges a violation of § 29. We think the endorsement was a " writing " within that section. Its language is " comprehensive " and " all-embracing." Cf. *United States* v. *Davis,* 231 U. S. 183, 188. The writings enumerated have no common characteristic from which a purpose may be inferred to restrict the statute to any particular class of writings. The addition of " other writing " to the enumeration was therefore not for the purpose of including writings of a limited class, but rather of extending the penal provisions of the statute to all writings of every class if forged for the purpose of

obtaining money from an officer of the United States. See *Howgate* v. *United States,* 7 App. D. C. 217, 232, 233; cf. *United States* v. *Lawrence,* 13 Blatch. 211. It has been generally assumed by the lower federal courts that § 29 covers the forging of an endorsement. *United States* v. *Winters,* 5 F. (2d) 321; *Gesell* v. *United States, supra,* pp. 287, 288; *White* v. *Levine, supra; Bailey* v. *United States,* 13 F. (2d) 325; *Lewis* v. *United States, supra;* cf. *United States* v. *Albert,* 45 Fed. 552; *DeLemos* v. *United States, supra.* But see, contra, *Hamil* v. *United States, supra,* p. 372; cf. *United States* v. *Wilson,* Fed. Cas. No. 16,732.

Petitioner asserts that the indictment is defective in that it does not charge that the forgery was with intent to defraud the United States. See *White* v. *Levine, supra,* p. 503. No such averment is required by the language of § 29 relating to forged endorsements. Other provisions of § 29 punish the uttering of a forged writing, or presenting any such writing to an officer of the United States in support of any claim, " with intent to defraud the United States." But the present indictment is not under either of those provisions. The charge is forgery of the endorsement, which is punishable by the different provision, now in question, if committed merely " for the purpose of obtaining or receiving " from an officer or agent of the United States any sum of money. This imports an intent to defraud the United States, which the indictment sufficiently charges in the language of the statute.

Nor is the present indictment defective, as is urged, because its material allegations are uncertain or repugnant. The accused was left in no uncertainty that he was charged with only a single act, that of forging the endorsement for the specified purpose. The judgment here would constitute an unmistakable bar to any future prosecution for the same offense. The validity of the indictment is therefore not affected by the fact that the pleader,

through excess of caution, has mistakenly stated the act to be a violation of both § 148 and § 29. See *Williams* v. *United States,* 168 U. S. 382.

Affirmed.

OXFORD PAPER COMPANY *v.* THE NIDARHOLM.

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

No. 58. Argued January 20, 1931.—Decided February 24, 1931.

1. The Court need not consider objections to the decree below raised by a respondent who did not ask certiorari. P. 684.
2. Under a time charter party in the usual "government form," which placed at the charterer's disposal "the whole reach of the vessel's holds, decks and usual places of loading," and provided that "charterers . . . load, stow, and trim the cargo at their expense under the supervision of the captain," the charterer is responsible, at least to the extent of the one-half of the damage decreed below, for a loss of cargo caused, a half hour after the departure of the ship and while it was still in smooth waters, by the collapse of defective stanchions, which had been erected by the charterer for its own convenience to facilitate stowing the deck load; and this, whether or not the topheaviness of the vessel, caused by faulty stowage, was a contributory cause. *Olsen* v. *United States Shipping Co.,* 213 Fed. 18, distinguished. P. 684.
3. The owner's duty to the charterer to provide a seaworthy and cargo-worthy ship at the beginning of the voyage does not extend to the furnishing of safe cribbing; the warranty applies only to the ship and to such equipment as is called for by the charter party. P. 685.
4. The master, under his duty of supervision of cargo stowage, is not bound to prevent the charterer from stowing the deck load in such manner as to expose it to dangers ordinarily incident to the transportation of deck loads and not peculiarly within his prevision. P. 685.

34 F. (2d) 442, 36 F. (2d) 227, affirmed.

CERTIORARI, 281 U. S. 712, to review a judgment which reversed a judgment of the District Court, 26 F. (2d) 92,

in favor of the petitioner in an admiralty suit *in rem* to recover damages for loss of part of a cargo.

Messrs. John W. Lowrance and *Nathan W. Thompson* for petitioner.

Mr. Robert E. Goodwin for respondent.

Mr. Justice Stone delivered the opinion of the Court.

Petitioner, charterer of the Steamship "Nidarholm," brought this admiralty suit *in rem* in the District Court for Southern Maine, to recover damages for the loss of part of a cargo of pulpwood from the deck of the vessel, where it had been stowed by the charterer. The time charter party, which was in the usual "government form," see *Golcar S. S. Co.* v. *Tweedie Trading Co.*, 146 Fed. 563, placed at the charterer's disposal "the whole reach of the vessel's holds, decks and usual places of loading," and provided that "charterers . . . load, stow, and trim the cargo at their expense under the supervision of the captain." The question was whether, under these clauses of the charter party, the ship was liable for the loss, although one of its causes was the failure of the charterer to make the deck load secure. Judgment for the libellant, petitioner here, in the District Court, 26 F. (2d) 92, was reversed by the Court of Appeals for the First Circuit, which divided the loss. 34 F. (2d) 442; rehearing denied, 36 F. (2d) 227. This Court granted certiorari, 281 U. S. 712, on a petition which relied in part on an alleged conflict of the decision below with that of the Court of Appeals for the Second Circuit, in *Olsen* v. *United States Shipping Co.*, 213 Fed. 18.

The District Court found the facts as follows. The Nidarholm was chartered by petitioner for the purpose of carrying pulpwood from its plant at Murray, Nova Scotia, to Portland, Maine. In loading for the voyage in ques-

tion, petitioner, after the hold was filled, piled the logs of pulpwood, cut in two-foot lengths, on the deck to a height of 17 feet. The deck load was secured by a crib, which petitioner constructed by erecting, at intervals along the rail, stanchions about 20 feet long and from 8 to 10 inches in diameter at the butt. The stanchions were held in position by wire rope lashings. When the ship backed from the dock, she had a list to starboard of about 5 degrees; but as she proceeded on her voyage, the list shifted to the port side, and increased to between 10 and 14 degrees. Within a half hour of her departure, and while she was still in smooth water, the stanchions broke, first on the port side, then on the starboard; and the deck load above the rails spilled into the sea. The court concluded that faulty stowage of the deck load had rendered the ship topheavy and unseaworthy, and held that, since this was a breach of the duty to supervise loading which the charter party had placed on the captain, the ship was responsible for the loss.

The Court of Appeals accepted the District Court's finding that the ship was topheavy and unseaworthy because of improper loading, and its conclusion that this was a fault for which the master was responsible, but stated that the question was whether the charterer was also at fault. It pointed out that the cribbing was no part of the equipment which the vessel was under an obligation to furnish; that the charterer had erected it and chosen the material of which it was constructed; and that all the stanchions gave way at a time when the stress caused by the list of the ship was less than that which would be occasioned by the normal roll of the vessel at sea. These findings are supported by evidence.

Whether the court considered the topheaviness of the ship, caused by the faulty stowage, and the defective cribbing to be joint contributing causes of the loss, or thought the latter the proximate cause, is not clear. But

it reached the conclusion, without referring to any supporting facts, that the construction of the cribbing was a joint undertaking carried out by the charterer and the vessel, for the failure of which both were at fault, and decreed that the loss be divided.

As respondent did not ask certiorari, the only question we shall consider is whether the court below was wrong in denying the asserted liability of the ship for the entire loss. *Warner Co.* v. *Independent Pier Co.*, 278 U. S. 85, 91.

By the terms of the charter party there was an affirmative warranty of seaworthiness on the part of the vessel which would otherwise have been implied. *The Caledonia,* 157 U. S. 124, 130, 131. This warranty extends to unseaworthiness of the ship due to faulty stowage of cargo, *Corsar* v. *Spreckles,* 141 Fed. 260, even though the charterer himself, subject to supervision of the captain, loads the vessel, *The Seguranca,* 250 Fed. 19. The charterer is entitled to rely on the master, in the exercise of his expert knowledge and judgment, to control the disposal of cargo so as to avoid dangers to it from any consequent unseaworthiness of the vessel. *Olsen* v. *United States Shipping Co., supra; The Oakley C. Curtis,* 4 F. (2d) 979; certiorari denied, 267 U. S. 599; *The Dana,* 190 Fed. 650; cf. *Corsar* v. *Spreckels, supra; The Thames,* 61 Fed. 1014.

Respondent argues that the responsibility of the ship, when loaded by the charterer, is limited to faulty stowage of cargo which endangers the ship, and that when the cargo alone is imperilled, as is contended was the case here, ensuing loss must be borne by the charterer. See *Elder & Dempster Co.* v. *Paterson, Zochonis & Co.,* (1924) A. C. 522, 560–562; *Reed & Co.* v. *Page, Son & East,* (1927) 1 K. B. 743, 754–756; cf. *The Oakley C. Curtis, supra,* p. 981.

We are not aware of any case in which the rule thus broadly stated has been applied so as to relieve the ship

from liability for damage to cargo exposed, by bad stowage, to sea perils peculiarly within the specialized knowledge and experience of the master. But it is unnecessary to pass on the question here for, independently of it, we think the ship cannot be held responsible for the loss imposed on petitioner by the decree below.

Whether or not the topheaviness of the Nidarholm be taken to have contributed to the loss, the collapse of the stanchions was also a contributing cause; and for the latter petitioner is responsible, at least to the extent of the one-half of the damage imposed on it below, unless there was a duty on the ship to guard against the defective construction of the cribbing.

The owner's duty to provide a seaworthy and cargoworthy ship at the beginning of the voyage did not extend to the defective cribbing. That warranty applies only to the ship and such equipment as is called for by the charter party. Cf. *The Santona,* 152 Fed. 516, 518. The cribbing was an enlargement of the ship's structural capacity for cargo beyond what she would otherwise naturally and reasonably take, which the vessel was not required to provide, and which was constructed by the charterer for its own convenience, to facilitate its stowage of cargo. The ship owed no duty to furnish the cribbing such as would relieve the charterer from the consequences of the failure to make it safe.

Even though the master's duty of supervision of cargo stowage might, for some purposes and under other circumstances, be deemed to extend to the erection of this structure as a means of stowing the deck load, still we think there was no duty of ship or master to prevent the charterer from loading the pulpwood in such manner as to expose it to dangers ordinarily incident to the transportation of a cargo on deck, and not peculiarly within the prevision of the master. See *Lawrence* v. *Minturn,* 17 How. 100, 115. The charterer knew, as well as the

master, that the ship would heel or roll at sea, and that the cribbing must be made sufficiently strong to hold the cargo on deck. We see no more reason for imposing responsibility on the ship for such an omission by the charterer than for the master's failure to prevent the charterer from stowing cargo in such manner that it is damaged by heat, *The Thomas P. Beal,* 11 F. (2d) 49; or in defective containers, *The Oakley C. Curtis, supra,* p. 982; or in such contact with other cargo that it suffers injury, cf. *Elder & Dempster Co.* v. *Paterson, Zochonis & Co., supra.* See also *Lawrence* v. *Minturn, supra.*

In the cases particularly relied upon by petitioner, the sole cause of the loss appears to have been the unseaworthiness of the ship. See *The Seguranca,* and *The Dana,* both *supra.* This was also the case with the part of the deck load of logs in *Olsen* v. *United States Shipping Co., supra,* jettisoned by the master to avoid danger to the ship, which, due to the excessive deck load, had listed 24 degrees, although no heavy weather had been encountered. Another part of the cargo of logs had been loaded by the charterer on the forward deck. As the loading was not completed until dark, the crew did not lash these logs, as they had those on the after deck. This part of the cargo spilled overboard when the master moved the ship without lashing the deck load. The court held the vessel liable, saying that she " . . . was unseaworthy as to her forward deck load, a thing which it was the duty of the master to prevent." But it did not appear that the charterer had assumed any duty of lashing the deck loads; and it is evident that the moving of the vessel before the logs were lashed, ready for the voyage, exposed them, by act of the master, to a peril within his knowledge and control. The case is thus distinguishable from the present, where the erection of the defective stanchions was the charterer's act, and where it does not appear that the defect was known to the master.

Affirmed.

Syllabus.

ALFORD *v.* UNITED STATES.

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

No. 370. Argued January 6, 1931.—Decided February 24, 1931.

1. Cross-examination of a witness is a matter of right. P. 691.
2. Its permissible purposes include the identification of the witness with his environment and the revelation of facts tending to discredit his testimony. P. 691.
3. The rule that the examiner must indicate the purpose of his inquiry does not, in general, apply to cross-examination. P. 692.
4. The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. P. 694.
5. Although it is the duty of the court to protect a witness from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him, there is no duty to protect him from being discredited, except when his constitutional right against self-incrimination is involved and properly invoked. P. 694.
6. In a criminal prosecution for using the mails to defraud in violation of § 215 of the Criminal Code, the Government called as a witness a former employee of the defendant, who testified to uncorroborated conversations of the defendant of a damaging character. Upon cross-examination the witness was asked "Where do you live?," and another question as to his place of residence, but these questions were excluded on the Government's objection that they were immaterial and not proper cross-examination. Counsel urged as an additional reason for asking the excluded questions, that he had been informed that the witness was then in the custody of the federal authorities, and that such fact might be brought out on cross-examination to show whatever bias or prejudice the witness might have. But the court adhered to its previous ruling. *Held:*

   (1) The case was a proper one for searching cross-examination, and the question "Where do you live?" was not only an appropriate preliminary to the cross-examination, but on its face was an essential step in identifying the witness with his environment. P. 692.

   (2) The defense was entitled to show by cross-examination that the testimony of the witness was affected by fear or favor growing out of his detention, and it was immaterial whether he was in

custody because of his participation in the transactions for which the defendant was indicted or for some other offense. P. 693.

(3) The ruling of the trial court, cutting off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination, was an abuse of discretion and prejudicial error. P. 694.

41 F. (2d) 157, reversed.

CERTIORARI, *post*, p. 826, to review a judgment affirming a judgment of the District Court, wherein the petitioner was convicted for using the mails to defraud.

Mr. Leo R. Friedman, with whom *Mr. Thomas M. Foley* was on the brief, for petitioner.

Assistant Attorney General Richardson, with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch*, Special Assistant to the Attorney General, and *Harry S. Ridgley* were on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioner was convicted in the District Court for Southern California of using the mails to defraud in violation of § 215 of the Criminal Code. The Court granted certiorari, to review a judgment of affirmance by the Court of Appeals for the Ninth Circuit, which upheld certain rulings of the trial court upon the evidence. 41 F. (2d) 157.

In the course of the trial the government called as a witness a former employee of petitioner. On direct examination he gave damaging testimony with respect to various transactions of accused, including conversations with the witness when others were not present, and statements of accused to salesmen under his direction, whom the witness did not identify. Upon cross-examination questions seeking to elicit the witness's place of residence were excluded on the government's objection that they were immaterial and not proper cross-examination. Counsel for the defense insisted that the questions were

proper cross-examination, and that the jury was entitled to know "who the witness is, where he lives and what his business is." Relevant excerpts of the record are printed in the margin.[1]

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[1] Q. Where do you live, Mr. Bradley?

MR. ARMSTRONG: That is objected to as immaterial and not proper cross-examination.

THE COURT: I cannot see the materiality.

MR. FRIEDMAN: Why, I think the jury has a perfect right to know who the witness is, where he lives and what his business is, and we have the right to elicit that on cross-examination. I may say that this is the first witness the Government had called that they have not elicited the address from.

THE COURT: I will sustain the objection.

Q. BY MR. FRIEDMAN: What is your business, Mr. Bradley?

A. My profession is an accountant, public accountant.

Q. What is your occupation now?

A. I am not doing anything at the present time on account of this case.

Q. On account of this case?

A. Yes.

Q. Do you live in Los Angeles?

MR. ARMSTRONG: That is objected to as immaterial and invading the Court's ruling.

THE COURT: I have ruled on that question.

MR. FRIEDMAN: I will temporarily pass on to something else. I would like leave to submit authorities on my right to develop that on cross-examination. I haven't them with me.

THE COURT: All right.

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The jury were thereupon excused by the court until 9:30 o'clock on the morning of July 24, 1929, whereupon the jury retired after which the following proceedings were had relative to the materiality of the testimony, as to the residence and place thereof of Cameron Bradley.

THE COURT: In what particular do you think that evidence is material?

MR. FRIEDMAN: I think it is material for this purpose, first, not only on the general grounds I urged in asking the question, but on the additional grounds that I have been informed and caused to believe

Later, the jury having been excused, counsel for the defense urged, as an "additional" ground for asking the excluded questions, that he had been informed that the witness was then in the custody of the federal authorities, and that such fact might be brought out on cross-examination "for the purpose of showing whatever bias or prejudice he may have." But the court adhered to its previous rulings, saying that if the witness had been convicted of a felony that fact might be proved, but not that he was detained in custody.

The Court of Appeals, after stating that it is customary to allow cross-examination of a witness with reference to

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that this witness himself is now in the custody of the Federal authorities.

MR. ARMSTRONG: You mean Mr. Bradley? You mean by the Federal authorities here?

MR. FRIEDMAN: I don't know by what authorities, but that is my impression, that he is here in the custody of the Federal authorities. If that is so, I have a right to show that for the purpose of showing whatever bias or prejudice he may have.

THE COURT: No; I don't think so. If you can prove he has ever been convicted of a felony, that is a different thing.

MR. FRIEDMAN: I realize that is the rule. I may impeach him if he has been convicted of a felony.

THE COURT: No. You may prove that fact as going to his credibility, but you can't merely show that he is detained or in charge of somebody. Everybody is presumed to be innocent until proven guilty.

MR. FRIEDMAN: It is a violent presumption sometimes, I know.

THE COURT: Your defendant is certainly to be given the benefit of that presumption.

MR. FRIEDMAN: I have no doubt of that.

THE COURT: If that is all you have, I will have to stand on the ruling.

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MR. FRIEDMAN: I would like, if the Court please, our exception noted to the Court's ruling made yesterday after the jury retired to the effect that we could not inquire as to the present address and residence of the witness.

THE COURT: Very well.

his place of residence, upheld the trial court, saying, p. 160:

"The purpose of such evidence is to identify the witness and to some extent give proper background for the interpretation of his testimony. In this case, however, the counsel indicated his purpose to use the information for the purpose of discrediting the witness. It is part of the obligation of a trial judge to protect witnesses against evidence tending to discredit the witness unless such evidence is reasonably called for by exigencies of the case. A witness is not on trial and has no means of protecting himself. Here it was evident that the counsel for the appellant desired to discredit the witness, without so far as is shown, in any way connecting the expected answer with a matter on trial. If it had been contended that the witness was in custody because of his participation in the transaction with which the appellant was charged, and if it was sought to show that he was testifying under some promise of immunity, it would undoubtedly have been prejudicial error to have excluded such testimony, but counsel avowed no such purpose, and indicated that the proposed question was merely in pursuit of a fishing expedition by which he hoped to discredit the witness. The witness was examined at great length concerning his relation to the appellant and great latitude was accorded in that examination."

Cross-examination of a witness is a matter of right. *The Ottawa,* 3 Wall. 268, 271. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood, cf. *Khan* v. *Zemansky,* 59 Cal. App. 324, 327ff.; 3 Wigmore, Evidence (2d ed.) § 1368 I. (1) (b); that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment, *Kirschner* v. *State,* 9 Wis. 140; *Wilbur* v. *Flood,* 16 Mich.

40; *Hollingsworth* v. *State,* 53 Ark. 387; *People* v. *White,* 251 Ill. 67, 72ff.; *Wallace* v. *State,* 41 Fla. 547, 574ff.; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. *Tla-Koo-Yel-Lee* v. *United States,* 167 U. S. 274; *King* v. *United States,* 112 Fed. 988; *Farkas* v. *United States,* 2 F. (2d) 644; see *Furlong* v. *United States,* 10 F. (2d) 492, 494.

Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. *Knapp* v. *Wing,* 72 Vt. 334, 340; *Martin* v. *Elden,* 32 Ohio St. 282, 289. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. *Tla-Koo-Yel-Lee* v. *United States, supra; King* v. *United States, supra; People* v. *Moore,* 96 App. Div. 56, affirmed without opinion, 181 N. Y. 524; cf. *People* v. *Becker,* 210 N. Y. 274. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. *Nailor* v. *Williams,* 8 Wall. 107, 109; see *People* v. *Stevenson,* 103 Cal. App. 82; cf. *Brasfield* v. *United States,* 272 U. S. 448. In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony. *Nailor* v. *Williams, supra.*

The present case, after the witness for the prosecution had testified to uncorroborated conversations of the defendant of a damaging character, was a proper one for

searching cross-examination. The question "Where do you live?" was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed. *State* v. *Pugsley,* 75 Ia. 742; *State* v. *Fong Loon,* 29 Ida. 248, 255ff.; *Wallace* v. *State, supra; Wilbur* v. *Flood, supra;* 5 Jones, Evidence (2d ed.) § 2366.

But counsel for the defense went further, and in the ensuing colloquy with the court urged, as an additional reason why the question should be allowed, not a substitute reason, as the court below assumed, that he was informed that the witness was then in court in custody of the federal authorities, and that that fact could be brought out on cross-examination to show whatever bias or prejudice the witness might have. The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution. *King* v. *United States, supra; Farkas* v. *United States, supra,* and cases cited; *People* v. *Becker, supra; State* v. *Ritz,* 65 Mont. 180, and cases cited on p. 188; *Rex* v. *Watson,* 32 How. St. Tr. 284. Nor is it material, as the Court of Appeals said, whether the witness was in custody because of his participation in the transactions for which petitioner was indicted. Even if the witness were charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross-examination that his testimony was affected by fear or favor growing out of his detention. See *Farkas* v. *United States, supra; People* v. *Dillwood,* 39 Pac. (Cal.) 438.

The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. *Storm* v. *United States,* 94 U. S. 76, 85; *Rea* v. *Missouri,* 17 Wall. 532, 542–543; *Blitz* v. *United States,* 153 U. S. 308, 312. But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him. *Great Western Turnpike Co.* v. *Loomis,* 32 N. Y. 127, 132; *Wallace* v. *State, supra;* 5 Jones, Evidence (2d ed.) § 2316. But no such case is presented here. The trial court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error. *Tla-Koo-Yel-Lee* v. *United States, supra; Nailor* v. *Williams, supra; King* v. *United States, supra; People* v. *Moore, supra;* cf. *People* v. *Becker, supra.* Other grounds for reversal were set up in the petition for certiorari, but we do not find it necessary to pass upon them.

Reversed.

HUSTY ET AL. *v.* UNITED STATES.

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

No. 477. Argued January 22, 1931.—Decided February 24, 1931.

1. The Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause; and arrest for the transportation or possession need not precede the search. P. 700.

2. To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected act. It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched. P. 700.
3. Acting on information, reasonably believed by him to be reliable, that one of the defendants herein, known to him to have been engaged in the illegal liquor traffic, possessed liquor in an automobile of particular description and location, a prohibition officer went to the place and found the automobile and the defendant in company with others, who, upon being hailed by the officer, tried to escape. *Held:*

   (1) That there were reasonable grounds for the officer's belief that liquor illegally possessed would be found in the car. P. 701.

   (2) The search was not unreasonable because sufficient time elapsed between the receipt by the officer of the information and the search of the car to have enabled him to procure a search warrant, since he could not know how soon the defendant would come to the car or how soon it would be removed. P. 701.
4. Rulings of the trial court excluding questions seeking to establish the name and identity of one who gave information to a prohibition officer upon which he based a search of defendant's automobile, are not considered here because not assigned as error and, so far as appears, not presented or passed upon, in the Court of Appeals. P. 701.
5. Where an indictment charged the transportation of intoxicating liquor, as a first offense by two defendants, and in another count, possession of intoxicating liquor as a first offense by one of them and as a third offense by the other, naming in each count a time and place within the jurisdiction of the court, *held,* that failure to state more specifically the amount of the liquor, and the time and place of the offenses, did not affect the validity of the indictment, but at most furnished ground for demanding a bill of particulars. P. 702.
6. The Act of March 2, 1929, known as the Jones Act, which increased the penalty for illegal manufacture, sale, etc., of intoxicating liquor, with the proviso " that it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law," added no new criminal offense to those enumerated and defined in the National Prohibition

Act, and therefore added nothing to the material allegations required to be set out in indictments for those offenses. P. 702.

7. The proviso mentioned is only a guide to the discretion of the court in imposing the increased sentences for those offenses for which an increased penalty is authorized by the Act. P. 702.
8. The maximum penalty for illegal possession of intoxicating liquor, under § 29 of the National Prohibition Act, was not increased by the Jones Act. P. 703.
9. Possession of intoxicating liquor in connection with its illegal transportation does not in itself justify a heavy sentence under the Jones Act for the illegal transportation, and does not necessarily justify such a sentence, when there has been a former conviction for illegal possession only. P. 703.

CERTIORARI, *post*, p. 831, to review conviction on two counts, for unlawful possession and for unlawful transportation of intoxicating liquor. Reversed.

Mr. Harold A. Kesler, with whom *Messrs. John B. McMahon* and *Percy F. Parrott* were on the brief, for petitioners.

The search was unlawful and the evidence should have been suppressed. *Skelly* v. *United States*, 37 F. (2d) 503; *United States* v. *Solomon*, 33 F. (2d) 193; *Carroll* v. *United States*, 267 U. S. 132, 147; *United States* v. *Setaro*, 37 F. (2d) 134; *People* v. *Margelis*, 217 Mich. 423; *United States* v. *Lukas*, 35 F. (2d) 599.

The indictment is bad for uncertainty; neither count specifies the place, the time, the liquor transported and possessed, or the amount thereof. *Skelly* v. *United States*, 37 F. (2d) 503; *McElvogue* v. *United States*, 40 F. (2d) 889; *Gurera* v. *United States*, 40 F. (2d) 338; *Sapp* v. *United States*, 35 F. (2d) 580.

The indictment does not invoke the Jones law. Cf. *United States* v. *Kent*, 36 F. (2d) 401. Defendants are not informed as to whether the charge against them is a felony or a misdemeanor, nor whether they were charged with a casual or slight violation, or with habitual sales and attempts to commercialize violations of the law.

If the issues raised by the proviso of the Jones Act should be included in the indictment, then the issue should be presented to the jury and should be included in the charge of the court. *United States* v. *Kent,* 36 F. (2d) 401; *United States* v. *Setaro,* 37 F. (2d) 134; *McElvogue* v. *United States,* 40 F. (2d) 889; *Gurera* v. *United States,* 40 F. (2d) 338.

Concerning the sentence: *United States* v. *Setaro, supra; Cisson* v. *United States,* 37 F. (2d) 330; *Ross* v. *United States,* 37 F. (2d) 557; *McElvogue* v. *United States, supra; Gurera* v. *United States, supra; Brady* v. *United States,* 39 F. (2d) 312; *United States* v. *Farrar,* 281 U. S. 624.

Mr. Amos W. W. Woodcock, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch,* Special Assistant to the Attorney General, *Mahlon D. Kiefer,* and *W. Marvin Smith* were on the brief, for the United States.

The arrest and search and seizure were upon probable cause. *Carroll* v. *United States,* 267 U. S. 132; *Brady* v. *United States,* 300 Fed. 540; *United States* v. *Lukas,* 35 F. (2d) 599. See also *Ash* v. *United States,* 299 Fed. 277; *Park* v. *United States,* 294 Fed. 776, 782–783.

The indictment alleges the unlawful transportation, in a specified kind of automobile, and the unlawful possession of, intoxicating liquor fit for use for beverage purposes, to-wit, whiskey, on December 10, 1929, in Grand Rapids, Kent County, Michigan, within the jurisdiction of the court. The petitioners' objection is that the indictment does not specify the amount of the liquor, nor the time when or the place where it was illegally transported and possessed. We submit that the indictment contained all the essential elements of the offenses averred and duly informed petitioners of the charges against them. See *Gurera* v. *United States,* 40 F. (2d) 338; *Jacobs* v. *United States,* 24 F. (2d) 890; *Leonard* v. *United States,*

18 F. (2d) 208; *Myers* v. *United States,* 15 F. (2d) 977; *Hovermale* v. *United States,* 5 F. (2d) 586; *Pane* v. *United States,* 2 F. (2d) 855. The allegation that the offenses took place within the jurisdiction of the court is sufficient. Further information could have been supplied by a bill of particulars but it was not asked for. *Durland* v. *United States,* 161 U. S. 306, 315. If at any time they should find it necessary to plead the record and conviction in bar of another prosecution, the time and place, as well as the amount of liquor involved, may be shown by other proof. See *Dunbar* v. *United States,* 156 U. S. 185, 191.

The proviso to the Jones Act defines no new crime, but merely cautions the court to exercise a judicial discretion in the imposition of sentences. *Ross* v. *United States,* 37 F. (2d) 557, certiorari denied, 281 U. S. 767; *United States* v. *Kent,* 36 F. (2d) 401. See also *McElvogue* v. *United States,* in which this Court denied certiorari.

The trial court had power under the Jones Act to impose a sentence for transportation of imprisonment not to exceed five years and a fine not to exceed $10,000. There was a general verdict of guilty, and the sentences imposed were general sentences which did not exceed those which might have been imposed under the first count. See *Abrams* v. *United States,* 250 U. S. 616, 619; *United States* v. *Trenton Potteries,* 273 U. S. 392, 401–402. Obviously, the proviso that Congress intended the court to use discrimination in imposing sentences was not intended as a limitation upon the power of the court. If the sentences were within the discretion of the trial court, petitioners' only recourse is to the executive. The court in imposing the sentences no doubt took into consideration the evidence in the case. See *Ross* v. *United States,* 37 F. (2d) 557.

MR. JUSTICE STONE delivered the opinion of the Court.

Petitioners were convicted in the District Court for Western Michigan upon two counts of an indictment, the first for transporting, and the second for possessing, intoxicating liquors in violation of the National Prohibition Act. They had been apprehended while in an automobile, and arrested without warrant. The officers had searched the automobile, without warrant, and found a quantity of intoxicating liquor, which they had seized. A motion by petitioners to suppress the use as evidence of the information thus acquired, on the ground that the arrest and the search and seizure were illegal, was denied. Each count of the indictment set forth a single offense; and the second, that for possession, alleged two prior convictions of petitioner Husty for unlawful possession. Petitioners were sentenced generally on the indictment, without reference to either count, Husty to five years' imprisonment and to pay a fine of $3000, and Laurel to imprisonment for one year and six months.

In the course of the proceedings before the District Court, petitioners, by appropriate motions and exceptions, challenged the correctness of the order denying the motion to suppress evidence; the sufficiency of the indictment; and the legality of the sentences, the last on the grounds that they were not authorized by the Jones Act of March 2, 1929, c. 473, 45 Stat. 1446, and exceeded the maximum penalties which could be imposed under § 29 of the National Prohibition Act.

The Court of Appeals for the Sixth Circuit, without opinion, affirmed the convictions under both counts and held the sentences to be supported by the convictions upon the second count—that for possession—alone. This Court granted certiorari, on a petition which asked review of the rulings of the District Court which have been

mentioned, the government opposing on the ground, among others, that the sentences were proper under the possession count.

1. In the proceeding to suppress evidence, one of the prohibition officers who made the arrest testified that he had known Husty to be a "bootlegger" for a number of years before the arrest, and had arrested him in 1922 and 1928 for violations of the National Prohibition Act, both arrests resulting in conviction and the second in imprisonment. On the day of petitioners' arrest, the witness had received information over the telephone that Husty had two loads of liquor in automobiles of a particular make and description, parked in particular places on named streets. The witness was well acquainted with his informant, having known him for about eight years, and had come in frequent contact with him in business and socially. The same person had given similar information to the witness before, which had always been found to be reliable. The officer believed the information, and, acting upon it, found one of the cars described, at the point indicated, and unattended. Later, petitioners and a third man entered the car. Husty had started it when he was stopped by the officers. Laurel and the third man fled, and the latter escaped. The officers, believing that the car contained intoxicating liquor, searched it, and found eighteen cases of whiskey.

The Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause; and arrest for the transportation or possession need not precede the search. *Carroll* v. *United States,* 267 U. S. 132. We think the testimony which we have summarized is ample to establish the lawfulness of the present search. To show probable cause it is not necessary that the arresting officer should have had before him

legal evidence of the suspected illegal act. *Dumbra* v. *United States,* 268 U. S. 435, 441; *Carroll* v. *United States, supra.* It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched. See *Dumbra* v. *United States, supra; Stacey* v. *Emery,* 97 U. S. 642, 645.

Here the information, reasonably believed by the officer to be reliable, that Husty, known to him to have been engaged in the illegal traffic, possessed liquor in an automobile of particular description and location; the subsequent discovery of the automobile at the point indicated, in the control of Husty; and the prompt attempt of his two companions to escape when hailed by the officers, were reasonable grounds for his belief that liquor illegally possessed would be found in the car. The search was not unreasonable because, as petitioners argue, sufficient time elapsed between the receipt by the officer of the information and the search of the car to have enabled him to procure a search warrant. He could not know when Husty would come to the car or how soon it would be removed. In such circumstances we do not think the officers should be required to speculate upon the chances of successfully carrying out the search, after the delay and withdrawal from the scene of one or more officers which would have been necessary to procure a warrant. The search was, therefore, on probable cause, and not unreasonable; and the motion to suppress the evidence was rightly denied. *Carroll* v. *United States, supra.*

In the course of the hearing on the motion, questions by petitioners seeking to establish the name and identity of the officer's informant, were excluded. Petitioners ask review of these rulings on the evidence, but we do not consider them, since they were not assigned as error on the ap-

peal to the Court of Appeals, and it does not appear that they were presented or passed upon there. *Duignan* v. *United States,* 274 U. S. 195, 200.

2. The indictment is in the form authorized by § 32 of the National Prohibition Act. It charges the transportation of intoxicating liquor as a first offense by both petitioners, and possession as a first offense by Laurel, and as a third offense by Husty, at a named time, and at a place within the jurisdiction of the court. Failure to state more specifically the amount of the liquor, and the time and place of the offenses charged, does not affect the validity of the indictment. It was at most ground for a bill of particulars if timely application had been made. See *Durland* v. *United States,* 161 U. S. 306, 315.

It is urged that the indictment is defective, because it fails to state whether the offenses charged were felonies or misdemeanors, and whether the petitioners were charged with casual or slight violations, or habitual sales of intoxicating liquor, or attempts to commercialize violations of the law, which, petitioners argue, were made new or aggravated offenses by the Jones Act.

But the Jones Act created no new crime. It increased the penalties for "illegal manufacture, sale, transportation, importation or exportation," as defined by § 1, Title II of the National Prohibition Act, to a fine not exceeding $10,000, or imprisonment not exceeding five years, or both, and added as a proviso, "that it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law." As the Act added no new criminal offense to those enumerated and defined in the National Prohibition Act, it added nothing to the material allegations required to be set out in indictments for those offenses. The proviso is only a

guide to the discretion of the court in imposing the increased sentences for those offenses for which an increased penalty is authorized by the Act. See *Ross* v. *United States,* 37 F. (2d) 557; certiorari denied, 281 U. S. 767. *McElvogue* v. *United States,* 40 F. (2d) 889; certiorari denied, *post.*

3. The sentence imposed on each of the petitioners exceeded the maximum penalty for illegal possession under § 29 of the National Prohibition Act, which is, for a first offense, $500 fine, and for a third offense, " not less than $500 " fine and not more than two years' imprisonment. As illegal possession is not one of the offenses enumerated in the Jones Act for which increased penalties are provided, and as the sentences imposed exceed any authorized by § 29 of the National Prohibition Act, the court below was in error in holding that they were supported by convictions on the second count, that for possession.

Since the convictions were upheld under the first count, sentences under the Jones Act were authorized, transportation being one of the offenses enumerated in that Act. But the possession alleged in the second count was not in itself necessarily an aggravation of the transportation charge which would warrant heavy sentences under the Jones Act as to either petitioner, and could not be as to Laurel, who, so far as the evidence shows, was a first offender both as to the transportation and possession. While the District Court may have had before it facts other than those appearing of record which it was entitled to consider in imposing sentence under the Jones Act, we think, in view of the confusion which has arisen with respect to the propriety of the sentences under the possession count, that the District Court should be afforded an opportunity in its discretion to resentence the petitioners in the view of the applicable statutes, as stated.

The judgment will be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

SARANAC AUTOMATIC MACHINE CORPORATION *v.* WIREBOUNDS PATENTS COMPANY ET AL.

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

No. 51. Argued January 13, 1931.—Decided February 24, 1931.

1. Patent No. 1,128,145 (Claim 25), granted to Inwood and Lavenberg, for mechanical means of holding in proper relative positions side pieces and step-mitered end cleats, preformed and separate, while joining them by stapling and wiring into a foldable box-blank,—*held* invalid for want of invention. P. 711.
2. The method of making the box-blanks out of separate, preformed pieces, suitably held for stapling and wiring, was involved in and disclosed by an earlier, and now expired, product patent to the same persons. P. 709.
3. The present patent (Claim 25) covers only a mechanical means, useful in pursuing that method but which did not in itself involve invention. It can not be construed as embracing the method, nor be given the effect of extending the monopoly, of the expired patent. P. 714.

37 F. (2d) 830, reversed.

CERTIORARI, 281 U. S. 711, to review a decree holding a patent valid and infringed and reversing a decree of the District Court, which adjudged otherwise, 24 F. (2d) 872.

Messrs. Howard M. Cox and *Amasa C. Paul* for petitioner.

Mr. Laurence A. Janney, with whom *Mr. Edward F. Dunne, Jr.,* was on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

In this case certiorari was granted, 281 U. S. 711, to resolve a conflict of decision between circuit courts of appeals with respect to the validity of Claim 25 of Patent No. 1,128,145, granted February 9, 1915, application filed October 27, 1904, to Inwood and Lavenberg, for a machine for making box blanks. In the present suit, brought by respondents in the District Court for Western Michigan to enjoin infringement of this and other patents, the District Court held the patent "invalid if infringed," and entered a decree for petitioner, 24 F. (2d) 872, which the Court of Appeals for the Sixth Circuit reversed, holding Claim 25 valid and infringed. 37 F. (2d) 830. The Court of Appeals for the Seventh Circuit had held the patent invalid, *Wirebounds Patents Co.* v. *Gibbons Box Co.*, 25 F. (2d) 363, affirming a decree without opinion of the District Court for Northern Illinois.

The present suit was based on three patents, all issued to the same patentees: the machine patent, already referred to; No. 1,128,144, issued February 9, 1915, application filed October 14, 1904, for a "work holder," used in connection with the box blank machine; and No. 1,128,252, issued February 9, 1915, application filed April 21, 1914, for a method of making wirebound boxes. The first two were based upon co-pending applications filed in October, 1904, and the third upon a divisional application cut out of the work holder application. Typical claims are printed in the margin.[1] A fourth product patent, now

[1] *Machine Patent No. 1,128,145, Claim 25.* A machine for making box blanks comprising work-controlling means having cleat-positioning means to receive sectional cleats in parallel lines, and spacing means to space cleats endwise from each other in each line, preparatory to connecting said cleats in their spaced relation, said work-controlling means being arranged to receive side material to be secured

expired and only indirectly involved, was No. 799,854, issued to the same patentees September 19, 1905, application filed October 17, 1904 (reissued in 1907, No. 12,725), covering a specific form of box blank, which could be produced by the use of the machine and method patents, but also might be made without resort to either.

The court below, after pointing out that the three patents directly involved were all issued on the same day and will expire at the same time, and that there could be no commercially important infringement of any of the patents which did not infringe the machine patent, limited its decision to determining the validity and infringement of Claim 25 of that patent. It gave the usual decree for injunction and accounting with respect to this claim, and dismissed the bill as to the work holder and method patents, but with leave to counsel to apply for further consideration of any other claim of the patents in suit if deemed necessary to settle the controversy. No

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to said cleats; fastener applying means for securing binding means to the side material and cleats controlled by the work-controlling means; means for relatively feeding the work-controlling means and fastener applying mechanism for securing said binding means across the intervals between said spaced cleats to secure them together in their spaced relations to form a foldable blank.

Machine Patent No. 1,128,145, Claim 55. A machine for making box blanks comprising a plurality of groups of work-controlling means, each group for a separate individual side section of the box, and comprising means to support cleats and side material in coöperative relationship for being secured together to form a box side, and each group having means to support its cleats and side material in a relationship to enable the same to be folded coöperatively with corresponding portions of a side section controlled by another group; and means to secure wire binding to the respective side sections and to provide wires for connecting one section and another in foldable relationship.

Work holder Patent No. 1,128,144, Claim 6. Work-controlling means for use in the manufacture of wire bound boxes comprising, in combination, cleat-positioning means to receive a plurality of

such application was made; and it was conceded at the bar that the disposition here of the issues raised with respect to Claim 25 will be, for all practical purposes, determinative of the case.

By the teachings of the Inwood and Lavenberg patents, to which reference has been made, wirebound box blanks may be produced, consisting usually of four panels which may be conveniently folded and attached to box ends so as to form strong, light weight, commercially useful boxes. The blanks, before folding, comprise the panels of side material in straight edged sheets of thin wood or veneer, stapled, at each end, to cleats placed at right angles to the side material, the staples straddling reinforcing wire. The cleats, which have previously been step-mitered or bevelled, and which in practice are usually eight in number, one at each end of the four panels of side material, are fastened to the side material in such position with respect to it and to each other that, when the blank is folded, the reinforcing wires serve as hinges; the ends

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rows of cleats disposed substantially end to end; and cleat-spacing means relatively adjustable to suit individual cleats of different lengths to be received in said positioning means.

Method Patent No. 1,128,252, Claim 2. The method of making wirebound boxes having individual cleats and individual side pieces separated at the lateral corner edges of the completed box and connected by wires at said edges, which comprises assembling previously formed individual cleats with the separate previously formed side material for an individual side to provide a side unit of the box; assembling additional such side units to provide the other sides of the box; securing to the cleats of each side unit a wire binding extending completely across said unit; connecting said side units by said wire binding, while leaving the latter laterally flexible to accommodate relative shifting of the separate meeting edges of the pieces of side material, arranging said side units in box form; and completing the continuity of the wire binding; whereby relative longitudinal shifting of meeting edges of pieces of side material tends to bend the wire-binding out of normal alinement, and is resisted by the tensile strength of the wire.

of adjoining cleats engage; and the panels form the four sides of a box, with or without overlapping edges, as may be preferred.

Before Inwood and Lavenberg, the method of manufacturing box blanks, under the so-called Rosback patents, had been to form a blank of a single sheet of side material, stapled, at each of its two sides, to a single cleat. The rigid blank formed by this first step was then prepared for folding by a second and distinct mechanical procedure, in the course of which each of the cleats was cut into four separate cleats, step-mitered at their ends, and the single sheet of side material scored. The blank was then capable of being folded by bending the side material along the scored lines so that the adjacent ends of the cleats would meet. Before any of their applications, Inwood and Lavenberg appear to have devised a machine or work holder for holding in position, and fastening, pre-formed cleats to a single piece of side material; but that did not wholly eliminate the second part of the earlier procedure, by which the side material was scored before folding. The final step which brought them to their improved method was taken only when both cleats and side panels, assembled in position, were fastened into a foldable box blank by a single operation. The difference between the two methods was that the old taught the production of foldable relationships by cutting the rigid box blanks. Inwood and Lavenberg taught the new by assembling and fastening together the separate elements. Their method constituted an important advance over the old, which had not been commercially successful. The new, by the substitution of a single for a two-step procedure, saved the expense and inconvenience of double handling, and made it practicable to use cleats which could be preformed in quantities cheaply, and permitted the use for that purpose of short and otherwise waste pieces of lumber. It eliminated certain mechanical difficulties of the

old method of mitering and scoring the rigid blanks, and resulted in a product with fewer defects and which folded more easily than the forms produced by the earlier.

Numerous details of the new procedure had been taught by the prior art. The idea of folding wire- or metal-bound sides into a box was old. Averill (1900, No. 661,481) and Rosback (1898, No. 608,796) specifically taught the binding of the sides together with wire. Howenstine (1891, No. 453,479), Hamilton (1887, No. 373,828), and others had developed the idea of using pre-formed cleats attached or to be attached to a plurality of side sheets. Rosback had developed elaborate machines for step-mitering (1898, No. 609,630; 1899, No. 623,258); and for stapling box blanks (1898, No. 614,348; 1899, No. 630,303); and devices for feeding box blank material into the stapling machine (1899, No. 625,958, No. 636,068).

The conception of Inwood and Lavenberg which was new, was that the pre-formed cleats and side materials could be assembled and so positioned with reference to each other, that they could be stapled together to manufacture, in the single stapling operation, the finished product, the box blank ready for folding. This constituted an important advance over the use of the rigid box blanks in the two-step method of the prior art, which had been developed by Rosback. The new method had a large and immediate commercial success; and we assume, as the court below held, that it involved invention. See *The Barbed Wire Patent,* 143 U. S. 275, 283; *Krementz* v. *S. Cottle Co.,* 148 U. S. 556, 560; *Minerals Separation, Ltd.* v. *Hyde,* 242 U. S. 261.

This conception is that of the reissue (product) patent, held valid as a basic patent in *Wirebounds Patents Co.* v. *Chicago Mill & Lumber Co.,* 238 Fed. 929, and by the Seventh Circuit Court of Appeals in *Wirebounds Patents Co.* v. *Gibbons Box Co., supra.* As it has now expired, the public is free to use the new procedure of making

wirebound folding box blanks, so far as taught by that patent. The patent is for a product, an improved wirebound box blank, foldable into a box with overlapping sides. It describes the earlier two-step procedure by which the rigid box forms were first assembled and then, by a second separate step, prepared for folding by step-mitering the cleats and scoring the side material. The specification of the patent is: "Our invention relates to certain improvements in wirebound boxes, especially of that class in which the blanks constituting the four sides of the box are assembled and secured in relative position to each other prior to folding by reinforcing wires, and has for its object the assembling and fastening together such parts constituting the completed blank so that the same when folded will produce overlapping edges of the side sheets." The drawings of the patent, which show a completed blank ready for folding, read with the specifications, indicate unmistakably that the advance, achieved by the improvement over the existing method of manufacturing box blanks, was in the process by which the product of the patent could be made by assembling and positioning pre-formed cleats and sides, so spaced that, when stapled, they will fold to form the four sides of a box.

Thus this patent completely discloses the invention of Inwood and Lavenberg and the advance which it made over the prior art. It taught all that was disclosed by their method patent, for the method claimed is but the process of the now expired reissue patent resulting in the product of the patent. As only the validity and infringement of the machine patent are now before us, it is unnecessary to consider whether, for the reason just stated, the later method patent is invalid, although granted on a co-pending application, as was held in *Mosler Safe & Lock Co.* v. *Mosler,* 127 U. S. 354, 361, or whether it is invalid

because of the delay in filing the divisional application, as was held by the District Court below.

All else embodied in the machine and work holder patents, we think, involved not invention, but the application of mechanical skill to the solution of the problem of devising suitable mechanical means for the manufacture of foldable box blanks by the process or method disclosed by the reissue patent.

The prior art had taught how to construct a machine which would fasten with staples the elements of the box blank of the reissue patent. That of Rosback, No. 614,348 and No. 625,958, used for stapling the rigid box forms of the earlier art, consisted of a stapler, stationary guides for directing the sheets and cleats, and an endless chain with attached pushers for feeding the materials along the guides to the stapler. Once it became apparent that an improved method could be employed in manufacturing the completed box blank by assembling all its pre-formed elements and holding them in their appropriate relative positions while they were being fed through a stapling machine, it was equally apparent that the new method could be used only by resort to some appropriate mechanical means for holding the elements of the blank in position until fastened. But the solution of that problem was, we think, obvious, involving only the adaptation of familiar mechanical means for holding cleats and sides in place, and requiring no more than the mechanical skill of the calling. That, we conclude, was all Inwood and Lavenberg achieved by their work holder and machine patents; and it is all that petitioner has done in the adaptation of the Rosback machine which it employs in the use of the method which it is now free to make.

The work holder patent describes and claims a portable work holder, embracing two parallel channels in which are placed the pre-formed cleats, their ends engaging space

blocks of such size, shape, and location as to hold the cleats in appropriate position. The box sides, resting upon the cleats so engaged, are positioned by the space blocks and held in place by clamps. The work holder, with the assembled elements of the box blank thus held in position, is then passed through the stapling machine, which staples together wire, sides, and cleats. Claim 25 of the machine patent, it will be observed, relates only to cleat treatment. The mechanism which it claims could be operated to make box blanks having multiple preformed cleats and a single piece of side material. It obviously would not, without some modification, hold both cleats and separate side panels in appropriate relative positions for stapling, and so could not be used for making boxes by the improved method. As other claims of the machine patent may be taken to supply this deficiency, we assume, for present purposes, that Claim 25, with others of the machine patent, is broad enough to embrace the essential elements of the work holder, and that the work holder is an exemplification of them. The machine patent, aside from the work controlling means, consists generally of a stapling head surmounting a table with feed roller mechanism for pushing the work holder under the stapler.

We think that the machine and work holder patents, read separately or together, apart from such disclosure as they make of the process or method of the reissue patent, disclose only the results of the application of mechanical skill to the development of a convenient mechanism for using the method. Petitioner, by the adaptation of the Rosback machine which it uses to produce the box blank of the reissue patent, has done no more. It has increased the number of pushers to that required for the desired number of assembled separate elements—cleats and side material. The pushers are spaced at appropriate distances and used in conjunction with a detent or "hold back," so that, by the co-operation of the pushers

and hold back, cleats and side material are held in appropriate positional relationship as they pass under the stapler. By this multiplication of pushers, the Rosback machine did for each panel only what it had previously done for the single rigid box blank. In making the latter, as well as the former, the pushers performed a positioning function, a fact which, alone, challenges the patentability of respondents' machine claim. With the old blank, as well as the new, the pushers could not be placed at random, and cleats and side materials both had to be brought into appropriate relative positions. Moreover, the spacing of the panels with reference to each other in box- or crate-making machines of the Rosback type, by the use of a plurality of spaced pushers on the same endless feed chain, was old. Such an arrangement, where the pushers performed this positioning function, is shown in Greenstreet (1895, No. 547,486; 1897, No. 579,574); and Lipps & Springer (1905, No. 801,998).

The pushers and hold back, like the channels and space blocks of the work holder, are familiar mechanical means for holding materials in position while work is being done upon them. Given the method of the reissue patent, failure to adapt these obvious means to the solution of the problem in hand would, we think, have evidenced a want of ordinary mechanical skill and familiarity with them. Their adaptation to the new use was not the creative work of the inventive faculty. It was "but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice." *Hollister* v. *Benedict Mfg. Co.,* 113 U. S. 59, 72, 73; *Concrete Appliances Co.* v. *Gomery,* 269 U. S. 177; *Aron* v. *Manhattan Ry. Co.,* 132 U. S. 84, 90.

The court below upheld the validity of the machine patent because it had contributed to the market success of the product, which could not have been attained with-

out an automatic machine for its manufacture, and because it thought that the "dominating new result" was to be found in the combination of machine elements. In considering the objection that the machine patent did not involve invention, it said, p. 836:

"It has been suggested that the disclosure made by the method patent left no room for invention in the machine patent. This suggestion cannot be of force, since the patents were copending and one is not prior art as against the other, even if they had not both been issued on the same day. . . . If by the suggestion it is meant that the primary thought was in the method and that little or no invention was needed to make a machine, once the method had been conceived, that may be true; but that cannot militate against the validity of the machine patent when the two are practically simultaneous, for in such case the concept involved in the method is an important and perhaps a vital part of the machine invention. The concept which underlies and precedes the machine may or may not involve an independently patentable method; in either event alike the machine is patentable."

But this, we think, does not meet the objection, which, more precisely stated, is that the machine and work holder patents, fairly read, do not embrace a patent for the dominating new result, the process of the reissue patent, but are patents for a particular combination of mechanical means, useful, as is that of petitioner, in availing of the process, but which, as we have said, does not involve invention. That the new result is not so embraced is apparent from respondents' insistence, to establish the seniority of the machine invention over that shown by the reissue patent, upon the early use, to which we have referred, of the Inwood and Lavenberg machine for stapling a plurality of pre-mitered cleats to a single piece of side material. But such use of the machine invention did not

disclose or involve the conception of the reissue patent of producing foldable relationships in one step, which, as we have said, is the new result.

The machine and work holder patents describe and claim only a combination of mechanical elements enumerated and arranged as stated in Claim 25, as we have construed it. This combination, which had been found suitable for manufacturing blanks with a plurality of pre-formed cleats and a single piece of side material, was suitable for using the process of the reissue patent, as is the combination used by petitioner. Such possibilities of use might be spelled out of the machine and work holder patents by one skilled in the art and familiar with the process described in the reissue patent. But nowhere do they describe or claim, as the invention of the patent, the new method or procedure of Inwood and Lavenberg, which was their improvement on the prior art. That is told in full in the reissue patent, and it is there that the dominating new result appears. Obviously, from what we have said, if the method concept which underlay and preceded the machine had not been independently patentable, the machine could not have been. For the same reasons, the machine cannot be patentable merely because it is capable of use in applying a conception independently patentable.

The question therefore is not one of reliance upon the prior art of the reissue patent as against a co-pending patent, or of double patenting, or of the overlapping of specific and generic patents. It is the attempted extension of the monopoly of the expired reissue patent in Inwood and Lavenberg's invention by resort to the machine patent, and to the work holder from which the described invention had been subtracted by division, and which cover, not the invention of the reissue patent, but a mechanical device which does not involve invention.

Reversed.

UNITED STATES *v.* SPRAGUE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 606. Argued January 21, 1931.—Decided February 24, 1931.

1. The Eighteenth Amendment was by lawful proposal and ratification made a part of the Constitution. Pp. 730–734.
2. Article V, in its provision that proposed amendments shall become part of the Constitution when ratified by the legislatures of three-fourths of the several States or by conventions in three-fourths thereof, "as the one or the other mode of ratification may be proposed by the Congress," plainly and without ambiguity places the choice between these two modes in the sole discretion of Congress, and cannot by construction be read as requiring that changes detracting from the liberty of the citizen, distinguished from changes in the character of federal means or machinery, shall be referred to conventions. P. 730.
3. The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition. P. 731.
4. The fact that an instrument drawn with such meticulous care, and by men who so well understood how to make language fit their thought, does not contain any phrase limiting the exercise of discretion by the Congress in choosing one or the other alternative modes of ratification, is persuasive evidence that no qualification was intended. P. 732.
5. Article V does not purport to delegate any governmental power to the United States, nor to withhold any from it; it is a grant of authority by the people to Congress, and not to the United States; Congress functions as the delegated agent of the people in choosing the one or the other method of ratifying proposed amendments to the Constitution. P. 733.
6. The Tenth Amendment added nothing to the Constitution as originally ratified, and lends no support to the contention that the people did not delegate this power to Congress in matters affecting their own personal liberty. P. 733.
7. The fact that several of the other Amendments (notably the Thirteenth, Fourteenth, Fifteenth, Sixteenth, and Nineteenth),

which touch rights of the citizens, were ratified by state legislatures, weighs against the argument that that mode was erroneously followed in the case of the Eighteenth Amendment. P. 734.

44 F. (2d) 967, reversed.

APPEAL, under the Criminal Appeals Act, from a judgment quashing an indictment based on the National Prohibition Act.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist* and *Messrs. Robert P. Reeder, John J. Byrne, Mahlon D. Kiefer,* and *Erwin N. Griswold* were on the brief, for the United States.

The language of Article V is clear and free from ambiguity; there is no room for the construction adopted by the court below. The words of the Constitution are to be taken in their obvious sense, and to have a reasonable construction. *Pollock* v. *Farmers' Loan & Trust Co.,* 158 U. S. 601, 618–619; *Lake County* v. *Rollins,* 130 U. S. 662, 670. This Court has said: "The language of the article is plain, and admits of no doubt in its interpretation." *Hawke* v. *Smith, No. 1,* 253 U. S. 221, 226. See *Dodge* v. *Woolsey,* 18 How. 331, 348. Furthermore, substantially the present argument was presented in the *National Prohibition Cases,* 253 U. S. 350, where it was held that the Eighteenth Amendment, "by lawful proposal and ratification, has become a part of the Constitution." And see *Hawke* v. *Smith, No. 2,* 253 U. S. 231; *Dillon* v. *Gloss,* 256 U. S. 368.

The precise question whether the Eighteenth Amendment is void because not ratified by conventions in the States, was presented in the *National Prohibition Cases* in the brief on behalf of the State of New Jersey, the brief of Rhode Island, and certain briefs of *amici curiae*; also, the bill of complaint of New Jersey.

While differing in form, the arguments made in the National Prohibition Cases and those made here all rest on

the proposition that the character of the proposed amendment determines the mode of ratification, and are alike disposed of by the holding in those cases that the Eighteenth Amendment was lawfully proposed and ratified.

The Articles of Confederation proposed by the Continental Congress were submitted to and ratified by the legislatures and not by conventions in the States (Journals of Continental Congress IX, 907, 932), and these Articles could only be amended in the same manner (Article XIII). In several of the States, constitutions had been adopted by the legislatures without submission to the people. This was true in South Carolina, Vermont, and Virginia. Thorpe, Constitutions & Charters, VI, 3241, 3248, 3737, 3749; VII, 3812; Pulliam, The Constitutional Conventions of Virginia, 13; Nevins, The American States During and After the Revolution, 128. In Massachusetts and in New Hampshire, constitutions had been submitted to town meetings for ratification. Nevins, *supra,* 183; S. E. Morrison, Massachusetts Constitution of 1780, Proceedings of Massachusetts Historical Society for 1917, p. 400. In no other State prior to 1789 had a constitution been submitted to popular vote. Nevins, *supra,* 128, 129. In five of the States the constitutions provided for amendment by conventions (Pennsylvania, Vermont, Georgia, Massachusetts, and New Hampshire); four had no provisions for amendment (New Jersey, New York, North Carolina, and Virginia), and three provided for amendment by legislative action (Delaware, Maryland, and South Carolina).

The debates in the Federal Constitutional Convention show that the methods for ratification and for amendment of the Constitution were carefully distinguished. Ratification as provided in Article VII was to be by state conventions, but it was left for Congress to determine whether amendments proposed should be ratified by state legislatures or state conventions. And see No. 85,

The Federalist; Remarks of Gerry in the First Congress, 1 Annals of Congress, 716.

An argument of great weight is found in the practical construction of Article V by Congress since the adoption of the Constitution. Nineteen Amendments to the Constitution have been adopted; and at least five additional Amendments have been proposed by Congress. All of these were referred to the legislatures and not to conventions. Of the Amendments, certainly the Thirteenth, and apparently the Sixteenth and Nineteenth, operated to grant powers to the Federal Government which had formerly been reserved to the States. The proposed Child Labor Amendment was of the same type. The Fourteenth Amendment imposed serious restraints upon the powers expressly reserved under the Tenth Amendment. We are not aware that the action of Congress in proposing the legislative mode of ratification has ever been challenged except in the case of the Eighteenth Amendment.

Messrs. Julius Henry Cohen and *Selden Bacon,* with whom *Messrs. Frederic M. P. Pearse, Daniel F. Cohalan, Kenneth E. Dayton, Leslie J. Tompkins, George H. Williams,* and *Burton A. Zorn* were on the brief, for appellees.

The meaning of any part of the Constitution is to be determined by the purpose and intent of those who framed and adopted it and in the light of the instrument as a whole. The real intent of the provisions of the Constitution, when ascertained, controls over the literal sense of the words and the terms employed. *Juilliard* v. *Greenman,* 110 U. S. 421, 439; *Legal Tender Cases,* 12 Wall. 457; *Gibbons* v. *Ogden,* 9 Wheat. 1, 188, 189; *Prigg* v. *Pennsylvania,* 16 Pet. 539, 610, 611; *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 721. In many instances the literal wording has been disregarded. *Popovici* v. *Agler,* 280 U. S. 379, 383; *Virginia* v. *Tennessee,* 148 U. S. 503,

517–518; *Collector* v. *Day,* 11 Wall. 113, 127; *Ex parte Grossman,* 267 U. S. 87, 108–109; *Ex parte Wells,* 18 How. 307, 311; *Dillon* v. *Gloss,* 256 U. S. 368, 371; *Ex parte Yarbrough,* 110 U. S. 651, 658; *South Carolina* v. *United States,* 199 U. S. 437, 451.

The provision in Article V for ratification by legislatures or conventions "as the one or the other mode of ratification may be proposed by the Congress" is no more to be construed literally than these other provisions of the Constitution, if it appears clearly that such a literal construction is inconsistent with the declarations, purpose and intention of those who framed and adopted the Constitution, and with the fundamental theory and structure of our Government, and the general aim and purpose of the instrument declared in the Preamble.

It is a fundamental concept of our system that all sovereignty ultimately resides in the people and that the United States in its existing form could have been created only by consent of the people and not by action of the States in their corporate capacities. The ultimate sovereignty in every State lies also in the people. *McCulloch* v. *Maryland,* 4 Wheat. 316, 402, 405 (see also Argument of Pinckney, *ibid.* 377); *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 324, 325; *Barron* v. *Baltimore,* 7 Pet. 242, 247, 249–250; *Keith* v. *Clark,* 97 U. S. 454, 475–476; in the Constitutional Convention, 5 Elliot's Deb., 199, 352–356; 1 Farrand, 122–123, 126–127; The Federalist, XXXIX, XLIII, XLIX; state conventions, 2 Elliot, 457–458; 4 *id.,* 328; First Congress, 3 Farrand, 374. Such powers as those purported to be conferred upon the United States by the Eighteenth Amendment could, in the original Constitution, have been granted only by the people themselves acting through conventions. The States and their legislatures would not have been competent to make such a grant.

When it was desired to form a true nation, distinguished from a Confederation or League, what grants or provisions had to be included for the creation of that nation, and whence were these elements to be derived?

(1) There must be a framework of the new government, a machinery through which the powers to be given to it would function. Its creation was within the power of the States, and of the legislatures as their representatives. It was precisely what they had done in the formation of the Confederation.

(2) It was necessary to surrender to the new government certain rights which belonged to the States, as such. These are illustrated by the provisions of Article IV of the Articles of Confederation, e. g., the agreement that the inhabitants of each State should be entitled to all the privileges and immunities of citizens of the several States, etc.

(3) In order that it might become an indissoluble Union and a nation, it was necessary that the assent of the people of the States be secured. They alone were competent to transform the federation into a nation, and they alone, in their several States, had the power to bind future legislatures so that they could not undo the bond. Thereafter the States and legislatures would themselves be competent to ratify amendments which affected merely the framework or machinery of government (and not its powers), or surrendered the rights of the States as such.

(4) It was essential that the new national government should have power to operate directly upon the people themselves and upon their rights and property. The Confederation did not possess this power. The legislatures were not competent to grant to a new nation the right for example, to levy taxes directly upon their inhabitants.

The same lack of power ran through the entire Confederation. To procure these direct powers over the people it was necessary to go to the people themselves.

The purported grant of power contained in the Eighteenth Amendment is of this class.

(5) There is a fifth class of provisions made necessary by reason of this grant of direct governmental power over the people—those which safeguard the people from usurpation and tyranny by the new national government after the grant to it of direct power over them. As a result of this fear the first ten amendments—the "Bill of Rights"—were demanded and adopted. Provisions of this kind could be adopted by legislatures. There were in them no grants of power over the people.

It must be evident that, unless there were express provision to the contrary, the residuum of powers remained with those who originally possessed them, States or the people, as the case may be. If no provision for amendment were made in the Constitution, conferring upon the States or legislatures the future right to grant powers over the people, then for new powers over the people the national government must resort again to the people themselves.

Legislatures and conventions were not equally representative of the people. The legislatures represented the States alone; the conventions represented the people, and, indeed, for the purpose of ratification were the people. There was a profound distrust of legislatures, a consistent assertion that they were not competent to bind the people, and an unwillingness to trust the people's right to their action. Chief Justice Hughes, New York State Bar Association Bulletin, October, 1930, p. 433; Jameson, The Constitutional Convention, pp. 11–13; Ford, Essays on the Constitution, 139–140; Letters of a Landholder, I; 5 Elliot's Deb., 161, 163, 352–356, 364; 1 Farrand, pp. 122, 123, 126–127, 317, 325, 326; The Federalist, No. XXXIX, No. XLIII, No. XLIX.

The face of the convention record itself shows that the final form of Article V was never intended so to be read as to make the legislatures competent to grant to the United States new and direct powers of government over the people or their rights, or to enable Congress to choose the legislatures as agents for that purpose.

To ascertain the true significance of Article V the debates on the provision for amendment must be read in their entirety, and, furthermore, they must be read in connection with the debates on the provision for ratification of the Constitution itself, because these two discussions ran side by side throughout the convention, and the principles which control one are very pertinent to the meaning of the other. 5 Elliot's Deb., pp. 126–132, 157–158, 182–183, 189–190, 195, 199, 352–356, 374–376, 376–381, 498, 499–502, 530–534, 541, 551–553.

To those who framed the Constitution, the rights of the States as such and the rights of the people were two distinct and different things. Throughout their debates they had two objects foremost in their minds. First, to create an effective national government, which should avoid the weaknesses of the Confederation, and secondly, to protect the people and their rights from usurpation and tyranny by government. States' rights and people's rights were to be kept separate and distinct. And yet, Article V, construed literally, might lead to the result that the safeguards and the protection theretofore afforded to the people and their individual rights and liberties were placed forever beyond their control and within the domination of the legislatures of the States, whom they distrusted, and against which they so carefully guarded themselves.

If the Article be read in the light of the proceedings of the convention as a whole, its reasonable meaning cannot be doubted—that it provided alternative forms indeed, but alternatives to be used each in its proper sphere, well understood and well defined, which Congress was to

select, not as a matter of discretion, but purely as a ministerial or administrative act.

The view that Article V was never intended to enable legislatures to delegate to the United States new direct powers of government over the people is confirmed by reference to, and indeed is the only view consistent with, the Preamble and the general spirit and purpose of the instrument. And that view was publicly urged in order to secure adoption of the Constitution. 3 Farrand, p. 374; 5 Elliot's Deb., 127, 162, 355, *et passim.*

The great Federalist leaders had no conception that they had, by the particular language of Article V placed all individual constitutional rights, guarded in almost every State from any interference by the state legislatures, at the mercy of the legislatures of other States. They asserted that these rights were fully guarded by the facts that the new government would have only specifically delegated powers, and that the people were the recognized source from which alone further powers over themselves and their rights could come. 2 Elliot's Deb., pp. 434–435, 436, 443–444, 453–455, 456–458, 478–479, 497–498, 502, 523; *id.* p. 230; The Federalist, LXXXIV; 2 Elliot's Deb., pp. 78, 87–88, 93, 141, 162; 1 Annals of Cong. 433, 438–439, 706, 746; *id.* pp. 732–733, 758–759; *id.* 766; *id.* 88, The Federalist, XXXI; 1 Works of Hamilton, pp. 500–501.

The reservation in the Tenth Amendment eliminates any possibility of power of the legislatures to adopt amendments granting to the national government any additional powers over the people.

The whole great struggle over the adoption of the Constitution (save only in Rhode Island, and, questionably, in New York) was not over whether a national government, a more perfect union, should be created; but over whether the Constitution as proposed should be adopted

without being first amended so as to provide expressly that the new government should have no power to acquire additional powers over the people or their rights beyond those expressly conferred on it by the original instrument, without express consent of the people. It was only by public promises that such amendments would be made that adoption by the people of the requisite nine States was secured.

Although it was generally then assumed that the power of amendment was limited by the terms of the Preamble, the importance of express limitation of the power of amendment, so that no other construction could ever be placed on it, was specifically asserted.

The first ten amendments were adopted for the express purpose of safeguarding the people forever in these respects. They must be construed accordingly. *Barron* v. *Baltimore,* 7 Pet. 243, 250; *McCulloch* v. *Maryland,* 4 Wheat. 316, 431; Winthrop, Letter of Agrippa, Feb. 5, 1788; Ford, Essays on the Constitution, p. 122; Cf. 2 Farrand, 630.

If there were such unlimited powers in a few legislatures they could override every one of the reserved rights covered by the first ten amendments; they could change the government of limited powers into one of unlimited powers; they could declare themselves hereditary rulers; they could abolish religious freedom; they could abolish free speech and even the right of the people to petition for redress; they could not only abolish trial by jury, but even the right to a day in court.

None of us believes that any such absolute powers lawfully exist in any little band of legislators exercising federal functions. Somewhere in this great charter of liberty, there is something, overlooked in these recent days, even by this Court, which stands in the way of any such despotic powers. Where and what is that provision?

The principle that such restraints existed somewhere in the instrument was declared by Chief Justice Marshall in *Marbury* v. *Madison,* 1 Cranch 137, 176.

The whole literature of the period of the adoption of the Constitution and the first ten amendments is one great testimony to the insistence that the Constitution must be so amended as to safeguard unquestionably the rights and freedom of the people so as to secure from any future interference by the new government, or any extension of its powers, matters the people had not already given into its control, unless by their own consent. Long afterwards, in *Ex parte Milligan,* 4 Wall. 2, 120, their attitude was summed up by this Court. Cf. First Message of President Washington, 1 Mess. and Papers, Richardson, 1896, 53; 1 Benton's Abr. 47; *id.* 13; *Virginia Coupon Cases,* 114 U. S. 269, 332.

The phraseology of the Tenth Amendment was deliberately altered by Congress before its submission so as expressly to prevent any possible power of legislatures to adopt amendments granting any added powers over the people and their rights, which added powers lay only in the gift of the people. Carroll's alteration of the original draft of the Tenth Amendment asserted the supreme powers of the people as distinguished from those of the States. Roger Sherman's correction pointed the Tenth Amendment directly at the amending powers granted by the Fifth Article. The reservation " to the people " did not mean acting by votes of the legislatures, but meant acting in and through constitutional conventions chosen for the purpose. For over a century this idea permeated the decisions of this Court and the declarations of our greatest constitutional lawyers. 2 Cong. Reg. 167, 421; 1 Ann. of Cong. 768; *id.* 708–715; Letter of Agrippa to the Massachusetts Convention of February 5, 1788; Ford, Essays on the Constitution, p. 122.

Had unlimited power of amendment been delegated " to the United States," all the limitations on the national power, whether express or implied, would have been meaningless. *Marbury* v. *Madison,* 1 Cranch 137, 176.

If the Tenth Amendment did not reserve to the people the sole power to adopt amendments enlarging the powers of the Federal Government over themselves and their rights, what powers were thereby reserved to the people? Their power, their one life-giving part in the government, was the power to fix, delimit and confer the powers delegated to the new government. If that power was not reserved to them, nothing was " reserved to the people."

All the characteristic rights of freemen, subject only to the power of amendment, were, but for this power of amendment, safeguarded by the first nine amendments. That subject of rights had been exhausted, and so the Tenth Amendment drops the subject of rights and deals expressly and solely with powers, and, by Roger Sherman's correction, specifically with the power of amendment. This provision that only the people can surrender their rights or grant further powers over themselves, is the vital clause that makes this a government by the people.

That the amendments were adopted to put an end to the possibility of encroachments by the general government, and to prevent any exercise of governmental functions in a manner dangerous to liberty, Marshall declared in *Barron* v. *Baltimore,* 7 Pet. 243, 250. And this was long afterwards reiterated in *Ex parte Milligan,* 4 Wall. 2, 119–120. These declarations of the Supreme Court reach their culmination in *Turner* v. *Williams,* 194 U. S. 279, 295; and *Kansas* v. *Colorado,* 206 U. S. 46, 89–90.

The provisions of Article V did not declare that the legislatures would be agents or representatives of the people in voting on amendments. The people, if called on to act,

would act in conventions. The method of adoption by legislatures was an alternative method of adoption without referring the amendment to the people. This was the understanding at the time and was expressly declared in connection with the reservation "to the people" made by the Tenth Amendment. *Leser* v. *Garnett*, 258 U. S. 130, failed to note the reservation to the people by the 10th Amendment, and naturally so, since the Court was there dealing with powers lying in the gift of the States.

In this case of the Eighteenth Amendment, especially, the legislatures could not claim to act in behalf of or as representatives of the people, because it was expressly proposed "to the States," and not to the people. It is the only amendment of which this is true.

The rulings in *Hawke* v. *Smith, No. 1*, 253 U. S. 221, and *Leser* v. *Garnett*, 258 U. S. 130, are inconsistent with any theory that the legislatures, in voting on constitutional amendments, are acting as representatives of the people.

Where an amendment is expressly proposed to the States for adoption, and the people of the States are not permitted any possible voice or control in the matter of adoption by their legislature, it is a misuse of terms to say that the people have adopted the amendment, or that the people have, through a legislature over which they are permitted no control, exercised their own reserved power to grant added governing powers over themselves.

No other amendment to the Constitution has involved the question here presented, nor will the validity of any of the other amendments be impaired by an affirmance in this case.

The question of power now presented has not been argued to or considered by this Court. It has been passed *sub silentio* in all previous cases dealing with the Eighteenth Amendment. And they do not conclude this ques-

tion. Distinguishing: *Hawke* v. *Smith, No. 1,* 253 U. S. 221; *National Prohibition Cases,* 253 U. S. 350; *Dillon* v. *Gloss,* 256 U. S. 368.

By special leave of Court, briefs were filed by *Mr. Eliot Tuckerman, Mr. William H. Crichton-Clarke,* and *Mr. Jeremiah M. Evarts,* as *amici curiae.*

Mr. Justice Roberts delivered the opinion of the Court.

The United States prosecutes this appeal from an order of the District Court (U. S. C., Tit. 18, § 682; Tit. 28, § 345) quashing an indictment which charged appellees with unlawful transportation and possession of intoxicating liquors in violation of § 3 of Title II of the National Prohibition Act (U. S. C., Tit. 27, § 12).

That court held that the Eighteenth Amendment by authority of which the statute was enacted has not been ratified so as to become part of the Constitution.

The appellees contended in the court below, and here, that notwithstanding the plain language of Article V, conferring upon the Congress the choice of method of ratification, as between action by legislatures and by conventions, this Amendment could only be ratified by the latter.

They say that it was the intent of its framers, and the Constitution must, therefore, be taken impliedly to require, that proposed amendments conferring on the United States new direct powers over individuals shall be ratified in conventions; and that the Eighteenth is of this character. They reach this conclusion from the fact that the framers thought that ratification of the Constitution must be by the people in convention assembled and not by legislatures, as the latter were incompetent to surrender the personal liberties of the people to the new na-

tional government. From this and other considerations, hereinafter noticed, they ask us to hold that Article V means something different from what it plainly says.

In addition they urge, that if there be any doubt as to the correctness of their construction of Article V, the Tenth Amendment removes it.

The District Court refused to follow this reasoning. It quashed the indictment, not as a result of analysis of Article V and Amendment X, but by resorting to "political science," the "political thought" of the times, and a "scientific approach to the problem of government." These, it thought, compelled it to declare the convention method requisite for ratification of an amendment such as the Eighteenth. The appellees do not attempt to justify the lower court's action by the reasons it states, but by resubmitting to us those urged upon that court and by it rejected.

The United States asserts that Article V is clear in statement and in meaning, contains no ambiguity, and calls for no resort to rules of construction. A mere reading demonstrates that this is true. It provides two methods for proposing amendments. Congress may propose them by a vote of two-thirds of both houses; or, on the application of the legislatures of two-thirds of the States, must call a convention to propose them. Amendments proposed in either way become a part of the Constitution, "when ratified by the legislatures of three-fourths of the several States or by conventions in three-fourths thereof, *as the one or the other mode of ratification may be proposed by the Congress. . . .*"

The choice, therefore, of the mode of ratification, lies in the sole discretion of Congress. Appellees, however, point out that amendments may be of different kinds, as, *e. g.*, mere changes in the character of federal means or machinery, on the one hand, and matters affecting the liberty of the citizen on the other. They say that the

framers of the Constitution expected the former sort might be ratified by legislatures, since the States as entities would be wholly competent to agree to such alterations, whereas they intended that the latter must be referred to the people because not only of lack of power in the legislatures to ratify, but also because of doubt as to their truly representing the people. Counsel advert to the debates in the convention which had to do with the submission of the draft of the Constitution to the legislatures or to conventions, and show that the latter procedure was overwhelmingly adopted. They refer to many expressions in contemporary political literature and in the opinions of this court to the effect that the Constitution derives its sanctions from the people and from the people alone. In spite of the lack of substantial evidence as to the reasons for the changes in statement of Article V from its proposal until it took final form in the finished draft, they seek to import into the language of the Article dealing with amendments, the views of the convention with respect to the proper method of ratification of the instrument as a whole. They say that if the legislatures were considered incompetent to surrender the people's liberties when the ratification of the Constitution itself was involved, *a fortiori* they are incompetent now to make a further grant. Thus, however clear the phraseology of Article V, they urge we ought to insert into it a limitation on the discretion conferred on the Congress, so that it will read, "as the one or the other mode of ratification may be proposed by the Congress, as may be appropriate in view of the purpose of the proposed amendment." This can not be done.

The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition. *Martin*

v. *Hunter's Lessee,* 1 Wheat. 304; *Gibbons* v. *Ogden,* 9 Wheat. 1; *Brown* v. *Maryland,* 12 Wheat. 419; *Craig* v. *Missouri,* 4 Pet. 410; *Tennessee* v. *Whitworth,* 117 U. S. 139; *Lake County* v. *Rollins,* 130 U. S. 662; *Hodges* v. *United States,* 203 U. S. 1; *Edwards* v. *Cuba R. Co.,* 268 U. S. 628; *The Pocket Veto Case,* 279 U. S. 655; Story on the Constitution (5th ed.) § 451; Cooley's Constitutional Limitations (2nd ed.), pp. 61, 70.

If the framers of the instrument had any thought that amendments differing in purpose should be ratified in different ways, nothing would have been simpler than so to phrase Article V as to exclude implication or speculation. The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode of ratification is persuasive evidence that no qualification was intended.

This Court has repeatedly and consistently declared that the choice of mode rests solely in the discretion of Congress. *Dodge* v. *Woolsey,* 18 How. 331, 348; *Hawke* v. *Smith (No. 1),* 253 U. S. 221; *Dillon* v. *Gloss,* 256 U. S. 368; *National Prohibition Cases,* 253 U. S. 350. Appellees urge that what was said on the subject in the first three cases cited is *dictum.* And they argue that although in the last mentioned it was said the "Amendment *by lawful proposal and ratification,* has become part of the Constitution," the proposition they now present was not before the Court. While the language used in the earlier cases was not in the strict sense necessary to a decision, it is evident that Article V was carefully examined and that the Court's statements with respect to the power of Congress in proposing the mode of ratifi-

cation were not idly or lightly made. In the *National Prohibition Cases,* as shown by the briefs, the contentions now argued were made—the only difference between the presentation there and here being one of form rather than of substance.

The Tenth Amendment provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Appellees assert this language demonstrates that the people reserved to themselves powers over their own personal liberty, and that the legislatures are not competent to enlarge the powers of the federal government in that behalf. They deduce from this that the people never delegated to the Congress the unrestricted power of choosing the mode of ratification of a proposed amendment. But the argument is a complete *non sequitur.* The Fifth Article does not purport to delegate any governmental power to the United States, nor to withhold any from it. On the contrary, as pointed out in *Hawke* v. *Smith* (*No. 1*), *supra,* that Article is a grant of authority by the people to Congress, and not to the United States. It was submitted as part of the original draft of the Constitution to the people in conventions assembled. They deliberately made the grant of power to Congress in respect to the choice of the mode of ratification of amendments. Unless and until that Article be changed by amendment, Congress must function as the delegated agent of the people in the choice of the method of ratification.

The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified and has

no limited and special operation, as is contended, upon the people's delegation by Article V of certain functions to the Congress.

The United States relies upon the fact that every amendment has been adopted by the method pursued in respect of the Eighteenth. Appellees reply that all these save the Eighteenth dealt solely with governmental means and machinery rather than with the rights of the individual citizen. But we think that several amendments touch rights of the citizens, notably the Thirteenth, Fourteenth, Fifteenth, Sixteenth and Nineteenth, and in view of this, weight is to be given to the fact that these were adopted by the method now attacked. *The Pocket Veto Case, supra.*

For these reasons we reiterate what was said in the *National Prohibition Cases, supra,* that the "Amendment by lawful proposal and ratification, has become a part of the Constitution."

The order of the court below is

Reversed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

ISAACS, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF HENRIETTA E. CUNNINGHAM, BANKRUPT, *v.* HOBBS TIE & TIMBER COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 72. Argued January 23, 26, 1931.—Decided February 24, 1931.

1. Upon an adjudication of bankruptcy the title to and constructive possession of land belonging to the bankrupt and situate in another State vest in the trustee as of the date of the filing of the peti-

tion; jurisdiction to determine the validity and amount of a lien upon the land, and to decree the method of its liquidation, can not be taken thereafter by a state court. P. 737.

2. Where a suit to foreclose a mortgage on land was begun in a local state court after the owner had been declared bankrupt in the bankruptcy court in another State, and the trustee in bankruptcy, made a party to the suit, removed it, upon the ground of diversity of citizenship, to the federal court of the district in which it was brought and set up the bankruptcy adjudication, *held:*

(1) A valid defense, since the state court was without jurisdiction to proceed to foreclosure and sale, and the federal court, upon removal, had no higher or different right than the state court had had to interfere with the bankruptcy administration. P. 738.

(2) The trustee did not, and could not, waive the lack of jurisdiction in the state court by removing the case; because he was powerless to surrender the exclusive jurisdiction of the court of bankruptcy. P. 739.

District Court reversed.

On Certificate of a question of jurisdiction in a suit to foreclose a mortgage on land owned by a bankrupt. The suit was removed from a state court. This Court brought up the entire record from the Circuit Court of Appeals, 281 U. S. 703.

Mr. William R. Watkins for Isaacs, Trustee.

Mr. John R. Duty, with whom *Messrs. Claude Duty* and *W. N. Ivie* were on the brief, for Hobbs Tie & Timber Company.

Mr. Justice Roberts delivered the opinion of the Court.

In this cause the Circuit Court of Appeals certified the following question:

"After the bankruptcy court has acquired jurisdiction of the estate of the bankrupt and the referee therein has entered an order requiring sale, by the trustee, of all of the property of the bankrupt but before the trustee has taken any steps to sell land (part of such estate) en-

tirely located in another judicial district, can a suit to foreclose a valid mortgage thereon be commenced and an order of sale thereunder be made over the objection of the trustee, by the court of the latter district?"

This Court ordered that the entire record be sent up.

The question correctly states the issue tried in the District Court which entered the judgment from which the trustee appealed.

Henrietta E. Cunningham was adjudged bankrupt in the Northern District of Texas. The estate embraces land situate in the Western District of Arkansas. B. K. Isaacs was elected trustee. Thereafter appellee, the holder of a note secured by a mortgage on the said land, instituted foreclosure proceedings in a state court of Arkansas. It named the bankrupt and Isaacs, the trustee, as defendants, recited the bankruptcy proceeding in the Texas district, and that it had not filed its secured note as a claim therein.

The bankrupt and the trustee specially appeared and petitioned for removal of the cause to the United States District Court for the Western District of Arkansas. After removal the trustee filed an answer in which he set up, *inter alia*, his right and title as trustee, his lack of information as to the execution of the note and mortgage, and the fact that the land had been scheduled in the Texas District Court as an asset of the bankrupt. He further averred that as trustee he had taken and then held peaceable possession of the land; that there was an equity in the same above the mortgage debt; that a sale in foreclosure would prejudice the rights of general creditors; that he required time for investigation as to the most favorable method of sale; that neither he nor the bankruptcy court had consented to the foreclosure of the mortgage; that the bankruptcy court had entered an order authorizing him to sell the land; that that court had exclusive jurisdiction to ascertain the facts and administer the property; that the Federal District Court in Ar-

kansas could proceed no further than to ascertain the interests of the defendants, the validity of the mortgage lien, and the amount of the debt. The answer prayed that after these preliminary steps the court should refuse an order of sale, because of its want of jurisdiction to enter one.

On motion of the plaintiff the court struck out so much of the answer as sought to delay judgment and sale, and entered, on the pleadings, a decree of foreclosure and sale containing a proviso that if there should be any surplus of purchase-money, over the amount of the judgment, interest and costs, the same should be paid to the trustee.

Upon adjudication, title to the bankrupt's property vests in the trustee with actual or constructive possession, and is placed in the custody of the bankruptcy court. *Mueller* v. *Nugent*, 184 U. S. 1, 14. The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits. *Robertson* v. *Howard,* 229 U. S. 254, 259–260; *Wells* v. *Sharp,* 208 Fed. 393; *Galbraith* v. *Robson-Hilliard Grocery Co.,* 216 Fed. 842. It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate. It may order a sale of real estate lying outside the district. *Robertson* v. *Howard, supra; In re Wilka,* 131 Fed. 1004. When this jurisdiction has attached the court's possession cannot be affected by actions brought in other courts. *White* v. *Schloerb,* 178 U. S. 542; *Murphy* v. *Hofman Co.,* 211 U. S. 562; *Dayton* v. *Stanard,* 241 U. S. 588. This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and

that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property. *Murphy* v. *Hofman Co., supra; Wabash R. Co.* v. *Adelbert College,* 208 U. S. 38; *Harkin* v. *Brundage,* 276 U. S. 36. Thus, while valid liens existing at the time of the commencement of a bankruptcy proceeding are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to decree the method of their liquidation. *Ex parte City Bank of New Orleans,* 3 How. 292; *Houston* v. *City Bank of New Orleans,* 6 How. 486; *Ray* v. *Norseworthy,* 23 Wall. 128; *In re Wilka, supra; Nisbet* v. *Federal Title & T. Co.,* 229 Fed. 644. The exercise of this function necessarily forbids interference with it by foreclosure proceedings in other courts, which save for the bankruptcy proceeding would be competent to that end. As mortgaged property ordinarily lies within the district in which the bankruptcy court sits, and the mortgagee can consequently be served with its process, the procedure usually followed is for that court to restrain the institution of foreclosure proceedings in any other.[1] Where the land lies outside the limits of the district in which the bankruptcy court sits, ancillary proceedings may be instituted in the district court of the United States for the district in which the land is, and an injunction against foreclosure issued by the court of ancillary jurisdiction. *In re Patterson Lumber Company,* 228 Fed. 916; 247 Fed. 578. Compare *Security Mortgage Co.* v. *Powers,* 278 U. S. 149. Such injunctions are granted solely for the reason that the court in which foreclosure proceedings are instituted is without jurisdiction, after adjudi-

[1] *In re Pittelkow,* 92 Fed. 901. *In re Dana,* 167 Fed. 529. *In re Brown,* 196 Fed. 758. *Pugh* v. *Loisel,* 219 Fed. 417; certiorari denied, 238 U. S. 631. *Karasik* v. *People's Trust Co.,* 241 Fed. 939. *In re Larkin,* 252 Fed. 885. *In re Locust Building Co.,* 272 Fed. 988. *First Trust Co.* v. *Baylor,* 1 Fed. (2d) 24. *In re Southern Florida Corp.,* 16 Fed. (2d) 171. *In re Gillette,* 18 Fed. (2d) 687.

cation of bankruptcy, to deal with the land or liens upon it save by consent of the bankruptcy court. The appellant-trustee might have instituted ancillary proceedings in the District Court for the Western District of Arkansas and there obtained an injunction to restrain the appellee from foreclosing its mortgage. There is no reason, however, why he should not have followed the course here pursued, of pleading the adjudication in Texas in abatement of the foreclosure proceeding. The state court in which the foreclosure action was begun was without jurisdiction to pursue it. Upon removal into the federal court upon the ground of diversity of citizenship, the latter court had no higher or different right to interfere with the bankruptcy administration than had the state court. The answer of the trustee stated a valid defence and it was error to enter judgment against him on the pleadings.

Appellee asserts that inasmuch as the appellant removed the cause into the federal court he waived any lack of jurisdiction in that court and estopped himself to set up exclusive jurisdiction of the bankruptcy court. There is no merit in this contention. The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors. This fact places it beyond the power of the court's officers to oust it by surrender of property which has come into its possession. *Whitney* v. *Wenman,* 198 U. S. 539; *In re Schermerhorn,* 145 Fed. 341. Indeed, a court of bankruptcy itself is powerless to surrender its control of the administration of the estate. *U. S. Fidelity & G. Co.* v. *Bray,* 225 U. S. 205. The action of the trustee in removing the cause, could not, therefore, divest the Texas District Court of its jurisdiction.

The judgment of the District Court must be reversed and the cause remanded to that court, for further proceedings in conformity with this opinion.

Reversed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 333. Argued January 15, 16, 1931.—Decided February 25, 1931.

The Interstate Commerce Commission ordered interstate carriers to desist from the practice of hauling each other's private, or office, cars free or at other than published tariff rates, and amended its regulations to provide that a car pass may be issued only for cars owned by the issuing carrier or held by it under lease for use in its business as a common carrier. *Held:*

1. The findings of the Commission sustain its conclusion that (as a matter of fact) it is unjustly discriminatory to haul private cars of other carriers free, while charging for the movement of the private cars of individuals or of corporations not carriers. P. 748.

2. Such discrimination is not saved from the condemnation of § 3 (1) of the Interstate Commerce Act by the fact that the car hauled free belongs to another railroad and is occupied by its officials engaged about its business and whose free transportation as passengers is permitted by §§ 1 (7) and 22 (1) of the Act. P. 749.

3. Nor can it be said (on the facts found by the Commission) that, so far as the transportation of the private car itself is concerned, the service is not rendered under substantially similar circumstances and conditions whether the occupants have passes or pay for their transportation as passengers. P. 753.

4. On the findings of the Commission, there is no ground for treating the private car of one carrier, when being hauled by another carrier, as a facility of the hauling carrier and not as property being transported by it for the owner. P. 754.

5. Section 6 (1), requiring that the provisions as to published tariffs shall apply to all traffic, transportation and facilities defined in the Act, and § 3 (1), prohibiting discriminations, clearly embrace the practice in question when they are applied to the facts as now found by the Commission, and §§ 1 (7) and 22 (1) clearly do not justify it. P. 757.

6. The Act being thus free from ambiguity, it can not be construed as permitting the practice merely because the practice has been in good faith pursued by the carriers since a time antedating the Act, without correction by the Commission or by Congress. *Id.*

Affirmed.

APPEAL from a decree of the District Court, of three judges, dismissing a bill to set aside, in part, two orders of the Interstate Commerce Commission. The court below delivered a *per curiam* opinion which seems not to have been reported.

Mr. Alfred P. Thom, with whom *Messrs. Edward S. Jouett, R. V. Fletcher, John J. Cornwell, Robert B. Tunstall, H. N. Quigley,* and *Alfred P. Thom, Jr.,* were on the brief, for appellants.

Mr. Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, with whom *Solicitor General Thacher* and *Mr. Elmer B. Collins,* Special Assistant to the Attorney General, were on the brief, for the United States et al.

Mr. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This is an appeal from a decree of the District Court, constituted as required by statute, dismissing the petition of the appellants to set aside, in part, two orders of the Interstate Commerce Commission, which were made on November 4, 1929, and July 30, 1929, respectively.

The first mentioned order was made in a proceeding instituted by the Commission in December, 1925, on its own motion, for an investigation concerning the use of private passenger-train cars, including so-called office cars. A questionnaire was sent to all Class I and Class II carriers, and to switching and terminal carriers, calling for information "as to private passenger-train cars owned, leased or operated, the movement or use of such cars as were transported free or at less than tariff rates on home and foreign lines, and the occupants of such cars on respective trips." Returns were made by 387 carriers covering the calendar years 1923, 1924 and 1925. In July, 1928, a proposed report was served upon appellants and

all other carriers. Exceptions were filed by the Association of Railway Executives on behalf of its members, including the appellants; argument was heard and the matter submitted to the Commission. Its report was issued on June 21, 1929, setting forth the Commission's findings and conclusions. 155 I. C. C. 775. After waiver by the carriers of further hearing before the Commission, the order in question was entered requiring the carriers named, including these appellants, "to cease and desist, on or before January 15, 1930, and thereafter to abstain, from the transportation or movement of private passenger train cars, including so-called office cars, of another carrier free or at other than published tariff rates."

The other order of the Commission under attack, that is, the order of July 30, 1929, amended the Commission's regulations, governing the form and recording of passes, by the insertion of the following: "A car pass may be issued only for cars owned by the issuing carrier or held by it under lease for use in its business as a common carrier. It may not be issued for other cars. This provision is not to be construed as prohibiting the issuance of passes for cars of lines operated as a part of the same system. See In the Matter of Private Passenger Train Cars, 155 I. C. C. 775."

The case was tried in the District Court on the facts detailed in the report of the Commission as to the practices of the carriers, and as to these facts there was no dispute. The court concluded that the practice condemned by the Commission was a matter within its jurisdiction, and that, the order being supported by substantial evidence, the court was without power to interfere.

The evidence before the Commission consisted of the returns of the carriers to its questionnaire. These returns contained a vast amount of statistical data, differing in details but practically the same in substance, which were reviewed and tabulated in the Commission's report. The Commission found, in substance, that carriers transported

free of charge the private, or office, cars [1] of other carriers when occupied by persons for whose transportation it was lawful to issue a pass; that carriers also provided accessorial transportation of such cars free of charge when they were moved "deadhead" to stations where they were to be occupied, or to their home stations after occupancy, and also in switching and storing the cars. The wide extent of the practice and the abuses attending it were shown.[2] The Commission referred to the proposal of the

[1] The Commission's report and order described the cars in question as private passenger-train cars, or private passenger cars, including so-called office cars. The reference is to the private, or office, cars of carriers as distinguished from cars privately owned by persons and corporations other than railroad companies.

[2] The Commission's report states (in part): "The returns show that a substantial portion of the total mileage of private passenger-train cars, including so-called office cars, herein referred to collectively as private cars, was on the lines of carriers other than those owning the cars. The private cars thus moved over foreign lines were transported without charge. In other words, a pass was issued covering transportation of the private cars similar to that issued for the transportation of certain classes of persons as provided for in sections 1 and 22 of the act. . . .

"It will be understood that a private car includes a kitchen, dining room, staterooms, and observation or sitting room, together with storage space and sleeping quarters for the cook and attendants. The facilities thus provided for those traveling in private cars excel the facilities of the ordinary coach or Pullman car.

"The returns . . . show that the occupants of private cars are not restricted to officials and employees of the carriers but include in a large number of cases the families, relatives, and friends of railway officials traveling on passes or on tickets that would in most cases entitle them only to transportation in the ordinary coach." (The report cites many instances of the movement of such cars when in charge of the wives of officials and the widows of deceased officials.) . . .

"There is also a substantial use of private cars, both on home and foreign lines, by directors of carriers. . . .

"The movement of private cars to resorts commonly patronized by those seeking recreation or amusement, and located on foreign

carriers to undertake the correction of such abuses, and stated that the Commission was concerned primarily with the legality of the free transportation of the private cars of other carriers.

With respect to the transportation of privately owned cars, that is, of cars owned by others than carriers, or of cars chartered for the exclusive use of special parties, the Commission found that such cars were transported in pas-

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lines, is very noticeable. . . . There is also an extensive use of private cars by short lines, industrial roads, and lines owned, controlled, or used in the interest of some particular business. The mileage of private cars used by the latter lines is largely on foreign lines, and in numerous instances the home stations of the cars and the movements thereof are so far removed from the vicinity of the owning road that it is difficult to conceive the circumstances under which such movements could have been in the interest of or connected with the operation of the road owning the car. . . .

"The returns show that a substantial portion of the total mileage of private cars, especially on foreign lines, was what is commonly referred to as 'deadhead' mileage, that is, the cars were not occupied, except in some instances by an attendant. The purpose of such movements is to return the cars to their home stations or to move them to stations where they are to be occupied. . . . The returns show numerous instances where private cars were deadheaded to and from off-line shops without charge. Also worthy of consideration is the matter of free switching service and free storage for private cars. A large number of the private cars covered by the returns are held at off-line stations when not in use. Many are so held at New York and the returns indicate that the matter of storage and switching of these cars is of considerable importance from the standpoint of operating expenditures. In numerous cases cars were rented from the Pullman Company by officers of carriers, and such cars were moved without charge by the carriers. . . .

"The private cars of railroad officials are intended to be offices on wheels for those whose duties require considerable travel over the line and when used for that purpose are an important facility for carrying on the business of the road. It is seldom, however, that these duties necessitate a movement of the car over other lines. In some cases such a movement may be justified for business reasons; for example, where it avoids a very circuitous haul over the

senger trains under tariffs which provided for certain minimum revenues,[3] and that these charges were intended to cover the service of transporting the cars, that is, "to

home line. But the returns to our questionnaire indicate that private cars are often used for other than business purposes by railroad officers, their relatives, and friends. Moreover, they appear to be used in some instances for the benefit of an industry which controls the railroad. In other instances, their use in entertaining shippers may be for the purpose of obtaining business for the railroad. These and other abuses are apparent from the returns, but we are here concerned primarily with the legality of the free transportation of the private cars of other carriers." 155 I. C. C., pp. 776, 778, 779, 781, 782, 783.

[3] The Commission stated: "Special, privately owned, or chartered cars for the exclusive use of special parties are transported in passenger trains under tariffs which provide for certain minimum revenues. In the case of sleeping and parlor cars, charges for a one-way movement are based on the authorized fare for each passenger, with a minimum of 25 adult fares, but not less than $42 for the car and party. The charges for a round-trip movement are similar, except the 25 fares are doubled or must be for the round trip, and the minimum revenue is $84. In either case, the surcharge must be paid for each passenger, with a minimum of 25 surcharges, but this is not used in computing the minimum revenue per car. When a car is moved empty or in charge of porter or other attendants, charges are assessed on the basis of 10 regular adult one-way fares, plus the authorized fare for each porter or attendant, except not more than three employees of common carriers may be carried free. In this case also the minimum revenue is $42, including fares of attendants, but the surcharge is not collected. In some of the tariffs the charges for empty movements apply to carrier-owned as well as privately owned equipment. The tariffs also provide for application of the minimum fares and revenue on carrier-owned cars equipped for certain special purposes, such as advertising, exhibition, instruction, and the like. These are the provisions generally in effect, although there may be variations on individual lines. The term privately owned cars is not defined in the tariffs, but its obvious meaning is cars owned by others than the carriers. Apparently a private car owned by an individual even though a railroad official would be subject to the tariff charges on privately owned cars. . . ." 155 I. C. C., pp. 787, 788.

compensate for the movement of the car rather than its contents."[4] The Commission concluded that the transportation of the private cars of other carriers free, or at less than published rates, while making charges for the movement of privately owned or chartered cars, was unjustly discriminatory.

Treating the private, or office, cars of other carriers as property, to which the provisions of the Interstate Commerce Act applied, and considering that the free transportation of property was lawful only in the exceptions provided in section 22 of the Interstate Commerce Act, the Commission concluded that the transportation of such cars free, or at other than published tariff rates, was a violation of the Act. The Commission pointed out that its finding " does not extend to the point of saying that it is unlawful for private cars of one carrier to be transported over the lines of other carriers, but is confined to the assertion that under existing law the transportation of private cars on foreign lines should be paid for through the assessment of a just and reasonable charge." 155 I. C. C. p. 793.

The conclusions of the Commission were thus summarized in its order of November 4, 1929:

" 1. That the transportation or movement of private passenger cars, including so-called office cars, of one car-

[4] The Commission said on this point: "As heretofore pointed out, the tariffs provide certain minimum fares and revenues for the movement of special, privately owned, or chartered cars, which are evidently intended to cover the service of transporting the car. This is apparent from the fact that the charges are the same whether the car is occupied by 1 passenger or 25. Especially in the case of cars moving empty or in charge of porter, it is manifest that the minimum fares and revenue are intended to compensate for the movement of the car rather than its contents. Apparently the only material difference between the cars on which these minimum charges apply and the private cars of other carriers is the matter of who owns or is using them." 155 I. C. C., p. 792.

rier subject to the Interstate Commerce Act by another such carrier free or at other than published tariff rates is contrary to the provisions of the Interstate Commerce Act;

"2. That it is unjustly discriminatory and unduly preferential and prejudicial to haul such private cars of other carriers free, or at less than published tariff rates, while charging certain minimum fares and revenues for the movement of privately owned or chartered cars; and

"3. That the transportation of persons in such private passenger cars, including berth and other accommodations, at the rate charged passengers provided only with ordinary coach accommodations is unjustly discriminatory and unduly preferential and prejudicial."

Appellants state that they are not attacking the third of these propositions; that is, there is no effort in this suit to set aside that part of the Commission's order which relates to the transporting of revenue passengers in business cars at the rate charged passengers holding tickets which are good only in the coach. The appellants say that it is the purpose of the carriers to remove this discrimination in some satisfactory way.

The first two propositions are those in controversy. The appellants confine their complaint in this Court to the aspect of the Commission's order which holds unlawful the movement by a carrier subject to the Act "of the private or business car of another such carrier when such car is occupied by a person using, and lawfully entitled to use, free transportation." A similar position is taken with respect to the other order of the Commission (of July 30, 1929), amending the Commission's regulations as to passes.

With the premise that the Commission has no authority except that delegated to it by the Congress, the appellants contend (1) that the movement under consideration "is not a shipment of property subject to section 6 of the

Interstate Commerce Act, which relates to property shipments"; and (2) that "the transaction here involved does not violate the discrimination provisions" of the Act.

We may first consider the question of unjust discrimination. It is not open to dispute that there is discrimination in fact. The findings of the Commission are decisive upon that point. The tariffs of the carriers provide for certain minimum fares and revenues for the movement of the private cars of individuals and of corporations other than those of other carriers. These charges, as the Commission found, cover the service of transporting the car and not simply the passengers. "Apparently," said the Commission, "the only material difference between the cars on which these minimum charges apply and the private cars of other carriers is the matter of who owns or is using them." The Commission found that this discrimination is unjust and, so far as this is a question of fact, it does not appear that the finding lacks adequate support. The appellants emphasize the convenience to railroad officials of the existing practice. It is said that much of a railroad officer's time is spent in traveling, not only over his own lines, but to points on the lines of other railroads, in connection with questions of management and operation, as well as of financial and other executive policies of importance to all the railroads; that he must attend meetings and conferences, and hearings before Commissions; that during such journeys, which frequently cover long periods, he is handling mail and business documents, and is giving attention to the conduct of his railroad work; and that he must take with him voluminous papers, and office assistants. It is also pointed out that inspection of the properties of other carriers is necessary to good management and has high educational value. But, if it be assumed that the existing practice is a convenience to railroad officials, still it does not appear that the convenience is essentially one peculiar to

their case. The finding of the Commission is that, while the use of private cars of railroad officials as "offices on wheels for those whose duties require considerable travel over the line," is an important facility for carrying on the business of the road, "it is seldom, however, that these duties necessitate a movement of the car over other lines." And it is a matter of common knowledge that there are large enterprises, other than railroads, extending throughout the country, or large portions of it, and requiring executive supervision; that there are numerous meetings and conferences, held in different parts of the country, of national organizations representing undertakings which are nation-wide in scope; and that those charged with administrative responsibilities in important activities must give appropriate attention to them while on their travels in the discharge of their duties or in the promotion of the interests confided to their care. Discrimination by a carrier with respect to the movement of private cars over its line, in favor of the officials of other railroad companies, and against all others who may desire the transportation of such private cars for their convenience, would require evidence to justify it (unless it can be deemed to lie outside the purview of the statute) and that evidence is lacking. We perceive no ground for disturbing the finding of the Commission as to unjust discrimination, unless it can be said as matter of law that there was none; that is, that the difference in treatment was one which was sanctioned by the Interstate Commerce Act. It is the contention of the appellants that the practice has this sanction.

The legislative history of the Interstate Commerce Act shows clearly that the evil of discrimination was the principal thing aimed at. Senate Report No. 46, 49th Cong., 1st sess., p. 215. See *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 597. This Court has said that the language of the Act "is certainly sweeping enough

to embrace all the discriminations of the sort described which it was within the power of Congress to condemn." [5] *The Shreveport Case,* 234 U. S. 342, 356. Section 3 provides that "it shall be unlawful for any common carrier . . . to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever." The prohibition, of course, does not reach the exceptional cases for which provision is made by sections 1 and 22 of the Act with respect to passes.[6] These provisions relate to the transportation,

[5] "Sec. 2. If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful". U. S. C., Tit. 49, § 2.

"Sec. 3 (1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." U. S. C., Tit. 49, § 3.

[6] "Sec. 1. . . . (7) No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and per-

free or at reduced rates, of the persons and property there described. Neither section provides for the free transportation of private cars. If discrimination, which would

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sons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees, and their families of other common carriers subject to the provisions of this chapter: *Provided further*, That the term 'employees' as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term 'families' as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. . . ." U. S. C., Tit., 49, § 1 (7).

"Sec. 22. (1) Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the

otherwise be unjust and condemned by the Act, can be deemed to be saved by the exceptions stated, it must be either because the transportation of a private car is to be regarded as incidental to the free transportation of a passenger who may hold a pass, or because the transportation of a private car occupied by a passenger with a pass is not a service rendered under circumstances and conditions substantially similar to those of the transportation of a private car with passengers paying fares.

Neither of these propositions is tenable. The pass which the statute allows is in lieu of the passenger's fare and is for the transportation of the passenger. The terms of the statutory permission go no further. Passes may be given under the statute to a variety of persons, including not only the principal officers of railroad companies but the agents and employees of common carriers, and their families, including among others, for example, furloughed and superannuated employees, and those who have become disabled or infirm in the service of a carrier, and also " the families of persons killed, and the widows during

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United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this chapter shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes. Nothing in this chapter shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; . . ." U. S. C., Tit. 49, § 22 (1).

widowhood and minor children during minority of persons who died, while in the service of any such common carrier." It would hardly be thought a reasonable contention that the transportation of a private car should be deemed incidental to the free transportation of all the persons in the categories mentioned. But so far as the pass *per se* is concerned, the hauling of a private car occupied by such a person is as much, and as little, incidental to the pass in one case as in any other. Even in the case of a railroad official, it appears that if he owns the private car, its transportation would be subject to the tariff charges on privately owned cars, (155 I. C. C. p. 788). The distinction, then, must be found, not in the fact that a pass may be issued for the transportation of the passenger, or that the passenger is a railroad official, but in the fact that the private car in which the holder of the pass is traveling belongs to another carrier. We find nothing in the terms of the statute recognizing such a differentiation. See *New York, N. H. & H. R. Co.* v. *Interstate Commerce Comm.*, 200 U. S. 361; *Interstate Commerce Comm.* v. *Baltimore & Ohio R. Co.*, 225 U. S. 326, 341, 342.

Nor can it be said that so far as the transportation of the private car itself is concerned, the service is not rendered under substantially similar circumstances and conditions whether the occupants have passes or pay for their transportation as passengers. The circumstances and conditions relating to the transportation of the cars, *as such*, are alike. The cars are hauled between the same points, on the same line, in the same or like passenger trains, and in the same manner.

The appellants' contention rests largely upon the long continuance of the practice of the carriers to transport the private, or office, cars of other carriers free of charge, and upon the fact that the Interstate Commerce Commission has not only not interfered with the practice here-

tofore, but has apparently sanctioned it by its regulations in recognizing passes for such cars. The argument based on this asserted sanction is addressed both to the conclusion of the Commission that the movement of such cars free, or at other than published tariff rates, is contrary to the provisions of the Interstate Commerce Act, and to the conclusion of the Commission as to unjust discrimination. It is said that in view of the nature of the subject of the transportation, and especially in the light of past administrative construction, the Act should be construed as not forbidding the free transportation of the cars in question, and that, if it is lawful to move the carrier-owned car free, no unlawful discriminatory conditions arise from the difference of treatment of privately owned cars. In this view, the right of free transportation of the cars in question is made the fundamental consideration and we pass to the examination of that question.

Supporting their contention in this respect, the appellants argue that the movement of the private, or office, car of another carrier is not a shipment of property; that such a car in the movement under consideration is to be regarded as a facility of the carrying line, ranking as its own for the purposes of the service. The Commission dealt with the question when railway equipment generally may be transported without charge. The Commission said that, of course, a carrier may transport its own property without the payment of tariff charges; that, likewise, property which is hired or rented for the performance of its common-carrier duties may be transported in the same way as property which it owns. The Commission reviewed the terms on which freight cars and passenger cars move over foreign lines. It found that " so long as a car is being handled for revenue purposes, it is in service and not subject to charges; but when it is transported

solely for the benefit of the owning line, the latter must pay for such transportation on another line." The Commission further found that " the criterion for determining when a passenger car is in service would seem to be the same as in the case of a freight car; that is, whether the car is being handled for revenue purposes in the interest of all the carriers in the through route or solely for the benefit of the owning line." 155 I. C. C., pp. 786, 787. After referring to the tariff charges for the movement of " special, privately owned, or chartered cars for the exclusive use of special parties " when transported in passenger trains,[7] the Commission reached the following conclusion: " It will be seen from the foregoing that tariff charges are provided for the transportation in freight trains of both carrier and privately owned cars of all kinds, when they are handled solely for the benefit of the owner and not for revenue purposes. It would not be seriously urged that such transportation could be rendered free if an attendant or other person having a pass should ride in the car. The tariffs also provide minimum charges for the transportation in passenger trains of special, privately owned, or chartered cars for the exclusive use of special parties. Apparently these minimum charges would not be lessened or affected in any way if a person or persons having passes should ride in the car. All of these charges show that there is nothing in the nature of railway equipment which justifies its transportation without charge, except when it is being handled for revenue purposes in the interest of the carrier performing the service. Even then the revenue from a passenger car used exclusively by a special party must be sufficient to warrant its transportation. . . . The transportation of a private car of another carrier is ordinarily for the benefit of the owning line or its officials and not for revenue purposes. While

[7] See Note 3.

ticket passengers may sometimes occupy such a car, they do so by invitation, and the carrier performing the transportation is not at liberty to make use of the car by putting other passengers in it. The returns to our questionnaire indicate that it is seldom, if ever, that the number of ticket passengers is sufficient to make the hauling of the private car of another carrier profitable to the carrier performing the service. This is further indicated by the additional fact that such passengers apparently do not pay the surcharge, which is assessed on persons riding in Pullman and privately owned or chartered cars. Indeed, the few ticket passengers sometimes riding in the private car of another carrier could probably be accommodated in other equipment that must be hauled anyhow, and the transporting carrier would receive more revenue if they rode in an ordinary Pullman car. Under these circumstances a carrier hauling the private car of another line can not be said to have hired its use, as it would have no interest in doing so and pays no rental therefor. Even if car hire should be provided on private cars, it would obviously be a mere subterfuge which could not change the legality of the practice. Our conclusion is that the transportation of the private car of another carrier is not of such advantage to the carrier performing the service as to warrant its peformance without charge, on the same principle as the free handling of revenue-producing equipment." *Id.*, pp. 788, 789. On the findings of the Commission, we perceive no ground for the conclusion that the cars in question are to be treated merely as a facility of the carrying line and not as property transported.

The Commission referred to the argument that the carriers had always hauled the private cars of other lines without charge, and that this practice had been well known to the Commission and had been expressly approved by it. Endeavoring to meet the contention that the Commission in its conference rulings and pass regula-

tions of 1917 had prescribed a form of pass for railway officials and employees, which included the word "car," and which, as the carriers asserted, applied to foreign-line cars, the Commission said that the form of pass should be given a construction in harmony with the law and that the Commission "never intended to approve the practice of issuing passes for the private cars of other lines." There is, however, no question as to the long-continued practice of transporting the private cars of other lines without charge, and it would seem that the form of pass prescribed by the Commission was available and was used in this practice. The Commission stated that this was the first time that the lawfulness of the practice of issuing passes for foreign-line private cars had been brought in issue before it, but the Commission recognized that the practice prevailed at the time of the passage of the Act to Regulate Commerce and had been continued. It appears that prior to this proceeding, the Commission had not attempted to disturb it.

The Act has been repeatedly amended, and has been reënacted, without any change directed to the correction of this practice. It is strongly urged that in the light of these circumstances the administrative construction should be determinative. The principle is a familiar one that in the interpretation of a doubtful or ambiguous statute the long continued and uniform practice of the authorities charged with its administration is entitled to great weight and will not be disturbed except for cogent reasons. *Logan* v. *Davis,* 233 U. S. 613, 627; *Kern River Co.* v. *United States,* 257 U. S. 147, 154; *Swendig* v. *Washington Water Power Co.,* 265 U. S. 322, 331; *United States* v. *Minnesota,* 270 U. S. 181, 205; *Wisconsin* v. *Illinois,* 278 U. S. 367, 413. But that principle does not go far enough to control the decision here. There is no ambiguity in the requirement of section 6 (1) of the Act that its provisions as to published tariffs "shall apply to all traffic, transpor-

tation, and facilities defined in this Act." Whether the private, or office, cars of other carriers are to be deemed property transported, or a facility of the carrying line, depends upon the circumstances of the carriage as matters of fact, and when the facts have been resolved by the Commission upon evidence, there is no escape from the application of the broad provision of the statute. Similarly, there is no ambiguity, so far as the terms of the provision of section 3 (1) are concerned, in its prohibition of discriminations, when it has been found as a fact that these cars are transported for the benefit of the owning line and do not belong in the category of the facilities of the carrying line, and that transporting them free of charge constitutes an unjust discrimination, as compared with the tariff charges for the transportation of privately owned cars. Nor are the provisions of sections 1 (7) and 22 (1) to be deemed ambiguous by reason of the omission of private, or office, cars owned by carriers from the specification of persons or property that may be carried free. The omission simply takes the cars out of the provisions of the sections. Whatever doubt or uncertainty attached to the application of the provision of the Act to the transactions under review lay in the appreciation of the facts, and appropriate action thereon, and not in the interpretation of the terms of the law after the facts have been ascertained. Thus, in *American Express Co.* v. *United States,* 212 U. S. 522, it was argued by the appellants that the custom of express companies to issue such passes as were there in question was one of long standing and presumably known to Congress; that there was no record of any protest against it to or by the Interstate Commerce Commission, or to Congress, nor any suggestion in any speech or report that it was supposed to be detrimental to the public interest, or that it was intended to be prohibited; that there was no direct or express pro-

hibition in the statute, but, on the contrary, the Interstate Commerce Act recognized and always had recognized that the granting of similar privileges to the officers and employees of railroad companies was consistent with sound public policy. (p. 523.) And this Court stated in its opinion that the facts were not seriously in dispute, and showed that it had been the custom of express companies for many years to issue franks such as were embraced in the proceeding. (p. 529.) But this Court held that, in view of the all-embracing prohibition of the Act, it could not be doubted that the transportation of property, such as was shown in that case, upon franks issued by the express companies, was within the terms of the Act. If the practice could be deemed to be lawful, the Court said that the right must be founded upon some exception incorporated in the statute. The Court found no such exception and gave effect to the Act according to its terms.

Long continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed. A failure to enforce the law does not change it. The good faith of the carriers in the transactions of the past may be unquestioned, but that does not justify the continuance of the practice.

We are of the opinion that the order of the Commission of November 4, 1929, was within its authority. For similar reasons, we conclude that the Commission had power to revise its regulation as to passes in the manner provided by the order of July 30, 1929.

Decree affirmed.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE SUTHERLAND are of opinion that the decree of the court below should be reversed.

KANSAS CITY SOUTHERN RAILWAY COMPANY ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 517. Argued January 16, 1931.—Decided February 25, 1931.

1. The pendency in a District Court of a suit by carriers under the Urgent Deficiencies Act of October 22, 1913 (U. S. C., Title 28, § 43) to set aside an order of the Interstate Commerce Commission does not prevent the District Court of another district from entertaining jurisdiction of a suit for the same relief brought, in accordance with the venue provisions of the Act, by other carriers entitled to attack the order. P. 762.
2. When such a suit has been brought in one venue, carriers entitled to attack the order in another venue may intervene in that suit. U. S. C., Title 28, § 45a. P. 763.
3. When two such suits to set aside the same order have been brought in different venues, the District Court in the later suit is to exercise a sound discretion in determining whether to proceed or to await the outcome of the earlier one, to the end that there shall not be a multiplicity of suits without substantial reason. P. 763.
4. Sound discretion was not abused in the present case by proceeding to judgment, since the pendency of the earlier suit was not raised until the defendants set up the decree therein as an affirmative defense in this one, several months after this suit was begun and on the day of final hearing. P. 764.
5. A common carrier dealing with transportation that is subject to the Interstate Commerce Act cannot escape its statutory obligations by calling itself a private carrier as to such transportation; and this applies to transactions with other carriers. P. 764.
6. Order of the Interstate Commerce Commission directing carriers to desist from transporting free the private, or office, cars of other carriers, sustained on the authority of *Louisville & Nashville R. Co.* v. *United States, ante,* p. 740. P. 764.
7. Objection that the Commission's order regulates movements of office cars in intrastate commerce, rejected because not made in the bill and because no reason for construing the order as intended to embrace transportation not within the purview of the Interstate Commerce Act is disclosed by the record. P. 765.

Affirmed.

APPEAL from a decree of the District Court, of three judges, dismissing a bill to set aside, in part, two orders of the Interstate Commerce Commission. The court below delivered a *per curiam* opinion which seems not to have been reported.

Mr. Samuel W. Moore, with whom *Messrs. Frank H. Moore* and *Cyrus Crane* were on the brief, for appellants.

Mr. Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, with whom *Solicitor General Thacher, Assistant to the Attorney General O'Brian,* and *Mr. Nelson Thomas* were on the brief, for the United States et al.

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

This suit was brought to set aside two orders of the Interstate Commerce Commission of November 4, 1929, and July 30, 1929, respectively (155 I. C. C. 775), relating to the transportation by carriers subject to the Interstate Commerce Act of private passenger-train cars, including so-called office cars, of other carriers free or at other than published tariff rates. The orders are the same as those under review in *Louisville & Nashville R. Co.* v. *United States, ante,* p. 740. Treating the two orders, which deal with the same subject matter, as substantially one requirement, the appellants challenge it " so far as it prohibits the movement of an office car of another carrier upon such terms as the interested parties may mutually agree upon, when such office car is occupied exclusively by officers and employees of the company owning the car and traveling upon business in connection with the operation of their own railroad." They also object to so much of the order as purports to regulate movements which are strictly intrastate. The District Court,

constituted as required by statute, sustained the orders of the Commission and dismissed the petition.

This suit in the District Court for the Western District of Missouri was begun in February, 1930, sometime after the suit of the *Louisville & Nashville R. Co., supra,* assailing the same orders, was brought in the District Court for the Western District of Kentucky. The petitioners in both suits were parties to the proceeding in which the orders of the Commission were made. The United States and the Interstate Commerce Commission made no reference in their answers in the present case to the pendency of the earlier suit, but after decree in that suit the Commission amended its answer herein, setting up that decision as an affirmative defense. The defense was that the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 208, 219–221; U. S. C. Tit. 28, §§ 43–47) which transferred to the several District Courts the jurisdiction to enjoin orders of the Commission, a jurisdiction formerly vested in the Commerce Court, was not intended to create conflicting jurisdictions among the several District Courts and, after the jurisdiction of one District Court had been unsuccessfully invoked to enjoin an order of the Commission, to permit the jurisdiction of another District Court subsequently invoked to be exercised for a similar purpose.

It is unnecessary to review the history of the legislation authorizing suits to be brought to set aside orders of the Interstate Commerce Commission. The effect of the Urgent Deficiencies Act was to redistribute the jurisdiction of the Commerce Court. *Vicksburg, Shreveport & P. Ry. Co.* v. *Anderson-Tully Co.,* 256 U. S. 408, 414. The venue provisions of the Urgent Deficiencies Act (U. S. C., Tit. 28, § 43) are as follows:

"The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial dis-

trict wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be construed as meaning final destination of such shipment."

We find no provision of the applicable statutes which deprives a District Court of jurisdiction of a suit brought by a party entitled to attack an order of the Interstate Commerce Commission in accordance with these provisions as to venue. But the existence of jurisdiction does not mean that it must be exercised and that grounds may not be shown for staying the hand of the Court. Compare *Langnes* v. *Green, ante,* p. 531. The appellants, upon proper application could have been allowed to intervene in the earlier suit brought for the same purpose in the District Court for the Western District of Kentucky (U. S. C., Tit. 28, § 45a) and could have presented there all of their grounds of attack upon the orders in question. The orders of the Interstate Commerce Commission may apply throughout the country, and there may be cases where the convenience of the parties and the interests of justice may make appropriate separate suits by different parties affected by the same order. The question is thus one for the sound discretion of the District Court, in which such a suit is brought, to determine whether it should be permitted to continue or proceedings therein should be stayed, pending the final outcome of

an earlier suit for the same purpose, to the end that there may not be a multiplicity of suits without substantial reason. As, however, the defendants here did not raise the question of the pendency of the earlier suit until the day of final hearing, several months after the suit was begun, we see no reason for disturbing the action of the District Court in this respect.

Upon the merits, the appellants present the argument that a railway company, in the transportation or movement of an office car of another carrier, acts in the capacity of a private carrier, or bailee, and retains full freedom of contract in relation to such transportation. There is no doubt that common carriers subject to the Interstate Commerce Act may have activities which lie outside the performance of their duties as common carriers and are not subject to the provisions of the Act. *Santa Fe, Prescott & P. Ry. Co.* v. *Grant Brothers Constr. Co.*, 228 U. S. 177, 188; *Terminal Taxicab Co.* v. *Public Utilities Comm.*, 241 U. S. 252. But a common carrier dealing with transportation that is subject to the Act cannot escape its statutory obligations by calling itself a private carrier as to such transportation. This applies to its transactions with other carriers. See *New York, N. H. & H. R. Co.* v. *Interstate Commerce Comm.*, 200 U. S. 361, 391, 392; *Interstate Commerce Comm.* v. *Baltimore & Ohio R. Co.*, 225 U. S. 326, 341, 342. Upon grounds which have been stated in the opinion of the Court in the *Louisville & Nashville* case, *supra,* we have concluded that, in view of the facts found by the Commission, the transportation of the cars in question falls within the provisions of the Interstate Commerce Act, and that the order of the Commission in directing the carriers to cease and desist from transporting such cars free or at less than published transportation rates was within its authority.

With respect to the contention that the Commission's order undertakes to regulate movements of office cars in

intrastate commerce, it is enough to say that no such complaint was made in the petition in this suit. The Commission's order is construed as intended to apply to transportation within the purview of the Interstate Commerce Act, and no different application of it is disclosed by the record.

Decree affirmed.

ABIE STATE BANK *v.* BRYAN, GOVERNOR OF NEBRASKA, ET AL.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

No. 63. Argued January 22, 23, 1931.—Decided February 25, 1931.

1. A decision of this Court, rendered soon after the enactment of a state law by which state banks were assessed for the establishment and maintenance of a common fund for the protection of depositors, and upholding it as a then valid police regulation, does not preclude banks on whose behalf the question was litigated from maintaining a subsequent suit to test the validity of later assessments in the light of later experience. P. 772.
2. The State Supreme Court, deciding that the state bank guaranty law was not repugnant to the Fourteenth Amendment, ruled also that the plaintiff banks were estopped by their conduct from assailing its validity. *Held* that the latter is not an independent non-federal ground broad enough to sustain the judgment but is interwoven with the federal question, and, therefore, this Court has jurisdiction to review the case. P. 772.
3. The principle that a police regulation, valid when adopted, may become invalid because in its operation it has proved to be confiscatory, implies that the right of protest when the regulation becomes intolerable is not forfeited by earlier compliance with it. P. 776.

   So *held* where state banks, after defeat of their effort to have the state bank guaranty law declared unconstitutional, endeavored to do business under it and therein advertised its purposes and the contemplated advantages that led to its enactment, but later, in the light of further experience, sued again to have it set aside.
4. On appeal from a state court, this Court takes judicial notice of statutes of that State, including those passed after the appeal was taken. P. 778.

5. A case appealed here and involving the right of appellant banks to enjoin, as confiscatory, the collection of specified assessments under a state bank guaranty statute, is not made moot by a statute, enacted after the appeal, repealing the section under which such assessments were made and otherwise modifying the old law, but retaining in force the assessments immediately complained of and leaving open the question whether, notwithstanding the changed situation, they are unconstitutional. P. 781.

6. The Nebraska Bank Guaranty Law (Comp. Stats., 1922, § 8024 *et seq.*), providing for a fund, to be raised by assessments upon all the state banks and to be applied, when any of them failed, to meet deficiencies owing from it to its depositors, was a police regulation designed to promote the public welfare; the rights of depositors arising under it (aside from the contract of each depositor with his own bank) are not contractual and did not prevent the legislature from modifying the plan, for the public welfare, or from exercising a reasonable discretion in so doing. P. 782.

7. This law provided for two semiannual assessments against each bank of ½oth of 1% of its average daily deposits, and special assessments, to repair deficiencies in the guaranty fund, up to ½ of 1% each year of such average deposits. The present suit was to enjoin collection of a special assessment, recently made, and any other such in the future, on the ground that, through failure of the guaranty scheme such assessments became confiscatory. After the appeal here, a statute was passed for the liquidation of the scheme; only three special assessments and two regular assessments were retained by it, and future assessments were restricted to $\frac{2}{10}$ths of 1% of average daily deposits annually, limited to a period of ten years. *Held*, that, since the law in its modified form can not be regarded as confiscatory, or as other than a reasonable method of liquidating the guaranty plan, a decree of the state court denying an injunction to restrain collection of assessments should be affirmed. P. 783.

119 Neb. 153; 227 N. W. 922, affirmed.

This was a suit brought by the above-named appellant for itself and on behalf of several hundred other state banks of Nebraska to enjoin the Governor of the State and the Secretary of its Department of Trade and Commerce from collecting special assessments under the

State Bank Guaranty Law. The Treasurer of the State, as depositor of public moneys, and several private depositors, intervened as defendants. A decree granting an injunction was reversed by the court below. The reversal is affirmed here because of subsequent modifications of the law assailed.

Messrs. Leonard A. Flansburg and *Frank H. Gaines,* with whom *Mr. S. S. Sidner* was on the brief, for appellant.

Messrs. C. A. Sorensen, Attorney General of Nebraska, and *Charles E. Abbott* for Bryan, Governor of Nebraska, et al., appellees.

Mr. William J. Hotz, with whom *Messrs. Clinton J. Campbell, Frank A. Hebenstreit, Robert H. Hotz, Ralph G. Coad, John D. Lynch,* and *Henry R. Gower* were on the brief, for Mary E. Gandy et al., intervening appellees.

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

This suit was brought in December, 1928, in the District Court of Lancaster County, Nebraska, by the Abie State Bank on its own behalf and that of several hundred other banks, all chartered under the laws of Nebraska, to enjoin the defendants from collecting special assessments under the Bank Guaranty Law of that State. The plaintiffs challenged the constitutionality of the statute authorizing the levy of such special assessments, upon the ground that their collection constituted the taking of the plaintiffs' property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. A number of depositors in the state banks were permitted to intervene. The District Court entered a decree in April, 1929, in favor of the complainants, sustaining the contention that the statute providing for such special assessments was, under the facts shown,

unreasonable and confiscatory, and hence repugnant to the Fourteenth Amendment. The decree, which gave a permanent injunction, was reversed by the Supreme Court of Nebraska; the injunction was dissolved and the action dismissed. 119 Neb. 153; 227 N. W. 922. The plaintiffs appeal to this Court.

The Bank Guaranty Law of Nebraska was originally enacted in the year 1909. Laws of Nebraska, 1909, chap. 10, p. 87; Compiled Statutes of Nebraska, 1922, § 8024 *et seq.* Its purpose was declared to be to provide a guaranty fund for the protection of depositors in banks, and every corporation engaged in the business of banking under the laws of the State was declared to be subject to assessment to be levied and applied in the manner stated. Banks were required to report semi-annually to the State Banking Board, succeeded by the Department of Trade and Commerce, their average daily deposits, and it was made the duty of that department twice each year to levy upon each bank an assessment (after certain prescribed initial payments) in the amount of one-twentieth of one per cent. of the average daily deposits reported. By section 8028, as amended in 1923 (Laws of 1923, chap. 191, p. 452), it was provided that if the depositors' guaranty fund should be reduced from any cause to any amount less than one per cent. of the average daily deposits, the Department of Trade and Commerce should levy, against the capital stock of the corporations concerned, a special assessment not exceeding one-half of one per cent. of said average daily deposits in any one year. In case of non-compliance with the provisions of the statute, the Attorney General was to obtain the appointment of a receiver; and by an amendment in 1925 (Laws of 1925, chap. 30, p. 122), the Department of Trade and Commerce, if its order was not obeyed, was authorized forthwith to take possession of the property and business of the bank and place it in charge of the Guar-

antee Fund Commission established in 1923 for the purpose of assisting in conserving and administering the guaranty fund (Laws of 1923, chap. 191). It was further provided that in case a bank failed, and its assets were insufficient to meet the claims of depositors, the court should determine the amount of the deficiency and direct the Department of Trade and Commerce to draw against the guaranty fund in the amount required to make up the deficiency. Claims of depositors were to be paid according to priority of adjudication.

Acting under the authority of the statute, the Department of Trade and Commerce for several years made an additional semi-annual assessment against the complaining banks of one-fourth of one per cent. of the average daily deposits. The result was that the total assessment against each of these banks had become an annual charge in the amount of six-tenths of one per cent. of their total average daily deposits.

This suit was begun immediately after the levy, on December 15, 1928, of a special assessment of one-fourth of one per cent. of the average daily deposits of the complaining banks, and the plaintiffs asked for an injunction restraining the collection of that special assessment and of any future special assessment called for by section 8028. The contention of the plaintiffs was that the Bank Guaranty Law no longer bore a rational relation to any public purpose, as the collection of the assesments in question took away from the security of present depositors in going banks in order to pay the depositors in failed banks, and was without hope or tendency of furnishing protection to present depositors. It was insisted that instead of the challenged assessment creating a fund for the safeguarding of depositors in going banks, as was its purpose, it directly defeated that object, and that its imposition constituted an unconstitutional burden because of its confiscatory character.

The District Court reviewed the results of the operations of the banks in Nebraska under the Bank Guaranty Law. It appeared that there were 1012 banks in the State in November, 1920, and that the number had been reduced to 726 in December, 1928; that these banks had a total capital of $19,001,000 and a total capital and surplus of $24,958,557.62; that for the period of eighteen months preceding June 30, 1928, 570 banks had net earnings and 156 had net deficits; that the total net earnings of both groups for that period amounted to $1,935,519.40 or 7.9 per cent. of the total capital and surplus; that, during the same period, these banks had paid into the depositors' guaranty fund $2,412,324.78. It also appeared from the testimony of the secretary of the Gurantee Fund Commission (as stated by the Supreme Court of the State) that up to December 31, 1928, 269 state banks had been closed by the State and placed in the hands of the Commission and that the total amount of the adjudicated claims was $10,536,518.59, exclusive of interest; and that in 72 state banks, then being operated as going concerns, the amount due depositors was $13,726,441.26, and the total amount due depositors in banks which were in receiverships, but whose claims were not yet adjudicated, was $2,133,627.54. The total claims, including both claims adjudicated and those not adjudicated, or the then existing liabilities against the guaranty fund, amounted to $26,400,282.76, and the total amount of assets to be realized would be $10,451,932.65, leaving a deficit of $15,948,350.11. The court concluded that "fully two-thirds of the banks under the existing financial conditions are unable, after paying assessments amounting to 8 per cent. of their capital, to pay compensatory dividends," and that the Bank Guaranty Law, as originally conceived, was "no longer serving its purposes."

Reversing the decree of the District Court in favor of the plaintiffs, the Supreme Court of the State sustained

the validity of the continued operation of the Bank Guaranty Law and entered judgment stating that " the levy of a special assessment upon the state banks," pursuant to the provisions of the applicable statute, " does not constitute the taking of private property without due process of law." The grounds of the decision of the Supreme Court of the State, in reversing the judgment of the District Court, were thus stated in the syllabus of the opinion:

" 1. ' The banking business, carried on pursuant to a state charter, is quasi-public and, for protection of the public and in its interests, is subject to reasonable regulation by the state.' *Citizens State Bank* v. *Strayer,* 114 Neb. 567;

" 2. It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions so clearly contravene a provision of the fundamental law, or it is so clearly against public policy that no other resort remains;

" 3. Where a state bank has accepted the benefits arising from the deposits of money pursuant to the terms of the bank depositors' guaranty law, such bank should not be heard, in a proper case, to make complaint of a special assessment upon such deposits which has been levied for the benefit of the depositors' guaranty fund;

" 4. Where a special assessment has been levied upon the state banks pursuant to the provisions of section 8028, Comp. St. 1922, as amended by section 26, ch. 191, Laws of 1923, such assessment does not constitute the taking of private property without due process."

In answer to the jurisdictional statement filed by the appellants, the appellees asserted the want of jurisdiction in this Court, upon two grounds; (1) that this Court conclusively adjudicated the validity of the Nebraska law against appellant in the suit heretofore brought on its behalf (*Shallenberger* v. *First State Bank of Holstein,*

219 U. S. 114); and (2) that the decision of the Supreme Court of the State, in its ruling with respect to the question of estoppel, rested upon an independent non-federal ground. The question of jurisdiction was postponed to the hearing on the merits.

As to the first objection, it is sufficient to say that the Bank Guaranty Law was sustained by this Court as a police regulation (*Shallenberger* v. *First State Bank of Holstein, supra; Noble State Bank* v. *Haskell,* 219 U. S. 104, 575), and that a police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation. *Smith* v. *Illinois Bell Tel. Co.,* 282 U. S. 133, 162; *Allen* v. *St. Louis, Iron Mountain & Southern Ry. Co.,* 230 U. S. 553, 555, 556; *Lincoln Gas & Elec. Co.* v. *City of Lincoln,* 250 U. S. 256, 268. In the *Shallenberger* case, the suit was brought immediately upon the enactment of the law, and that decision sustaining the law cannot be regarded as precluding a subsequent suit for the purpose of testing the validity of assessments in the light of the later actual experience.

In support of the second objection, and in answer to the contention of the appellants that the findings of fact by the trial court had not been modified by the Supreme Court, the appellees point to the plenary character of the jurisdiction of the latter court in equity cases, and to the statute which makes it necessary for that court to try the case *de novo* and to "reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence." Section 9150, Compiled Statutes of Nebraska, 1922; *Colby* v. *Foxworthy,* 80 Neb. 239, 245. The appellees insist that reading together the syllabus and the text of the opinion (*Old Colony Trust Co.* v. *Omaha,* 230 U. S. 100, 116), it appears that the Supreme Court, exercising its proper authority, made an independent finding as to the waiver or estoppel which the appellees had pleaded in defense.

But the federal ground being present, it is incumbent upon this Court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment. *Enterprise Irrigation District* v. *Farmers' Mutual Canal Co.,* 243 U. S. 157, 164; *Union Pacific R. Co.* v. *Public Service Comm.,* 248 U. S. 67, 69, 70; *Ward* v. *Love County,* 253 U. S. 17, 22; *Broad River Power Co.* v. *South Carolina,* 281 U. S. 537, 540; 282 U. S. 187. As this Court said in *Enterprise Irrigation District* v. *Farmers' Mutual Canal Co., supra:* "But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain." See *Creswill* v. *Knights of Pythias,* 225 U. S. 246, 261.

In reaching its conclusion, the Supreme Court of the State referred to the testimony, already mentioned, of the secretary of the Guarantee Fund Commission, with respect to the state of the guaranty fund, and to his further testimony that "the majority of the losses sustained by the banks resulted from loans made prior to 1923 during the deflation period." The court said that since 1919 the total amount of bank assessments was $14,609,576.65, which had been paid over and become a part of the guaranty fund; that it appeared from the evidence of the president of one of the largest Nebraska state banks "that he was active in the publication of 2,000 pamphlets which were distributed generally in respect of the establishment of the guaranty fund," and that he "was also chairman of a committee of three bankers by whom this suit was begun"; that in 1926 "full-page newspaper advertisements, attractively featured with pictures and aptly prepared reading matter" were published in one of

Omaha's leading newspapers, stressing "the proposed protection that was shortly to be afforded the depositors of money in the state banks"; that it was stated in these advertisements that 336 banks, which were listed, had "paid their pro-rata share of the cost of publication"; and that wide circulation was given to the enterprise, "in practically every town and its suburbs where a state bank was located," in a manner calculated to attract the favorable attention, and the patronage, of those having money for deposit.[1] The court concluded that the evidence clearly showed "that a majority of the state bankers throughout Nebraska, and many others as well, counted the bank depositors' guaranty fund, in its inception, a valuable asset, and many predicted that this beneficent plan would add greatly to the stability of the state banks."[2] The court referred to the testimony of the cashier of a bank in Lincoln, Nebraska, that in his opin-

[1] Reference was made by the court to the headings of the illustrated pages of these advertisements, as, for example: "A Story no other State can Tell"; "No Mattress Banks in Nebraska"; "Strong Banks make Strong States"; "In the Hands of Skilled Bankers"; "State Banks Protect their Deposits in Nebraska"; "Nebraska is a Remarkable State"; "Pushing your Money Through the Window"; "All Work Together in Nebraska"; "Safe through the Slump of Deflation Days"; "In Nebraska the Guarantee Works both Ways"; "The Men who Told the Story that No Other State Can Tell."

[2] To illustrate this feature of the guaranty fund law, the court quoted the following excerpt from an advertisement which appeared in January, 1928, in one of the Nebraska newspapers having a large circulation: "First, there are a few state bankers here and there who have good banks and who think they are greatly imposed upon by being compelled to pay an assessment to the guaranty fund. This is a natural feeling as they are in no way responsible for the banks that fail. . . . The guaranty fund, so-called, is merely an insurance company whereby the state banks of Nebraska are the members and must pay through an assessment each other's losses up to the maximum amount of six-tenths of one per cent. a year. . . . Any good bank, making a fair profit, can pay this assessment without injury to itself and can do so to the great benefit of the state." *Id.*

ion the failure of nearly 300 state banks had been " caused largely by the general economic condition existing prior to 1928 "; that he did not think that " the bank assessments from 1923 to July 1, 1928, were a contributing factor in the failure of banks during that period "; that " the guaranty fund law and the assessments collected thereunder had a steadying influence on the deposits of every state bank "; and, further, that " it is no exaggeration to say it has accounted for at least one hundred million dollars deposited in the state banks of Nebraska which would not otherwise have been made except for the bank guaranty law." The court cited the opinion of the witness that " the condition of the banks and their ability to pay the assessment is 'incomparably better than in 1923.' "

The appellees, in amplification of the matters set forth in the opinion of the state court, urge that the banks continuously, from 1911 to the time of the suit, utilized the Bank Guaranty Law by advertising its adjudicated validity and the obligation of the banks to pay assessments, in order to induce deposits of public and private funds; and that this was accomplished not only " by continuous and extensive newspaper publicity," but " by signs on the interior and exterior of banks, pamphlets, statements on checks and certificates of deposit and on deposit slips, by moving pictures, public speakers, resolutions at bankers' conventions, personal solicitation and argument."

So far as the facts summarized in the opinion of the state court, and in argument, may be deemed to oppose the evidence introduced to show the oppressive character of the Bank Guaranty Law, these facts bear upon the question whether the law had become so burdensome as to transcend in its operation the constitutional limits of state power. But if, as the appellants contend, the continued enforcement of the law in the conditions shown

at the time of the suit did involve unconstitutional exactions, we should not be justified in refusing appropriate relief on the theory that the conduct of the banks, in their endeavor to do business under the law and to make the best of the State's policy embodied in it, estopped them from asserting constitutional right. The appellees say that, upon the original enactment of the Bank Guaranty Law and the decision of this Court sustaining it, the state banks could have done one of three things: (1) liquidate and invest their capital in some other business; (2) undertake to organize as a national bank; or (3) apply to the state banking department for a certificate of authority to operate under the Bank Guaranty Law. That is, the state banks had to comply with the law in order to continue in business as state banks. "The fact that a choice was made according to interest does not exclude duress." *Union Pacific R. Co.* v. *Public Service Comm., supra.* The fact that the banks, defeated in their attack on the law, fell into line with the policy of the State and proclaimed the purposes of the law and the contemplated advantages which had led to its enactment, cannot be regarded as depriving the banks of the opportunity of subsequently pointing out that the public purpose in view was no longer being served, and that the interests of the banks were being unreasonably sacrificed by confiscatory exactions in an effort the futility of which had been demonstrated. The banks were not bound for all time, regardless of consequences. The principle that a police regulation, valid when adopted, may become invalid because in its operation it has proved to be confiscatory, carries with it the recognition of the fact that earlier compliance with the regulation does not forfeit the right of protest when the regulation becomes intolerable. And we perceive no basis for a different rule because the regulation was extolled while being obeyed. We conclude that the constitutional question was properly raised and

was decided, and that the judgment under review is not supported by an independent and adequate non-federal ground. Hence, the appeal was properly brought.

Since the appeal, the situation has been altered by the passage, in March, 1930, by the legislature of Nebraska, of an act which repealed section 8028 (Compiled Statutes of Nebraska, 1922), under which the assessment of December 15, 1928, challenged in this suit, was levied, and modified the provisions of the former Bank Guaranty Law by creating a "depositors' final settlement fund" and providing for a limitation of future assessments.[3]

[3] The important portions of the Act of 1930 (Senate File No. 3, Session Laws of Nebraska, 46th Special Session, March, 1930, Compiled Statutes of Nebraska, 1929, § 8–171 *et seq.*) are as follows:

"8–171. Depositors' Final Settlement Fund, How Comprised. For the purpose of providing a fair and just settlement of the claims of depositors and others heretofore authorized to be paid out of the Depositors' Guarantee Fund, there is hereby created and established a fund to be known and designated as 'Depositors' Final Settlement Fund' which fund shall comprise and consist of the following: (a) All records, accounts, books, documents, property and assets formerly in the possession of or under the control of the Guarantee Fund Commission and now in the possession of the secretary of the Department of Trade and Commerce. (b) All property and assets of every kind and nature, constituting, accruing upon, or derived from what was formerly designated as the Depositors' Guarantee Fund of the State of Nebraska. (c) All property, monies, funds, proceeds, rights, credits, accounts and choses in action, of every kind and nature, constituting, derived from, arising out of, or in any manner connected with, or pertaining to, the assessments, regular and special, heretofore accrued and levied against any and all corporations transacting a banking business in this state for the purpose of establishing, maintaining, or reimbursing what was formerly designated as the Depositors' Guarantee Fund of the State of Nebraska; which assessments, more specifically, are the special assessments levied by the Department of Trade and Commerce on or about December 15, 1928, April 17, 1929, and January 2, 1930, and the regular assessments accrued and levied on or about July 1, 1929, and January 1, 1930. (d) All moneys and funds derived from the annual assessment of two-tenths of one per cent upon average daily deposits of each state bank,

This Court takes judicial notice of this legislation. *Owings* v. *Hull*, 9 Pet. 607, 625; *Hanley* v. *Donoghue*, 116 U. S. 1, 6; *Lloyd* v. *Matthews*, 155 U. S. 222, 227. The

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levied as provided in Section 2 of this act. (e) All moneys which may hereafter be appropriated out of the state treasury to help pay, or to be applied upon, any deficit in what was formerly designated as the Depositors' Guarantee Fund. (f) Such other moneys, funds, and property as may lawfully accrue to, be paid into, or become a part of the Depositors' Final Settlement Fund. (1930, Special Session, S. F. 3, § 1.)

"8–172. Depositors' Final Settlement Fund, Assessments, Levy, Amount, When Made. For the purpose of providing a fund for depositors in state banks closed prior to the time this act goes into effect, every corporation engaged in the business of banking under the laws of this state shall be subject to assessment to be levied, kept, collected and applied as in this act provided. On the first day of January of each year during the period of ten years, beginning with the year 1931, and ending with the year 1940, inclusive, the Department of Trade and Commerce shall levy upon every state bank an assessment of two tenths of one per cent of its average daily deposits during the year ending December 1st last preceding, as shown by the statements required to be made and filed with the department; *Provided*, any state bank may, at its option, at any time during said ten year period, prepay one or more of said assessments at a discount of five per cent *per annum* for the unexpired period aforesaid, in which event the assessments thus prepaid shall be computed upon the average daily deposits in such bank for the period of the three years last preceding such prepayment. All payments of assessments under the provisions of this section shall be made to and become a part of the Depositors' Final Settlement Fund. Nothing in this section shall be construed to bind any corporation transacting a banking business under the laws of this state to pay any assessments accruing or levied after such corporation shall have ceased to do business as a state bank. (1930, Special Session, S. F. 3, § 2.)

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"8–175. Administration, Department of Trade and Commerce, Specific Powers, Enumerated. The Department of Trade and Commerce shall have the power and authority to sell, transfer, convey and exchange any property or assets of the Depositors' Final Settlement Fund; to enter into contracts, and to institute, defend, or other-

act provides that the "depositors' final settlement fund" shall consist "of all property, moneys, funds, proceeds, rights, credits, accounts and choses in action" arising

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wise participate in any suit or proceeding, involving the property or assets of said fund, or any claims, rights, or choses in action therein or pertaining thereto; to compromise and settle suits, claims, choses in action and all other matters and things pertaining to, or affecting said fund, or the administration, maintenance, or distrbution thereof; the intent and purpose of this act being that the department shall efficiently and expeditiously liquidate and reduce to cash or its equivalent, all the property and assets, tangible and intangible, of said fund, and pay out and distribute the same to those entitled thereto, in the manner and form, and according to the plan hereinafter set forth; Provided, nothing in this act shall authorize the Department of Trade and Commerce to reduce any Assessment required to be levied against banks under the provisions of this act, and Provided further, the Department of Trade and Commerce may, in its sound discretion, grant to any bank an extension of time, not exceeding 3 years from the date of the passage of this act, within which to pay any of the assessments, regular or special, heretofore made, levied, or accrued against, or payable by such bank, as defined in subsection (c) of Section 1 of this act. (1930, Special Session, S. F. 3, § 4.)

"8–176. Claims, Payment. Only owners and holders of the following described claims and rights shall be entitled to receive payment from the Depositors' Final Settlement Fund and to participate in the benefits thereof, to wit: 1. Unpaid claims of depositors and of others entitled to priority, as by law provided, which shall have been heretofore or hereafter adjudicated against insolvent state banks of this state, including those banks which have heretofore closed and those which hereafter and prior to the time this act goes into effect, shall have been closed by the Department of Trade and Commerce: Provided, such claims have been heretofore certified to the department as claims against the Depositors' Guarantee Fund, or shall have been hereafter certified to the department as claims entitled to the benefits of the Depositors' Final Settlement Fund. (1930, Special Session, S. F. 3, § 5.)

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"8–178. Specific Sections, Repeal. That said Sections 7995, 8008, 8028 and 8033, Compiled Statutes of Nebraska, 1922, as amended; Sections 22 and 23 of Chapter 191, Laws of 1923; and Sections 8024,

from the assessments, regular and special, theretofore accrued and levied, for the purpose of maintaining or reimbursing what was formerly designated as the depositors' guaranty fund. Among these assessments, and specifically mentioned, are " the special assessments levied by the Department of Trade and Commerce on or about December 15, 1928, April 17, 1929, and January 2, 1930, and the regular assessments accrued and levied on or about July 1, 1929, and January 1, 1930." For the future, and for the purpose of providing a fund for depositors in state banks closed prior to the time of the new enactment, there is to be levied upon every state bank " on the first day of January of each year during the period of ten years beginning with the year 1931, and ending with the year 1940, inclusive," an assessment of " two-tenths of one per cent of its average daily deposits during the year ending December 1st last preceding." The effect of this provision is to reduce assessments for the future from a total annual amount of six-tenths of one per cent of the average daily deposits (that is, including both the original regular assessment of one-tenth of one per cent and the special assessments of five-tenths of one per cent) to a total of two-tenths of one per cent per annum for a period of ten years.

8025, 8026, 8027, 8009 and 8035, Compiled Statutes of Nebraska, 1922; as heretofore existing are hereby repealed. (1930, Special Session, S. F. 3, § 16.)

" 8–179. Inducement for Passage, Constitutionality, Construction. The inducement for the passage of Section 16 of this Act, which repeals various sections of the statutes relating to the bank depositors guarantee fund and assessments therefor, is the passage of sections 1 to 5, inclusive, of this Act, and if any one or more of said sections 1 to 5, inclusive, of this Act, shall for any reason be held unconstitutional or invalid, in whole or in part, then and in that event said section 16 of this Act shall be invalid and of no force or effect and the sections of the statutes sought to be repealed by said Section 16 shall be in full force and effect. (1930, Special Session, S. F. 3, § 17.)"

The depositors' final settlement fund is to be distributed only to depositors in banks closed prior to the taking effect of the statute. The Department of Trade and Commerce has authority to administer the fund and to institute and defend suits involving any claims or rights pertaining thereto. That Department may grant, in its sound discretion, to any bank an extension of time, not exceeding three years, from the date of the passage of the act, within which to pay any of the assessments theretofore levied against it.

The appellees, who are state officers, urge that by this legislation the case has become moot. The appellants, and the appellees who are intervening depositors, assert the contrary, and we agree with the latter view. Despite the repeal of section 8028, the assessment of December 15, 1928, which was assailed in this suit, is continued in effect, and the amount due thereunder is made a part of the depositors' final settlement fund. The later special assessments, to which the new act refers (those of April 17, 1929, and January 2, 1930), also remain in force. While the repeal of section 8028 prevents further assessments under the old law, still assessments which were enjoined by the District Court, and which were sustained by the judgment of the Supreme Court, are to be paid, and the amounts are to be applied as the act of 1930 directs. If, taking into consideration the limitations of the new legislation, the appellants could still be considered to have constitutional grounds for objecting to the collection of the special assessments which were the subject of their petition, they are not deprived of their right by the statute which leaves them with liability for those assessments. It would still be possible for this Court to grant appropriate relief. *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, 433. See *Groesbeck* v. *Duluth, South Shore & A. Ry. Co.,* 250 U. S. 607, 609; *Boston* v. *Jackson,* 260 U. S. 309, 313.

While the case has not become moot, the questions raised by the appellants must be considered in the light of the modifying legislation, which has restricted in an important degree their liability to assessments, and has provided for what is, in substance, a liquidation of the guaranty scheme. The appellees, intervening depositors, insist that by their deposits in the state banks they acquired contractual rights which cannot be affected by the later legislation. In support of this contention, these appellees refer to the observation of the dissenting opinion in *Lankford* v. *Platte Iron Works,* 235 U. S. 461, 487, that the Bank Guaranty Law of Oklahoma prescribed a contract between the banks and the depositors and expressed the terms in which it should be made. The point decided in that case was that a suit by a depositor in a bank in Oklahoma against the members of the State Banking Board and the Bank Commissioner of Oklahoma to compel payments from, distribution of, and assessments for, the depositors' guaranty fund, was a suit against the State and under the Eleventh Amendment could not be maintained. The view stressed in the remark of the dissenting opinion, to which reference has been made, was not presented in the opinion of the Court and was not essential to the decision. When money is deposited in bank, the contract that is made is between that bank and the depositor. Notwithstanding the provisions of the Bank Guaranty Law, there is, properly speaking, no contract between the depositor and other banks. The Bank Guaranty Law provided for a fund to be raised by assessments upon all the state banks, and while this was regarded as an important safeguard for all depositors, it was but a police regulation, the sanction of which lay in the constitutional power of the State and not in contract. See *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379, 385–387. And this is the view that has been taken by state courts which have had occasion to consider this question in connection

with legislation by which relief has been sought from the difficulties encountered in the continued operation of bank guaranty plans. *Wirtz* v. *Nestos,* 51 N. D. 603, 616, 621; 200 N. W. 524, 529, 531; *Standard Oil Co.* v. *Engel,* 55 N. D. 163, 170, 174; 212 N. W. 822, 824, 826; *South Dakota ex rel. Sharpe* v. *Smith,* 234 N. W. 525, Supreme Court of South Dakota, decided January 30, 1931.

The origin of rights under the Bank Guaranty Law was wholly statutory,—an act of grace by the legislature, so far as depositors were concerned, with the purpose of promoting the public welfare and with freedom in the legislature to modify its regulation when the public welfare was deemed to require a change. We see no reason to doubt the power of the legislature to extricate the banks and the administration of the guaranty fund from the serious plight in which they were found under the operation of the old plan and to exercise a reasonable discretion in seeking this result.

We return to the contention of the appellants. When the suit was brought, these banks were confronted with a situation which contained no promise of relief from the assessments for which the act, as it then existed, provided, and the cumulative effect of which was alleged to be disastrous. It was the special assessments under the old law that were definitely assailed. Under the modifying act of 1930, only three of these special assessments and two regular assessments remain effective; and, for the future, there is a limitation of the obligation to a total annual assessment of two-tenths of one per cent of average daily deposits instead of assessments aggregating six-tenths, as were made possible by the previous law. The future assessments, to this restricted amount, are limited to a period of ten years. This, obviously, is a change of great importance. The appellants sought an injunction, and their petition necessarily related to the assessments in December, 1928 and thereafter, as the pay-

ments previously made were not in any event recoverable by the banks. Considering the reduction in the extent of the obligation as to future assessments, we are unable to say that the statute in this modified form is confiscatory, or other than a reasonable method of liquidating the guaranty plan. In this view, the judgment of the Supreme Court of the State denying an injunction should be affirmed.

Judgment affirmed.

SMITH, ADMINISTRATRIX, *v.* MAGIC CITY KENNEL CLUB, INCORPORATED, ET AL.

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

No. 77. Argued January 28, 1931.—Decided February 25, 1931.

1. Patent No. 1,379,224 (Claims 1 and 2), granted to Owen P. Smith, for improvements in devices for dog races, which calls for a lure-carrying arm, attached or hinged to a conveyor car, and equipped with a wheel at its outer end for ground support, is narrowly limited and does not cover a rigid horizontal lure-carrying arm without ground support. P. 787.
2. Where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he cannot, after the issue of the patent, broaden his claim by dropping that element. P. 789.
3. Where a patentee has narrowed his claim, in order to escape rejection, he may not, by resort to the doctrine of equivalents, give to the claim the larger scope which it might have had without the amendments which amount to disclaimer. P. 790.
4. Patent No. 1,507,440, to Owen P. Smith, which relates to the form and supports of a casing used to house the tracks upon which runs the car conveying the lure-carrying arm in dog races, is *held* void for want of novelty and invention. P. 791.

38 F. (2d) 170, affirmed.

CERTIORARI, 281 U. S. 714, to review a decision which reversed a decree of the District Court upholding the petitioner's patent in an infringement suit.

Mr. E. Howard McCaleb for petitioner.

Mr. Arthur C. Brown for respondents.

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

This suit was brought in the District Court of the United States for the Northern District of Oklahoma to enjoin the infringement of letters patent No. 1,379,224, May 24, 1921, and No. 1,507,440, September 2, 1924 (and also three other patents not here involved) issued to Owen P. Smith, the petitioner's intestate, for improvements in devices for dog races. A Special Master was appointed to hear and determine the issues. The Master reported that each of the patents was valid and infringed. The District Court approved the report, and entered a decree for injunction, and for recovery, upon a bond given under the order of the court, of damages. This decree was reversed by the Circuit Court of Appeals for the Tenth Circuit. 38 F. (2d) 170. This decision was in conflict with that of the Circuit Court of Appeals for the Fifth Circuit in *American Electric Rabbit Racing Assn.* v. *Smith,* 26 F. (2d) 1016, affirming, without discussion, the decree of the District Court for the Eastern District of Louisiana, 21 F. (2d) 366, which held patents No. 1,379,224 and No. 1,507,440 to be valid and infringed. In view of this conflict, this Court granted a writ of certiorari in the instant case. 281 U. S. 714.

These patents were also before the District Court for the Southern District of Ohio, in *Smith* v. *Springdale Amusement Park,* where the bill of complaint was dismissed for want of infringement, 39 F. (2d) 92, and the decree was affirmed by the Circuit Court of Appeals for the Sixth Circuit, 40 F. (2d) 173; certiorari granted, *post,* p. 823.

Patent No. 1,379,224. The claims in suit are numbers 1 and 2, as follows:

"1. In a dog racing amusement, a race course suited for dogs, a casing extending around the outer side of the race course and provided with a longitudinal opening, a mechanical conveyer including a track extending around the race course and located within the casing, and a conveyer car mechanically operated upon said track and provided with an arm extending through the longitudinal opening of the casing in a projecting position over the track and adapted to carry a lure, and a wheel rotatably mounted on and supporting the arm at the projecting end thereof.

"2. In an amusement, the combination of a race course suited for dogs, a covered rail track adjacent said course on one side, a conveyor car mechanically operated upon said track, a horizontally extending arm hinged to said car extending midway of said course, a wheel rotatably mounted near the end of said arm, and resting upon the ground, a platform supported by said arm and a lure or quarry mounted upon said platform for attracting the dogs."

The prior art shows various contrivances for carrying an artificial lure around a track in front of racing dogs. Hind, 1884 (British, No. 4274) described an inanimate lure moved by means of a rope traveling along a sunken trough. Pinard, 1887 (No. 362,396) proposed a lure-carrier dragged upon the ground by a cable winding upon a drum at the end of the track. Moss, 1896 (British, No. 9058) showed a device, on the order of an electric trolley system, with a rail laid on the race course. Walsh, 1898 (No. 611,876) placed his conveyor car adjacent to the track and separated from it by a fence, and provided an arm reaching over the fence and connected with another arm, pliant or stiff, which extended downward to the lure-carrying mat dragging on the ground. Smith, 1912 (No. 1,038,504) provided an underground track, within and beneath the race course, and a conveying mechanism hidden from view and carrying the lure which

was visible above the ground. Everett, 1913 (No. 1,052,-807) followed Smith, using an underground cable.

Smith, in the combination for which the patent in suit (No. 1,379,224) was issued, placed his covered rail track adjacent to the race course, and he connected the coöperating elements of conveyor car and lure by an arm horizontally extending over the course. The distinctive feature of his invention is set forth in claim 1 as " an arm extending through the longitudinal opening of the casing in a projecting position over the track and adapted to carry a lure, and a wheel rotatably mounted on and supporting the arm at the projecting end thereof "; and, in claim 2, as " a horizontally extending arm hinged to said car extending midway of said course, a wheel rotatably mounted near the end of said arm, and resting upon the ground, a platform supported by said arm and a lure or quarry mounted upon said platform for attracting the dogs."

The petitioner asserts that, by his apparatus, Smith surmounted the difficulties encountered in the impracticable devices of the prior art and led to commercial success. The Circuit Court of Appeals in the instant case, while finding that there was no infringement, had no doubt that Smith's device was an improvement over the prior art and assumed that it was patentable, 38 F. (2d) at p. 171. We make the same assumption. Smith's improvement, however, was in a limited field. There was manifestly no invention in a combination consisting of a rail track, with a casing adjacent to the course, a conveyor car, and an arm projecting over the course and connected with a mechanical lure carried in advance of racing dogs. Patentability could be predicated of Smith's improvement, only by reason of the distinctive feature of the arm which he employed.

The differences in the respondents' apparatus, which are urged as avoiding infringement, are that the respond-

ents use a rigid horizontal arm; that it is not hinged to the car; that there is no wheel; and that the arm has no ground support at its free end; and, further, that the respondents have located their conveyor housing on the inner side of the race course, while claim 1 of the patent puts the casing on the outer side. We may at once dispose of the latter point, as we find no basis for the conclusion that the invention of the patent is limited to a location of the casing on the outer side of the course. There is no such limitation in claim 2. The important question is whether the patent covers a rigid horizontal lure-carrying arm without ground support.

It appears from the file wrapper that in the application, which resulted in patent No. 1,379,224, Smith made, among others, the following claim:

"3. In an amusement, the combination of a race track suited for dogs, a covered rail track adjacent said course, a conveyor car mechanically operated upon said track, an arm attached to said car extending midway of said course, a wheel rotatably mounted on said arm and a lure mounted on said arm."

This claim was rejected on the prior patent to Walsh (No. 611,786). Another claim (then numbered 4) was allowed as originally presented, and is claim 2 of the patent. Smith did not contest the rejection of original claim 3, above mentioned, but proposed an amendment which related to the casing. This amendment was rejected "on either Walsh or Moss," the examiner stating "that Moss is provided with a housing and it would not be invention to provide Walsh with one." Without further contest, Smith then canceled the rejected claim 3 and substituted what is now claim 1 of the patent. On comparing the claim as thus allowed and the rejected claim, it appears that the important difference was that instead of claiming "an arm attached to said car extending midway of said course, a wheel rotatably

mounted on said arm, and a lure mounted on said arm," the claim was made to read " an arm extending through the longitudinal opening of the casing in a projecting position over the track and adapted to carry a lure, and a wheel rotatably mounted on and supporting the arm at the projecting end thereof."

The petitioner insists that the gist of Smith's invention was "the straight out lure-carrying arm laterally extending and operating exclusively in a substantially horizontal plane." But it will be observed that the rejected and abandoned claim was the broad one of " an arm attached to said car extending midway of said course," and that the new claim, as proposed and allowed, did not specify a horizontal arm alone. The essential difference in the allowed claim lay in the specification of the wheel " as supporting the arm at the projecting end thereof." Claim 2 (original claim 4), which was allowed without question, specified a horizontal arm hinged to the car and resting on a wheel. A rigid, horizontal arm, without hinge or wheel, was not the subject of either claim.

The case, in our opinion, thus calls for the application of the principle that where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he cannot after the issue of the patent broaden his claim by dropping the element which he was compelled to include in order to secure his patent. *Shepard* v. *Carrigan,* 116 U. S. 593, 597. As this Court said in *I. T. S. Rubber Co.* v. *Essex Rubber Co.,* 272 U. S. 429, 443: " If dissatisfied with the rejection he should pursue his remedy by appeal; and where, in order to get his patent, he accepts one with a narrower claim, he is bound by it. *Shepard* v. *Carrigan, supra,* 597; *Hubbell* v. *United States,* 179 U. S. 77, 83. Whether the examiner was right or wrong in rejecting the original claim, the court is not to inquire. *Hubbell* v.

United States, supra, 83. The applicant having limited his claim by amendment and accepted a patent, brings himself within the rules that if the claim to a combination be restricted to specified elements, all must be regarded as material, and that limitations imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and looked upon as disclaimers. *Sargent* v. *Hall Safe & Lock Co.,* 114 U. S. 63, 86; *Shepard* v. *Carrigan, supra,* 598; *Hubbell* v. *United States, supra,* 85. The patentee is thereafter estopped to claim the benefit of his rejected claim or such a construction of his amended claim as would be equivalent thereto. *Morgan Envelope Co.* v. *Albany Paper Co.,* 152 U. S. 425, 429."

The petitioner resorts to the doctrine of equivalents, insisting that the rigid horizontal arm of the respondents is to be treated as the equivalent of the arm of the patent, and that the limiting specifications of the claims may be ignored. What has already been said disposes of this contention, for where a patentee has narrowed his claim, in order to escape rejection, he may not " by resort to the doctrine of equivalents, give to the claim the larger scope which it might have had without the amendments which amount to disclaimer." *Weber Electric Co.* v. *Freeman Electric Co.,* 256 U. S. 668, 677, 678; *I. T. S. Rubber Co.* v. *Essex Rubber Co., supra.* It should also be observed that the difference here was both in structure and in mode of operation and result. Petitioner's witness testified that Smith " built cars with rigid arms and had the arms snap off," and " that is why he went to the wheel and hinge. It reduces the friction there, I guess you would call it, crystallizing the arm from the vibration. If the arm was at the end and no wheel to support it, it would naturally drag on the track." Respondents' witness testified that the difference in the arm they used, which does not in-

clude the wheel for supporting the arm, is that when the arm "has a wheel under the end as it runs over the track, it doesn't have any vibration"; that vibration makes the lure "jump up and down" giving it a more lifelike appearance.

We agree with the decision of the Circuit Court of Appeals that infringement of letters patent No. 1,379,224, was not established.

Patent No. 1,507,440. This patent is for "Housing for Conveyor Cars and Tracks." It relates to the casing element called for by patent No. 1,379,224. The claims as originally presented were rejected "as indefinite and as aggregations." Other claims were substituted, which included claim 1 of the patent, as allowed, as follows:

"1. In a housing for covering tracks and cars having laterally extending arm operated upon said track, the combination of posts set in the ground at the sides of said track, timbers attached to said posts to form a frame, and boards attached to said timbers and posts to form a continuous enclosure above said track, and having a continuous opening in one side of said housing adapted to permit extension of the laterally extending arm, therethrough, and truss rods attached to the closed side of the housing adapted to support the side of said housing above the said continuous opening."

All the elements in this claim were old. So far as the continuous opening "adapted to permit extension of the laterally extended arm" is concerned, there was anticipation by Bertram, 1903, No. 729,120, whose housing for a third or electric rail disclosed a similar method of contact with an outside track, in providing for a casing (enclosing the electric rail) "in which is formed a longitudinal slot or opening." A comparison of claim 1 of the patent with the other claims which were rejected and canceled, shows that the distinctive features of the claim allowed were that the opening was placed "in one side of said

housing" and that there was a specification of a particular sort of support, that is, "truss rods attached to the closed side of the housing." In other claims allowed, the reference is to "adjustable stay rods."

The Circuit Court of Appeals for the Tenth Circuit, in the instant case, questioned the patentability of the device and said that if patentability existed at all, it must depend upon the truss rod support or the adjustable stay rods, neither of which the respondents use. We agree with this statement, and we are also of the opinion, as was the Circuit Court of Appeals for the Sixth Circuit, (*Smith* v. *Springdale Amusement Park, supra*), that supplying the feature of the truss rods and the adjustable stay rods did not constitute invention. To provide such supports would be but a step obvious to any skilled mechanic. *Atlantic Works* v. *Brady*, 107 U. S. 192, 200; *Railroad Supply Co.* v. *Elyria Iron & Steel Co.*, 244 U. S. 285, 292; *Powers Kennedy Contracting Corp.* v. *Concrete Mixing & C. Co.*, 282 U. S. 175, 186.

Decree affirmed.

UNITED STATES *v.* MALCOLM.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 512. Submitted January 12, 1931.—Decided January 19, 1931.

1. Under the Revenue Act of 1928, the entire community income of a husband and wife, domiciled in California, need not be returned and the income tax thereon be paid by the husband.
2. Under § 161 (a), California Civil Code, the wife has such an interest in the community income that she should separately report and pay the tax on one-half of it.

The certificate from the court below stated the facts as follows:

"Robert K. Malcolm and Esther Jarrett Malcolm are husband and wife and citizens of the United States.

Since October 1, 1920, they have continuously maintained their domicile in the State of California. During the year 1928, Robert Malcolm received a salary of $3,600 for personal services rendered as an officer of the Liberty Farms Company, a California corporation. Under the laws of the State of California, this income was community property. On March 1, 1929, the husband and wife filed separate returns of their income for federal income-tax purposes. Each reported one-half of the salary of $3,600 received in 1928 by the husband, and each fully paid the amount shown to be due on the return. It is admitted that all income taxes due from either husband or wife for the year 1928 have been fully paid, if, as a matter of law, they had a lawful right to make such separate returns under the provisions of §§ 11, 12, and 51 of the Revenue Act of 1928.

"After the husband had filed his income-tax return for the calendar year, 1928, as set out above, the Commissioner, upon an audit and examination, determined that his return was incorrect in that the salary of $3,600 should have been reported by the husband alone, and an income tax paid thereon by him, instead of both husband and wife reporting it at $1,800 on each return. Accordingly the Commissioner determined against the husband a deficiency in income tax amounting to $18.39. An assessment in this amount was then made and collected from the husband, the plaintiff herein, together with interest amounting to $1.12. A claim for refund was thereafter filed and rejected by the Commissioner. From a judgment for this amount in plaintiff's favor, the defendant has appealed."

The questions certified were as follows:

"1. Under the applicable provisions of the Revenue Act of 1928 must the entire community income of a husband and wife domiciled in California be returned and the income tax thereon be paid by the husband?

"2. Has the wife under § 161 (a) of the Civil Code of California such an interest in the community income that she should separately report and pay tax on one-half of such income?"

Solicitor General Thacher, Assistant Attorney General Youngquist, Mr. Sewall Key and *Miss Helen R. Carloss,* Special Assistants to the Attorney General, and *Mr. Erwin N. Griswold* submitted for the United States.

The Government conceded that, with respect to the particular income here in question, the interests of the husband and wife were such as to bring the case within the rulings which are cited in the *per curiam* decision, *infra*—this because of amendments of the California statutes made since *United States* v. *Robbins,* 269 U. S. 315 was decided.

Messrs. Kingman Brewster, James S. Y. Ivins, Allen G. Wright, A. J. Hill, O. R. Folsom-Jones, Joseph D. Brady, and *F. E. Youngman* submitted for Malcolm.

PER CURIAM. The first question certified is answered: No. The second question is answered: Yes. *Poe* v. *Seaborn, ante,* p. 101; *Goodell* v. *Koch, ante,* p. 118; *Hopkins v. Bacon, ante,* p. 122.

DECISIONS PER CURIAM, FROM OCTOBER 6, 1930, TO AND INCLUDING FEBRUARY 25, 1931.*

No. 528 (October Term, 1929). BROAD RIVER POWER CO. ET AL. *v.* SOUTH CAROLINA EX REL. DANIEL, ATTORNEY GENERAL. Certiorari to the Supreme Court of South Carolina. Submitted June 11, 1930. Decided October 13, 1930. The petition for a rehearing is granted. See 281 U. S. 537; also *ante*, p. 187. *Messrs. Wm. Marshall Bullitt, C. Edward Paxson, George M. Le Pine,* and *W. C. McLain,* for petitioners. *Messrs. John M. Daniel, Cordie Page,* and *W. S. Nelson* for respondent.

No. 19, original. ARIZONA *v.* CALIFORNIA ET AL. Submitted October 6, 1930. Decided October 13, 1930. The motion for leave to file the bill of complaint herein is granted. *Messrs. K. Berry Peterson, Dean G. Acheson,* and *Clifton Mathews* for complainant. *Messrs. U. S. Webb, W. B. Mathews,* and *Charles L. Childers* for California. *Messrs. William W. Ray* and *George P. Parker* for Utah. *Messrs. John S. Underwood, Clarence L. Ireland, Delph E. Carpenter, Thomas H. Gibson, Raymond L. Santer,* and *L. Ward Bannister* for Colorado. *Messrs. E. K. Neuman* and *Francis C. Wilson* for New Mexico. *Mr. Gray Mashburn* for Nevada. *Messrs. James A. Greenwood, George W. Furgeson, Richard J. Jackson,* and *Wm. O. Wilson* for Wyoming.

No. 20, original. WYOMING *v.* COLORADO. Motion submitted October 6, 1930. Decided October 13, 1930. The motion for leave to file the bill of complaint herein is

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* For decisions on applications for certiorari, see *post,* pp. 816, 837.

granted. *Mr. William O. Wilson* for complainant. *Messrs. Clarence L. Ireland, Charles Roach, C. D. Todd, Wm. R. Kelly, Paul W. Lee, George H. Shaw,* and *Lawrence R. Temple* for defendant.

No. 3, original. VERMONT *v.* NEW HAMPSHIRE. Motion submitted October 6, 1930. Decided October 13, 1930. The motion for the appointment of a Special Master in this case is granted; and Edmund F. Trabue, Esquire, of Louisville, State of Kentucky, is appointed special master in this cause. The master is directed to make special findings of fact and conclusions of law, and to submit the same to this Court with all convenient speed, together with his recommendations for a decree; he shall accord to the parties a full hearing on all questions in the cause, whether of fact or of law, and shall base his findings and recommendations on the entire record as heretofore made and this day ordered to be filed in this Court. The findings, conclusions, and recommendations of the special master shall be subject to consideration, revision, or approval by the Court. *Messrs. John G. Sargent* and *Warren R. Austin* for complainant. *Messrs. James P. Tuttle, Jos. A. Matthews, De Witt C. Howe,* and *Winthrop Wadleigh* for defendant.

No. 26. VERMONT LOAN & TRUST CO. *v.* GILLIS, ATTORNEY GENERAL OF IDAHO; and

No. 27. NEW WORLD LIFE INS. CO. *v.* SAME. Appeals from the District Court of the United States for the District of Idaho. October 13, 1930. On consideration of stipulations in these causes, respectively, setting forth an opinion and judgment of the Supreme Court of Idaho, of July 31, 1930, in "Utah Mortgage Loan Co. *v.* W. D. Gillis," these causes, by separate orders, were reversed and remanded with directions to dismiss the bills, on the

grounds set forth in the stipulations. *Messrs. Oliver O. Haga and W. G. Graves* for appellants. *Mr. Leon M. Fisk* for appellee. Reported below: 35 F. (2d) 386.

No. 5. INDIAN MOTOCYCLE CO. *v.* UNITED STATES. Certificate from the Court of Claims. Motion submitted October 6, 1930. Decided October 13, 1930. The motion to amend the certificate in this case is granted. *Messrs. Monte Appel* and *Frederick Schwertner* for Indian Motocycle Co. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Fred K. Dyar* for the United States.

No. 9. FRANC-STROHMENGER & COWAN, INC., *v.* FORCHHEIMER ET AL. Certiorari to the Circuit Court of Appeals for the Sixth Circuit. Motions submitted October 6, 1930. Decided October 13, 1930. *Per Curiam: The* motion of Bachrach Co., Inc., Hut Neckwear Co., McCurrach Organization, Inc., I. Isaac & Co., and Kramer-Brandeis, Inc., for leave to intervene in this Court as parties respondent in this cause is denied. The motion of petitioner to dismiss the writ of certiorari is granted. *Messrs. Joe E. Daniels, Holland S. Duell, Clifford E. Dunn, Frederick P. Fish,* and *Charles Neave* for petitioner. *Mr. O. Ellery Edwards* for respondents. *Mr. Milton Strasburger* for Bachrach Co. et al. Reported below: 32 F. (2d) 696.

No. 545 (October Term, 1928). STANDARD OIL CO. ET AL. *v.* CITY OF MARYSVILLE ET AL. Motion submitted October 6, 1930. Decided October 13, 1930. The motion for an order interpreting the decision of this Court is denied. See 279 U. S. 582. *Mr. James W. Reid* for petitioners. *Mr. Chester I. Long* for respondents.

No. 63. ABIE STATE BANK *v.* WEAVER, GOVERNOR, ET AL. Appeal from the Supreme Court of Nebraska. Motions submitted October 6, 1930. Decided October 13, 1930. On suggestions of diminution of the record, the motions for writs of certiorari are granted. *Messrs. Frank H. Gaines, Leonard S. Flansburg,* and *Seymour S. Sidner* for appellant. *Messrs. William J. Hotz, Henry R. Gower, C. A. Sorensen,* and *Charles E. Abbott* for appellees. Reported below: 227 N. W. 922.

No. 67. INTERSTATE COMMERCE COMMISSION *v.* NORTHERN PACIFIC R. CO. ET AL. Certiorari to the Court of Appeals of the District of Columbia. Motion submitted October 6, 1930. Decided October 13, 1930. *Per Curiam:* On consideration of the motion of respondents to dismiss the writ of certiorari, the judgment of the Court of Appeals of the District of Columbia is reversed, and the cause is remanded to the Supreme Court of the District of Columbia with directions to set aside its order for the issuance of a peremptory writ of mandamus and to dismiss the petition for writ of mandamus. *Messrs. Daniel W. Knowlton,* Chief Counsel, Interstate Commerce Commission, and *Nelson Thomas* for petitioner. *Messrs. D. F. Lyons, W. W. Millan, R. E. L. Smith, F. G. Dorety,* and *R. J. Hagman* for respondents. Reported below: 39 F. (2d) 508.

No. —, original. EX PARTE Salisbury. Motions submitted October 6, 1930. Decided October 13, 1930. The motion for leave to file petition for a writ of mandamus and the motion for leave to proceed *in forma pauperis* are severally denied. *Adele T. Salisbury, pro se.*

No. 289. WENGLINSKY *v.* ZURBRICK, DISTRICT DIRECTOR OF IMMIGRATION, ET AL. Certiorari to the Circuit

Court of Appeals for the Sixth Circuit. Petition for certiorari submitted October 6, 1930. Decided October 13, 1930. *Per Curiam:* The petition for a writ of certiorari is granted. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to the United States District Court for the Eastern District of Michigan with directions to sustain the writ of habeas corpus. *Mr. Leonard S. Coyne* for petitioner. *Solicitor General Thacher* and *Messrs. Claude R. Branch, Harry S. Ridgely, Frank M. Parrish, W. Marvin Smith,* and *Albert E. Reitzel* for respondents. Reported below: 38 F. (2d) 985.

No. —, original. Ex parte Goldsmith. Motions submitted October 13, 1930. Decided October 20, 1930. The motions for leave to file petition for writ of mandamus and for leave to proceed *in forma pauperis* are denied. *Mr. H. Ely Goldsmith, pro se.*

No. 102. Neustadt et al. *v.* Coline Oil Co. et al. Appeal from the Supreme Court of Oklahoma. Jurisdictional statement submitted October 13, 1930. Decided October 20, 1930. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Messrs. Fred E. Suits* and *R. L. Disney* for appellants. *Messrs. George M. Green, W. A. Ledbetter,* and *E. E. McInnis* for appellees. Reported below: 284 Pac. 52.

No. 108. Nebraska ex rel. Beatrice Creamery Co. *v.* Marsh, Secretary of State. Appeal from the Supreme

Court of Nebraska. Jurisdictional statement submitted October 13, 1930. Decided October 20, 1930. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Kansas City Ry. Co.* v. *Kansas,* 240 U. S. 227; *Cream of Wheat Co.* v. *County of Grand Fork,* 253 U. S. 325. *Mr. T. S. Allen* for appellant. *Mr. C. A. Sorensen* for appellee. Reported below: 227 N. W. 926.

No. 159. FLEMING *v.* OHIO. Appeal from the Supreme Court of Ohio. Jurisdictional statement submitted October 13, 1930. Decided October 20, 1930. *Per Curiam:* The motion of the appellee to dismiss the appeal herein is granted; and the appeal is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). The petition for a writ of certiorari in this cause is denied. *Mr. Alexander H. Martin* for appellant. *Messrs. Ray T. Miller, Robert T. Scott,* and *David Ralph Hertz* for appellee. Reported below: 171 N. E. 27.

No. 219. BRINKLEY *v.* HASSIG ET AL. Appeal from the Supreme Court of Kansas. Jurisdictional statement submitted October 13, 1930. Decided October 20, 1930. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Meffert* v. *Packer,* 195 U. S. 625; *Missouri ex rel. Hurwitz* v. *North,* 271 U. S. 40; *Standard Stock Food Co.* v. *Wright,* 225 U. S. 540, 550. *Mr. Fred S. Jackson* for appellant. *Messrs. William A. Smith* and *William C. Ralston* for appellees. Reported below: 134 Kan. 874; 289 Pac. 64.

No. 237. PRIDEAUX *v.* DES MOINES JOINT-STOCK LAND BANK. Appeal from the District Court of the United States for the District of Minnesota. Jurisdictional state-

ment submitted October 13, 1930. Decided October 20, 1930. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 238, Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938). *Mr. Harold C. Prideaux, pro se. Mr. George Cosson* for appellee. Reported below: 34 F. (2d) 308.

No. 256. AMERICAN OIL CO. *v.* METZ ET AL. Appeal from the Court of Appeals of Maryland. Jurisdictional statement submitted October 13, 1930. Decided October 20, 1930. *Per Curiam:* On consideration of the motion of the appellee, the Cumberland and Westernport Transit Company, to dismiss the appeal herein, it is ordered that the appeal be, and it is hereby, dismissed for the want of a substantial federal question. *Wabash R. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. Co.* v. *Solomon,* 237 U. S. 427; *Zucht* v. *King,* 260 U. S. 174; *Sugarman* v. *United States,* 249 U. S. 182; *C. A. King & Co.* v. *Horton,* 276 U. S. 600; *Bank of Indianola* v. *Miller,* 276 U. S. 605; *Roe* v. *Kansas,* 278 U. S. 191. *Messrs. Edwin H. Brownley* and *George Henderson* for appellant. *Mr. Walter C. Capper* for appellees. Reported below: 149 Atl. 4.

No. 296. CALDWELL *v.* LOUISIANA. Appeal from the Supreme Court of Louisiana. Jurisdictional statement submitted October 13, 1930. Decided October 20, 1930. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Atkins* v. *Kansas,* 191 U. S. 207; *Heim* v. *McCall,* 239 U. S. 175; *Crane* v. *New York,* 239 U. S. 195. *Messrs. Henry B. Curtis* and *Luther E. Hall* for appellant. No appearance for appellee. Reported below: 170 La. 851; 129 So. 368.

No. 443. DUNN *v.* OHIO. Appeal from the Supreme Court of Ohio. Jurisdictional statement submitted October 20, 1930. Decided October 27, 1930. *Per Curiam:*

The appeal herein is dismissed for the want of a substantial federal question. *Griffith* v. *Connecticut,* 218 U. S. 563; *Mutual Loan Co.* v. *Martell,* 222 U. S. 225, 233; *Morgan* v. *Georgia,* 281 U. S. 691. The petition for a writ of certiorari in this cause is denied. *Messrs. Rufus S. Day* and *W. E. Minshall* for appellant. *Messrs. Gilbert Bettman, Frank R. Hubachek, Henry S. Brainard,* and *Alfred Clum* for respondent. Reported below: 172 N. E. 148.

No. 451, MATHEUS, U. S. MARSHAL, v. UNITED STATES EX REL. CUNNINGHAM. Certiorari to the Circuit Court of Appeals for the Third Circuit. Petition for certiorari submitted October 20, 1930. Decided October 27, 1930. *Per Curiam:* The petition for a writ of certiorari in this cause is granted. On consideration of the suggestion of the United States that this cause has abated, it is ordered that the judgments of the Circuit Court of Appeals for the Third Circuit and of the United States District Court for the Eastern District of Pennsylvania in this cause be, and the same are hereby, vacated, and the cause is remanded to the District Court with directions to dismiss the proceeding as abated. *United States ex rel. Claussen* v. *Curran, Commissioner of Immigration,* 276 U. S. 590. *Solicitor General Thacher* and *Messrs. Harry S. Ridgely* and *W. Marvin Smith* for petitioner. *Messrs. Benjamin M. Golder* and *Ruby R. Vale* for respondent. Reported below: 33 F. (2d) 261.

No. 21, original. EX PARTE DAUGHERTY. Submitted October 27, 1930. Decided November 3, 1930. The motion for leave to file a petition for writ of mandamus is granted and a rule to show cause is ordered to issue. *Mr. Richard L. Merrick* for petitioner. See *post,* p. 809.

No. —, original. Ex parte Doble Laboratories. Submitted October 27, 1930. Decided November 3, 1930. The motion for leave to file a petition for writ of mandamus is denied. *Messrs. Wm. H. Hunt, Frederick S. Lyon,* and *Leonard S. Lyon* for petitioner.

No. 14, original. United States *v.* Utah. November 3, 1930. The report of the special master is received and ordered to be filed. Exceptions by the parties, if any, shall be filed on or before January 26 next, and the case is assigned for hearing on such exceptions, if any, on Tuesday, February 24 next. *Solicitor General Thacher* and *Messrs. Charles M. Blackmar* and *Randolph S. Collins* for the United States. *Messrs. George P. Parker, Waldemar Van Cott, P. T. Farnsworth, Jr., Geo. D. Parkinson,* and *Wm. A. Hilton* for defendant.

No. 442. Magnolia State Building & Loan Assn. *v.* Miller, State Tax Collector. Appeal from the Supreme Court of Mississippi. Jurisdictional statement submitted October 27, 1930. Decided November 3, 1930. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132; *Kansas City M. & B. R. Co.* v. *Stiles,* 242 U. S. 111. *Messrs. Garner W. Green, Marcellus Green, R. H. Thompson,* and *Wm. H. Watkins* for appellant. *Messrs. Gordon Garland Lyell* and *Simon Rosenthal* for appellee. Reported below: 128 So. 585.

No. 465. Guaranty Trust Co., Trustee, *v.* New York & Queens County Ry. Co. et al. Appeal from the Supreme Court of New York, County of Queens. Jurisdictional statement submitted October 27, 1930.

Decided November 3, 1930. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Wabash R. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. Co.* v. *Solomon,* 237 U. S. 427; *Zucht* v. *King,* 260 U. S. 174; *Sugarman* v. *United States,* 249 U. S. 182; *C. A. King & Co.* v. *Horton,* 276 U. S. 600; *Bank of Indianola* v. *Miller,* 276 U. S. 605; *Roe* v. *Kansas,* 278 U. S. 191. *Messrs. H. C. McCollom, Joseph S. Auerbach, Charles E. Hotchkiss, Alfred T. Davison,* and *Martin A. Schenck* for appellant. *Messrs. James H. McIntosh, James L. Quackenbush,* and *Charles F. Kingsley* for appellee. Reported below: 253 N. Y. 190, 170 N. E. 887; 254 N. Y. 126, 172 N. E. 264.

No. —, original. Ex parte Walkinshaw. Submitted November 3, 1930. Decided November 24, 1930. The motion for leave to file petition for writ of mandamus is denied. *Mr. D. R. Walkinshaw, pro se.*

No. 304. Robinson et al. *v.* Holman et al. Appeal from the Supreme Court of Arkansas. Jurisdictional statement submitted November 3, 1930. Decided November 24, 1930. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a) Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c) Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Messrs. John A. Hibbler* and *Scipio A. Jones* for appellants. No appearance for appellees. Reported below: 26 S. W. (2d) 66.

No. 22, original. United States *v.* Oregon. Submitted November 24, 1930. Decided December 1, 1930. The motion for leave to file bill of complaint herein is granted

and process is ordered to issue. *Messrs. Charles M. Blackmar* and *Randolph S. Collins* for the United States. *Messrs. I. H. Van Winkle* and *L. A. Liljegvist* for defendant.

No. 23, original. Ex parte Harper et al. Submitted November 24, 1930. Decided December 1, 1930. The motion for leave to file petition for writ of mandamus is granted and a rule to show cause is ordered to issue. *Messrs. Henry J. Balzer* and *Charles T. Coleman* for petitioners. See *post*, p. 810.

No. —, original. Ex parte Blaine. Submitted November 24, 1930. Decided December 1, 1930. The motions for leave to file petition for writ of habeas corpus and for leave to proceed *in forma pauperis* are denied. *Mr. William Wallace Blaine, pro se.*

No. 35. General Motors Acceptance Corp. *v.* United States. Certificate from the Circuit Court of Appeals for the Eighth Circuit. Motion submitted November 4, 1930. Decided December 1, 1930. *Per Curiam:* The motion to bring up the entire record and cause is granted. On inspection of the record as presented upon that motion, and the confession of error by the Government in view of the decision of this Court in *Richbourg Motor Company* v. *United States*, 281 U. S. 528, it is ordered that the judgment be, and the same is hereby, reversed, and the cause is remanded to the District Court of the United States for the District of Nebraska with instruction to dismiss the libel. *Messrs. John Thomas Smith* and *Fontaine Bradley* for General Motors Acceptance Corporation. *Solicitor General Thacher* and *Assistant Attorney General Youngquist* for the United States.

No. 467. LATSHAW, JUDGE, *v.* MISSOURI EX REL. KANSAS CITY PUBLIC SERVICE CO. Appeal from the Supreme Court of Missouri. Jurisdictional statement submitted November 24, 1930. Decided December 1, 1930. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a) Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c), Judicial Code as amended (43 Stat. 936, 938), certiorari is denied.

In view of this disposition of the case the Court does not pass upon the motion of the City of Kansas City, Missouri, for leave to intervene and to be made a party appellant in this cause. *Mr. Marcy K. Brown, Jr.,* for appellant. *Messrs. Robert W. Otto, Richard J. Higgins, Henry N. Ess,* and *Powell C. Groner* for appellee. Reported below: 30 S. W. (2d) 105.

No. —, original. EX PARTE JOHNSON OIL REFINING CO. Submitted December 1, 1930. Decided December 8, 1930. The motion for leave to file petition for writ of mandamus is denied. *Mr. Chester I. Long* for petitioner.

No. 499. THOMAS *v.* GEORGIA. Appeal from the Supreme Court of Georgia. Jurisdictional statement submitted December 1, 1930. Decided December 8, 1930. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237(a) Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for certiorari, as required by § 237(c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Benjamin E. Pierce* for appellant. *Messrs. George M. Napier* and *T. R. Gress* for appellee. Reported below: 153 S. E. 428.

No. 500. PETTY *v.* GEORGIA. Appeal from the Supreme Court of Georgia. Jurisdictional statement submitted December 1, 1930. Decided December 8, 1930. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237(a) Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for certiorari, as required by § 237(c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Benjamin E. Pierce* for appellant. *Messrs. George M. Napier* and *T. R. Gress* for appellee. Reported below: 153 S. E. 428.

No. 506. BAKER *v.* NEW MEXICO. Appeal from the Supreme Court of New Mexico. Jurisdictional statement submitted December 1, 1930. Decided December 8, 1930. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction, § 237(a) Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937); *California Powder Works* v. *Davis,* 151 U. S. 389, 393; *Manning* v. *French,* 133 U. S. 186, 192, 193; *Clark* v. *Pennsylvania,* 128 U. S. 395, 397; *Leeper* v. *Texas,* 139 U. S. 462, 467; *Butler* v. *Gage,* 138 U. S. 52; *Warfield* v. *Chaffe,* 91 U. S. 690; *Corkran Oil and Development Co.* v. *Arnaudet,* 199 U. S. 192, 193. Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237(c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Elmer L. Brock* for appellant. No appearance for appellee. Reported below: 289 Pac. 801.

No. 20. COX *v.* COLORADO ET AL. Appeal from the Supreme Court of Colorado. Argued December 1, 1930. Decided December 8, 1930. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. *Bailey*

v. *Alabama,* 211 U. S. 452, 453; *Matter of Gregory,* 219 U. S. 210; *Harlan* v. *McGourin,* 218 U. S. 442; *Riddle* v. *Dyche,* 262 U. S. 333, 335, 336; *Craig* v. *Hecht,* 263 U. S. 255, 277; *Goto* v. *Lane,* 265 U. S. 393; *Knewel* v. *Egan,* 268 U. S. 442. *Messrs. James H. Brown* and *M. W. Spaulding* for appellant. *Messrs. John S. Underwood,* Attorney General of Colorado, *Colin A. Smith,* Assistant Attorney General, and *Jack Garrett Scott,* were on the brief, for appellee.

No. 25. WALL ET AL. *v.* BANKERS LIFE CO. Appeal from the Supreme Court of Iowa. Argued December 4, 1930. Decided December 8, 1930. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Wright* v. *Minnesota Mutual Life Ins. Co.,* 193 U. S. 657; *Polk* v. *Mutual Reserve Fund Life Assn.,* 207 U. S. 310. *Mr. Louis H. Salinger,* with whom *Messrs. Howard L. Bump, Francis G. Ryan, James M. Parsons, John M. Stewart, W. H. Keating, Clarence I. Spencer,* and *Vernon W. Lynch* were on the brief, for appellants. *Messrs. Charles S. Bradshaw* and *Raymond B. Alberson* were on the brief for appellee. *Mr. Frank W. Hamilton,* by special leave of Court, filed a brief as *amicus curiae.* Reported below: 208 Ia. 1053; 223 N. W. 257.

No. 28. MEAD-MORRISON MFG. CO. *v.* MARCHANT, TRUSTEE IN BANKRUPTCY. Appeal from the Supreme Court of New York. Argued December 4, 5, 1930. Decided December 8, 1930. *Per Curiam:* The appeal herein is dismissed for the want of a properly presented federal question. *John* v. *Paullin,* 231 U. S. 583, 585; *Central Union Telephone Co.* v. *City of Edwardsville,* 269 U. S. 190, 195; *Beaty* v. *Richardson,* 276 U. S. 599. *Mr. Edward F. McClennen,* with whom *Mr. Arthur P.*

French was on the brief, for appellant. *Mr. Kenneth M. Spence* for appellee. Reported below: 226 App. Div. 397, 169 N. E. 386; 252 N. Y. 284.

No. 30. WESTON *v.* BEAVER-REMMERS-GRAHAM CO. ET AL. Appeal from the Supreme Court of Ohio. Argued December 5, 1930. Decided December 8, 1930. *Per Curiam:* The motion of the appellees to dismiss the appeal herein is granted, and it is ordered that the appeal be, and the same is hereby, dismissed for the want of a substantial federal question. *Wabash R. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. Co.* v. *Solomon,* 237 U. S. 427; *Zucht* v. *King,* 260 U. S. 174; *Sugarman* v. *United States,* 249 U. S. 182; *C. A. King & Co.* v. *Horton,* 276 U. S. 600; *Bank of Indianola* v. *Miller,* 276 U. S. 605; *Roe* v. *Kansas,* 278 U. S. 191. *Mr. Guy H. Wells* argued the cause and *Messrs. Wellmore B. Turner* and *E. H. Turner* filed a brief for appellants. *Messrs. Murray Seasongood, J. Sprigg McMahon, Irvine G. Bieser, Andrew A. Thomas,* and *Lester A. Jaffe* were on the brief for appellees. Reported below: 172 N. E. 379.

No. 21, original. EX PARTE DAUGHERTY. Return to rule submitted January 5, 1931. Decided January 12, 1931. Upon consideration of the return of the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia to the rule, issued in this case, to show cause why a writ of mandamus should not issue herein, it is now here ordered that the said rule be, and the same is hereby, discharged, and that the said petition be, and the same hereby is, denied without prejudice to an application to the Circuit Court of Appeals for the Fourth Circuit. *Mr. Richard L. Merrick* for petitioner. *Solicitor General Thacher* and *Mr. Erwin N. Griswold* for respondent.

No. 23, original. EX PARTE HARPER ET AL. Return to rule submitted January 5, 1931. Decided January 12, 1931. Upon consideration of the return of the Honorable John E. Martineau, Judge of the District Court of the United States for the Eastern District of Arkansas to the rule, issued in this case, to show cause why a writ of mandamus should not issue herein, it is now here ordered that the said rule be, and the same is hereby, discharged, and that the petition be, and the same hereby is, denied. *Mr. Charles T. Coleman* for petitioners. *Mr. Charles D. Frierson* for respondent.

No. 527. GUGENHINE *v.* GERK, CHIEF OF POLICE, ET AL. Appeal from the Supreme Court of Missouri. Jurisdictional statement submitted January 5, 1931. Decided January 12, 1931. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c), Judicial Code as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Freeman L. Martin* for appellant. *Mr. Stratton Shartel,* Attorney General of Missouri, for appellees. Reported below: 31 S. W. (2d) 1.

No. —, original. EX PARTE DELAWARE BAY & RIVER PILOTS ASSN. Submitted January 12, 1931. Decided January 19, 1931. The motion for leave to file petition for writ of mandamus is denied. *Mr. Otto Wolff, Jr.,* for petitioner.

No. 512. UNITED STATES *v.* MALCOLM. Reported *ante,* p. 792.

No. 49. BAIN PEANUT CO. ET AL. *v.* PINSON ET AL. Appeal from the Court of Civil Appeals, Eleventh Supreme Judicial District of Texas. Argued January 12, 1931. Decided January 19, 1931. *Per Curiam:* The appeal herein is dismissed for want of a properly presented federal question. *John* v. *Paullin,* 231 U. S. 583, 585; *Central Union Telephone Co.* v. *City of Edwardsville,* 269 U. S. 190, 195; *Beaty* v. *Richardson,* 276 U. S. 599. *Mr. B. G. Mansell,* with whom *Mr. B. L. Agerton* was on the brief, for appellants. *Messrs. Gib Callaway* and *Mark Callaway* submitted for appellees. Reported below: 19 S. W. (2d) 203. See same case, *ante,* p. 499.

No. 52. CLARK *v.* MAXWELL, COMMISSIONER OF REVENUE. Appeal from the Supreme Court of North Carolina. Argued January 13, 1931. Decided January 19, 1931. *Per Curiam:* The judgment herein is affirmed. *Carley & Hamilton, Inc.,* v. *Snook,* 281 U. S. 66, 72, 73; *Packard* v. *Banton,* 264 U. S. 140, 143, 144; *Clark* v. *Titusville,* 184 U. S. 329, 332, 333. *Mr. Albert L. Cox* for appellant. *Messrs. Dennis G. Brummitt,* Attorney General of North Carolina, and *Frank Nash,* Assistant Attorney General, were on the brief for appellee. Reported below: 150 S. E. 190.

No. 412. ROY & TITCOMB, INC., *v.* UNITED STATES. On writ of certiorari to the Court of Claims. Argued December 11, 1930. Decided January 26, 1931. *Per Curiam:* Judgment affirmed. (1) *Stange* v. *United States, ante,* p. 270; *Aiken, Administratrix, v. Burnet, Commissioner of Internal Revenue, ante,* p. 277; *W. P. Brown & Sons Lumber Company* v. *Burnet, Commissioner of Internal Revenue, ante,* p. 283; *Burnet, Commissioner of Internal Revenue,* v. *Chicago Railway Equipment Co., ante,* p. 295. (2) *Graham* v. *Goodcell, ante,* p. 409; *Mascot Oil Com-*

pany, Inc., v. *United States ante*, p. 434. *Mr. Sidney P. Simpson*, with whom *Messrs. A. C. Rearick* and *Theodore B. Benson* were on the brief, for petitioner. *Assistant Attorney General Rugg*, with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch*, Special Assistant to the Attorney General, *Lisle A. Smith, Bradley B. Gilman*, and *Erwin N. Griswold* were on the brief, for the United States. Reported below: 39 F. (2d) 753; 69 Ct. Cls. 614.

No. 97. ROBERTS SASH & DOOR CO. *v.* UNITED STATES. On writ of certiorari to the Court of Claims. Argued December 11, 1930. Decided January 26, 1931. *Per Curiam:* Judgment affirmed. *United States* v. *John Barth Co.*, 279 U. S. 370. *Mr. Jesse I. Miller* for petitioner. *Assistant Attorney General Rugg*, with whom *Solicitor General Thacher* and *Messrs. Claude R. Branch*, Special Assistant to the Attorney General, *George H. Foster, Bradley B. Gilman*, and *H. Brian Holland* were on the brief, for the United States. Reported below: 69 Ct. Cls. 363; 38 F. (2d) 716.

No. 546. LAMM *v.* SILVER FALLS TIMBER CO. Appeal from the Supreme Court of Oregon. Jurisdictional statement submitted January 19, 1931. Decided January 26, 1931. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Wabash R. Co.* v. *Flannigan*, 192 U. S. 29; *Erie R. Co.* v. *Solomon*, 237 U. S. 427; *Zucht* v. *King*, 260 U. S. 174; *Sugarman* v. *United States*, 249 U. S. 182; *C. A. King & Co.* v. *Horton*, 276 U. S. 600; *Bank of Indianola* v. *Miller*, 276 U. S. 605; *Roe* v. *Kansas*, 278 U. S. 191. *Mr. Arthur I. Moulton* for appellant. *Messrs. I. H. Van Winkle, Charles A. Hart*, and *Charles E. McCulloch* for appellee. Reported below: 286 Pac. 527; 291 *id.* 375.

No. 547. VARRELMAN *v.* FLORA LOGGING CO. Appeal from the Supreme Court of Oregon. Jurisdictional statement submitted January 19, 1931. Decided January 26, 1931. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Wabash R. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. Co.* v. *Solomon,* 237 U. S. 427; *Zucht* v. *King,* 260 U. S. 174; *Sugarman* v. *United States,* 249 U. S. 182; *C. A. King & Co.* v. *Horton,* 276 U. S. 600; *Bank of Indianola* v. *Miller,* 276 U. S. 605; *Roe* v. *Kansas,* 278 U. S. 191. *Mr. Arthur I. Moulton* for appellant. *Mr. I. H. Van Winkle* for appellee. Reported below: 286 Pac. 541; 290 *id.* 751.

No. 50. WISCONSIN ELECTRIC CO. *v.* DUMORE CO. On writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. Argued January 12, 13, 1931. Decided January 26, 1931. *Per Curiam:* It appearing that the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law, the writ of certiorari is dismissed as improvidently granted. *Mr. George Bayard Jones,* with whom *Messrs. Walter F. Murray* and *Greer Maréchal* were on the brief, for petitioner. No appearance for respondent. Reported below: 35 F. (2d) 555.

No. 62. DAILY PANTAGRAPH, INC., *v.* UNITED STATES. On writ of certiorari to the Court of Claims. Submitted January 19, 1931. Decided January 26, 1931. *Per Curiam:* On confession of error by the respondent, the United States, the judgment is reversed so far as it relates to the question of the reduction of invested capital by reason of dividends paid, being the question under review by this Court. *Mr. Arnold L. Guesmer* submitted for petitioner. *Solicitor General Thacher, Assistant Attorney*

General Rugg and *Messrs. Claude R. Branch,* Special Assistant to the Attorney General, *Bradley B. Gilman,* and *Erwin N. Griswold* submitted for the United States. Reported below: 68 Ct. Cls. 251; 37 F. (2d) 783.

No. 71. ADAM *v.* NEW YORK TRUST CO., TRUSTEE. On writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. Argued January 23, 1931. Decided January 26, 1931. *Per Curiam:* The writ of certiorari herein is dismissed as improvidently granted. *Messrs. Michael Adam* and *Richard A. Dowling* submitted for petitioner. *Mr. Charles Rosen,* with whom *Messrs. Stamps Farrar* and *Edwin C. Hollins* were on the brief, for respondent. Reported below: 37 F. (2d) 826.

No. —, original. EX PARTE JACKSON. Submitted January 26, 1931. Decided February 2, 1931. The motion for leave to file petition for writ of mandamus is denied. *Mr. Crandall Mackey* for petitioner.

No. —, original. EX PARTE STUTZMAN. Submitted January 28, 1931. Decided February 2, 1931. The motion for leave to file petition for writ of mandamus and for leave to proceed *in forma pauperis* is denied. *Mr. Charles A. Stutzman, pro se.*

No. —, original. EX PARTE DIAL. Submitted January 26, 1931. Decided February 2, 1931. The motion for leave to file petition for writ of mandamus is denied. *Mr. Frank Dial, pro se.*

No. 567. DENVER & SALT LAKE R. CO. *v.* BOARD OF COUNTY COMMISSIONERS OF ROUTT COUNTY; and

No. 568. SAME *v.* BOARD OF COUNTY COMMISSIONERS OF MOFFAT COUNTY. Appeals from the Supreme Court of Colorado. Jurisdictional statement submitted January 26, 1931. Decided February 2, 1931. *Per Curiam:* The appeals herein are dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937.) Treating the papers whereon the appeals in these causes were allowed as petitions for writs of certiorari (§ 237 (c) Judicial Code, as amended, 43 Stat. 936, 938), consideration thereof is postponed, and leave is granted to petitioners to file briefs supporting applications for certiorari within 15 days, with 10 days for opposing counsel to reply. The clerk shall cause the record to be printed and, on the first motion day after the expiration of the time granted to the parties for the filing of briefs, shall submit these cases to the Court for further consideration. *Mr. Elmer L. Brock* for appellant. *Mr. Thomas M. Woodward* for appellees. Reported below: 291 Pac. 1020, 1022.

No. 574. BEVINS *v.* IOWA. Appeal from the Supreme Court of Iowa. Jurisdictional statement submitted January 26, 1931. Decided February 2, 1931. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. (1) *Nash* v. *United States,* 229 U. S. 373; *Omaechevarria* v. *Idaho,* 246 U. S. 343; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 501. (2) *Huntington* v. *Worthen; Little Rock & Fort Smith Ry.* v. *Worthen,* 120 U. S. 97, 102. *Mr. Donald Evans* for appellant. *Messrs. John Fletcher* and *Neill Garrett* for appellee. Reported below: 230 N. W. 865.

No. 590. FRITZINGER *v.* ILLINOIS ET AL. Appeal from the Supreme Court of Illinois. Jurisdictional statement submitted February 2, 1931. Decided February 25, 1931.

Per Curiam: The appeal herein is dismissed for the want of jurisdiction. Section 237 (a) Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c) Judicial Code as amended (43 Stat. 936, 938), the petition is denied. *Mr. Henry Fritzinger, pro se. Messrs. Oscar E. Carlstrom* and *Russell O. Hanson* for appellees. Reported below: 331 Ill. 380; 163 N. E. 149.

No. 591. FRITZINGER *v.* ILLINOIS ET AL. Appeal from the Supreme Court of Illinois. Jurisdictional statement submitted February 2, 1931. Decided February 25, 1931. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a) Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c) Judicial Code, as amended (43 Stat. 936, 938), the petition is denied. *Mr. Henry Fritzinger, pro se. Messrs. Oscar E. Carlstrom* and *Russell O. Hanson* for appellees. Reported below: 331 Ill. 380; 163 N. E. 149.

DECISIONS GRANTING CERTIORARI, FROM OCTOBER 6, 1930, TO AND INCLUDING FEBRUARY 25, 1931.

No. 125. CARR, DIRECTOR, *v.* ZAJA. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Thacher, Assistant Attorney General Luhring* and *Messrs. Claude R. Branch* and *Frank M. Parrish* for petitioner. *Messrs. J. Edward Keating* and *Erwin I. Feldman* for respondent. Reported below: 37 F. (2d) 1016.

No. 336. UNITED STATES EX REL. CATECHES *v.* DAY, COMMISSIONER OF IMMIGRATION. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Harold Van Riper* for petitioner. *Solicitor General Thacher* and *Messrs. Claude R. Branch, Harry S. Ridgely,* and *Paul D. Miller* for respondent. Reported below: 41 F. (2d) 1019.

No. 278. CONCORDIA INS. CO. *v.* SCHOOL DISTRICT NO. 98;

No. 279. ROYAL INS. CO., LTD. *v.* SAME;

No. 280. NATIONAL FIRE INS. CO. *v.* SAME; and

No. 281. FIRE ASSOCIATION OF PHILADELPHIA *v.* SAME. October 13, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Messrs. F. A. Rittenhouse* and *Hal C. Thurman* for petitioners. *Messrs. R. M. Rainey, Frank G. Anderson,* and *Streeter B. Flynn* for respondent. Reported below: 40 F. (2d) 379.

No. 289. WENGLINSKY *v.* ZURBRICK, DISTRICT DIRECTOR OF IMMIGRATION ET AL. See same case, *ante,* p. 798.

No. 87. MILLIKEN ET AL. *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Court of Claims granted. *Messrs. D. A. Embury* and *Hugo Kohlmann* for petitioners. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *Fred K. Dyar* for the United States. Reported below: 38 F. (2d) 381; 69 Ct. Cls. 231.

No. 103. WAITE *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Court of Claims granted. *Messrs. O. Ellery Edwards* and *Joseph W. Cox*

for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch, Percy M. Cox,* and *W. Marvin Smith* for the United States. Reported below: 63 Ct. Cls. 438; 69 *id.* 153.

No. 114. VARIOUS ITEMS OF PERSONAL PROPERTY ET AL. *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Lewis Landes* and *Wm. E. Leahy* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. John J. Byrne* and *Paul D. Miller* for the United States. Reported below: 40 F. (2d) 422.

No. 129. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* WHITEHOUSE. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Seawall Key, J. Louis Monarch, Clarence M. Charest, Morton P. Fisher,* and *Miss Helen R. Carloss* for petitioner. *Messrs. John W. Davis, Spottswood D. Bowers, Marion N. Fisher,* and *Robert W. Candler* for respondent. Reported below: 38 F. (2d) 162.

No. 141. HALBERT ET AL. *v.* UNITED STATES;
No. 142. SAME *v.* SAME;
No. 143. SAME *v.* SAME;
No. 144. SAME *v.* SAME;
No. 145. PICKERNOLL ET AL. *v.* SAME;
No. 146. ELLIOTT ET AL. *v.* SAME;
No. 147. PETIT ET AL. *v.* SAME;
No. 148. BARICHIO ET AL. *v.* SAME;
No. 149. ELLIOTT ET AL. *v.* SAME;

No. 150. SAME *v.* SAME;

No. 151. RUBENS ET AL. *v.* SAME;

No. 152. WALKOWSKY ET AL. *v.* SAME;

No. 153. ROLFSON ET AL. *v.* SAME; and

No. 154. PROVOE ET AL. *v.* SAME. October 13, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Overton G. Ellis, Stuart H. Elliott,* and *Webster Ballinger* for petitioners. *Solicitor General Thacher, Assistant Attorney General Richardson,* and *Messrs. Capo Rodriguez* and *W. Marvin Smith* for the United States. Reported below: 38 F. (2d) 795, 805, 806, 799.

No. 155. CHESAPEAKE & OHIO RY. CO. *v.* MARTIN ET AL. October 13, 1930. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia granted. *Mr. Walter Leake* for petitioner. No appearance for respondents. Reported below: 143 S. E. 629; 152 *id.* 335.

No. 176. PAGEL, ADMINISTRATOR, *v.* HALLBOM. October 13, 1930. Petition for writ of certiorari to the Supreme Court of Minnesota granted. *Mr. Henry T. Ronning* for petitioner. *Mr. Fred W. Putnam* for respondent. Reported below: 229 N. W. 344.

No. 179. FARBWERKE ET AL. *v.* CHEMICAL FOUNDATION, INC., ET AL.;

No. 180. FARBWERKE *v.* E. I. DU PONT DE NEMOURS & CO. ET AL.;

No. 181. DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT *v.* SAME;

No. 182. BADISCHE-ANILIN & SODA-FABRIK *v.* SAME;

No. 271. WOODS, TREASURER, *v.* CHEMICAL FOUNDATION, INC., ET AL.;

No. 272. SUTHERLAND, ALIEN PROPERTY CUSTODIAN, *v.* FARBWERKE ET AL.;

No. 273. SAME *v.* DEUTSCHE GOLD & SILBER SCHEIDE ANSTALT ET AL.; and

No. 274. SAME *v.* BADISCHE ANILIN & SODA-FABRIK ET AL. October 13, 1930. Petitions for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Frederick H. Wood, Almuth C. Vandiver,* and *Charles F. Curry* for petitioners in Nos. 179, 180, 181, and 182. *Solicitor General Thacher* for petitioners in Nos. 271, 272, 273, and 274. *Messrs. Joseph H. Choate, Jr., Wm. G. Mahaffy, S. M. Stellwagin, G. Carroll Todd, J. P. Laffey, W. S. Gregg, Solicitor General Thacher, J. Frank Staley,* and *Thomas E. Rhodes* for respondents in Nos. 179, 180, 181, and 182. *Messrs. G. Carroll Todd, Joseph H. Choate, Jr., Wm. G. Mahaffy,* and *S. M. Stellwagin* for respondents in Nos. 271, 272, 273, and 274. Reported below: 39 F. (2d) 366.

No. 199. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* HOUSTON. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. J. Louis Monarch, John G. Remey, W. Marvin Smith, Clarence M. Charest,* and *Allin H. Pierce* for petitioner. *Mr. Wm. Clark Mason* for respondent. Reported below: 39 F. (2d) 351.

No. 202. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* HENRY. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. J. Louis Monarch, John G. Remey, W. Marvin Smith, Clarence*

M. Charest, and *Allin H. Pierce* for petitioner. *Mr. Wm. Clarke Mason* for respondent. Reported below: 39 F. (2d) 358.

No. 203. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* PORTER ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. J. Louis Monarch, John G. Remey, W. Marvin Smith, Clarence M. Charest*, and *Allin H. Pierce* for petitioner. *Mr. Walter Lee Sheppard* for respondents. Reported below: 39 F. (2d) 360.

No. 205. ROSE, COLLECTOR, *v.* GRANT; and

No. 206. SAME *v.* GRANT ET AL. October 13, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key, Andrew D. Sharpe*, and *Paul D. Miller* for petitioner. *Messrs. John M. Slaton* and *Richard H. Wilmer* for respondents. Reported below: 39 F. (2d) 338, 340.

No. 231. BURNET, COMMISSIONER OF INTERNAL REVENUE *v.* CHICAGO RAILWAY EQUIPMENT CO. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Thacher* for petitioner. *Mr. Wm. S. Oppenheim* for respondent. Reported below: 39 F. (2d) 378.

No. 235. FLYNN, EXECUTOR, *v.* NEW YORK, NEW HAVEN & HARTFORD R. Co. October 13, 1930. Petition

for writ of certiorari to the Supreme Court of Errors of Connecticut granted. *Mr. Thomas R. FitzSimmons* for petitioner. *Mr. Edward R. Brumley* for respondent. Reported below: 111 Conn. 196; 149 Atl. 682.

No. 239. MAYNARD, ADMINISTRATOR, *v.* ELLIOTT, TRUSTEE;

No. 240. VARNEY *v.* SAME;

No. 241. SMITH ET AL. *v.* SAME; and

No. 242. RUTHERFORD *v.* SAME. October 13, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Randolph Bias* and *Wells Goodykoontz* for petitioners. *Mr. Stanley Reed* for respondent. Reported below: 40 F. (2d) 17.

No. 252. UNITED STATES *v.* WELLS ET AL. October 13, 1930. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Thacher* for the United States. *Mr. W. W. Spalding* for respondents. Reported below: 39 F. (2d) 998; 69 Ct. Cls. 485.

No. 261. STANDARD MARINE INS. CO., LTD., *v.* SCOTTISH METROPOLITAN ASSURANCE CO., LTD. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Russell T. Mount* for petitioner. *Messrs. T. Catesby Jones* and *James W. Ryan* for respondent. Reported below: 39 F. (2d) 436.

No. 263. MAAS & WALDSTEIN CO. *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Court of Claims granted. *Messrs. George E. Holmes, W. A. Sutherland,* and *Donald Havens* for petitioner. *Solicitor General Thacher, Assistant Attorney General*

Rugg and *Messrs. Claude R. Branch* and *Charles R. Pollard* for the United States. Reported below: 37 F. (2d) 196; 68 Ct. Cls. 613.

No. 282. BONWIT TELLER & Co. *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Court of Claims granted. *Mr. Arthur B. Hyman* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *George H. Foster* for the United States. Reported below: 39 F. (2d) 730; 69 Ct. Cls. 638.

No. 288. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* THOMPSON OIL & GAS Co. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Sewall Key, J. Louis Monarch, Paul D. Miller,* and *Clarence M. Charest* for petitioner. *Messrs. Phil D. Morelock* and *James S. Y. Ivins* for respondent. Reported below: 40 F. (2d) 493.

No. 315. SMITH, ADMINISTRATRIX, *v.* SPRINGDALE AMUSEMENT PARK ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. E. Howard McCaleb* and *John E. Sater* for petitioner. *Mr. Paul Bakewell* for respondents. Reported below: 40 F. (2d) 173.

No. 352. V. LOEWERS GAMBRINUS BREWERY Co. *v.* ANDERSON, COLLECTOR. October 20, 1930. The petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit is granted, limited to the question

whether the petitioner is entitled to any deduction for obsolescence of its tangible property in the taxable years 1918 and 1919 under § 234 (a) (7) of the Revenue Act of 1918. *Messrs. Arthur B. Hyman* and *Karl D. Loos* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, J. Louis Monarch,* and *Norman D. Keller* for respondent. Reported below: 42 F. (2d) 216.

No. 362. GASOLINE PRODUCTS CO., INC., *v.* CHAMPLIN REFINING CO. October 20, 1930. The petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit is granted, limited to the question whether the Circuit Court of Appeals erred in limiting the new trial to the question of damages. *Mr. John B. Marsh* for petitioner. *Messrs. Horace G. McKeever, Harry O. Glasser,* and *Carl C. Jones* for respondent. Reported below: 39 F. (2d) 521.

No. 448. PRUSSIAN *v.* UNITED STATES. October 20, 1930. The petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit is granted, limited to the question whether the indictment states an offense under the Criminal Code. *Messrs. Walter B. Milkman* and *Harold L. Turk* for petitioner. *Solicitor General Thacher* and *Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 42 F. (2d) 854.

No. 323. SECOND NATIONAL BANK *v.* UNITED STATES. October 20, 1930. Petition for writ of certiorari to the Court of Claims granted. *Messrs. W. A. Sutherland* and *Samuel Nesbit Evins* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs.*

Claude R. Branch and *W. Marvin Smith* for the United States. Reported below: 69 Ct. Cls. 745.

No. 337. BOSTON PRESSED METAL CO. *v.* UNITED STATES. October 20, 1930. Petition for writ of certiorari to the Court of Claims granted. *Mr. Harry Friedman* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *W. Marvin Smith* for the United States. Reported below: 42 F. (2d) 312; 70 Ct. Cls. 272.

No. 463. DANIEL REEVES, INC., *v.* ANDERSON, COLLECTOR. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Elkan Turk* and *Herman Goldman* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch* and *S. Dee Hanson* for respondent. Reported below: 43 F. (2d) 679.

No. 195. COLUMBUS & GREENVILLE RY. CO. ET AL. *v.* MILLER, STATE TAX COLLECTOR. October 20, 1930. Petition for writ of certiorari to the Supreme Court of Mississippi granted. *Messrs. William H. Watkins, R. C. Stovall,* and *A. F. Gardner, Sr.,* for petitioners. *Messrs. George Butler* and *Simon Rosenthal* for respondent. Reported below: 127 So. 784.

No. 330. TWIN CITY PIPE LINE CO. ET AL. *v.* HARDING GLASS CO. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. J. P. Woods* for petitioners. *Messrs. Joseph R. Brown* and *James B. McDonough* for respondent. Reported below: 39 F. (2d) 408.

No. 342. SOUTHERN RAILWAY CO. *v.* HUSSEY. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Charles A. Houts* and *H. N. Quigley* for petitioner. *Mr. Jesse W. Barrett* for respondent. Reported below: 42 F. (2d) 70.

No. 351. ECKERT *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. C. R. Dewey* and *Henry T. Dorrance* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key,* and *A. H. Conner* for respondent. Reported below: 42 F. (2d) 158.

No. 370. ALFORD *v.* UNITED STATES. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Thos. M. Foley* and *Leo R. Friedman* for petitioner. *Solicitor General Thacher* and *Messrs. Claude R. Branch* and *Harry S. Ridgely* for the United States. Reported below: 41 F. (2d) 157.

No. 422. CUSTER *v.* MCCUTCHEON. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. James R. Bothwell* and *J. F. Nugent* for petitioner. *Solicitor General Thacher, Assistant Attorney General Richardson* and *Messrs. Claude R. Branch, E. T. Burke,* and *Paul D. Miller* for respondent. Reported below: 41 F. (2d) 354.

No. 423. SANCHEZ *v.* BORRAS. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals

for the First Circuit granted. *Mr. Nelson Gammans* for petitioner. *Messrs. Henry G. Molina, Archie O. Dawson,* and *Sidney P. Simpson* for respondent. Reported below: 41 F. (2d) 914.

No. 426. McCaughn, Collector, *v.* Hershey Chocolate Co.;

No. 427. Lederer, Collector, *v.* Same;

No. 428. Davis, Collector, *v.* Same;

No. 429. Lederer, Collector, *v.* Same;

No. 430. McCaughn, Collector, *v.* Same;

No. 431. Davis, Collector, *v.* Same;

No. 432. Same *v.* Klein Chocolate Co.;

No. 433. Lederer, Collector, *v.* Same;

No. 434. Same *v.* Same;

No. 435. McCaughn, Collector, *v.* Same;

No. 436. Lederer, Collector, *v.* Wilbur-Suchard Chocolate Co.;

No. 437. Same *v.* Same;

No. 438. McCaughn, Collector, *v.* Same;

No. 439. Davis, Collector, *v.* York Chocolate Co.;

No. 440. Lederer, Collector, *v.* Same; and

No. 441. McCaughn, Collector, *v.* Same. October 20, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key, J. Louis Monarch,* and *Clarence M. Charest* for petitioners. *Messrs. A. Allen Woodruff, F. Lyman Windolph,* and *Wm. Clarke Mason* for respondents. Reported below: 42 F. (2d) 408.

No. 445. Baldwin *v.* Iowa State Traveling Men's Assn. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit

granted. *Messrs. C. W. Prince, James Beery, Denton Dunn,* and *F. W. Lehmann, Jr.,* for petitioner. *Mr. J. M. Parsons* for respondent. Reported below: 40 F. (2d) 357.

No. 387. KLEIN ET AL. *v.* UNITED STATES. October 20, 1930. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Benjamin B. Pettus, Edward Clifford,* and *H. H. Shinnick* for petitioners. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Fred K. Dyar* for the United States. Reported below: 42 F. (2d) 596; 70 Ct. Cls. 151.

No. 416. UNITED STATES *v.* WYMAN, PARTRIDGE & Co. October 20, 1930. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Thacher* for the United States. *Messrs. Frank J. Albus* and *Wm. Meyerhoff* for respondent. Reported below: 41 F. (2d) 886; 70 Ct. Cls. 119.

No. 455. PHILLIPS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Elkan Turk* and *Herman Goldman* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key, Morton K. Rothschild, Paul D. Miller, Clarence M. Charest,* and *Allin H. Pierce* for respondent. Reported below: 42 F. (2d) 177.

No. 451. MATHEUS, U. S. MARSHAL, *v.* UNITED STATES EX REL. CUNNINGHAM. See same case, *ante,* p. 802.

No. 400. MASCOT OIL CO., INC., *v.* UNITED STATES. October 27, 1930. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Theodore B. Benson, Wm. Meyerhoff,* and *W. A. Sutherland* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *George H. Foster* for the United States. Reported below: 42 F. (2d) 309; 70 Ct. Cls. 246. See *ante,* p. 434.

No. 412. ROY & TITCOMB, INC., *v.* UNITED STATES. October 27, 1930. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Theodore B. Benson, A. C. Rearick,* and *Sidney P. Simpson* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *Lisle A. Smith* for the United States. Reported below: 39 F. (2d) 753; 69 Ct. Cls. 614. See *ante,* p. 811.

No. 484. FEDERAL TRADE COMMISSION *v.* RALADAM CO. November 3, 1930. The petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit is granted, limited to the question of the jurisdiction of the Federal Trade Commission. *Solicitor General Thacher, Assistant to the Attorney General O'Brian* and *Messrs. Claude R. Branch, Charles H. Weston, William G. Davis, Robert E. Healy,* and *Martin A. Morrison* for petitioner. *Mr. Thomas G. Long* for respondent. Reported below: 42 F. (2d) 430.

No. 97. ROBERTS SASH & DOOR CO. *v.* UNITED STATES. Petition for writ of certiorari to the Court of Claims. November 24, 1930. In view of the conflict of decisions appearing since the former order of this Court, it is or-

dered that the petition for rehearing be, and the same is hereby, granted. The order heretofore entered on October 13, 1930, denying the petition for writ of certiorari herein is vacated, and it is ordered that the petition for writ of certiorari in this case be, and the same is hereby, granted. *Mr. Jesse I. Miller* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch, George H. Foster,* and *Fred K. Dyar* for the United States. Reported below: 38 F. (2d) 716; 69 Ct. Cls. 363. See same case, *ante,* p. 812.

No. 425. GROUP NO. 1, OIL CORP. *v.* BASS, COLLECTOR OF INTERNAL REVENUE. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. November 24, 1930. In view of the interest of the State of Texas, as stated by it as *amicus curiae* in support of the petition for rehearing, it is ordered that the petition for rehearing be, and the same is hereby, granted. The order heretofore entered on October 20, 1930, denying the petition for writ of certiorari herein is vacated, and it is ordered that the petition for writ of certiorari in this case be, and the same is hereby, granted. *Messrs. Homer L. Bruce* and *James A. Baker* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key,* and *John G. Remey* for respondent. Reported below: 41 F (2d) 483.

No. 457. DUQUESNE STEEL FOUNDRY CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. November 24, 1930. In view of the conflict of decisions appearing since the former order of this Court, it is ordered that the petition for rehearing be, and the same is hereby, granted. The order heretofore entered on October 20, 1930, denying the petition for writ of certiorari

herein is vacated and it is ordered that the petition for writ of certiorari in this case be, and the same is hereby, granted. *Mr. Wm. S. Moorhead* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key, John Henry McEvers, W. Marvin Smith,* and *Clarence M. Charest* for respondent. Reported below: 41 F. (2d) 995.

No. 489. ENAMELED METALS CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. November 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. S. Leo Ruslander, Samuel Kaufman, Clarence N. Goodwin,* and *George R. Beneman* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, J. Louis Monarch, John MacC. Hudson,* and *Clarence M. Charest* for respondent. Reported below: 42 F. (2d) 213.

No. 477. HUSTY ET AL. *v.* UNITED STATES. November 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. John B. McMahon* and *P. F. Parrott* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Mahlon D. Kiefer, F. Cadmus Damrell,* and *Paul D. Miller* for the United States. Reported below: 30 F. (2d) 1012.

No. 490. FRANK L. YOUNG CO. *v.* MCNEAL EDWARDS CO. November 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. John G. Palfrey* and *Charles F. Albert* for petitioner. *Mr. Asa P. French* for respondent. Reported below: 42 F. (2d) 829. See also 35 *id.* 829; 43 *id.* 99.

No. 504. UNITED STATES *v.* MACINTOSH. November 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Thacher* and *Messrs. Harry S. Ridgely* and *Paul D. Miller* for the United States. *Mr. John W. Davis* for respondent. Reported below: 42 F. (2d) 845.

No. 505. UNITED STATES *v.* BLAND. November 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Thacher* and *Messrs. Harry S. Ridgely* and *Paul D. Miller* for the United States. *Emily Marx* for respondent. Reported below: 42 F. (2d) 842.

No. 508. HEINER, COLLECTOR OF INTERNAL REVENUE, *v.* ERIE COAL & COKE CO. November 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist, Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch, Sewall Key, Geo. H. Foster,* and *Norman D. Keller* for petitioner. No appearance for respondent. Reported below: 42 F. (2d) 214.

No. 519. AMERICAN GLUE CO. *v.* UNITED STATES. November 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Harris H. Gilman* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, J. Louis Monarch,* and *Norman D. Keller* for the United States. Reported below: 42 F. (2d) 235.

No. 529. JENNINGS, EXECUTRIX, *v.* ANDERSON, COLLECTOR. November 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Robert N. Miller, Ewing Everett* and *J. Robert Sherrod* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, J. Louis Monarch,* and *Norman D. Keller* for respondent. Reported below: 43 F. (2d) 683.

No. 520. LEWIS-SIMAS-JONES CO. *v.* SOUTHERN PACIFIC CO. December 1, 1930. Petition for writ of certiorari to the District Court of Appeals, First Appellate District, of California, granted. *Messrs. Ernest Clewe* and *Robert E. Quirk* for petitioner. *Messrs. Henley C. Booth, J. R. Bell, G. H. Muckley,* and *James E. Lyons* for respondent. Reported below: 289 Pac. 643.

No. 521. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* LOGAN; and

No. 522. SAME *v.* BRUCE. December 1, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. J. Louis Monarch, Randolph C. Shaw, Clarence M. Charest,* and *Allin H. Pierce* for petitioner. *Mr. R. S. Doyle* for respondents. Reported below: 42 F. (2d) 193, 197.

No. 543. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RY. CO. *v.* MOQUIN. December 8, 1930. The petition for a writ of certiorari in this case to the Supreme Court of Minnesota is granted, limited to the question arising

from the failure of the state court to grant a new trial in a case under the Federal Employers' Liability Act where the verdict was obtained by appeals to passion and prejudice. *Messrs. Henry S. Mitchell* and *John E. Palmer* for petitioner. *Messrs. Tom Davis* and *Ernest A. Michel* for respondent. Reported below: 231 N. W. 829; see also, 231 *id.* 920.

No. 565. WRIGHT & TAYLOR, INC., *v.* LUCAS, COLLECTOR OF INTERNAL REVENUE. December 8, 1930. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Donald V. Hunter* and *Robert N. Miller* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key,* and *Norman D. Keller* and *John MacC. Hudson* for respondent. Reported below: 34 F. (2d) 328; 45 *id.* 75.

No. 542. MCCORMICK ET AL. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. December 8, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Robert N. Miller, Horace Kent Tenney, George T. Rogers, Henry F. Tenney,* and *Roger Sherman* for petitioners. *Solicitor General Thacher* for respondent. Reported below: 43 F. (2d) 277.

No. 535. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* NORTHERN TRUST CO., EXECUTOR. December 8, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. J. Louis Monarch, Clarence M. Charest,* and

Prew Savoy for petitioner. *Messrs. Theodore Schmidt, Edward H. Blanc, Russell L. Bradford, John W. Davis,* and *Frederic Ullmann* for respondent. Reported below: 41 F. (2d) 732.

No. 549. NASH-BREYER MOTOR CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. January 5, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. T. B. Benson, Arthur H. Deibert, M. F. Mitchell,* and *George G. Witter* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key,* and *J. Louis Monarch* for respondent. Reported below: 42 F. (2d) 192.

No. 552. MCBOYLE *v.* UNITED STATES. January 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted, limited to the question whether the National Motor Vehicle Theft Act applies to aircraft. *Mr. Harry F. Brown* for petitioner. *Solicitor General Thacher* and *Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 43 F. (2d) 273.

No. 581. MORSMAN, ADMINISTRATOR, *v.* COMMISSIONER OF INTERNAL REVENUE. January 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Edgar M. Morsman, Jr., Edward H. Blanc,* and *Russell L. Bradford* for petitioner. *Solicitor General Thacher* and *Mr. Claude R. Branch* for respondent. Reported below: 44 F. (2d) 902.

No. 563. GREAT NORTHERN RY. CO. *v.* DELMAR CO. January 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. F. G. Dorety* and *R. J. Hagman* for petitioner. *Mr. Fred W. Putnam* for respondent. Reported below: 43 F. (2d) 780.

No. 600. ATLANTIC COAST LINE R. CO. *v.* POWE, ADMINISTRATOR. January 19, 1931. Petition for writ of certiorari to the Supreme Court of South Carolina granted. *Messrs. Thomas W. Davis* and *Arthur R. Young* for petitioner. *Messrs. Lionel K. Legge* and *W. Turner Logan* for respondent.

No. 683. ALDRIDGE *v.* UNITED STATES. Petition for writ of certiorari to the Court of Appeals of the District of Columbia. February 25, 1931. The motion for leave to proceed further herein *in forma pauperis* is granted. The petition for writ of certiorari is also granted, limited to the question raised by the exception to the ruling of the trial court on the examination on *voir dire* of prospective jurors. *Mr. James F. Reilly* for petitioner. *Messrs. Leo A. Rover,* U. S. Attorney for the District of Columbia, and *Neil Burkinshaw,* Assistant U. S. Attorney, for the United States. Reported below: 60 App. D. C. —; 47 F. (2d) 407.

No. 630. DE FOREST RADIO CO. *v.* GENERAL ELECTRIC CO. February 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Samuel E. Darby, Jr.,* and *Thomas G. Haight* for petitioner. *Messrs. Ralph B. Evans, Hubert Howson,* and *Albert G. Davis* for respondent. Reported below: 44 F. (2d) 931.

DECISIONS DENYING CERTIORARI, FROM OCTOBER 6, 1930, TO AND INCLUDING FEBRUARY 25, 1931.

No. 187. MANKE *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed *in forma pauperis,* denied. *Mr. Charles H. Sooy* for petitioner. *Solicitor General Thacher* and *Messrs. J. Frank Staley, W. Clifton Stone,* and *Paul D. Miller* for the United States. Reported below: 38 F. (2d) 624.

No. 190. GOLDSMITH *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed *in forma pauperis,* denied. *Mr. H. Ely Goldsmith, pro se.* No appearance for the United States. Reported below: 42 F. (2d) 133.

No. 220. KALASANCKAS *v.* HINES, DIRECTOR, U. S. VETERANS' BUREAU. October 13, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed *in forma pauperis,* denied. *Mr. Hallock P. Long* for petitioner. *Solicitor General Thacher* and *Messrs. Claude R. Branch, J. Frank Staley, W. Clifton Stone, Paul D. Miller,* and *J. T. Brady* for respondent. Reported below: 38 F. (2d) 389.

No. 403. MARCEAUX *v.* POLICE JURY OF VERMILLION PARISH. October 13, 1930. Petition for writ of certiorari to the Court of Appeals, First Circuit, of Louisiana, and motion for leave to proceed *in forma pauperis,* denied.

Mr. Charles A. McCoy for petitioner. No appearance for respondent. Reported below: 126 So. 529.

No. 469. FITZGERALD ET AL. *v.* UNION CENTRAL LIFE INS. CO. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, and motion for leave to proceed *in forma pauperis*, denied. *Mr. Joseph F. Fitzgerald, pro se.* No appearance for respondent. Reported below: 42 F. (2d) 76.

No. 97. ROBERTS SASH & DOOR CO. *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Court of Claims denied. See same case, *ante*, pp. 812, 829. *Mr. Jesse I. Miller* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *George H. Foster* for the United States. Reported below: 38 F. (2d) 716; 69 Ct. Cls. 363.

No. 98. NIX *v.* STERNBERG, TRUSTEE. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George W. Dodd* for petitioner. No appearance for respondent. Reported below: 38 F. (2d) 611.

No. 99. ADAM SCHUMANN ASSOCIATES, INC., *v.* CITY OF NEW YORK. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. O. Ellery Edwards* for petitioner. *Messrs. Arthur J. W. Hilly* and *J. Joseph Lilly* for respondent. Reported below: 40 F. (2d) 216.

No. 100. RIVERSIDE & DAN RIVER COTTON MILLS, INC., *v.* UNITED STATES. October 13, 1930. Petition for writ

of certiorari to the Court of Claims denied. *Messrs. J. Marvin Haynes, Robert H. Montgomery,* and *Thomas G. Haight* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *Charles R. Pollard* for the United States. Reported below: 37 F. (2d) 965; 69 Ct. Cls. 70.

No. 101. York Safe & Lock Co. *v.* United States. October 13, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messers. J. Marvin Haynes, Robert H. Montgomery,* and *Thomas G. Haight* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Charles R. Pollard* for the United States. Reported below: 40 F. (2d) 148; 69 Ct. Cls. 529.

No. 208. Graniteville Mfg. Co. *v.* United States; and

No. 209. National Equipment Co. *v.* Same. October 13, 1930. Petition for writs of certiorari to the Court of Claims denied. *Messrs. Homer Hendricks* and *J. Robert Sherrod* for petitioners. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *Charles R. Pollard* for the United States. Reported below: 39 F. (2d) 746, 757; 69 Ct. Cls. 475, 69 *id.* 549.

No. 232. United States ex rel. Leland *v.* McCarl, Comptroller General, et al. October 13, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. James Craig Peacock* and *John W. Townsend* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key,* and *Clarence M. Charest* for respondents. Reported below: 42 F. (2d) 346.

No. 107. HOWARD *v.* OWENS. October 13, 1930. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. William Neff* for petitioner. *Mr. John S. Severson* for respondent. Reported below: 285 Pac. 5.

No. 110. MCCARTHY ET AL. *v.* BLOEDEL DONOVAN LUMBER MILLS. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. James A. Williams* and *Wm. H. Griffin* for petitioners. *Messrs. E. S. McCord* and *W. B. McCord* for respondent. Reported below: 39 F. (2d) 34.

No. 117. STEWART, TRUSTEE, ET AL., *v.* NEBRASKA TIRE & RUBBER CO. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edward J. McVann* for petitioners. No appearance for respondent. Reported below: 39 F. (2d) 309.

No. 118. CHRISTIAN ET AL. *v.* WILSON'S EXECUTORS ET AL. October 13, 1930. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. S. H. Williams* for petitioners. *Mr. Littleton M. Wickham* for respondents. Reported below: 151 S. E. 300.

No. 119. MASSAGLI *v.* T. I. BUTLER CO. ET. AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Clarence A. Linn* for petitioner. No appearance for respondents. Reported below: 39 F. (2d) 346.

No. 120. A. R. DEMORY INVESTMENT CO. *v.* HAESE, TRUSTEE. October 13, 1930. Petition for writ of certio-

rari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Paul B. Cromelin, Bolitha J. Laws,* and *Francis Price* for petitioner. *Mr. Isaac Pacht* for respondent. Reported below: 38 F. (2d) 232.

No. 121. DAVIS *v.* TOLOWA ROYALTIES, INC., ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Charles West* for petitioner. No appearance for respondents. Reported below: 40 F. (2d) 264.

No. 122. AMERICAN MOLASSES CO. *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Adrian C. Humphreys, S. M. Stroock, Charles C. Carlin,* and *M. Carter Hall* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch, George H. Foster,* and *Paul D. Miller for the United States.* Reported below: 68 Ct. Cls. 1.

No. 123. BLACK HARDWARE CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John David Watkins* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. J. Louis Monarch, Harvey R. Gamble,* and *W. Marvin Smith* for respondent. Reported below: 39 F. (2d) 460.

No. 127. ROBB ET AL. *v.* NOXON CHEMICAL PRODUCTS CO., INC., ET AL.; and

No. 128. LECKIE ET AL. *v.* SAME. October 13, 1930. Petition for writs of certiorari to the Circuit Court of

Appeals for the Third Circuit denied. *Messrs. John W. Davis* and *Clement K. Corbin* for Robb et al. *Mr. Maximilian M. Stallman* for Leckie et al. *Mr. James F. Meagher* for respondents. Reported below: 39 F. (2d) 318.

No. 130. INGRAM *v.* LEWIS ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Charles A. Chandler* for petitioner. *Messrs. R. Emmett Stewart* and *Daniel Haden Linebaugh* for respondents. Reported below: 37 F. (2d) 259.

No. 188. INGRAM *v.* WESLEY ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles A. Chandler* for petitioner. *Mr. Edward S. Boyles* for respondents. Reported below: 37 F. (2d) 201.

No. 132. DAVIS, BANKRUPT, *v.* NATIONAL SURETY CO. ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Richard B. Montgomery* for petitioner. No appearance for respondents. Reported below: 38 F. (2d) 987.

No. 133. ELSER, SPECIAL ADMINISTRATOR, *v.* ASIA BANKING CORP. October 13, 1930. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. C. A. DeWitt, Eugene A. Perkins, David A. Buckley, Jr.,* and *Wm. Cattron Rigby* for petitioner. *Mr. Allison D. Gibbs* for respondent.

No. 135. UNITED STATES CAN CO. *v.* RYAN. October 13, 1930. Petition for writ of certiorari to the Circuit

Court of Appeals for the Eighth Circuit denied. *Mr. Wayne Ely* for petitioner. *Mr. David W. Hill* for respondent. Reported below: 39 F. (2d) 445.

No. 171. SPOKANE, PORTLAND & SEATTLE RY. CO. *v.* COLE. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles H. Carey, Charles A. Hart,* and *Charles E. McCulloch* for petitioner. No appearance for respondent. Reported below: 40 F. (2d) 172.

No. 284. ERIE RAILROAD CO. *v.* STEWART. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. G. A. Foote* and *Benjamin D. Holt* for petitioner. *Messrs. William L. Day* and *Luther Day* for respondent. Reported below: 40 F. (2d) 855.

No. 136. BOARD OF COUNTY COMMISSIONERS *v.* BRISTOW BATTERY CO. ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Eugene Jordan* for petitioner. No appearance for respondents. Reported below: 37 F. (2d) 504; 38 *id.* 562.

No. 156. TEXAS CO. *v.* WILBUR, SECRETARY OF THE INTERIOR. October 13, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. A. Mitchell Palmer, C. B. Ames, Edward M. Freeman,* and *William J. Neale* for petitioner. *Solicitor General Thacher, Assistant Attorney General Richardson* and *Messrs. Nat M. Lacy* and *Paul D. Miller* for respondent. Reported below: 40 F. (2d) 787.

No. 157. SEINFEL ET AL. *v.* HENNENLOTTER, TRUSTEE. October 13, 1930. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Harold R. Medina* for petitioners. *Mr. Matt Goldstein* for respondent. Reported below: 227 App. Div. 794, 802, 804; 228 *id.* 637, 819; 229 *id.* 734.

No. 158. CLAY *v.* MOBILE & OHIO R. Co. October 13, 1930. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *Mr. Marion W. Reily* for petitioner. *Mr. Carl Fox* for respondent. Reported below: 156 Miss. 463; 125 So. 819.

No. 162. SALISBURY TRANSPORTATION CO. *v.* STARK ELECTRIC R. Co. October 13, 1930. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Messrs. John W. Guider, Frank J. Hogan,* and *Sidney L. Geiger* for petitioner. No appearance for respondent. Reported below: 121 Oh. St. 550; 170 N. E. 360.

No. 163. WHITEBIRD ET AL. *v.* EAGLE-PICHER LEAD CO. ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. C. B. Ames* for petitioners. *Messrs. Atlee Pomerene, V. E. Thompson,* and *A. C. Wallace* for respondents. Reported below: 40 F. (2d) 479.

No. 164. CZARNIKOW-RIONDA CO. *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Frank Roberson* and *Garrard Glenn* for petitioner. *Solicitor General Thacher* and *Mr. J. Frank Staley* for the United States. Reported below: 40 F. (2d) 214.

No. 167. McElvogue *v.* United States; and

No. 168. Brown *v.* Same. October 13, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Hugh McElvogue, pro se,* and *Mr. William J. Brown, pro se. Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Mr. John J. Byrne* for the United States. Reported below: 40 F. (2d) 889, 891.

No. 169. Longson *v.* Belasco. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Lila Longson, pro se. Mr. Nathan Burkan* for respondent. Reported below: 38 F. (2d) 1015.

No. 170. Pillsbury Flour Mills Co. *v.* Interlake Steamship Co. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. D. Roger Englar, Henry N. Longley,* and *Ezra G. Benedict Fox* for petitioner. *Messrs. George W. Cottrell* and *Thomas C. Burke* for respondent. Reported below: 40 F. (2d) 439.

No. 172. Passailaigue *v.* Herron et al. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. N. B. K. Pettingill* for petitioner. *Mr. Donald C. McMullen* for respondents. Reported below: 38 F. (2d) 775.

No. 173. Stanley Securities Co. *v.* United States. October 13, 1930. Petition for writ of certiorari to the Court of Claims denied. *Mr. Bernhard Knollenberg* for petitioner. *Solicitor General Thacher, Assistant Attorney*

General Rugg and *Messrs. Claude R. Branch* and *W. Marvin Smith* for the United States. Reported below: 38 F. (2d) 907; 69 Ct. Cls. 271.

No. 174. ELLIS *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Joseph W. Cox* and *F. Hunter Creech* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *William W. Scott* for the United States. Reported below: 68 Ct. Cls. 11.

No. 175. WEED & BROTHER *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Court of Claims denied. *Mr. Donald Horne* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch, Paul D. Miller,* and *George H. Foster* for the United States. Reported below: 38 F. (2d) 935; 69 Ct. Cls. 246.

No. 177. CHESAPEAKE & OHIO RY. CO. *v.* RUSSO, ADMINISTRATOR; and

No. 178. SAME *v.* SAME. October 13, 1930. Petition for writs of certiorari to the Appellate Court of Indiana and to the Supreme Court of Indiana denied. *Mr. Albert H. Cole* for petitioner. *Mr. Henry M. Dowling* for respondent. Reported below: 163 N. E. 283.

No. 184. MATHIS *v.* LIGON ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. C. Dale Wolfe* and *W. M. Haulsee* for petitioner. No appearance for respondents. Reported below: 37 F. (2d) 635; 39 *id.* 455.

No. 185. LITTLE, EXECUTRIX, *v.* KEATON, RECEIVER. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Frank T. McCoy* for petitioner. *Mr. Robert B. Keenan* for respondent. Reported below: 38 F. (2d) 457.

No. 186. NORFOLK & WESTERN RY. CO. *v.* AYLOR. October 13, 1930. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Messrs. F. M. Rivinus* and *James F. Wright* for petitioner. No appearance for respondent. Reported below: 150 S. E. 252.

No. 189. LOUISVILLE & NASHVILLE R. CO. *v.* JOLLY, ADMINISTRATRIX. October 13, 1930. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. *Messrs. A. M. Warren, E. S. Jouett, J. H. McChord,* and *S. D. Rouse* for petitioner. *Mr. Johnst Northcutt* for respondent. Reported below: 232 Ky. 702; 23 S. W. (2d) 564.

No. 191. REYNOLDS ET AL. *v.* SCHMIDT ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Charles West* for petitioners. No appearance for respondents. Reported below: 40 F. (2d) 238.

No. 192. PAN AMERICAN PETROLEUM & TRANSPORT CO. *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. C. I. Clark* and *Eugene Underwood* for petitioner. *Attorney General Mitchell* and *Messrs. Claude R. Branch, J. Frank Staley,* and *W. Marvin Smith* for the United States. Reported below: 39 F. (2d) 569.

No. 194. STAR METAL MFG. CO. ET AL. *v.* ALLEN FILTER Co. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. E. Hayward Fairbanks* for petitioners. *Mr. Percy H. Moore* for respondent. Reported below: 40 F. (2d) 252.

No. 196. PACKARD MOTOR CAR CO. *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messrs. J. Robert Sherrod* and *Robert N. Miller* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Claude R. Branch* for the United States. Reported below: 39 F. (2d) 991; 69 Ct. Cls. 570.

No. 197. COUGHLIN *v.* SOUTHWESTERN BELL TELEPHONE Co. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. D. A. Simmons* and *Thomas H. Ball* for petitioner. *Messrs. Nelson Phillips* and *Jos. W. Jamison* for respondent. Reported below: 40 F. (2d) 349.

No. 198. GAMBLE *v.* DANIEL, RECEIVER. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Francis A. Brogan, Edgar M. Morsman, Jr.,* and *C. A. Sorensen* for petitioner. *Messrs. Arthur F. Mullen* and *Paul L. Martin* for respondent. Reported below: 39 F. (2d) 447.

No. 200. HALPIN, TRUSTEE, *v.* SAVANNAH RIVER ELECTRIC Co. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. D. W. Robinson, E. H. Callaway,* and

George E. O'Connor for petitioner. *Mr. F. B. Grier* for respondent. Reported below: 41 F. (2d) 329.

No. 201. BOWMAN *v.* PENNSYLVANIA RAILROAD CO. October 13, 1930. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Mr. Charles A. Ludlow* for petitioner. *Messrs. Frederic D. McKenney, John Spalding Flannery,* and *George Bowdoin Craighill* for respondent. Reported below: 299 Pa. 558; 149 Atl. 877.

No. 204. UNITED STATES EX REL. ENDICOTT ET AL. *v.* MELLON, SECRETARY OF THE TREASURY, ET AL. October 13, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. J. Harry Covington, Spencer Gordon,* and *Newell W. Ellison* for petitioners. *Solicitor General Thacher* and *Messrs. Claude R. Branch, Sewall Key, Andrew D. Sharpe, W. Marvin Smith,* and *Clarence M. Charest* for respondent. Reported below: 39 F. (2d) 505.

No. 207. MEANS *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messrs. John M. Perry, Arthur A. Ballantine,* and *George E. Cleary* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *Fred K. Dyar* for the United States. Reported below: 39 F. (2d) 748; 69 Ct. Cls. 539.

No. 211. QUICK ACTION IGNITION CO. ET AL. *v.* MAYTAG CO. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Howard M. Cox* and *Amasa C. Paul* for petition-

ers. *Mr. William H. Davis* for respondent. Reported below: 39 F. (2d) 595.

No. 212. MARS, EXECUTOR, *v.* MCDOUGAL ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. John T. Smith* for petitioner. *Messrs. Daniel A. McDougal, Leonard O. Lytle, William V. Pryor, Charles B. Rockwood,* and *Nathan A. Gibson* for respondents. Reported below: 40 F. (2d) 247.

No. 213. OSBURN CALIFORNIA CORP. *v.* WELCH, COLLECTOR. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ralph W. Smith* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key, Harvey R. Gamble, W. Marvin Smith, Clarence M. Charest,* and *F. W. DeWart* for respondent. Reported below: 39 F. (2d) 41.

No. 214. BANK SAVINGS LIFE INS. CO. *v.* BUTLER. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. W. Broaddus* and *F. W. McAllister* for petitioner. *Mr. Fred A. Boxley* for respondent. Reported below: 38 F. (2d) 972.

No. 215. ARONSTEIN *v.* NEW YORK CENTRAL R. CO. October 13, 1930. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Emmet L. Holbrook* for petitioner. *Messrs. Jacob Aronson* and *William Mann* for respondent. Reported below: 136 Misc. Rep. 352; 243 N. Y. S. 221.

No. 216. UNITED STATES *v.* ELMHIRST, EXECUTRIX. October 13, 1930. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Thacher* for the United States. *Messrs. Swagar Sherley, Frederick DeC. Faust,* and *Charles F. Wilson* for respondent. Reported below: 38 F. (2d) 915; 69 Ct. Cls. 295.

No. 221. PICKFORD ET AL. *v.* JACKSON, RECEIVER. October 13, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Lawrence Koenigsberger* for petitioners. No appearance for respondent. Reported below: 41 F. (2d) 103.

No. 222. KAUFMAN ET AL. *v.* JACKSON, RECEIVER. October 13, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Lawrence Koenigsberger* for petitioners. No appearance for respondent. Reported below: 41 F. (2d) 103.

No. 223. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* FIRST TRUST & SAVINGS BANK. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Sewall Key, A. H. Conner, Clarence M. Charest,* and *Allin H. Pierce* for petitioner. *Mr. W. S. Hammers* for respondent. Reported below: 39 F. (2d) 462.

No. 224. HIGMAN TOWING CO. *v.* THE SOUTHSEAS ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Brantly Harris* and *John David Watkins* for peti-

tioner. No appearance for respondents. Reported below: 41 F. (2d) 176.

No. 225. HIND *v.* CLARK, COLLECTOR OF INTERNAL REVENUE. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. C. R. Dewey* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, J. Louis Monarch,* and *W. Marvin Smith* for respondent. Reported below: 39 F. (2d) 1022.

No. 226. FRISCHER & Co., INC., ET AL. *v.* TARIFF COMMISSION ET AL. October 13, 1930. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Meyer Kraushaar* for petitioners. *Mr. Albert MacC. Barnes, Jr.,* for respondents. Reported below: 39 F. (2d) 247.

No. 227. FRIEDRICHSEN *v.* GUARANTY TRUST CO., TRUSTEE, ET AL.; and

No. 228. SAME *v.* SAME. October 13, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. C. Mathes* for petitioner. *Messrs. Edwin S. S. Sunderland, Montgomery B. Angell,* and *Thomas O'G. FitzGibbon* for respondents. Reported below: 39 F. (2d) 859.

No. 229. GAMAGE ET AL. *v.* MASONIC CEMETERY ASSN. ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Aaron M. Sargent, Peter tum Suden,* and *Sidney M. Van Wyck, Jr.,* for petitioners. *Mr. Edward I. Barry* for respondents. Reported below: 38 F. (2d) 950.

No. 230. MOORE *v.* PATE ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. S. D. Redmond* for petitioner. *Messrs. Marcellus Green* and *Garner W. Green* for respondents. Reported below: 39 F. (2d) 616.

No. 233. ATLANTIC COAST LINE R. CO. ET AL. *v.* BELL, ADMINISTRATRIX. October 13, 1930. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Mr. Thomas W. Davis* for petitioners. *Mr. Louis M. Shimel* for respondent. Reported below: 155 S. E. 397.

No. 234. BARDE STEEL PRODUCTS CORP. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. W. W. Spalding* and *Roscoe C. Nelson* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, J. Louis Monarch, John Vaughan Groner, W. Marvin Smith, Clarence M. Charest,* and *Randolph C. Shaw* for respondent. Reported below: 40 F. (2d) 412.

No. 236. MARYLAND CASUALTY CO. *v.* MASSEY. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Edward B. Klewer* for petitioner. *Mr. H. D. Minor* for respondent. Reported below: 38 F. (2d) 724.

No. 238. SACRAMENTO SUBURBAN FRUIT LANDS CO. *v.* LINDQUIST ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John L. McNab* for petitioner. No

appearance for respondents. Reported below: 39 F. (2d) 900.

No. 243. ANAHMA REALTY CORP. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Martin Taylor* and *Nathaniel T. Guernsey* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key, John Vaughan Groner, W. Marvin Smith,* and *Clarence M. Charest* for respondent. Reported below: 42 F. (2d) 128.

No. 244. ROBERTSON *v.* CHICAGO, ROCK ISLAND & PACIFIC RY. CO. October 13, 1930. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Mr. Frederick M. Miner* for petitioner. *Messrs. Thomas D. O'Brien, Alexander E. Horn,* and *Edward S. Stringer* for respondent. Reported below: 230 N. W. 585.

No. 245. REICHELDERFER ET AL. *v.* AMERICAN SECURITY & TRUST CO. ET AL.; and

No. 246. SAME *v.* HEURICH. October 13, 1930. Petition for writs of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. William W. Bride, Vernon E. West,* and *Francis H. Stephens* for petitioners. *Messrs. Frederic D. McKenney, Wilton J. Lambert, John S. Flannery, Rudolph H. Yeatman, G. Bowdoin Craighill,* and *Alexander H. Bell* for respondents. Reported below: 40 F. (2d) 813, 815.

No. 414. REICHELDERFER ET AL. *v.* DODGE. October 13, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Wil-*

liam W. Bride, Vernon E. West, and *Francis H. Stephens* for petitioners. No appearance for respondent. Reported below: 46 F. (2d) 727.

No. 247. GREAT NORTHERN RY. CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. F. G. Dorety* and *J. P. Plunkett* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key, John Vaughan Groner, W. Marvin Smith, Clarence M. Charest,* and *Percy S. Crewe* for respondent. Reported below: 40 F. (2d) 372.

No. 248. CHESAPEAKE & OHIO RY. CO. *v.* FULTZ, ADMINISTRATRIX; and

No. 249. SAME *v.* SAME. October 13, 1930. Petition for writs of certiorari to the Appellate Court of Indiana and to the Supreme Court of Indiana denied. *Mr. Albert H. Cole* for petitioner. *Messrs. Tom Davis* and *Ernest A. Michel* for respondent. Reported below: 161 N. E. 835.

No. 250. NICKMAN *v.* NEW YORK LIFE INS. CO. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John A. Cline* for petitioner. *Mr. James R. Garfield* for respondent. Reported below: 39 F. (2d) 763.

No. 251. RUBIO *v.* COLLECTOR OF INTERNAL REVENUE. October 13, 1930. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. C. A. DeWitt, E. A. Perkins, Dean Hill Stanley,* and

David A. Buckley, Jr., for petitioner. *Messrs. Wm. Cattron Rigby, W. A. Graham,* and *Edward A. Kreger* for respondent.

No. 253. First National Bank et al. *v.* Board of Supervisors. October 13, 1930. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *Messrs. W. L. Guice* and *T. J. Wills* for petitioners. No appearance for respondent. Reported below: 127 So. 686.

No. 254. James *v.* United States. October 13, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Robert E. Coulson, Oscar W. Underwood, Jr.,* and *H. C. Kilpatrick* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *Charles R. Pollard* for the United States. Reported below: 38 F. (2d) 140; 69 Ct. Cls. 215.

No. 255. James et al. *v.* United States. October 13, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Robert E. Coulson, Oscar W. Underwood, Jr.,* and *H. C. Kilpatrick* for petitioners. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *Charles H. Pollard* for the United States. Reported below: 38 F. (2d) 143; 69 Ct. Cls. 230.

No. 257. Chesapeake & Ohio Ry. Co. *v.* Smith. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Fred C. Rector* for petitioner. No appearance for respondent. Reported below: 42 F. (2d) 111.

No. 258. MAY ET AL. *v.* MARBURY ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. U. G. Hahn* and *Joseph Higgins* for petitioners. *Mr. Albert Williams* for respondents. Reported below: 39 F. (2d) 438.

No. 259. E. C. ATKINS & Co. *v.* DUNN, AUDITOR. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Joseph J. Daniels, Samuel Ashby,* and *Albert Baker* for petitioner. *Messrs. William H. Thompson* and *Albert L. Rabb* for respondent. Reported below: 38 F. (2d) 403.

No. 260. AVERY *v.* VERNON ET AL. October 13, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. George P. Lemm* for petitioner. *Mr. W. Gwynn Gardiner* for respondents. Reported below: 40 F. (2d) 796.

No. 262. BRILEY ET AL. *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Edwin W. Sims* and *Elwood G. Godman* for petitioners. *Solicitor General Thacher, Assistant to the Attorney General O'Brian* and *Messrs. Claude R. Branch, Charles H. Weston,* and *W. Marvin Smith* for the United States. Reported below: 40 F. (2d) 49.

No. 265. MOORE *v.* BALTIMORE & OHIO R. Co. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr.*

Walter F. Boye for petitioner. *Messrs. Arthur C. Fraser* and *Duncan K. Brent* for respondent. Reported below: 37 F. (2d) 884.

No. 266. ATLANTIC COAST LINE R. Co. *v.* COVINGTON. October 13, 1930. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Messrs. Thomas W. Davis* and *F. L. Willcox* for petitioner. *Mr. Philip H. Arrowsmith* for respondent. Reported below: 155 S. E. 438.

No. 267. PANHARD OIL CORP. *v.* SOCIETE ANONYME DES ANCIENS ETABLISSEMENTS PANHARD & LEVASSOR. October 13, 1930. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Julian S. Wooster* for petitioner. *Messrs. Hugo Mock* and *Asher Blum* for respondent. Reported below: 39 F. (2d) 496.

No. 268. NEWMAN *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Charles H. Garnett, Preston C. West, A. A. Davidson, Nathan A. Gibson,* and *Joseph L. Hull* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, J. Louis Monarch, Randolph C. Shaw, Clarence M. Charest,* and *Percy S. Crewe* for respondent. Reported below: 40 F. (2d) 225; 41 *id.* 743.

No. 269. PIGGLY WIGGLY CORP. *v.* JITNEY JUNGLE CORP. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Ernest W. Bradford* and *William H. Watkins* for petitioner. *Mr. James N. Flowers* for respondent. Reported below: 39 F. (2d) 592.

No. 270. F. W. WOOLWORTH CO. *v.* DAVIS. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Richard K. Bridges* and *Randolph Shirk* for petitioner. *Mr. Peter Q. Nyce* for respondent. Reported below: 41 F. (2d) 342.

No. 275. CENTRAL VERMONT TRANSPORTATION CO. *v.* THE HARFORD ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Clarence Bishop Smith* for petitioner. *Messrs. T. Catesby Jones* and *James W. Ryan* for respondents. Reported below: 39 F. (2d) 1023.

No. 276. ATLANTIC REFINING CO. *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Ira Jewell Williams, Ira Jewell Williams, Jr., John H. Stone, Francis Shunk Brown,* and *Charles L. Guerin* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *J. Frank Staley* for the United States. Reported below: 42 F. (2d) 342; 69 Ct. Cls. 713.

No. 277. DIAMOND SHOE CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. A. H. Frisch* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, J. Louis Monarch, Norman D. Keller, W. Marvin Smith,* and *Clarence M. Charest* for respondent. Reported below: 42 F. (2d) 144.

No. 283. CLINCHFIELD RAILROAD CO. *v.* DUNN, ADMINISTRATRIX. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John W. Price* for petitioner. *Messrs. P. A. Bonham* and *Robert Burrow* for respondent. Reported below: 40 F. (2d) 586.

No. 285. HARTFORD ACCIDENT & INDEMNITY CO. *v.* WEIL BROTHERS. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Ray Rushton* for petitioner. *Mr. Richard T. Rives* for respondent. Reported below: 41 F. (2d) 171.

No. 286. CHESAPEAKE & OHIO RY. CO. *v.* SOUTHERN COAL, COKE & MINING CO. October 13, 1930. Petition for writ of certiorari to the Appellate Court of Illinois, Fourth District, denied. *Messrs. D. H. Leake* and *Wm. G. Wise* for petitioner. *Messrs. Edward C. Kramer* and *Bruce A. Campbell* for respondent. Reported below: 254 Ill. App. 238.

No. 287. COLLECTOR OF INTERNAL REVENUE *v.* MANILA RAILROAD CO. October 13, 1930. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. Wm. Cattron Rigby* and *E. A. Kreger* for petitioner. *Mr. Jose C. Abreu* for respondent.

No. 291. GLASS, TRUSTEE, *v.* CUMMING. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John Arthur Brown* for petitioner. *Mr. Eugene Mackey* for respondent. Reported below: 39 F. (2d) 1022.

No. 292. UNITED STATES EX REL. LIVINGSTON *v.* HINES, DIRECTOR. October 13, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Samuel T. Ansell* and *George M. Wilmeth* for petitioner. *Solicitor General Thacher* and *Messrs. Claude R. Branch, J. Frank Staley, W. Clifton Stone, W. Marvin Smith,* and *James T. Brady* for respondent. Reported below: 42 F. (2d) 347.

No. 293. SUITS ET AL. *v.* MAGNOLIA PETROLEUM CO. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Fred E. Suits, J. B. Dudley, J. H. Everest, James H. Maxey,* and *Wilbur J. Holleman* for petitioners. *Messrs. W. H. Francis, B. B. Blakeney,* and *Hubert Armbrister* for respondent. Reported below: 43 F. (2d) 280.

No. 294. HENRY VOGT MACHINE CO. *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Adrian C. Humphreys* and *Chester A. Gwinn* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *George H. Foster* for the United States. Reported below: 39 F. (2d) 986; 69 Ct. Cls. 656.

No. 295. BELLAIRE, BENWOOD & WHEELING FERRY CO. *v.* INTERSTATE BRIDGE CO. ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Robert F. Cogswell* for petitioner. *Messrs. James Morgan Clarke* and *Charles McCamic* for respondents. Reported below: 40 F. (2d) 323.

No. 297. PIERCE ET AL. *v.* ALBION IDAHO LAND CO. ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. S. T. Lowe* for petitioners. No appearance for respondents. Reported below: 39 F. (2d) 37.

No. 298. WHITE RIVER LEVEE DISTRICT *v.* MCWILLIAMS DREDGING CO. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles T. Coleman* for petitioner. *Mr. T. W. Davis* for respondent. Reported below: 40 F. (2d) 873.

No. 299. DELUCA *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Henry Woog* and *William D. Harris* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Claude R. Branch* for the United States. Reported below: 69 Ct. Cls. 262.

No. 300. FINLEY *v.* MCDOUGALD CONSTRUCTION CO. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Clifford L. Anderson* for petitioner. *Messrs. John M. Slaton, John A. Sibley,* and *Ellis Spear, Jr.,* for respondent. Reported below: 38 F. (2d) 809.

No. 301. THOMAS *v.* JONES ET AL. October 13, 1930. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. Fred E. Suits* for petitioner. No appearance for respondents. Reported below: 289 Pac. 339.

No. 302. COLPO *v.* PENNSYLVANIA. October 13, 1930. Petition for writ of certiorari to the Superior Court of Pennsylvania denied. *Mr. E. Lowry Humes* for petitioner. No appearance for respondent.

No. 303. CASALS *v.* FERNANDEZ. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Jose Tous Soto* for petitoner. No appearance for respondent. Reported below: 40 F. (2d) 831.

No. 305. LA MESA, LEMON GROVE & SPRING VALLEY IRRIGATION DISTRICT *v.* SAN DIEGO. October 13, 1930. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. Albert J. Lee, H. W. O'Melveny,* and *Walter K. Tuller* for petitioner. *Messrs. Wm. J. Hunsaker, E. W. Britt,* and *T. B. Cosgrove* for respondent. Reported below: 287 Pac. 496.

No. 308. B. ALTMAN & Co. *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Joseph M. Hartfield* and *A. C. Newlin* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *Fred K. Dyar* for respondent. Reported below: 40 F. (2d) 781; 69 Ct. Cls. 721.

No. 309. PROCTOR, RECEIVER, ET AL. *v.* FIRST NATIONAL BANK. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Romney Spring* for petitioners. *Mr. George S. Fuller* for respondent. Reported below: 40 F. (2d) 841.

No. 310. MILLER & VIDOR LUMBER CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Wm. S. Hammers* and *John Neethe* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, J. Louis Monarch, Paul D. Miller, Clarence M. Charest, John MacC. Hudson,* and *Miss Helen R. Carloss* for respondent. Reported below: 39 F. (2d) 890.

No. 311. NATIONAL BRAKE & ELECTRIC CO. *v.* CHRISTENSEN ET AL. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Charles A. Brown* and *Paul Synnestvedt* for petitioner. *Messrs. Louis Quarles, Newton D. Baker, Joseph B. Cotton,* and *William R. Rummler* for respondents. Reported below: 38 F. (2d) 721.

No. 312. SQUIRE *v.* PAIGE. October 13, 1930. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Frank Hendrick* for petitioner. No appearance for respondent. Reported below: 173 N. E. 862.

No. 314. JOHNSEN *v.* UNITED STATES. October 13, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Robert B. McMillan* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, A. W. Henderson,* and *Paul D. Miller* for the United States. Reported below: 41 F. (2d) 44.

No. 317. ASSOCIATED BILL POSTERS ET AL. *v.* WM. H. RANKIN CO.; and

No. 318. SAME *v.* CHARLES A. RAMSEY CO. October 13, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George F. Hurd* and *Richard T. Green* for petitioners. *Messrs. Nathan Burkan, Emanuel Harris, Thos. G. Haight,* and *Sol A. Rosenblatt* for respondents. Reported below: 42 F. (2d) 152.

No. 319. DENVER & SALT LAKE RY. CO. *v.* LOMBARDI. October 13, 1930. Petition for writ of certiorari to the Supreme Court of Colorado denied. *Messrs. Elmer L. Brock, David W. Oyler,* and *E. R. Campbell* for petitioner. *Mr. Arthur B. Bouton* for respondent. Reported below: 287 Pac. 648.

No. 102. NEUSTADT ET AL. *v.* COLINE OIL CO. ET AL. See same case, *ante,* p. 799.

No. 159. FLEMING *v.* OHIO. See same case, *ante,* p. 800.

No. 320. BLANCHARD *v.* UNITED STATES. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George S. Atkinson* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch* and *W. Marvin Smith* for the United States. Reported below: 40 F. (2d) 904.

No. 321. RIPLEY ET AL. *v.* SUTHERLAND, ALIEN PROPERTY CUSTODIAN ET AL. October 20, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. C. C. Calhoun, Walter C. Bal-*

derson, M. Carter Hall, and *Morton K. Yonts* for petitioners. *Solicitor General Thacher* and *Messrs. Claude R. Branch, J. Frank Staley, Thomas E. Rhodes, Paul D. Miller, Charles Henry Butler, John A. Kratz, George L. Shearer,* and *McCready Sykes* for respondents. Reported below: 40 F. (2d) 785.

No. 325. SCRIPPS, EXECUTRIX, *v.* SCRIPPS, EXECUTOR, ET AL. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Frank H. Shaffer, Jr., Nathan L. Miller, John Weld Peck, Charles A. Brodek,* and *John H. Perry* for petitioner. *Mr. Newton D. Baker* for respondents. Reported below: 40 F. (2d) 176.

No. 326. MISSOURI PACIFIC R. CO. *v.* CHICAGO, ROCK ISLAND & PACIFIC RY. CO. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. R. E. Wiley* and *Edward J. White* for petitioner. No appearance for respondent. Reported below: 41 F. (2d) 188.

No. 328. LOUISIANA EX REL. BOARD OF SCHOOL DIRECTORS *v.* BROOKLYN COOPERAGE CO. October 20, 1930. Petition for writ of certiorari to the Supreme Court of Louisiana denied. *Mr. Peyton R. Sandoz* for petitioner. *Mr. E. B. Dubuisson* for respondent. Reported below: 170 La. 531; 128 So. 470.

No. 329. BRIDGEPORT IRRIGATION DISTRICT *v.* UNITED STATES. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William Ritchie, Jr.,* for petitioner. *Solici-*

tor General Thacher, Assistant Attorney General Richardson and *Messrs. Claude R. Branch, E. T. Burke,* and *Paul D. Miller* for the United States. Reported below: 40 F. (2d) 827.

No. 331. ANNAPOLIS CO. *v.* WARDMAN ET AL. October 20, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Camden R. McAtee* for petitioner. No appearance for respondents. Reported below: 41 F. (2d) 115.

No. 332. PROCTOR, RECEIVER, *v.* AMERICAN TRUST CO. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Romney Spring* and *Wm. G. Thompson* for petitioner. *Mr. Edmund K. Arnold* for respondent. Reported below: 42 F. (2d) 384.

No. 335. NEW YORK *v.* ISAAC G. JOHNSON & CO. October 20, 1930. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Robert P. Beyer* and *Hamilton Ward* for petitioner. *Messrs. John Jay McKelvey, Morgan J. O'Brien, Martin Conboy,* and *Harry B. Chambers* for respondent. Reported below: 226 App. Div. 882; 219 *id.* 285; 253 N. Y. 535; 171 N. E. 771.

No. 338. ZARATE *v.* UNITED STATES. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Herbert Stanton Phillips* for petitioner. *Solicitor General Thacher* and *Messrs. Claude R. Branch, Harry S. Ridgely,* and *Paul D. Miller* for the United States. Reported below: 41 F. (2d) 598.

No. 339. SOUTHERN RAILWAY CO. *v.* FRANKFORT DISTILLERY, INC., ET AL. October 20, 1930. Petition for writ of certiorari to the Court of Appeals of Kentucky denied. *Mr. Edward P. Humphrey* for petitioner. *Mr. Thomas C. Mapother* for respondents. Reported below: 233 Ky. 771; 26 S. W. (2d) 1025.

No. 340. HUDSON RIVER NAVIGATION CO. *v.* THE CEDARHURST. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Horace L. Cheyney* for petitioner. *Mr. E. Curtis Rouse* for respondent. Reported below: 42 F. (2d) 139.

No. 341. THE TROJAN ET AL. *v.* THE FREEPORT CORPORATION. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Horace L. Cheyney* for petitioners. *Mr. E. Curtis Rouse* for respondent. Reported below: 42 F. (2d) 139.

No. 343. LEVI STRAUSS REALTY CO. *v.* UNITED STATES. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John C. Altman* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key, A. H. Conner, W. Marvin Smith,* and *Clarence M. Charest* for the United States. Reported below: 41 F. (2d) 55.

No. 344. STATES STEAMSHIP CO. *v.* BERGLANN. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Erskine Wood* for petitioner. No appearance for respondent. Reported below: 41 F. (2d) 456.

No. 345. HAMILTON ET AL. *v.* ATLANTIC MORTGAGE & FINANCE CO. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. A. L. Nash* for petitioners. *Messrs. H. P. Adair* and *John C. Cooper, Jr.,* for respondent. Reported below: 40 F. (2d) 583.

No. 346. CLARKE ET AL. *v.* BOYSEN ET AL.;

No. 347. POGSON, TRUSTEE, ET AL., *v.* BIG HORN POWER CO. ET AL.; and

No. 348. CLARKE ET AL. *v.* CHICAGO, BURLINGTON & QUINCY R. CO. October 20, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Fred R. Wright* and *O. Ellery Edwards* for petitioners. *Messrs. J. Q. Dier, J. C. James,* and *Bruce Scott* for respondents. Reported below: 39 F. (2d) 800.

No. 349. NELSON *v.* PUGET SOUND NAVIGATION CO. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Winter S. Martin* for petitioner. *Mr. H. B. Jones* for respondent. Reported below: 41 F. (2d) 356.

No. 353. PHOENIX ASSURANCE CO. *v.* FLEMING ET AL. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert E. Steiner, Jr.,* for petitioner. *Mr. W. O. Mulkey* for respondents. Reported below: 40 F. (2d) 38.

No. 354. LEWIS *v.* CANADIAN PACIFIC RY. CO. ET AL. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Andrew R. Sheriff* for petitioner. *Messrs. Wirt E.*

Humphrey and *Edwin H. Cassels* for respondents. Reported below: 39 F. (2d) 834.

No. 355. I. G. FARBENINDUSTRIE *v.* LACY. October 20, 1930. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. Livingston Gifford* and *Wm. E. Warland* for petitioner. *Mr. Julian S. Wooster* for respondent. Reported below: 39 F. (2d) 672.

No. 357. WOOD ET AL. *v.* SALT RIVER VALLEY WATER USERS ASSN. INC. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John W. Ray* for petitioners. *Messrs. Walter Bennett, John L. Gust,* and *Frank O. Smith* for respondent. Reported below: 39 F. (2d) 9.

No. 359. FLORIDA EAST COAST RY. CO. *v.* CLARK, ADMINISTRATRIX. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert H. Anderson* for petitioner. *Mr. George C. Bedell* for respondent. Reported below: 42 F. (2d) 216.

No. 363. LENSING, RECEIVER, *v.* RAYZOR. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. B. Stroud, Jr.,* for petitioner. *Mr. J. Newton Rayzor* for respondent. Reported below: 41 F. (2d) 224.

No. 364. EX PARTE FRANTZ. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Russell S. Ritz* for petitioner.

No. 365. SEAGRAVES *v.* WALLACE ET AL.; and

No. 366. SAME *v.* SAME. October 20, 1930. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Clyde A. Sweeton* for petitioner. *Messrs. John Neethe* and *S. J. Brooks* for respondents. Reported below: 41 F. (2d) 679.

No. 367. BANKERS RESERVE LIFE CO. *v.* UNITED STATES. October 20, 1930. Petition for writ of certiorari to the Court of Claims denied. *Mr. Charles Kerr* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *Lisle A. Smith* for the United States. Reported below: 42 F. (2d) 313; 70 Ct. Cls. 379.

No. 371. WINGERT *v.* HAGERSTOWN BANK ET AL.;

No. 372. SAME *v.* SAME;

No. 373. SAME *v.* SAME;

No. 374. SAME *v.* SAME;

No. 375. HAGERSTOWN SILK CO. *v.* SAME; and

No. 376. ANTIETAM KNITTING CO. *v.* SAME. October 20, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Miller Wingert* for petitioners. No appearance for respondents. Reported below: 41 F. (2d) 660.

No. 377. CVITKOVICH ET AL. *v.* UNITED STATES. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John F. Dore* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, John J. Byrne,* and *Paul D. Miller* for the United States. Reported below: 41 F. (2d) 682.

No. 379. FARMERS BANK ET AL. *v.* BICKENBACH, TRUSTEE. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Lawrence B. Stringer* for petitioners. *Mr. William L. Patton* for respondent. Reported below: 41 F. (2d) 700.

No. 383. STANDARD OIL CO. *v.* PENNSYLVANIA RAILROAD CO. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. L. L. Stephens, Frederick E. Brown, John R. Cochran,* and *Thomas Williamson* for petitioner. *Messrs. Frederic D. McKenney, John S. Flannery,* and *G. Bowdoin Craighill* for respondent. Reported below: 40 F. (2d) 52.

No. 385. KAMINSKI *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO. October 20, 1930. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Mr. Frederick M. Miner* for petitioner. *Messrs. O. W. Dynes, F. W. Root,* and *A. C. Erdall* for respondent. Reported below: 231 N. W. 189.

No. 386. CHEVROLET MOTOR CO. *v.* GLADDING. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. William H. Hudgins* for petitioner. No. appearance for respondent. Reported below: 42 F. (2d) 440.

No. 388. ERIE RAILROAD CO. *v.* FIRTH. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George S. Hobart* for petitioner. *Mr. William J. Kraft* for respondent. Reported below: 42 F. (2d) 35.

No. 389. UNITED STATES EX REL. KNICKERBOCKER INSURANCE CO. *v.* MELLON, SECRETARY OF THE TREASURY, ET AL. October 20, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. H. Stanley Hinrichs, John Walsh* and *Frank S. Bright* for petitioner. *Solicitor General Thacher* and *Messrs. Claude R. Branch, J. Frank Staley,* and *Thomas E. Rhodes* for respondents. Reported below: 41 F. (2d) 119.

No. 390. PACENT REPRODUCER CORP. ET AL. *v.* WESTERN ELECTRIC CO., INC., ET AL.; and

No. 460. CHISHOLM ET AL. *v.* DEITEL. October 20, 1930. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Wm. Houston Kenyon* and *Theodore S. Kenyon* for Pacent Reproducer Corp. et al. *Mr. C. P. Goepel* for Chisholm et al. *Messrs. Charles Neave* and *Wm. R. Ballard* for Western Electric Co. et al. *Mr. W. P. Preble* for Deitel. Reported below: 42 F. (2d) 116, 172.

No. 391. JONES STORE CO. ET AL. *v.* KANSAS CITY. October 20, 1930. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. Maurice H. Winger* for petitioners. *Mr. J. C. Petherbridge* for respondent. Reported below: 28 S. W. (2d) 1008.

No. 392. KUDY ET AL. *v.* UNITED STATES. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. M. M. Doyle* and *Martin J. Brennan* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, John J. Byrne,* and *Paul D. Miller* for respondent.

No. 394. TATHAM ET AL. *v.* SACRAMENTO SUBURBAN FRUIT LANDS CO.;

No. 395. KRAL *v.* SAME;

No. 396. WAGNER *v.* SAME;

No. 397. HANDLER ET AL. *v.* SAME; and

No. 398. KLAFFENBACH ET AL. *v.* SAME. October 20, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Ray T. Coughlin* and *Ralph H. Lewis* for petitioners. No appearance for respondent. Reported below: 40 F. (2d) 894; 41 *id.* 508; 40 *id.* 897; 41 *id.* 511; 40 *id.* 899.

No. 399. COCHRAN *v.* COUZENS. October 20, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Harry Friedman* for petitioner. *Messrs. Adrian F. Busick, Joseph E. Davies, Raymond N. Beebe, Clarence E. Wilcox,* and *Arthur J. Lacy* for respondent. Reported below: 42 F. (2d) 783.

No 401. C. J. FARLEY & Co. *v.* STOLL. October 20, 1930. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Julius H. Amberg* for petitioner. No appearance for respondent. Reported below: 250 Mich. 495; 231 N. W. 71.

No. 404. MAILLIARD & SCHMIEDELL ET AL. *v.* PACIFIC STEAMSHIP CO.; and

No. 418. AMERICAN-HAWAIIAN STEAMSHIP CO. *v.* SAME. October 20, 1930. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Howard S. Cosgrove, Robert S. Terhune,* and *Wm. H. Gorham* for Mailliard & Schmiedell et al. *Messrs.*

Louis T. Hengstler and *Frederick W. Dorr* for American-Hawaiian Steamship Co. *Mr. Hugh Montgomery* for respondent. Reported below: 41 F. (2d) 718.

No. 406. MORAN TOWING & TRANSPORTATION CO. *v.* J. W. HIGMAN CO. ET AL. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Chauncey I. Clark* for petitioner. *Messrs. Horace L. Cheyney, John A. McManus,* and *G. Noyes Slayton* for respondents. Reported below: 42 F. (2d) 161.

No. 407. MALINOW ET AL. *v.* UNITED STATES. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. R. Palmer Ingram* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch* and *Paul D. Miller* for the United States. Reported below: 42 F. (2d) 374.

No. 408. STEVENS HOTEL CO. *v.* CHICAGO YACHT CLUB ET AL. October 20, 1930. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Messrs. George P. Merrick* and *Tappan Gregory* for petitioner. *Mr. Edwin W. Sims* for respondents. Reported below: 339 Ill. 463; 171 N. E. 550.

No. 409. TEXAS & NEW ORLEANS R. CO. *v.* JOHN BONURA & CO., INC. October 20, 1930. Petition for writ of certiorari to the Court of Appeals of Louisiana denied. *Messrs. Harry McCall, Victor Leovy, Henry H. Chaffe,* and *Jas. Hy. Bruns* for petitioner. *Mr. Burt W. Henry* for respondent. Reported below: 126 So. 593; 128 *id.* 68.

No. 410. GOLDSCHLAG *v.* DEEGAN, COMMISSIONER. October 20, 1930. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Bernard Hershkoff* for petitioner. *Messrs. Arthur J. W. Hilly, Hamilton Ward,* and *J. Joseph Lilly* for respondent. Reported below: 173 N. E. 859.

No. 415. GRAUSTEIN *v.* WESTMINSTER NATIONAL BANK ET AL. October 20, 1930. Petition for writ of certiorari to the Superior Court of Massachusetts, Worcester County, denied. *Ida S. Graustein, pro se.* No appearance for respondents. Reported below: 170 N. E. 621.

No. 417. SMITH *v.* UNITED STATES. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Arthur I. Moulton* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch* and *W. Marvin Smith* for the United States. Reported below: 41 F. (2d) 215.

No. 419. WILLIAMS *v.* ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Dwight L. Pendleton* for petitioner. *Mr. Beverley R. Jouett* for respondent. Reported below: 41 F. (2d) 745.

No. 420. GRUEBY ET AL. *v.* CHRISTOPHER, ADMINISTRATRIX, ET AL.; and

No. 421. SAME *v.* SAME. October 20, 1930. Petitions for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Foye M. Murphy* and

Dudley H. Dorr for petitioners. *Mr. George Stanley Harvey* for respondents. Reported below: 40 F. (2d) 8.

No. 424. WILLIS *v.* SCOTT ET AL. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Guy H. Sigler* and *P. M. Jackson* for petitioner. *Messrs. W. F. Semple* and *Marion W. Reily* for respondents. Reported below: 40 F. (2d) 330; 41 *id.* 523.

No. 425. GROUP NO. 1 OIL CORP. *v.* BASS, COLLECTOR OF INTERNAL REVENUE. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Homer L. Bruce* and *James A. Baker* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key,* and *John G. Remey* for respondent. Reported below: 41 F. (2d) 483. S. c., *ante,* p. 830.

No. 446. POWERS ET AL. *v.* NEW YORK, CHICAGO & ST. LOUIS R. CO. ET AL. October 20, 1930. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. Donald M. Hamilton* for petitioners. *Messrs. Leslie Nichols* and *Alfred Clum* for respondents. Reported below: 174 N. E. 14.

No. 450. PETREE *v.* UNITED STATES. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Charles T. Cates, Jr.,* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key, John H. McEvers, W. Marvin Smith,* and *Clarence M. Charest* for the United States. Reported below: 41 F. (2d) 517.

No. 444. WILMOUTH, ADMINISTRATRIX, *v.* SOUTHERN RAILWAY CORP. October 20, 1930. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. M. J. Fulton* for petitioner. *Mr. Wirt P. Marks, Jr.,* for respondent. Reported below: 153 S. E. 874.

No. 447. LUCCIONI *v.* UNITED STATES. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Roscoe M. Ewing* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Mahlon D. Kiefer,* and *Paul D. Miller* for the United States. Reported below: 41 F. (2d) 741.

No. 452. NATIONAL CITY BANK *v.* PETROGRADSKY MEJDUNARODNY KOMMERCHESKY BANK. October 20, 1930. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. John A. Garver* for petitioner. *Mr. Frederick B. Campbell* for respondent. Reported below: 253 N. Y. 23, 170 N. E. 479; 254 N. Y. 563, 173 N. E. 867.

No. 456. LAKE WORTH *v.* R. M. GRANT & CO., INC. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles D. Gould* for petitioner. *Mr. E. J. L'Engle* for respondent. Reported below: 40 F. (2d) 579.

No. 457. DUQUESNE STEEL FOUNDRY CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Wm. S. Moorhead* for

petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key, John Henry McEvers, W. Marvin Smith,* and *Clarence M. Charest* for respondent. Reported below: 41 F. (2d) 995. See same case, *ante,* p. 830.

No. 462. GOLDSTEIN *v.* KLAGES, TRUSTEE. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Julian C. Ryer* for petitioner. *Mr. Edward M. Evarts* for respondent. Reported below: 43 F. (2d) 698.

No. 466. OHIO GALVANIZING & MFG. CO. *v.* SOUTHERN PACIFIC CO. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Union C. DeFord, Wm. Marshall Bullitt,* and *N. A. Emery* for petitioner. *Messrs. Charles W. Milner, Edw. P. Humphrey,* and *Louis Seelbach, Jr.,* for respondent. Reported below: 39 F. (2d) 840.

No. 468. SAPINKOPF *v.* CUNARD STEAMSHIP CO., LTD. October 20, 1930. Petition for writ of certiorari to the Supreme Court of New York, Appellate Division, denied. *Mr. Wilson E. Tipple* for petitioner. *Mr. George de Forest Lord* for respondent. Reported below: 254 N. Y. 111; 172 N. E. 259.

No. 476. COPELAND *v.* HIGGINS, POLICE COMMISSIONER. October 20, 1930. Petition for writ of certiorari to the Supreme Court of New York, Erie County, denied. *Mr. A. Stanley Copeland, pro se.* No appearance for respondent. Reported below: 254 N. Y. 522; 173 N. E. 848.

No. 480. LUTZ *v.* BUCK. October 20, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John T. Gano* for petitioner. *Messrs. Nathan Burkan* and *Maurice J. O'Sullivan* for respondent. Reported below: 40 F. (2d) 501.

No. 481. KORN *v.* BUCK; and

No. 482. SAME *v.* SAME. October 20, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John T. Gano* for petitioner. *Messrs. Nathan Burkan* and *Maurice J. O'Sullivan* for respondent. Reported below: 40 F. (2d) 501.

No. 496. IOWA STATE INS. CO. *v.* GODWIN ET AL. October 20, 1930. Petition for writ of certiorari to the St. Louis Court of Appeals of Missouri, denied. *Messrs. W. L. Cole* and *Samuel H. West* for petitioner. No appearance for respondents. Reported below: 27 S. W. (2d) 464.

No. 443. DUNN *v.* OHIO. Appeal from the Supreme Court of Ohio. See same case, *ante*, p. 801.

No. 380. SPICER *v.* UNITED STATES;

No. 381. STEPHENS *v.* SAME; and

No. 382. WOTKYNS *v.* SAME. October 27, 1930. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Edward Hohfeld* and *Herbert W. Clark* for Spicer et al. *Mr. John L. McNab* for Stephens. *Messrs. Joseph E. Davies* and *Ernest C. Carman* for Wotkyns. *Solicitor General Thacher* and *Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 41 F. (2d) 440.

No. 405. UNITED PROFIT SHARING CORP. *v.* UNITED STATES. October 27, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Sol M. Stroock, Leslie C. Garnett, Edward F. Spitz, Charles C. Carlin,* and *M. Carter Hall* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch, Joseph H. Shephard,* and *Paul D. Miller* for the United States. Reported below: 43 F. (2d) 266; 70 Ct. Cls. 788.

No. 458. MULHENS & KROPFF, INC., *v.* FERD. MUELHENS, INC.; and

No. 478. FERD. MUELHENS, INC., *v.* MULHENS & KROPFF, INC. October 27, 1930. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Lucius E. Varney* and *Manvel Whittemore* for Mulhens & Kropff, Inc. *Messrs. Maxwell C. Katz, Otto C. Sommerich,* and *Edwin M. Borchard* for Ferd. Muelhens, Inc. Reported below: 43 F. (2d) 937.

No. 461. WOOD & SELICK, INC., ET AL., *v.* TODD, TRUSTEE, ET AL. October 27, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Carroll Blakely Low* for petitioners. *Mr. Guy M. Page* for respondents. Reported below: 42 F. (2d) 174.

No. 473. STAR CAN OPENER CO. *v.* BUNKER-CLANCY MFG. CO. October 27, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Thomas Ewing, Stephen J. Cox, John H. Miller, A. W. Boykin,* and *Francis C. Downey* for petitioner. *Messrs. Maurice H. Winger, Frank P. Barker,*

and *Arthur C. Brown* for respondents. Reported below: 41 F. (2d) 142.

No. 474. HAMS, EXECUTOR, *v.* MARSHALL ET AL. October 27, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Winifred Sullivan* and *George C. Lay* for petitioner. *Mr. Moses Cohen* for respondents. Reported below: 43 F. (2d) 703.

No. 483. SCHLESINGER *v.* COUNTY OF MILWAUKEE. October 27, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Charles F. Fawsett* for petitioner. *Mr. Eugene Wengert* for respondent. Reported below: 42 F. (2d) 21.

No. 411. BECKERS *v.* UNITED STATES. November 3, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messrs. James Craig Peacock* and *John W. Townsend* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch, Joseph H. Shephard,* and *Paul D. Miller* for the United States. Reported below: 42 F. (2d) 300; 70 Ct. Cls. 319.

No. 475. ST. LOUIS ARCHITECTURAL IRON CO. *v.* NEW AMSTERDAM CASUALTY CO. November 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John P. Leahy* and *James J. O'Donohoe* for petitioner. No appearance for respondent. Reported below: 40 F. (2d) 344.

No. 479. COCA COLA CO. *v.* CARLISLE BOTTLING WORKS. November 3, 1930. Petition for writ of certiorari to the

Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Thomas L. Mead, Jr., Harold Hirsch,* and *Frank Troutman* for petitioner. *Mr. E. C. O'Rear* for respondent. Reported below: 43 F. (2d) 119.

No. 485. EASTERN MASSACHUSETTS STREET RY. CO. *v.* TRANSMARINE CORPORATION ET AL. November 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. G. Philip Wardner* for petitioner. *Messrs. Carroll Single* and *Albert T. Gould* for respondents. Reported below: 42 F. (2d) 58.

No. 486. KULESZA ET AL. *v.* BLAIR ET AL.; and

No. 487. SAME *v.* AMERICAN CAR AND FOUNDRY CO. ET AL. November 3, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. Hamilton Lewis* for petitioners. *Messrs. James M. Sheean* and *Weymouth Kirkland* for Blair et al. *Mr. Ephriam Banning* for American Car and Foundry Co. et al. Reported below: 41 F. (2d) 439.

No. 488. DOBLE LABORATORIES *v.* THOMAS DAY CO. November 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Frederick S. Lyon, Leonard S. Lyon,* and *William H. Hunt* for petitioner. *Messrs. John H. Miller, George L. Wilkinson,* and *Langdon Moore* for respondent. Reported below: 42 F. (2d) 6.

No. 491. ST. LOUIS NATIONAL BASEBALL CLUB *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. November 3, 1930. Petition for writ of certiorari to the Circuit

Court of Appeals for the Eighth Circuit denied. *Messrs. James C. Jones, Lon O. Hocker, Frank H. Sullivan, James C. Jones, Jr.*, and *Ralph T. Finley* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, J. Louis Monarch, John MacC. Hudson, Paul D. Miller, Clarence M. Charest,* and *Percy S. Crewe* for respondent. Reported below: 42 F. (2d) 984.

No. 492. LUETTE ET AL. *v.* BANK OF ITALY NATIONAL TRUST & SAVINGS ASSN. November 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. James Westervelt* and *Williamson S. Summers* for petitioners. *Mr. Elvon Musick* for respondent. Reported below: 42 F. (2d) 9.

No. 493. HILL ET AL. *v.* UNITED STATES. November 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. John Philip Hill* and *James A. O'Shea* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Mahlon D. Kiefer,* and *W. Marvin Smith* for the United States. Reported below: 42 F. (2d) 812.

No. 494. MCAVOY CO. *v.* GLOBE INDEMNITY CO. November 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Silas H. Strawn, John D. Black, and Harold A. Smith* for petitioner. *Mr. George T. Buckingham* for respondent. Reported below: 41 F. (2d) 122.

No. 495. SHEDD *v.* STATE LINE GENERATING CO. November 3, 1930. Petition for writ of certiorari to the

Circuit Court of Appeals for the Seventh Circuit denied. *Mr. C. B. Tinkham* for petitioner. *Mr. Buell McKeever* for respondent. Reported below: 41 F. (2d) 505.

No. 510. MARSHALL HALL MILLING CO. ET AL. *v.* MEXICAN-AMERICAN FRUIT & STEAMSHIP CORP. November 3, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Carroll Single, J. M. Richardson Lyeth,* and *Henry P. Dart, Jr.,* for petitioners. *Messrs. George H. Terriberry* and *Joseph M. Rault* for respondent. Reported below: 42 F. (2d) 1012.

No. 304. ROBINSON ET AL. *v.* HOLMAN ET AL. S. c., *ante,* p. 804.

No. 356. POSADOS, COLLECTOR OF INTERNAL REVENUE, *v.* OSSORIO. November 24, 1930. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. William Cattron Rigby, W. A. Graham,* and *E. A. Kreger* for petitioner. No appearance for respondent.

No. 413. ANDREWS STEEL CO., INC., *v.* UNITED STATES. November 24, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Robert T. Tedrow* and *Walter W. McCaslin* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *Paul D. Miller* for respondent. Reported below: 42 F. (2d) 573; 70 Ct. Cls. 235.

No. 497. CHICAGO, INDIANAPOLIS & LOUISVILLE RY. CO. *v.* INTERNATIONAL MILLING CO. November 24, 1930. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Eighth Circuit denied. *Messrs. Charles P. Stewart, Clint C. Hine, Harry N. Quigley,* and *Samuel W. Baxter* for petitioner. *Mr. Harold G. Simpson* for respondent. Reported below: 43 F. (2d) 93.

No. 501. TOMPLAIN ET AL. *v.* UNITED STATES. November 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hugh M. Wilkinson* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, A. W. Henderson,* and *Paul D. Miller* for the United States. Reported below: 42 F. (2d) 203.

No. 502. TOMPLAIN ET AL. *v.* UNITED STATES. November 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Hugh M. Wilkinson* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, A. W. Henderson,* and *W. Marvin Smith* for the United States. Reported below: 42 F. (2d) 202.

No. 503. BEARD *v.* UNITED STATES. November 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Elwood H. Seal* and *Frank L. Muhleman* for petitioner. *Solicitor General Thacher, Assistant Attorney General Richardson* and *Messrs. Claude R. Branch, E. T. Burke,* and *W. Marvin Smith* for the United States. Reported below: 41 F. (2d) 711.

No. 507. CONSOLIDATED MACHINE TOOL CORP. *v.* COLLINS CO. November 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Harold E. Stonebraker* for peti-

tioner. *Mr. Ephriam Banning* for respondent. Reported below: 41 F. (2d) 641.

No. 511. AETNA LIFE INS. CO. *v.* EATON, COLLECTOR OF INTERNAL REVENUE. November 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. William Marshall Bullitt* and *Harry W. Reynolds* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, J. Louis Monarch, S. Dee Hanson, Clarence M. Charest,* and *Edward H. Horton* for respondent. Reported below: 43 F. (2d) 711.

No. 516. NATIONAL UNION FIRE INS. CO. *v.* KAPLAN AND KAPLAN, CO-PARTNERS. November 24, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Frederick D. Silber* and *Charles E. Kremer* for petitioner. *Mr. Samuel E. Hirsch* for respondents. Reported below: 41 F. (2d) 569.

No. 541. HATEM *v.* UNITED STATES. December 1, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, and motion for leave to proceed *in forma pauperis,* denied. *Mr. Charles L. Abernethy* for petitioner. No appearance for the United States. Reported below: 42 F. (2d) 40. See also 38 *id.* 226.

No. 556. HARRISON *v.* L. E. MYERS CONSTRUCTION CO. ET AL. December 1, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit, and motion for leave to proceed *in forma pauperis,* denied. *Mr. Hugh Carney* for petitioner. No appearance for respondents. Reported below: 42 F. (2d) 950.

No. 559. SPRUILL *v.* BUCK. December 1, 1930. Petition for writ of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed *in forma pauperis,* denied. *Georgia M. Spruill, pro se.* No appearance for respondent.

No. 467. LATSHAW, JUDGE, *v.* MISSOURI EX REL. KANSAS CITY PUBLIC SERVICE CO. See same case, *ante,* p. 806.

No. 454. JOHN M. BRANT CO. *v.* UNITED STATES. December 1, 1930. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Earle W. Wallick* and *David J. Shorb* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch* and *George H. Foster* for the United States. Reported below: 40 F. (2d) 126; 69 Ct. Cls. 516.

No. 459. GEORGE A. HORMEL & CO. *v.* UNITED STATES. December 1, 1930. Petition for writ of certiorari to the Court of Claims denied. *Mr. L. L. Hamby* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg* and *Messrs. Claude R. Branch, George H. Foster,* and *W. Marvin Smith* for the United States. Reported below: 39 F. (2d) 726; 69 Ct. Cls. 385.

No. 498. WALKER ET AL. *v.* SUTHERLAND, ALIEN PROPERTY CUSTODIAN. December 1, 1930. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Mr. James J. Crossley* for petitioners. *Solicitor General Thacher* and *Messrs. Claude R. Branch, J. Frank Staley, Thomas E. Rhodes, Paul D. Miller,* and *A. W. Henderson* for respondent. Reported below: 289 Pac. 387.

No. 509. BRUNTON, EXECUTRIX, *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. December 1, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Minor Moore* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key, A. H. Conner, W. Marvin Smith, Clarence M. Charest,* and *J. K. Polk* for respondent. Reported below: 42 F. (2d) 81.

No. 514. WALLER ET AL. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE; and

No. 515. BEENE ET AL. *v.* SAME. December 1, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Fred R. Angevine* and *John H. Tucker, Jr.,* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key, John G. Remey,* and *W. Marvin Smith* for respondent. Reported below: 40 F. (2d) 892, 893.

No. 518. COMMERCIAL BANK OF SCOTLAND *v.* MCMILLAN, HAZEN & CO. ET AL. December 1, 1930. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Messrs. James J. Lynch* and *James B. Sizer* for petitioner. *Mr. Vaughn Miller* for respondents.

No. 523. COMMISSIONER OF INTERNAL REVENUE *v.* J. ROGERS FLANNERY & CO.;

No. 524. SAME *v.* FLANNERY BOLT CO.; and

No. 525. SAME *v.* VANADIUM METALS CO. December 1, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Solicitor Gen-*

eral Thacher for petitioner. *Messrs. Kenneth N. Parkinson* and *David A. Pine* for respondents. Reported below: 42 F. (2d) 11.

No. 528. WEIDENFELD *v.* PACIFIC STEAMSHIP CO. December 1, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. C. C. Daniels* for petitioner. *Messrs. Arthur H. Van Brunt, Welles V. Moot,* and *H. Z. M. Rodgers* for respondent.

No. 530. PANTAGES THEATRE CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. December 1, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. James S. Y. Ivins* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key, John Henry McEvers,* and *Paul D. Miller* for respondent. Reported below: 42 F. (2d) 810.

No. 531. SUTHERLAND, ALIEN PROPERTY CUSTODIAN, *v.* INTERNATIONAL INSURANCE CO. December 1, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Nathan Ottinger* and *Charles J. Schuck* for petitioner. *Messrs. David Rumsey, Henry Newton Arnold,* and *Louis A. Johnson* for respondent. Reported below: 43 F. (2d) 969.

No. 532. SUTHERLAND, ALIEN PROPERTY CUSTODIAN, *v.* INTERNATIONAL INSURANCE CO. ET AL.; and

No. 533. SAME *v.* SAME. December 1, 1930. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Nathan Ottinger* for petitioner. *Messrs. Emory B. Buckner* and *Louis A. Johnson* for respondents. Reported below: 43 F. (2d) 972.

No. 534. AMERICAN SURETY CO. *v.* COVE IRRIGATION DISTRICT. December 1, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Sterling M. Wood* for petitioner. *Mr. Horace S. Davis* for respondent. Reported below: 42 F. (2d) 957.

No. 526. APOLLO STEEL CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. On petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. December 1, 1930. *Per Curiam:* The petition for a writ of certiorari herein is denied because of failure to file the petition within the time prescribed by the statute. *Mr. Paul Armitage* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key, John MacC. Hudson,* and *W. Marvin Smith* for respondent. Reported below: 41 F. (2d) 986.

No. 499. THOMAS *v.* GEORGIA. S. c., *ante,* p. 806.

No. 500. PETTY *v.* GEORGIA. S. c., *ante,* p. 807.

No. 506. BAKER *v.* NEW MEXICO. S. c., *ante,* p. 807.

No. 538. COLLEGE SILK THROWING CO. *v.* AMERICAN CREDIT INDEMNITY CO. December 8, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Walter J. Rosston* for petitioner. *Mr. Frederic M. P. Pearse* for respondent. Reported below: 43 F. (2d) 668.

No. 551. LEITCH ET AL. *v.* CHICAGO ET AL. December 8, 1930. Petition for writ of certiorari to the Circuit

Court of Appeals for the Seventh Circuit denied. *Olive A. Leitch* for petitioners. *Messrs. Samuel A. Ettelson* and *Albert H. Veeder* for respondents. Reported below: 41 F. (2d) 728.

No. 307. WING *v.* PHILIPPINE RAILWAY CO. December 15, 1930. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Wm. J. Rohde* for petitioner. *Mr. Richard H. Wilmer* for respondent.

No. 540. KAHLE *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. December 15, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John J. Brennan, Jr., John F. McCarron,* and *Edward W. Foristel* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, J. Louis Monarch, Paul D. Miller, Clarence M. Charest,* and *Prew Savoy* for respondent. Reported below: 43 F. (2d) 61.

No. 536. PRATT ET AL. *v.* WEEKS; and

No. 537. SAME *v.* SAME. December 15, 1930. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Edgar Watkins* and *Mac Asbill* for petitioners. No appearance for respondents. Reported below: 43 F. (2d) 53.

No. 544. GILL v. BENJAMIN FRANKLIN REALTY & HOLDING CO. ET AL. December 15, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. William W. Montgomery, Horace Andrews,* and *William P. Belden* for petitioners. *Messrs. Stanley Folz* and *Frederic L. Ballard* for respondents. Reported below: 43 F. (2d) 337.

No. 553. SHERMAN & ELLIS, INC., *v.* INDIANA MUTUAL CASUALTY CO. December 15, 1930. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John R. Cochran* for petitioner. *Messrs. Charles O. Roemler, William H. Thompson,* and *Albert L. Rabb* for respondent. Reported below: 41 F. (2d) 588.

No. 554. ST. LOUIS-SAN FRANCISCO RY. CO. *v.* CASE, ADMINISTRATRIX. December 15, 1930. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Edward T. Miller, Lisbon E. Durham,* and *Henry S. Conrad* for petitioner. *Mr. Mont T. Prewitt* for respondent. Reported below: 30 S. W. (2d) 1069.

No. 539. EX PARTE HAWKINS. January 5, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed *in forma pauperis,* denied. *Messrs. Lee Bond* and *Morton S. Hawkins* for petitioner. Reported below: 42 F. (2d) 1015.

No. 583. DRAZICH *v.* ARCHER, WARDEN. January 5, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, and motion for leave to proceed *in forma pauperis,* denied. Act of June 27, 1922 (c. 246, 42 Stat. 666; U. S. C. Title 28, § 832). *Mr. Joe Drazich, pro se.* No appearance for respondent.

No. 588. BROWNE ET AL. *v.* POOL ET AL. January 5, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, and motion for leave to proceed *in forma pauperis,* denied. *Mr. George H. Browne* for petitioners. No appearance for respondents. Reported below: 44 F. (2d) 125.

No. 545. WOOD ET AL. *v.* EMPLOYER'S LIABILITY ASSURANCE CORP., LTD. January 5, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Earl B. Barnes* for petitioners. *Messrs. John Rynerson* and *Donald P. Shinn* for respondent. Reported below: 41 F. (2d) 573.

No. 548. CHICAGO, ROCK ISLAND & PACIFIC RY. CO. *v.* CALLOWAY, ADMINISTRATRIX. January 5, 1931. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Messrs. M. L. Bell, W. F. Dickinson, Thos. P. Littlepage,* and *W. R. Bleakmore* for petitioner. *Messrs. W. A. Ledbetter, H. L. Stuart,* and *R. R. Bell* for respondent. Reported below: 291 Pac. 111.

No. 550. WILKERSON *v.* UNITED STATES. January 5, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Harry C. Hendrickson* for petitioner. *Solicitor General Thacher* and *Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 41 F. (2d) 654.

No. 557. NATIONAL SURETY CO. *v.* HOLTZMAN, COLLECTOR OF CUSTOMS. January 5, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Homer L. Loomis* for petitioner. *Solicitor General Thacher* and *Messrs. Frank M. Parrish* and *Paul D. Miller* for respondent. Reported below: 43 F. (2d) 544.

No. 558. NATIONAL SURETY CO. *v.* HOLTZMAN, COLLECTOR OF CUSTOMS. January 5, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the

Fourth Circuit denied. *Mr. Homer L. Loomis* for petitioner. *Solicitor General Thacher* and *Messrs. Frank M. Parrish* and *Paul D. Miller* for respondent. Reported below: 43 F. (2d) 544.

No. 561. NATIONAL SURETY CO. *v.* INTERNATIONAL HARVESTER CO. January 5, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Ralph M. Shaw, Edward W. Everitt, Silas H. Strawn,* and *George T. Evans* for petitioner. *Messrs. William S. Elliott* and *J. F. Dammann* for respondent. Reported below: 44 F. (2d) 746.

No. 566. CRUMMIES CREEK COAL CO. *v.* CARRS FORK COAL CO. ET AL. January 5, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Joseph S. Laurent* for petitioner. *Messrs. Frank E. Wood* and *Robert S. Marx* for respondents. Reported below: 41 F. (2d) 736.

No. 569. GREAT NORTHERN RY. CO. *v.* GENERAL RAILWAY SIGNAL CO. January 5, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Thomas Ewing* and *F. G. Dorety* for petitioner. *Messrs. Clifton V. Edwards, Amasa C. Paul,* and *Harry E. Knight* for respondent. Reported below: 43 F. (2d) 790.

No. 573. M. & J. TRACY, INC., *v.* NORTHWESTERN FIRE & MARINE INS. CO. ET AL. January 5, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. John C. Crawley* for petitioner. *Mr. William F. Purdy* for respondents. Reported below: 43 F. (2d) 965.

No. 527. GUGENHINE *v.* GERK, CHIEF OF POLICE, ET AL. See same case, *ante*, p. 810.

No. 560. DEXTER & CARPENTER, INC., *v.* KUNGLIG JARNVAGSSTYRELSEN ET AL. January 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles S. Haight* for petitioner. *Messrs. Edward B. Burling, William C. Cannon,* and *Porter R. Chandler* for respondents. Reported below: 43 F. (2d) 705.

No. 564. PFEIFER *v.* WRIGHT, EXECUTRIX. January 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Robert Stone* for petitioner. *Mr. V. P. Crowe* for respondent. Reported below: 41 F. (2d) 464.

No. 570. MOTTER ET AL. *v.* BRITTAIN. January 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Samuel W. Fordyce* and *Henry J. Richardson* for petitioners. *Mr. Robert A. Brown* for respondent. Reported below: 42 F. (2d) 613.

No. 571. KYLE *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 572. REINHART *v.* SAME. January 12, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. William A. Seifert* and *William Wallace Booth* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key, Norman D. Keller,* and *Paul D. Miller* for respondent. Reported below: 43 F. (2d) 291.

No. 575. GENERAL MOTORS CORP. *v.* SWAN CARBURETOR Co. January 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Lawrence C. Spieth* and *J. L. Stackpole* for petitioner. *Mr. Harrison B. McGraw, Joseph H. Milans,* and *F. O. Richey* for respondent. Reported below: 44 F. (2d) 24.

No. 576. EWING-THOMAS CONVERTING Co. *v.* MCCAUGHN, COLLECTOR OF INTERNAL REVENUE. January 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. James Craig Peacock* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key,* and *Paul D. Miller* for respondent. Reported below: 43 F. (2d) 503.

No. 577. BOURKE *v.* UNITED STATES. January 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Leonard S. Coyne* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, F. Cadmus Damrell, John J. Byrne,* and *W. Marvin Smith* for the United States. Reported below: 44 F. (2d) 371.

No. 578. BRIERLY ET AL., RECEIVERS, ET AL. *v.* COMMERCIAL CREDIT Co. January 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Frank A. Harrington* and *Arthur E. Weil* for petitioners. *Mr. Duane R. Dills* for respondent. Reported below: 43 F. (2d) 730.

No. 579. COMMISSIONER OF INTERNAL REVENUE *v.* MERLE-SMITH. January 12, 1931. Petition for writ of

certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, Norman D. Keller,* and *Paul D. Miller* for petitioner. *Mr. John W. Davis* for respondent. Reported below: 42 F. (2d) 837.

No. 580. COMMISSIONER OF INTERNAL REVENUE *v.* FOWLER. January 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Thacher* for petitioner. *Mr. John W. Davis* for respondent. Reported below: 42 F. (2d) 837.

No. 585. SEABOARD AIR LINE RY. CO. *v.* COLE. January 12, 1931. Petition for writ of certiorari to the Supreme Court of North Carolina denied. *Mr. Murray Allen* for petitioner. *Messrs. Clyde A. Douglass* and *Robert N. Simms* for respondent. Reported below: 199 N. C. 389; 154 S. E. 682.

No. 589. SCHNERB ET AL. *v.* CATERPILLAR TRACTOR CO. January 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Gregory Hankin, William H. Page,* and *William Harvey Smith* for petitioners. *Mr. John Thomas Smith* for respondent. Reported below: 43 F. (2d) 920.

No. 592. ZURICH GENERAL ACCIDENT & LIABILITY INS. CO., LTD., *v.* O'KEEFE. January 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Henry B. Morrow, Ralph F. Potter,* and *George A. Bangs* for petitioner. *Mr. C. J.*

Murphy for respondent. Reported below: 43 F. (2d) 809.

No. 595. EAGLE STAR & BRITISH DOMINIONS INS. CO. ET AL. *v.* NIAGARA FERRY & TRANSPORTATION CO. January 12, 1931. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Carroll Single* for petitioners. *Mr. Ray M. Stanley* for respondent. Reported below: 254 N. Y. 626, 173 N. E. 895; 229 App. Div. 433.

No. 598. AMERICAN CAN CO. *v.* LADOGA CANNING CO. January 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. William H. Thompson, Albert L. Rabb, Garrard B. Winston, John A. Garver, Lemuel A. Welles,* and *Leonard B. Smith* for petitioner. *Messrs. Solon J. Carter, Harold K. Bachelder,* and *William C. Bachelder* for respondent. Reported below: 44 F. (2d) 763.

No. 599. DIRECTOPLANE CORP. *v.* HUEBNER-BLEISTEIN PATENTS CO. January 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Glen E. Smith, Reeve Lewis,* and *Frank Parker Davis* for petitioner. *Messrs. George I. Haight* and *Samuel W. Banning* for respondent. Reported below: 44 F. (2d) 783.

No. 582. W. J. MCCAHAN SUGAR REFINING & MOLASSES CO. ET AL. *v.* NORTON, DEPUTY COMMISSIONER. January 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Maurice W. Sloan* for petitioners. *Solicitor General*

Thacher and *Messrs. Mortimer W. H. Cox, Claude R. Branch, J. Frank Staley, W. Clifton Stone,* and *W. Marvin Smith* for respondents. Reported below: 43 F. (2d) 505.

No. 593. SEABOARD AIR LINE RY. CO. *v.* LINK. January 19, 1931. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Mr. Murray Allen* for petitioner. *Mr. James D. Poag* for respondent. Reported below: 156 S. E. 481.

No. 594. KING AMUSEMENT CO. *v.* COMMISSIONER OF INTERNAL REVENUE. January 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Abraham J. Levin* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, J. Louis Monarch, John G. Remey,* and *Paul D. Miller* for respondent. Reported below: 44 F. (2d) 709.

No. 597. HAUPTMAN ET AL. *v.* UNITED STATES. January 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Robert W. Jennings* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch* and *W. Marvin Smith* for the United States. Reported below: 43 F. (2d) 86.

No. 602. ATLANTIC TRANSPORT CO. *v.* KOPFINGER. January 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Cletus Keating* for petitioner. *Mr. Charles A. Ellis* for respondent. Reported below: 44 F. (2d) 1016.

No. 603. FARMERS BANK *v.* FIDELITY & DEPOSIT CO. January 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Cyrus Crane* for petitioner. *Mr. Maurice H. Winger* for respondent. Reported below: 44 F. (2d) 11.

No. 604. PEOPLES BANK *v.* FIDELITY & DEPOSIT CO. January 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Cyrus Crane* for petitioner. *Mr. Maurice H. Winger* for respondent. Reported below: 44 F. (2d) 19.

No. 605. MISSOURI STATE BANK *v.* FIDELITY & DEPOSIT CO. January 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Fred A. Boxley* for petitioner. *Mr. Maurice H. Winger* for respondent. Reported below: 44 F. (2d) 19.

No. 662. GOLDSMITH *v.* ADERHOLT, WARDEN. January 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, and motion for leave to proceed *in forma pauperis,* denied. *Mr. H. Ely Goldsmith, pro se.* No appearance for respondent. Reported below: 44 F. (2d) 166.

No. 586. BERNEY *v.* UNITED STATES; and

No. 587. BLOOM *v.* SAME. January 26, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Halle* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Mahlon D. Kiefer, A. E. Gottschall,* and *W. Marvin Smith* for the United States. Reported below: 45 F. (2d) 145.

No. 608. WYOMING NATIONAL BANK *v.* OMAHA NATIONAL BANK ET AL. January 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edgar M. Morsman, Jr.,* for petitioner. *Messrs. Halleck F. Rose, Arthur R. Wells,* and *Paul L. Martin* for respondents. Reported below: 45 F. (2d) 511.

No. 609. SHEPPARD & MYERS, INC., *v.* COMMISSIONER OF INTERNAL REVENUE. January 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. John F. McCarron* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Claude R. Branch, Sewall Key, Paul D. Miller, Clarence M. Charest,* and *Miss Helen R. Carloss* for respondent. Reported below: 45 F. (2d) 50.

No. 610. ROOS *v.* TEXAS CO. February 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. J. B. Lewright* and *R. L. Batts* for petitioner. *Messrs. C. B. Ames* and *S. J. Brooks* for respondent. Reported below: 43 F. (2d) 1.

No. 611. SEABOLT *v.* UNITED STATES. February 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. A. M. Belcher* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Mahlon D. Kiefer, A. E. Gottschall,* and *W. Marvin Smith* for the United States. Reported below: 44 F. (2d) 169.

No. 612. NICHOLS *v.* UNIVERSAL PICTURES CORP. ET AL. February 2, 1931. Petition for writ of certiorari to the

Circuit Court of Appeals for the Second Circuit denied. *Mr. Moses L. Malevinsky* for petitioner. *Mr. Siegfried F. Hartman* for respondents. Reported below: 45 F. (2d) 119.

No. 613. MISSOURI-KANSAS-TEXAS R. Co. *v.* KAMER. February 2, 1931. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Joseph M. Bryson* and *C. S. Burg* for petitioner. *Mr. Jesse W. Barrett* for respondent. Reported below: 32 S. W. (2d) 1075.

No. 617. DUKE POWER Co. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. February 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. H. H. Shelton* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Sewall Key, W. Marvin Smith, Clarence M. Charest,* and *Allin H. Pierce* for respondent. Reported below: 44 F. (2d) 543.

No. 619. FISH ET AL. *v.* WISE ET AL. February 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Robert L. Owen, Frank J. Boudinot, D. H. Linebaugh,* and *Henry G. Thomas* for petitioners. *Messrs. James A. Veasey* and *Lloyd G. Owen* for respondents.

No. 562. MOORE *v.* CARTER OIL Co. February 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Thomas H. Owen, Chester I. Long, W. E. Stanley, Peter Q. Nyce,* and *Samuel W. McIntosh* for petitioner. *Messrs. James A. Veasey* and *Lloyd G. Owen* for respondent. Reported below: 43 F. (2d) 322.

No. 633. UNITED STATES HOFFMAN MACHINERY CORP. *v.* PANTEX PRESSING MACHINE, INC. February 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles Neave* for petitioner. *Messrs. Thomas G. Haight, J. Granville Meyers, Charles S. Jones,* and *T. J. Johnston* for respondent. Reported below: 44 F. (2d) 685.

No. 634. TROPIC-AIRE, INC., *v.* SEARS, ROEBUCK & Co. February 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. A. C. Paul* and *Maurice M. Moore* for petitioner. *Mr. Otto Raymond Barnett* for respondent. Reported below: 44 F. (2d) 580.

No. 590. FRITZINGER *v.* ILLINOIS ET AL. S. c., *ante,* p. 815.

No. 591. FRITZINGER *v.* ILLINOIS ET AL. S. c., *ante,* p. 816.

No. 614. JOHNSON ET AL. *v.* LOS ANGELES ET AL. February 25, 1931. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Gurney E. Newlin* for petitioners. *Messrs. Erwin P. Werner* and *Frederick von Schrader* for respondents. Reported below: 291 Pac. 395.

No. 616. SMITH, TREASURER OF ALASKA, *v.* FREEMAN. February 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied.

Mr. John Rustgard for petitioner. *Mr. Martin J. Lund* for respondent. Reported below: 44 F. (2) 703.

No. 629. CHASM POWER CO. ET AL. *v.* CHATEAUGAY. February 25, 1931. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Frank Irvine* for petitioners. *Mr. Patrick J. Tierney* for respondent. Reported below: 253 N. Y. 592, 171 N. E. 796; 227 App. Div. 642.

No. 647. INTERNATIONAL HARVESTER CO. v. MISSISSIPPI LAND CO. February 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. George W. Morgan, Frank B. Kellogg, Cleon Headley, Horace Kent Tenny,* and *John P. Wilson* for petitioner. *Mr. C. E. Elmquist* for respondent. Reported below: 43 F. (2d) 17.

No. 652. CENTRAL RAILROAD COMPANY OF NEW JERSEY *v.* HART. February 25, 1931. Petition for writ of certiorari to the Court of Common Pleas, Hudson County, of New Jersey, denied. *Mr. Charles E. Miller* for petitioner. *Mr. Charles Hershenstein* for respondent. Reported below: 171 Atl. 733; 151 Atl. 906.

No. 667. GORDON OIL CO., INC., *v.* CITIES SERVICE REFINING CO. ET AL. February 25, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Harry G. Seligman* for petitioners. No appearance for respondents. Reported below: 44 F. (2d) 514.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 6, 1930, TO AND INCLUDING FEBRUARY 25, 1931.

No. 161. WALDOCK *v.* NEWELL, WARDEN. Appeal from the Supreme Court of Oklahoma. October 6, 1930. Dismissed with costs, on motion of *Mr. Finis E. Riddle* for appellant. No appearance for appellee. Reported below: 286 Pac. 765.

No. 70. JUNGST ET AL. *v.* BALDRIDGE, GOVERNOR, ET AL. Appeal from the District Court of the United States for the District of Idaho. October 13, 1930. Appeal dismissed with costs on motion of *Mr. Charles J. Williamson* for appellants. *Mr. Leon M. Fisk* for appellees.

No. 327. FOREMAN TRUST & SAVINGS BANK, TRUSTEE, ET AL. *v.* CHICAGO. Appeal from the Supreme Court of Illinois. October 13, 1930. Appeal and petition for writ of certiorari dismissed with costs per stipulations of counsel. *Messrs. Howard F. Bishop, John F. Caskey,* and *George W. Schurman* for appellants. *Messrs. Samuel A. Ettelson* and *Gotthard A. Dahlberg* for appellee. Reported below: 174 N. E. 419.

No. 59. ORENSTEIN & KOPPEL AKTIENGESELLSCHAFT *v.* KOPPEL INDUSTRIAL CAR & EQUIPMENT CO Certiorari to the Court of Appeals of the District of Columbia. December 12, 1930. Dismissed and mandate granted per stipulation of counsel. *Messrs. Dean Hill Stanley, Arthur Garfield Hays,* and *Wm. Cattron Rigby* for petitioner. *Messrs. Charles Henry Butler, John A. Kratz,* and *Godfrey L. Munter* for respondent. Reported below: 38 F. (2d) 532.

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