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VOLUME 284

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1931

FROM OCTOBER 5, 1931, TO AND
INCLUDING FEBRUARY 15, 1932

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Corrections.

P. 293, of this volume, footnote 4, line 1, change "January" to June.

281 U. S. 709, in No. 700, strike out 38 F. (2d) 365.

282 U. S. 595, third line from bottom, change 1914 to 1924.

Memorial Proceedings. The account promised for this volume (see 283 U. S. v) will be found in Vol. 285 U. S.

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

CHARLES EVANS HUGHES, Chief Justice.
OLIVER WENDELL HOLMES, Associate Justice.[2]
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.

[2] Mr. Justice Holmes retired on January 12, 1932.

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.

RETIREMENT OF MR. JUSTICE HOLMES.

ORDER OF JANUARY 13, 1932.

It is ordered by this Court that the accompanying correspondence between members of the Court and Mr. Justice Holmes, upon his retirement as an Associate Justice of the Court, be this day spread upon the record, and that it also be printed in the reports of the Court.

SUPREME COURT OF THE UNITED STATES,
Washington, D. C., January 12, 1932.

DEAR JUSTICE HOLMES: We can not permit your long association in the work of the Court to end without expressing our keen sense of loss and our warm affection. Your judicial service of over forty-nine years—twenty years in the Supreme Judicial Court of Massachusetts and twenty-nine years upon this bench—has a unique distinction in uninterrupted effectiveness and exceptional quality. Your profound learning and philosophic outlook have found expression in opinions which have become classic, enriching the literature of the law as well as its substance. With a most conscientious exactness in the performance of every duty, you have brought to our collaboration in difficult tasks a personal charm and a freedom and independence of spirit which have been a constant refreshment. While we are losing the privilege of daily companionship, the most precious memories of your unfailing kindliness and generous nature abide with us, and these memories will ever be one of the choicest traditions of the Court.

Deeply regretting the necessity for your retirement, we trust that—relieved of the burden which had become too heavy—you may have a renewal of vigor and that you may find satisfaction in your abundant resources of intellectual enjoyment.

Affectionately yours,

CHARLES E. HUGHES.
WILLIS VAN DEVANTER.
JAMES C. MCREYNOLDS.
LOUIS D. BRANDEIS.
GEORGE SUTHERLAND.
PIERCE BUTLER.
HARLAN F. STONE.
OWEN J. ROBERTS.

MR. JUSTICE HOLMES.

SUPREME COURT OF THE UNITED STATES,
Washington, D. C., January 12, 1932.

MY DEAR BRETHREN: You must let me call you so once more. Your more than kind, your generous, letter touches me to the bottom of my heart. The long and intimate association with men who so command my respect and admiration could not but fix my affection as well. For such little time as may be left for me I shall treasure it as adding gold to the sunset.

Affectionately yours,

O. W. HOLMES.

The CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

The letter of resignation and the President's reply were as follows:

SUPREME COURT OF THE UNITED STATES,
Washington, D. C., January 12, 1932.

MR. PRESIDENT: In accordance with the provision of the Judicial Code as amended Section 260, Title 28 United States Code 375, I tender my resignation as Justice of the Supreme Court of the United States of America. The condition of my health makes it a duty to break off connections that I cannot leave without deep regret after the affectionate relations of many years and the absorbing interests that have filled my life. But the time has come and I bow to the inevitable. I have nothing but kindness to remember from you and from my brethren. My last word should be one of grateful thanks.

With great respect, your obedient servant,

OLIVER WENDELL HOLMES.

HON. HERBERT HOOVER.

THE WHITE HOUSE,
Washington, January 12, 1932.

HON. OLIVER WENDELL HOLMES,
Supreme Court of the United States,
Washington, D. C.

MY DEAR MR. JUSTICE: I am in receipt of your letter of January 12th tendering your resignation from the Supreme Court of the United States. I must, of course, accept it.

No appreciation I could express would even feebly represent the gratitude of the American people for your whole life of wonderful public service, from the time you were an officer in the Civil War to this day—near your ninety-first anniversary. I know of no American retiring from public service with such a sense of affection and devotion of the whole people.

Yours faithfully,

HERBERT HOOVER.

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TABLE OF CASES

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TABLE OF STATUTES

Cited in Opinions

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1931.

UNITED STATES *v.* KIRBY LUMBER CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 26. Argued October 21, 1931. Decided November 2, 1931.

Where a corporation purchased and retired some of its own bonds for less than their par value, which it had received for them when issued, the difference was a taxable gain or income under the Revenue Act of 1921. P. 3.

71 Ct. Cls. 290; 44 F. (2d) 885, reversed.

CERTIORARI, 283 U. S. 814, to review a judgment allowing a claim for refund of money collected as income tax.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Messrs. Fred K. Dyar, Bradley B. Gilman, Erwin N. Griswold, Paul D. Miller, Clarence M. Charest,* and *T. H. Lewis, Jr.,* were on the brief, for the United States.

Mr. Robert Ash for respondent.

No income was derived from the transaction, which was the expenditure rather than the receipt of money. The principle involved has been decided in *Bowers* v. *Kerbaugh-Empire Co.,* 271 U. S. 170, wherein it was

held that a corporation does not realize taxable income by settling a debt for a lesser sum in dollars than it was obligated to pay.

The Board of Tax Appeals in many cases, beginning with Independent Brewing Co., 4 B. T. A. 870, has held that no income is realized in the circumstances here involved.

Cancellation of indebtedness is a capital transaction which does not result in income. *United States* v. *Oregon-Washington R. & N. Co.*, 251 Fed. 211; Meyer Jewelry Co., 3 B. T. A. 1319; John F. Campbell Co., 15 B. T. A. 458; 50 F. (2d) 487; Eastside Mfg. Co., 18 B. T. A. 461; Progress Paper Co., 20 B. T. A. 234; Herman Senner, 22 B. T. A. 655.

Income does not mean transactions not connected with the corporate activities and which only affect the capital structure of the corporate taxpayer. *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, 185.

The transaction is a purchase by the taxpayer of its promise to pay. It is settled that income can be realized only by the sale or other disposition of capital assets. If income could be realized by purchase, every "good bargain" is taxable when made. Purchase could not result in income in this case, because bonds were purchased at their then value, as shown by the judgment of the market place.

Mr. Justice Holmes delivered the opinion of the Court.

In July, 1923, the plaintiff, the Kirby Lumber Company, issued its own bonds for $12,126,800 for which it received their par value. Later in the same year it purchased in the open market some of the same bonds at less than par, the difference of price being $137,521.30. The question is whether this difference is a taxable gain or income of the plaintiff for the year 1923. By the Rev-

enue Act of (November 23,) 1921, c. 136, § 213 (a) gross income includes "gains or profits and income derived from any source whatever," and by the Treasury Regulations authorized by § 1303, that have been in force through repeated reënactments, "If the corporation purchases and retires any of such bonds at a price less than the issuing price or face value, the excess of the issuing price or face value over the purchase price is gain or income for the taxable year." Article 545 (1) (c) of Regulations 62, under Revenue Act of 1921. See Article 544 (1) (c) of Regulations 45, under Revenue Act of 1918; Article 545 (1) (c) of Regulations 65, under Revenue Act of 1924; Article 545 (1) (c) of Regulations 69, under Revenue Act of 1926; Article 68 (1) (c) of Regulations 74, under Revenue Act of 1928. We see no reason why the Regulations should not be accepted as a correct statement of the law.

In *Bowers* v. *Kerbaugh-Empire Co.,* 271 U. S. 170, the defendant in error owned the stock of another company that had borrowed money repayable in marks or their equivalent for an enterprise that failed. At the time of payment the marks had fallen in value, which so far as it went was a gain for the defendant in error, and it was contended by the plaintiff in error that the gain was taxable income. But the transaction as a whole was a loss, and the contention was denied. Here there was no shrinkage of assets and the taxpayer made a clear gain. As a result of its dealings it made available $137,521.30 assets previously offset by the obligation of bonds now extinct. We see nothing to be gained by the discussion of judicial definitions. The defendant in error has realized within the year an accession to income, if we take words in their plain popular meaning, as they should be taken here. *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359, 364.

Judgment reversed.

MOORE, TRUSTEE IN BANKRUPTCY FOR THE ESTATE OF SASSARD & KIMBALL, INC., BANKRUPT, *v.* BAY.

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

No. 27. Argued October 22, 1931. Decided November 2, 1931.

1. The provisions of the Bankruptcy Act concerning liens are superior to state laws. P. 5.
2. In the administration of an estate in bankruptcy, a chattel mortgage which, under the state law, is bad as against creditors who were such at the date of the mortgage, or who became such between the date of the mortgage and the date on which it was recorded, should not be given priority over those who gave the bankrupt credit at a later date, after the mortgage was on record. Bankruptcy Act, §§ 70, 67, and 65. *Id.*

45 F. (2d) 449, reversed.

CERTIORARI, 283 U. S. 814, to review an affirmance of an order of the District Court holding a chattel mortgage to be valid as to creditors whose claims came into existence subsequently to its recordation.

Mr. Thomas S. Tobin, with whom *Messrs. Charles F. Hutchins, Frank C. Weller,* and *James P. Keleher* were on the brief, for petitioner. *Mr. Max Isaac* also appeared for petitioner.

No appearance for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The bankrupt executed a mortgage of automobiles, furniture, show room and shop equipment that is admitted to be bad as against creditors who were such at the date

of the mortgage and those who became such between the date of the mortgage and that on which it was recorded, there having been a failure to observe the requirements of the Civil Code of California, § 3440. The question raised is whether the mortgage is void also as against those who gave the bankrupt credit at a later date, after the mortgage was on record. The Circuit Court of Appeals affirmed an order of the District Judge giving the mortgage priority over the last creditors. Whether the Court was right must be decided by the Bankruptcy Act since it is superior to all state laws upon the subject. *Globe Bank* v. *Martin,* 236 U. S. 288, 298.

The trustee in bankruptcy gets the title to all property which has been transferred by the bankrupt in fraud of creditors, or which prior to the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him. Act of July 1, 1898, c. 541, § 70; U. S. Code, Title 11, § 110. By § 67, Code, Title 11, § 107 (a), claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate. The rights of the trustee by subrogation are to be enforced for the benefit of the estate. The Circuit Courts of Appeals seem generally to agree, as the language of the Bankruptcy Act appears to us to imply very plainly, that what thus is recovered for the benefit of the estate is to be distributed in "dividends of an equal percentum on all allowed claims, except such as have priority or are secured." Bankruptcy Act, § 65, Code, Title 11, § 105. *In re Kohler,* 159 Fed. 871. *Mullen* v. *Warner,* 11 F. (2d) 62. *Campbell* v. *Dalbey,* 23 F. (2d) 229. *Cohen* v. *Schultz,* 43 F. (2d) 340. *Globe Bank* v. *Martin,* 236 U. S. 288, 305.

Decree reversed.

PUBLIC SERVICE COMMISSION OF INDIANA ET AL. *v.* BATESVILLE TELEPHONE CO.

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

No. 120. Jurisdictional statement submitted October 12, 1931. Decided October 26, 1931.

Appeal to this Court from a Circuit Court of Appeals is limited to cases in which that court decided against the validity of a statute of a State upon the ground of its being repugnant to the Constitution, treaties, or laws of the United States. In other cases review by this Court, if it be had, must be pursuant to a writ of certiorari, duly applied for and granted. Jud. Code, § 240, (b), (c). Dismissed. For opinion below, see 46 F. (2d) 226.

Messrs. James M. Ogden and *G. W. Hufsmith* for appellants.

Messrs. Wm. H. Thompson and *Albert L. Rabb* for appellee.

Per Curiam: This suit was brought to restrain the enforcement of an order of the Public Service Commission of Indiana upon the grounds that the commission had exceeded its authority and that the order violated the due process clause and the equal protection clause of the Fourteenth Amendment of the Federal Constitution. The District Court (a single judge sitting, as an interlocutory injunction was not sought, *Stratton* v. *St. Louis, S. W. Ry. Co.*, 282 U. S. 10, 15) dismissed the bill for want of equity. The decree was reversed by the Circuit Court of Appeals, which directed that the relief for which the bill prayed be granted. The sole ground of the decision of the Circuit Court of Appeals was that the Public Service Commission had no jurisdiction under the law of the State to make the order.

The statute governing appeals to this Court from the Circuit Court of Appeals is § 240 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938), which provides in paragraphs (b) and (c) as follows:

"(b) Any case in a Circuit Court of Appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such state statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the federal questions presented in the case.

"(c) No judgment or decree of a Circuit Court of Appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section."

The plain intent of this statute is to limit appeals to this Court from a Circuit Court of Appeals to cases where its decision is against the validity of a statute of a State upon the ground of its being repugnant to the Constitution, treaties, or laws of the United States. In other cases, review by this Court, if it be had, must be pursuant to a writ of certiorari duly applied for and granted.

As in this case the Circuit Court of Appeals did not decide against the validity of the order of the Public Service Commission upon the asserted federal grounds, but dealt with its validity solely under the state law, the appeal must be dismissed. [See *post,* p. 578.]

BANDINI PETROLEUM CO. ET AL. *v.* SUPERIOR COURT, LOS ANGELES COUNTY, CALIFORNIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, OF CALIFORNIA.

No. 43. Argued October 13, 14, 1931.—Decided November 23, 1931

1. A judgment of a state court denying a writ of prohibition to restrain another state court and one of its judges from enforcing an injunction order, *held* a final judgment within the meaning of Jud. Code, § 237 (a). P. 14.
2. A proceeding in California for a writ of prohibition to restrain a California court from exercising jurisdiction in an injunction suit under a statute of that State alleged to be in conflict with the Federal Constitution, goes only to the jurisdiction of that court to entertain the suit before it, and if on its face, as construed by the state courts, the statute be valid, judgment denying prohibition should be affirmed here; constitutional and other questions, as to the application of the statute to the situation developed in the injunction suit, should be decided and reviewed in that proceeding; they can not be imported into the prohibition case. P. 14.
3. The Oil & Gas Conservation Act of California (§§ 8b and 14b) prohibits "the unreasonable waste of natural gas" in oil and gas fields and authorizes the Director of Natural Resources to enforce the prohibition. The term "unreasonable waste," as construed by the state supreme court, means allowing gas to come to the surface in excess of a reasonable proportion to the amount of oil produced, so that the power of the gas to lift oil from the oil "sand" or formation is not fully utilized; and that court has found that this reasonable proportion could not be determined by the legislature by definite ratios or percentages which would operate without discrimination, but can be judicially ascertained with fair certainty in each individual case. *Held* that the statute is not invalid on its face for uncertainty, so as to deprive a state court of jurisdiction to consider relevant questions of fact and determine with respect to a particular field whether there has been the unreasonable waste that the statute condemns. P. 16.
4. The provision of the above-mentioned statute that "the blowing release or escape of natural gas into the air shall be *prima facie* evidence of unreasonable waste," is not invalid. P. 18.

5. Construed as regulating the correlative rights of surface owners with respect to a common source of supply of oil and gas, the statute is valid upon its face. P. 22.

109 Cal. App. —; 293 Pac. 899, affirmed.

APPEAL from a judgment denying a writ of prohibition. The Supreme Court of the State declined to review.

Mr. Robert B. Murphey, with whom *Mr. Asa V. Call* was on the brief, for appellants.

Prohibition is appellants' proper remedy. The state court having treated the federal questions involved as being properly raised by prohibition and having decided them adversely to the asserted federal right, this Court has jurisdiction to pass upon them.

The validity of the statute is to be determined by its operation and effect as applied to appellants. Appeal rather than certiorari is the proper remedy.

The facts being admitted by demurrer and their examination being essential to the enforcement of the federal rights asserted, this Court will examine them and draw its own conclusion.

Legislative regulation curtailing production of natural gas and providing for its conservation invades the rights of private owners and is repugnant to the due process clause of the Fourteenth Amendment, when directed not to the protection of correlative rights of different owners in a common source of supply but to conservation for the benefit of the consuming public.

The statute, as applied, constitutes a taking of appellants' property for a public use without compensation and without due process of law.

Under the admitted facts, the extent of the invasion of appellants' property rights is so great, so arbitrary, so oppressive, and so unreasonable, as to exceed the police power of the State.

The statute is void for uncertainty and lack of a sufficiently definite standard of conduct, under the due process clause of the Fourteenth Amendment.

The prima facie evidence clause of the statute violates the due process clause.

The statute, as applied, unconstitutionally impairs appellants' lease contracts and denies to them the equal protection of the laws.

If appeal was improvidently sought and allowed, then certiorari should be granted upon the appeal papers.

Mr. James S. Bennett, with whom *Mr. U. S. Webb,* Attorney General of California, was on the brief, for appellees.

Mr. Chief Justice Hughes delivered the opinion of the Court.

The appellants are producers of oil and gas from their respective wells in the Santa Fe Springs oil field in Los Angeles County, California. In September, 1929, the State, acting through its Director of Natural Resources, brought suit in the Superior Court of the State against the appellants and others, seeking to enjoin an alleged unreasonable waste of natural gas in that field. The authority for the suit was found in §§ 8b and 14b of what is called the Oil and Gas Conservation Act of California. Stats. Cal. 1915, c. 718; 1917, c. 759; 1919, c. 536; 1921, c. 912; 1929, c. 535. Section 8b prohibits "the unreasonable waste of natural gas," and § 14b authorizes suit by the Director of Natural Resources to enforce the prohibition.[1]

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[1] These sections are as follows:

"Sec. 8b. The unreasonable waste of natural gas by the act, omission, sufferance or insistence of the lessor, lessee or operator of any land containing oil or gas, or both, whether before or after the removal of gasoline from such natural gas, is hereby declared to be opposed to

The Superior Court granted a preliminary injunction after a hearing upon the pleadings, affidavits, oral testimony and documents submitted. The court recited in its order that there appeared to be an unreasonable waste of natural gas in the Santa Fe Springs oil field, and that an injunction was necessary in order "to preserve the subject matter of the action to abide the decree of the court at the conclusion of the trial." The court restricted the average daily production of "net formation gas" from "any lease or other property unit" to the amount shown for each operator in an accompanying schedule.[2]

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the public interest and is hereby prohibited and declared to be unlawful. The blowing, release or escape of natural gas into the air shall be prima facie evidence of unreasonable waste." (Stats. Cal. 1929, ch. 535, p. 927.)

"Sec. 14b. Whenever it appears to the director of the department of natural resources that the owners, lessors, lessees, or operators of any well or wells producing oil and gas or oil or gas are causing or permitting an unreasonable waste of gas, he may institute, or have proceedings instituted, in the name of the people of the State of California to enjoin such unreasonable waste of gas regardless of whether proceedings have or have not been instituted under section 8 hereof, and regardless of whether an order has or has not been made therein. Such proceedings shall be instituted in the superior court for the county in which the well or wells from which the unreasonable waste of gas is occurring or any thereof are situated. The owners, lessors, lessees or operators causing or permitting an unreasonable waste of gas in the same oil or gas field, although their properties and interests may be separately owned and their unreasonable waste separate and distinct, may be made parties to said action. In such suits no restraining order shall be issued *ex parte,* but otherwise the procedure shall be governed by the provisions of chapter three, title seven, part two of the Code of Civil Procedure of the State of California and no temporary or permanent injunction issued in such proceedings shall be refused or dissolved or stayed pending appeal upon the giving of any bond or undertaking, or otherwise." (Stats. Cal. 1929, ch. 535, p. 930.)

[2] The injunction order sets forth "that the evidence available to the Court at this time shows that the unreasonable waste of natural gas

The court also directed each defendant to file reports showing the daily production of gas and oil, and the order was without prejudice to the right of any of the parties to move on five days' notice for modification of the injunction. The court later modified the order in particulars not important here. Appellants state that the order curtailed their production of gas from 57,120,000 to 27,187,000 cubic feet a day.

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in said field may be substantially reduced and that the equities of all parties may be fairly conserved by a preliminary injunction which will limit the waste of gas by restricting the production thereof to a quantity reasonably in excess of the present outlets for beneficial use above ground, require the extraction of gasoline from the gas produced in the field; that accordingly for the purposes of this order, the total gas outlets for all uses with a reasonable tolerance to take care of fluctuating demands and the necessary waste is taken at approximately two hundred eighty-five million (285,000,000) cubic feet of gas each day, and the estimated potential production of oil is taken at two hundred thirty-seven thousand five hundred seventy-six (237,576) barrels each day distributed among leases and other operating property units, as shown in the schedule hereafter set out; and that sufficient cause has been shown for the extraordinary relief of a preliminary injunction pending the trial of the action on the merits, and the entry of a final judgment herein;

"It Is Ordered and Decreed that the above named defendants . . . be and they hereby are restrained and enjoined . . . until the further order of this court as follows:

"1. From blowing, releasing or permitting any natural gas to escape into the air from any well or wells in the Santa Fe Springs Oil Field before the removal of the gasoline from such natural gas.

"2. From operating any well producing natural gas in the Santa Fe Springs Oil Field except while exercising a high degree of care in the selection and adjustment of appliances and in the use thereof for the purpose of keeping each producing well in its 'optimum gas-oil ratio'—the term 'optimum gas-oil ratio' being defined as the smallest number of cubic feet of gas which can be produced with each barrel of oil from the same well at the same time.

"3. From producing more net formation gas on the average day of each seven (7) day period from any lease or other property unit than is set forth in the 'Allowed Gas Production' column" than that shown for each operator in the accompanying schedule.

Thereupon the appellants sought a writ of prohibition from the District Court of Appeal, Second Appellate District of the State, restraining the Superior Court and the respondent, William Hazlett, as one of its judges, from enforcing the injunction order. The jurisdiction of the Superior Court was attacked upon the ground of the invalidity of the statute invoked. The appellants contended, in substance, that the statute violated the due process clause of the Fourteenth Amendment in that it afforded no certain or definite standard as to what constituted "waste" or "unreasonable waste" and unlawfully delegated power to the Superior Court to legislate upon that subject; in that, upon the facts and as applied against the appellants, the statute prohibited them "from utilizing such amount of natural gas produced from their respective wells" as was "reasonably necessary to produce oil therefrom in quantities not exceeding a reasonable proportion to the amount of oil produced from the same well"; and in that the statute required appellants to curtail their production of oil and gas "for the purpose of conserving such natural gas for the benefit of the general public" without eminent domain proceedings and without just compensation, and was so arbitrary and oppressive that it was in excess of the power of the State. By reference to their pleadings in the injunction suit, the appellants also assailed, under the due process clause, the provision of the statute as to what should constitute *prima facie* evidence of unreasonable waste, and the appellants further insisted that the statute as enforced against them impaired the obligation of their lease contracts in violation of the contract clause of the Federal Constitution and that they were denied the equal protection of the laws as guaranteed by the Fourteenth Amendment.

The respondents (appellees here) demurred to the petition, and the District Court of Appeals, entertaining and overruling the contentions of the appellants under the

due process clause, denied the writ of prohibition. 63 Cal. App. Dec. 1175, 293 Pac. 899. The appellants then applied for a hearing in the Supreme Court of the State and, this having been denied, they seek in this Court a review of the judgment of the District Court of Appeal.

This Court has jurisdiction. The proceeding for a writ of prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of § 237 (a) of the Judicial Code. U. S. C., Tit. 28, § 344. *Weston* v. *Charleston,* 2 Pet. 449, 464; *Mt. Vernon Cotton Co.* v. *Alabama Power Co.,* 240 U. S. 30, 31; *Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor,* 266 U. S. 200, 206; *Michigan Central R. Co.* v. *Mix,* 278 U. S. 492, 494. That judgment, however, merely dealt with the jurisdiction of the Superior Court of the suit for injunction, and the only question before us is whether the District Court of Appeal erred in deciding the federal questions as to the validity of the statute upon which that jurisdiction was based. Moreover, with all questions of fact, or with questions of law which would appropriately be raised upon the facts adduced in the trial of the case in the Superior Court, as a court competent to entertain the suit, we are not concerned on this appeal. The appellants annexed to their petition in the prohibition proceeding, and made a part of it, the pleadings in the injunction suit and the affidavits presented upon the hearing of the application for preliminary injunction. But they could not in that manner, or by their characterization of the evidence thus adduced, or by pleading the conclusions derived therefrom, substitute the District Court of Appeal for the Superior Court in the determination of the facts, or of the law as addressed to the facts, which should properly be considered by the latter tribunal. It appears that in California, in accordance with the general conception of the province of the writ, prohibition is for the purpose of arresting the proceedings of any tribunal exercising ju-

dicial functions when such proceedings are without, or in excess of, jurisdiction. Cal. Code of Civ. Pro., §§ 1102, 1103; *Jacobsen* v. *Superior Court,* 192 Cal. 319; 219 Pac. 986. See also, *Baar* v. *Smith,* 201 Cal. 87, 101; 255 Pac. 827, 833. The writ of prohibition is not available as a substitute for an appeal from a court having jurisdiction. As was said by the Supreme Court of California, in *Truck Owners & Shippers, Inc.,* v. *Superior Court,* 194 Cal. 146, 155; 228 Pac. 19, 22, 23: "If the superior court has jurisdiction to entertain the action it has the power to define the right sought to be protected. . . . If the judgment of the superior court be incorrect, it may be reversed on appeal, but not on prohibition."

After the decision of the District Court of Appeal, and before the denial by the Supreme Court of the State of a hearing in the instant case, the latter court passed upon the constitutional validity of the statute in question. That decision was made upon an application for a writ of *supersedeas* pending an appeal by certain co-defendants of the appellants here (who were not parties to the appeal) from the above mentioned injunction order. *People ex rel. Stevenot, Director of Natural Resources,* v. *Associated Oil Co.,* 80 Cal. Dec. 607; 294 Pac. 717. The Supreme Court found no reason to interfere with the action of the Superior Court, and, later, the Supreme Court, on that appeal, affirmed the injunction order, holding that under the statute the Superior Court had the power to determine what wastage of gas in the production of oil was unreasonable. *id.* 81 Cal. Dec. 468, 471; 297 Pac. 536, 537. The District Court of Appeal, in the instant case, had expressed the same opinion and accordingly decided that it could not interfere by writ of prohibition. 63 Cal. App. Dec. at p. 1186; 293 Pac. at p. 907.

It follows that, in considering and deciding federal questions in the prohibition proceeding, the District Court of Appeal must be regarded, as its opinion imports, as

having determined merely that the statute was valid upon its face so that the Superior Court had jurisdiction to entertain the injunction suit. It is that determination alone that we can now consider.

The District Court of Appeal overruled the contention that the statute was so uncertain and devoid of any definition of a standard of conduct as to be inconsistent with due process. The Supreme Court of the State, reaching the same conclusion (in the opinion above cited, 80 Cal. Dec. at pp. 614, 615; 294 Pac. at p. 724) described the general condition in which oil and gas were found in California and the standard which the court considered to be established by the statute. After observing that courts were entitled to take judicial notice of the condition and development of the petroleum industry, and of matters of science and common knowledge, and referring to scientific reports, the Supreme Court said:

"For present purposes it need only be noted that oil in this state is found under layers of rock in a sand or sandstone formation termed a lentille or 'lentil,' under pressure caused by the presence of natural gas within the formation. The layers of rock thus form a gas-tight dome or cover for the oil reserve. The oil adheres in the interstices between the sand particles. The natural gas may be in a free state at the top of the dome, but is also in solution with the oil, thus increasing the fluidity of the oil and the ease with which the oil is lifted with the gas in solution when the pressure on the gas is released by drilling into the oil 'sand.' It is estimated that only from ten to twenty-five per cent. of the total amount of oil deposited in a reservoir is ultimately recovered, depending on the natural characteristics of the reservoir and the methods employed in utilizing the lifting power of the gas. The importance of gas in the oil-producing industry has, therefore, become a question, of great concern to the industry itself and to government, to the end that its

function may be fully utilized without waste. It fairly appears on this application that, depending on its location in the oil reservoir, the extent of the oil 'sand,' the degree of pressure within the formation, the amount of oil in the 'sand,' the amount of gas in solution with the oil, the porosity of the 'sand' and other considerations, each oil and gas well has a best mean gas and oil ratio in the utilization of the lifting power of the gas and the production of the greatest quantity of oil in proportion to the amount of gas so utilized, and which may be computed as to each individual well to a reasonable degree of certainty and be regulated accordingly."

In view of these circumstances, the Supreme Court concluded that it might be said that there was an "unreasonable waste" of gas where it "has been allowed to come to the surface without its lifting power having been utilized to produce the greatest quantity of oil in proportion." It was such a waste of gas, the court said, that the legislature of California intended to prohibit. In support of this conclusion the court referred to the provisions of section 8d of the statute.[3] These provisions showed, in the opinion of the court, that the legislature had "plainly adopted the standard so expressed," that is, "that gas

[3] Section 8d relates to the procedure upon complaint of undue waste, and the portion quoted by the Supreme Court of the State is as follows: "If it shall appear that gas is being produced from any oil well or wells in quantities exceeding a reasonable proportion to the amount of oil produced from the same well or wells, even though it is shown that such excess gas is being used in the generation of light, heat, power or other industrial purpose and that there is sufficient other gas available for such uses from other wells in the same or other fields in which the gas produced is not in excess of the amount which bears a reasonable proportion to the amount of oil produced from such other wells and that there are adequate gas-pipeline connections between such other wells and the place of utilization of such gas the state oil and gas supervisor shall hold that such excess production of gas is unreasonable waste thereof if such holding will not cause an unreasonable waste of gas in any other field."

may not be produced, under existing conditions where the production thereof so greatly exceeds the market demand therefor, in quantities exceeding a reasonable proportion to the amount of oil produced." And, in explanation of its reasons for considering such a standard sufficiently definite, the court said that "because of the many and varying conditions peculiar to each reservoir and to each well, which will bear upon a determination of what is a reasonable proportion of gas to the amount of oil produced, it may be said that it would be impossible for the legislature to frame a measure based on ratios or percentages or definite proportions which would operate without discrimination, and that what is a reasonable proportion of gas to the amount of oil produced from each well or reservoir is a matter which may be ascertained to a fair degree of certainty in each individual case."

The statute is to be read with the construction placed upon it by the state court. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 73. And, so read, we find no ground for concluding that the statute should be regarded as invalid upon its face, merely by reason of uncertainty, so as to deprive the Superior Court of jurisdiction to consider the relevant questions of fact and to determine with respect to a particular field whether or not there has been the unreasonable waste of gas which the statute condemns. *Nash* v. *United States*, 229 U. S. 373, 377; *Miller* v. *Strahl*, 239 U. S. 426, 434; *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 502.

The appellants make the further contention that the statute is invalid because of the provision of § 8b (*supra*, p. 10) that "the blowing, release or escape of natural gas into the air shall be *prima facie* evidence of unreasonable waste." The State, in the exercise of its general power

to prescribe rules of evidence, may provide that proof of a particular fact, or of several facts taken collectively, shall be *prima facie* evidence of another fact when there is some rational connection between the fact proved and the ultimate fact presumed. The legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense. *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35, 43; *Bailey* v. *Alabama,* 219 U. S. 219, 238; *Lindsley* v. *Natural Carbonic Gas Co., supra,* at pp. 81, 82; *Manley* v. *Georgia,* 279 U. S. 1, 5, 6; *Western & Atlantic R. Co.* v. *Henderson,* 279 U. S. 639, 642. In the present case there is a manifest connection between the fact proved and the fact presumed, and under the construction placed upon the statute by the state court there appears to be no deprivation of a full opportunity to present all the facts relating to operations within the field.

The question remains whether the statutory scheme of regulation, with the standard which it sets up under the construction of the state court, is on its face beyond the power of the State. The District Court of Appeal, in the instant case, approached this question by considering the correlative rights, under the law of California, of surface owners in the same field. The court concluded that under the law of California "on account of the self-propelling or migratory character of natural gas, as well as oil," the owner of the surface did not have an absolute title to the gas and oil beneath, and could acquire such a title only when he had reduced these substances to possession. As justifying this opinion, the court cited the case of *Acme Oil Co.* v. *Williams* (140 Cal. 681; 74 Pac. 296) where the Supreme Court of the State had said, with respect to oil, that it is "of a fluctuating, uncertain, fugi-

tive nature, lies at unknown depths, and the quantity, extent and trend of its flow are uncertain. It requires but a small surface area, in what is known as an oil district, upon which to commence operations for its discovery. But when a well is developed the oil may be tributary to it for a long distance through the strata which hold it. This flow is not inexhaustible, no certain control over it can be exercised, and its actual possession can only be obtained, as against others in the same field, engaged in the same enterprise, by diligent and continuous pumping. It is the property of anybody who can acquire the surface right to bore for it, and when the flow is penetrated, he who operates his well most diligently obtains the greatest benefit, and this advantage is increased in proportion as his neighbor similarly situated neglects his opportunity." And the Supreme Court of the State, in its decision dealing with the statute in question, quoted this language and held that "the same rule would apply to natural gas." 80 Cal. at p. 612; 294 Pac. at p. 722.

It was with that understanding of the law of the State that the District Court of Appeal considered the statute, taken as a whole, as one regulating and adjusting the co-existing rights of the surface owners in the same field, and accordingly sustained the statute as a valid exercise of state power against the contentions under the due process clause. The court said: "It is the co-existence of these rights which authorizes the State to make use of its legislative power. When the rights of one impinge upon the rights of others the State may interpose for the purpose of adjusting and regulating the enjoyment of those rights." The District Court of Appeal apparently thought it doubtful whether the State might restrict or regulate the production of oil or gas "on the theory of the public's interest in their natural resources" but demed it unnecessary to

decide that question in the present case. That court explicitly refused to accept the view that the statute "does not proceed upon the theory of correlative rights, but only upon the policy of conserving or preserving the common supply." And, replying to the suggestion that the legislature was without authority to restrict the production of oil, the District Court of Appeal concluded its opinion with the statement that the record did not "indicate that the temporary injunction was founded upon such a theory. Nor are we determining that the Act attempts to confer upon the court any such power. Rather we are convinced that a proper construction of the enactment confines the authority within the limits of enjoining the production of gas when in excess of the reasonable proportion to the oil for the particular field involved, when not conveniently necessary for other than lifting purposes."

While this was the basis of the decision of the District Court of Appeal, the appellants insist that, in the subsequent decisions upon the appeal from the injunction order of the Superior Court, the Supreme Court of the State has taken a broader ground and has upheld the statute as one designed to protect the public interest in the conservation of natural resources. 80 Cal. at pp. 612–614; 294 Pac. at pp. 722, 723. We do not understand, however, that the Supreme Court in taking that view denied the operation of the statute as a safeguard of the co-existing rights of surface owners. On the contrary, the Supreme Court, in its second decision affirming the injunction order of the Superior Court, summed up its conclusions in these words (81 Cal. at p. 471; 297 Pac. at pp. 537, 538): "We reiterate that the legislation in question has lawfully vested in the Superior Court the power to determine what wastage of gas in the production of oil is reasonable or unreason-

able. Whether such wastage be reasonable or unreasonable is a question of fact and should be determined in view of the necessity of one land owner to make productive use of his parcel, in view of the equal right of the adjoining owners not to be deprived of correlative production from their parcels and in view of the right of the public to prevent the waste of that which cannot be replaced."

If the statute be viewed as one regulating the exercise of the correlative rights of surface owners with respect to a common source of supply of oil and gas, the conclusion that the statute is valid upon its face, that is, considered apart from any attempted application of it in administration which might violate constitutional right, is fully supported by the decisions of this Court. *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, 210, 211; *Lindsley* v. *Natural Carbonic Gas Co., supra,* at p. 77; *Walls* v. *Midland Carbon Co.,* 254 U. S. 300, 323. In that aspect, the statute unquestionably has a valid operation, and it cannot be said that the Superior Court was without jurisdiction to entertain the suit in which the injunction order was granted. That was all that the District Court of Appeal determined in the judgment now under review. It is not necessary to go further and to deal with contentions not suitably raised by the record before us. Constitutional questions are not to be dealt with abstractly. Having jurisdiction of the suit the Superior Court had authority to take steps to protect the subject matter of the action pending the trial on the merits. The injunction order stated that to be its purpose. Upon the trial, all questions of fact and of law relevant to the application and enforcement of the statute may be raised and every constitutional right which these appellants may have in any aspect of the case as finally developed may be appropriately asserted and determined in due course of procedure.

Judgment affirmed.

Counsel for Parties.

CUMBERLAND COAL CO. *v.* BOARD OF REVISION OF TAX ASSESSMENTS IN GREENE COUNTY, PENNSYLVANIA.*

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 7. Argued October 16, 19, 1931.—Decided November 23, 1931.

1. A federal question which was entertained by a state supreme court and decided on a petition for reargument is reviewable here. Jud. Code, § 237 (b). P. 24.
2. Discrimination in state *ad valorem* taxation, resulting from intentional, systematic undervaluation of some property as compared with the valuation of other property of the same class in other ownership, violates the equal protection clause of the Fourteenth Amendment, even though the property so discriminated against be not assessed higher than its fair market value, or higher than a percentage of fair market value adopted as a uniform basis in making the assessments. Pp. 25, 28.

   The property considered was virgin coal, of uniform quality and thickness, underlying the taxing district. The taxing authorities assigned a uniform value per acre to all of it, notwithstanding that those lands which were near to a river were, because of access to transportation, etc., several times more valuable than those that were farther away. The assessment was made on the uniform basis of 50% of the values assigned.

302 Pa. 179; 152 Atl. 755, reversed.

CERTIORARI, 283 U. S. 812–813, to review judgments which affirmed the dismissal, by the Court of Common Pleas of Pennsylvania, of appeals from tax assessments.

Mr. Arthur B. Van Buskirk, with whom *Messrs. William A. Seifert, Samuel McClay, W. J. Kyle,* and *Carl E. Glock* were on the brief, for petitioners.

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* Together with Nos. 8, 9, and 10, *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments;* No. 11, *Phillips* v. *Board of Revision of Tax Assessments;* No. 12, *Piedmont Coal Co.* v. *Board of Revision of Tax Assessments;* and No. 13, *Greene County Coal Co.* v. *Board of Revision of Tax Assessments.*

Mr. Challen W. Waychoff, with whom *Messrs. A. A. Purman* and *Ambrose Bradley* were on the brief, for respondent.

Mr. Chief Justice Hughes delivered the opinion of the Court.

These seven cases were heard together in the state court and decided in a single opinion, as they were deemed to present but one question. They relate to assessments for taxation of the coal lands of the petitioners, for the year 1928, in several townships of Greene County, Pennsylvania. Taking as typical the assessment of coal lands in the township of Cumberland, it appears that petitioners, on appeal to the Court of Common Pleas of Greene County, assailed the plan of assessment adopted by the Commissioners of the County sitting as a Board of Appeal for the Revision and Equalization of Assessments. Petitioners alleged that the valuation placed upon their coal was unjust and discriminatory, as the Commissioners had "assessed all coal in the same township (except what is termed 'active coal') at the same valuation, regardless of the remoteness or accessibility of the said coal to market, cost of operation, or means of transportation and regardless of the difference in value and without due regard to the valuation and assessment of other coal and other classes of real estate in the County of Greene." The Court of Common Pleas, on findings of fact and conclusions of law, dismissed the appeals, and the decrees were affirmed by the Supreme Court of the State. 302 Pa. 179; 152 Atl. 755. The specific contention that the plan of assessment violated the equal protection clause of the Fourteenth Amendment was presented by petition for reargument and was considered and was explicitly overruled by the Supreme Court. As the state court entertained and decided the federal question, this Court has jurisdiction. Jud. Code, § 237 (b); U. S. C., Tit. 28,

§ 344. *Leigh* v. *Green,* 193 U. S. 79, 85; *Sullivan* v. *Texas,* 207 U. S. 416, 422; *Illinois Central R. Co.* v. *Kentucky,* 218 U. S. 551, 556; *Fleming* v. *Fleming,* 264 U. S. 29, 31.

There is no question that the assessments under review were made pursuant to a deliberately adopted system. The case is not one of mere errors in judgment in following a proper method (*Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350, 352, 353; *Southern Railway Co.* v. *Watts,* 260 U. S. 519, 526), but one where the challenged discrimination resulted from a plan of assessment which was none the less systematic and intentional because of belief in its validity. *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 35, 37; *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441, 445; *Chicago Great Western Ry. Co.* v. *Kendall,* 266 U. S. 94, 98, 99.

From the facts as found by the Court of Common Pleas, it appears that the petitioners' property in question is virgin coal (as distinguished from "active coal," that is, coal which " is opened and mined " [1]) and is part of the Pittsburgh or River vein. That is a continuous vein of bituminous coal underlying the whole of Greene County and is "practically of the same character, quality and thickness." Greene County is bounded on the east by the Monongahela River, and the Pittsburgh or River vein extends westerly for several miles through a number of townships. The coal immediately along the river front, by reason of proximity to rail and river transportation, is more valuable than the " back coal," and the value of the coal decreases with the distance from the river. Within a distance of about three miles westerly from the river,

[1] The court found that " where the coal is opened and mined," the Commissioners " have assessed one hundred acres as active coal, and if the amount of coal mined exceeds seventy-five acres for the year 1927 they have increased the acreage of the active coal to two hundred fifty acres."

mining operations are being conducted. In making the triennial assessments for the taxation of property *ad valorem,* the Commissioners adopted as a uniform basis for all property fifty per cent. of the amount taken as actual value. The Commissioners then assigned different values for the coal in the different townships of the county, but assessed the coal within the same township at the same value an acre notwithstanding differences in actual or market value due to distances from transportation facilities and to other factors.

Cumberland Township adjoins the Monongahela River and extends westerly about nine miles. All the coal in the Pittsburgh or River vein within the limits of this township, except what was described as "active coal," [2] was assessed by the Commissioners (on the fifty per cent. basis) at $260 an acre, despite the fact that the coal along the river, and for a considerable area (much more than 250 acres [3]) around the operating plants, was worth $1,000 an acre.

The petitioner, Cumberland Coal Company, owns 64,574 acres of the Pittsburgh or River vein of coal within Greene County, of which 9,237 acres lie in Cumberland Township and consist (with the exception of two small, detached tracts not here involved) of a block of coal extending from a point distant 2¼ miles westerly from the Monongahela River to the western boundary of the township. With respect to the difference in actual value of that petitioner's coal, distant from the river, as compared with coal of the same sort belonging to other owners and more favorably located, the Court of Common Pleas expressly found as follows:

"The Pittsburgh or River vein of coal of appellant" (petitioner here) "lying a distance of three miles west of the Monongahela River and extending back a distance

[2] "Active coal" was assessed at $500 an acre.

[3] See Note 1, *supra.*

of three miles, or six miles from the river, does not possess a value of more than one-half of the value of the same vein of coal fronting on the Monongahela River, belonging to others than appellant, and extending back a distance of three miles westwardly."

In attempted justification of the discrimination, the Court of Common Pleas adverted to the fact that other owners of coal in this vein were also assessed for "active coal" and for buildings, equipment and real estate constituting "operating properties." But such assessments appear to have been made for items in a different class of properties and the complaint of the petitioner is not with respect to such items, but as to the discrimination in the assessment of coal of the same character and description within the township (that is, exclusive of active coal and operating properties) which was assessed at the same figure of $260 an acre throughout the township notwithstanding the great differences in actual value according to location.

It is not necessary to deal with disparities in the assessments of coal in the same vein in other townships of Greene County, as these assessments present essentially the same question. Nor is it necessary to enlarge upon the facts, as the Supreme Court of the State made no question as to these and dealt specifically with the question of law which they raise. That question was defined and answered by the Supreme Court in its opinion, as follows:

"Appellants' counsel state their position thus: Township assessors and county commissioners sitting as a board of revision may not assess all bituminous coal in the Pittsburgh or river vein within the territorial limits of a township at the same value, disregarding differences in actual or market values by reason of great differences of distance from the river or rail transportation and other factors entering into values where it is undisputed that

the actual or market value of the coal varies throughout the township and that the coal fronting on the river and railroads possesses a value twice that of the coal lying back from the river and extending to a distance of nine or ten miles. Our answer must be that they may so assess it, and the courts may not alter individual assessments, provided they do not fix the value at a figure in each instance greater than the fair market value of each owner's property, or, as in the cases before us, higher than the percentage of value, here fifty per cent. uniformly fixed throughout the county.

"None of the appellants has shown that its or his property in the market is not worth double the assessment fixed by the county commissioners and court below. Since they fixed fifty per cent. of market value as they conceived it to be, appellants without showing a less value for their properties, have no standing to complain. . . .

" . . . The fifty per cent. ratio throughout the county having been uniformly fixed and appellants not having shown that their assessments as made are in excess of fifty per cent. of the fair market values of their property, have no standing to complain, it matters not what other assessments of other properties not before us may be." 302 Pa. at pp. 182–184; 152 Atl. 755.

And, on the petition for reargument, presenting the federal question, the Supreme Court, modifying its first order denying the petition, said, upon consideration, that the Court was "of opinion that the plan of assessment in these cases does not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States."

We are unable to agree with this view. It is established that the intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property.

Sunday Lake Iron Co. v. *Wakefield, supra; Sioux City Bridge Co.* v. *Dakota County, supra; Raymond* v. *Chicago Union Traction Co., supra; Chicago Great Western Ry. Co.* v. *Kendall, supra.* In *Sioux City Bridge Co.* v. *Dakota County, supra* (at p. 446), this Court, referring to the dilemma presented by a case where one or a few of a class of taxpayers are assessed at one hundred per cent. of the value of their property pursuant to statutory requirement and the rest of the class are intentionally assessed at a lower percentage, stated the rule to be as follows: "This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."

In applying this principle, the fact that a uniform percentage of assigned values is used, cannot be regarded as important if, in assigning the values to which the percentage is applied, a system is deliberately adopted which ignores differences in actual values so that property in the same class as that of the complaining taxpayer is valued at the same figure (according to the unit of valuation, as, for example, an acre) as the property of other owners which has an actual value admittedly higher. Applying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same. If the Commissioners, in the instant case, had taken the basis of one hundred per cent. instead of fifty per cent. of the assigned values, but had adopted the same method of assessment by which all the coal in a township

(aside from active coal) was assessed at the same value an acre, despite well known and important differences in value, the result would have been an undervaluation of similar coal belonging to other owners, which would have brought the case of the petitioners within the principle of the decisions cited. In such case, if the petitioners' property had been valued at one hundred per cent. of its actual value, the like property of the other owners, having a higher actual value, would in effect have been valued at less than one hundred per cent. The discrimination is essentially the same, and is equally repugnant to constitutional right, when both assessments are made on the basis of fifty per cent. of assigned values and differences in actual values are deliberately and systematically disregarded. The undervalued property is in effect valued at less than fifty per cent. of its actual value; for example, coal of the same description worth twice as much as that of the Cumberland Coal Company was really valued at twenty-five per cent. of its actual value.

The petitioners are entitled to a readjustment of the assessments of their coal so as to put these assessments upon a basis of equality, with due regard to differences in actual value, with other assessments of the coal of the same class within the tax district.

The decrees are reversed and the causes are remanded for further proceedings not inconsistent with this opinion.

Reversed.

SANTOVINCENZO, CONSUL OF THE KINGDOM OF ITALY AT NEW YORK, *v.* EGAN, PUBLIC ADMINISTRATOR, ET AL.

APPEAL FROM THE SURROGATES' COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

No. 31. Argued October 22, 1931.—Decided November 23, 1931.

1. Case from a state court, involving the construction and application of treaties, *held* reviewable by certiorari. P. 35.

2. Article XVII of the Consular Convention of 1878 with Italy provides that "The respective Consuls General . . . shall enjoy in both countries all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favoured nation." Article VI of the Treaty of 1856 with Persia (terminated in 1928) declares: "In case of a citizen or subject of either of the contracting parties dying within the territories of the other, his effects shall be delivered up integrally to the family or partners in business of the deceased; and in case he has no relations or partners, his effects in either country shall be delivered up to the consul or agent of the nation of which the deceased was a subject or citizen, so that he may dispose of them in accordance with the laws of his country." An Italian subject, domiciled in New York, died there, intestate and without heirs or next of kin, before the termination of the treaty; and, in the administration of his estate by the New York courts, the question arose whether his net assets, after satisfying creditors and expense of administration, should escheat to the State or be paid to the Italian Consul General for disposition to the Kingdom of Italy. *Held:*

(1) The provision in the convention, assuming it contemplates reciprocity of rights and is so recognized by Italy, confers upon the Consul General the rights defined by the treaty provision. P. 36.

(2) The termination of the treaty, having occurred after the death, does not affect the case. *Id.*

(3) The net assets must be delivered to the Consul General, since Art. VI contains no qualification recognizing precedence of local laws, and, when considered with other portions of the treaty, and the general purpose of the treaty to promote commercial intercourse, it clearly includes subjects of either country who are domiciled in the other. Pp. 36–39.

3. As treaties are contracts between independent nations, their words are to be taken in their ordinary meaning as understood in the public law of nations. P. 40.

4. The United States, under the treaty-making power, may determine the disposition of property of aliens, and any conflicting law of a State must yield. *Id.*

135 N. Y. Misc. 733; 240 N. Y. Supp. 691, reversed.

APPEAL, given the effect of a writ of certiorari, to review a decree of the Surrogates' Court of New York County settling an estate, which was affirmed by the Appellate Division, 229 App. Div. 862, 243 N. Y. S. 814. The

record went back to the Surrogates' Court by remittitur, leave to appeal to the Court of Appeals having been denied by that court and by the Appellate Division.

Mr. Carroll G. Walter, with whom *Mr. Ralph Atkins* was on the brief, for appellant.

The question in this case is to be carefully distinguished from the much-discussed question of the right of foreign consuls to administer the estates of their nationals (*Rocca* v. *Thompson,* 223 U. S. 317; *Matter of D'Adamo,* 212 N. Y. 214). No right of administration is here asserted.

The word "effects" unquestionably includes personal property of all kinds. 19 C. J. 1017; Bouvier's Law Dictionary; Burrill's Law Dictionary; *Todok* v. *Union State Bank,* 281 U. S. 449, 453, 454.

The test laid down in the treaty is nationality and not domicile.

The treaty coincides with and furthers the long-standing policy of the United States to have its consuls take possession of the estates of its citizens, who die in foreign countries leaving no legal claimant there, and remit the same to this country. Rev. Stats. § 1709; U. S. Code, Title 22, § 75; Act of April 14, 1792, 1 Stat. 255; *Matter of D'Adamo,* 212 N. Y. 214; *Rocca* v. *Thompson,* 223 U. S. 317, 332.

If the matter were in doubt, then, too, the construction contended for by the appellant should be adopted. *Asakura* v. *Seattle,* 265 U. S. 332, 342; *Nielsen* v. *Johnson,* 279 U. S. 47, 52; *Jordan* v. *Tashiro,* 278 U. S. 123, 127; *Geofroy* v. *Riggs,* 133 U. S. 258, 271, 272.

The statutes of New York, in accordance with which the courts below directed payment of the estate, are inconsistent with the treaties and therefore invalid. The courts below, in substance and effect, have denied the validity of the treaties. See *Bryant* v. *Zimmerman,* 278 U. S. 63, 67.

When two constructions of a treaty are possible, the one which enlarges, rather than restricts, the rights claimed under it is to be preferred.

Decedent's estate is a derelict estate. It escheats either to New York or to Italy. The only question is: To which sovereign does it escheat?

Mr. Robert P. Beyer, Deputy Assistant Attorney General of New York, with whom *Mr. John J. Bennett, Jr.,* Attorney General, was on the brief, for appellee.

The established rule that succession to personalty follows the law of the domicile is not affected by the Persian treaty.

Whether the treaty-making power may constitutionally supplant, or even qualify, the state laws regulating the administration of estates, was left open to question in *Matter of D'Adamo,* 212 N. Y. 214, although the court cites, and without disapproval, the opinions of various secretaries of state disclaiming the existence of such a power. Nor is that question here involved. The construction of the treaty here sought is, as that opinion points out, so subversive of our settled law, that it should be rejected. It was designed to apply only to derelict estates.

To hold that the treaty applies solely to Persian nationals temporarily sojourning here, not only reconciles the convention to well settled law, but gives it a rational, if not the only credible interpretation.

In this view of the understanding of the treaty, it is not deemed necessary to comment on appellant's insistence that he is entitled to all its benefits, perforce of the "most favored nation" clause of the Italian treaty. It must be presumed that the subject was under consideration in 1894, when our Government declined to authorize Italian consuls to settle the estates of their deceased

nationals in this country. See *Rocca* v. *Thompson,* 223 U. S. 317, affirming 157 Cal. 552.

The State has declared a settled policy that all personal property of persons domiciled within its borders is to remain in the State unless directed to be paid to those next of kin who are proved to be actually entitled thereto. No presumption destructive of state sovereignty should be indulged.

Mr. Chief Justice Hughes delivered the opinion of the Court.

Antonio Comincio, a native of Italy, died intestate in New York City sometime prior to March 10, 1925, when letters of administration were issued to the respondent as Public Administrator by the Surrogates' Court of New York County. Upon the judicial settlement of the administrator's account, the appellant, the Consul General of Italy at New York, presented the claim that the decedent at the time of his death was a subject of the King of Italy and had left no heirs or next of kin, and that, under Article XVII of the Consular Convention of 1878 between the United States and Italy, the petitioner was entitled to receive the net assets of the estate for distribution to the Kingdom of Italy. The Attorney General of New York contested the claim. The Surrogates' Court, finding that the domicile of the decedent was in New York City, decreed that the balance of the estate, amounting to $914.64, after payment of debts and the sums allowed as commissions and as expenses of administration, be paid into the treasury of New York City for the use and benefit of the unknown kin of the decedent. The decree was affirmed by the Appellate Division of the Supreme Court of the State, First Department, and both the Appellate Division and the Court of Appeals of the State denied leave to appeal to the latter court. The case may

be regarded as properly here on certiorari. Jud. Code, § 237 (c); U. S. C., Tit. 28, § 344 (c).

There is no controversy as to the facts. The decedent was never naturalized, and at the time of his death was an Italian subject. He had lived in New York for many years, and the finding that the decedent was domiciled there is not open to question. Nor were any heirs or next of kin discovered. The testimony introduced on behalf of the Italian Consul General, which was undisputed, stated that the decedent had no relatives, and the decree of the Surrogates' Court recited that next of kin were unknown. The decree was made pursuant to c. 230 of the Laws of New York of 1898. The Surrogate said in his opinion: "Pursuant to our statutes this amount would be directed in the decree to be paid into the city treasury of the City of New York to await ascertainment of the next of kin. Ultimately the amount would find its way into the treasury of the State of New York."

The provision of the Consular Convention between the United States and Italy, under which the claim of the Italian Consul General was made, provides (20 Stat. 725, 732):

"Article XVII. The respective Consuls General, Consuls, Vice-Consuls and Consular Agents, as likewise the Consular Chancellors, Secretaries, Clerks or Attachés, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favoured nation."

Pursuant to this agreement, the Italian Consul General sought the application of Article VI of the Treaty between the United States and Persia of 1856, as follows (11 Stat. 709, 710):

"Article VI. In case of a citizen or subject of either of the contracting parties dying within the territories of the other, his effects shall be delivered up integrally to

the family or partners in business of the deceased; and in case he has no relations or partners, his effects in either country shall be delivered up to the consul or agent of the nation of which the deceased was a subject or citizen, so that he may dispose of them in accordance with the laws of his country."

This Treaty with Persia was terminated on May 10, 1928, but, as this was subsequent to the death of the Italian national whose estate is in question, the termination does not affect the present case.

It may be assumed that Article XVII of the Consular Convention with Italy contemplates reciprocity with respect to the rights and privileges sought, and there is no suggestion that Italy has not recognized the right of consuls of the United States to take the effects of the citizens of the United States dying in Italy in circumstances similar to those in which the present claim of the Italian Consul General is pressed. As, in this view, there appears to be no ground for denying the right of the Italian Consul General to demand the application of the last clause of Article VI of the Treaty with Persia, the only question is as to the interpretation of that provision.

We are not here concerned with questions of mere administration, nor is it necessary to determine that the loose phrasing of the provisions of Article VI precludes an appropriate local administration to protect the rights of creditors. Nor have we to deal with a case of testamentary disposition. In this instance there is no will, administration has been had, creditors have been paid, proper steps have been taken, without success, to discover kin of the decedent, and, assuming the absence of relatives, the question is one of escheat, that is, whether the net assets shall go to Italy or to the State of New York. The provision of Article VI of the Treaty with Persia does not contain the qualifying words " conformably with the laws of the country " (where the death occurred) as in

the case of the Treaty between the United States and the Argentine Confederation of 1853 (Art. IX, 10 Stat. 1001, 1009; *Rocca* v. *Thompson,* 223 U. S. 317, 326, 330, 332); or the phrase "so far as the laws of each country will permit," as in the Consular Convention between the United States and Sweden of 1910 (Art. XIV, 37 Stat. 1479, 1487, 1488; *Rocca* v. *Thompson, supra; Matter of D'Adamo,* 212 N. Y. 214, 222, 223; 106 N. E. 81). The omission from Article VI of the Treaty with Persia of a clause of this sort, so frequently found in treaties of this class, must be regarded as deliberate. In the circumstances shown, it is plain that effect must be given to the requirement that the property of the decedent "shall be delivered up to the consul or agent of the nation of which the deceased was a subject or citizen, so that he may dispose of them in accordance with the laws of his country," unless a different rule is to apply simply because the decedent was domiciled in the United States.

The language of the provision suggests no such distinction and, if it is to be maintained, it must be the result of construction based upon the supposed intention of the parties to establish an exception of which their words give no hint. In order to determine whether such a construction is admissible, regard should be had to the purpose of the Treaty and to the context of the provision in question. The Treaty belongs to a class of commercial treaties the chief purpose of which is to promote intercourse, which is facilitated by residence. Those citizens or subjects of one party who are permitted under the Treaty to reside in the territory of the other party are to enjoy, while they are such residents, certain stipulated rights and privileges. Whether there is domiciliary intent, or domicile is acquired in fact, is not made the test of the enjoyment of these rights and privileges. The words "citizens" and "subjects" are used in several articles of the Treaty with Persia and in no instance are

they qualified by a distinction between residence and domicile. Thus, in Article III we find the following provision (11 Stat. 709):

"Article III. The citizens and subjects of the two high contracting parties, travellers, merchants, manufacturers, and others, who may reside in the territory of either country, shall be respected and efficiently protected by the authorities of the country and their agents, and treated in all respects as the subjects and citizens of the most favored nation are treated."

It would be wholly inadmissible to conclude that it was the intention that citizens of the United States, making their residence in Persia under this Treaty, would be denied the benefit of Article III in case they acquired a domicile in Persia. The provision contemplated residence, nothing is said to indicate that domicile is excluded, and the clear import of the provision is that, so long as they retained their status as citizens of the United States, they would be entitled to the guaranty of Article III. The same would be true of Persians permitted to reside here under the Treaty.

Again, the provisions of Article V of the Treaty were of special importance, as they provided for extraterritorial jurisdiction of the United States in relation to the adjudication of disputes.[1] It would thwart the major

[1] "Article V. All suits and disputes arising in Persia between Persian subjects and citizens of the United States, shall be carried before the Persian tribunal to which such matters are usually referred at the place where a consul or agent of the United States may reside, and shall be discussed, and decided according to equity in the presence of an employé of the consul or agent of the United States.

"All suits and disputes which may arise in the empire of Persia between citizens of the United States, shall be referred entirely for trial and for adjudication to the consul or agent of the United States residing in the province wherein such suits and disputes may have

purpose of the Treaty to exclude from the important protection of these provisions citizens of the United States who might be domiciled in Persia. The test of the application of every paragraph of Article V, with respect both to citizens of the United States and to Persian subjects, clearly appears to be that of nationality, irrespective of the acquisition of a domicile as distinguished from residence.

We find no warrant for a more restricted interpretation of the words "a citizen or subject of either of the contracting parties" in Article VI than that which must be given to the similar description of persons throughout the other articles of the Treaty. The same intention which made nationality, without limitation with respect to domicile, the criterion in the other provisions, dominates this provision. The provision of Article VI is reciprocal. The property of a Persian subject dying within the United States, leaving no kin, is to be dealt with in the same manner as the property of a citizen of the United States dying in Persia in similar circumstances.

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arisen, or in the province nearest to it, who shall decide them according to the laws of the United States.

"All suits and disputes occurring in Persia between the citizens of the United States and the subjects of other foreign powers, shall be tried and adjudicated by the intermediation of their respective consuls or agents.

"In the United States, Persian subjects, in all disputes arising between themselves, or between them and citizens of the United States or foreigners, shall be judged according to the rules adopted in the United States respecting the subjects of the most favored nation.

"Persian subjects residing in the United States, and citizens of the United States residing in Persia, shall, when charged with criminal offences, be tried and judged in Persia and the United States in the same manner as are the subjects and citizens of the most favored nation residing in either of the above-mentioned countries."

It is not necessary to invoke the familiar rule with respect to the liberal construction of treaties,[2] as the instant case merely calls for a reading of the provision as to "citizens" and "subjects" according to its terms. There is no applicable principle which permits us to narrow them. As treaties are contracts between independent nations, their words are to be taken in their ordinary meaning "as understood in the public law of nations." *Geofroy* v. *Riggs,* 133 U. S. 258, 271.

There can be no question as to the power of the Government of the United States to make the Treaty with Persia or the Consular Convention with Italy. The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations, and agreement with respect to the rights and privileges of citizens of the United States in foreign countries, and of the nationals of such countries within the United States, and the disposition of the property of aliens dying within the territory of the respective parties, is within the scope of that power, and any conflicting law of the State must yield. *Hauenstein* v. *Lynham,* 100 U. S. 483, 489; *Geofroy* v. *Riggs, supra,* at p. 266; *Missouri* v. *Holland,* 252 U. S. 416, 434; *Sullivan* v. *Kidd,* 254 U. S. 433, 440; *Asakura* v. *Seattle,* 265 U. S. 332, 343; *Todok* v. *Union State Bank,* 281 U. S. 449, 453.

Our conclusion is that, by virtue of the most-favored-nation clause of Article XVII of the Consular Convention between the United States and Italy of 1878, the Italian Consul General was entitled in the instant case, being that of the death of an Italian national in this country prior to the termination of the Treaty between the United

[2] *Hauenstein* v. *Lynham,* 100 U. S. 483, 487; *Geofroy* v. *Riggs,* 133 U. S. 258, 271; *Tucker* v. *Alexandroff,* 183 U. S. 424, 437; *Asakura* v. *Seattle,* 265 U. S. 332, 342; *Jordan* v. *Tashiro,* 278 U. S. 123, 127; *Nielsen* v. *Johnson,* 279 U. S. 47, 52.

States and Persia of 1856, to the benefit of Article VI of that Treaty, and that the net assets of the decedent should be delivered to him accordingly.

The decree is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

STATE TAX COMMISSION OF MISSISSIPPI ET AL. *v.* INTERSTATE NATURAL GAS CO., INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 40. Argued October 26, 1931.—Decided November 23, 1931.

The selling of gas wholesale to local, independent distributors from a supply passing into and through the State in interstate commerce, does not become a local affair and subject to a local privilege tax merely because the vendor, to deliver the quantities sold, uses a thermometer and a meter and reduces the pressure.

Affirmed.

APPEAL from a decree enjoining the Commission from enforcing a privilege tax.

Mr. Edward R. Holmes, Jr., argued the cause for appellants, appearing *pro hac vice* by leave of Court; and *Messrs. George T. Mitchell,* Attorney General of Mississippi, and *J. A. Lauderdale,* Assistant Attorney General, were on the brief.

The New York contracts are simply executory contracts of sale. The appellee cannot tell what gas it will sell to the distributor at Woodville, or what gas it will carry on through Mississippi into Louisiana. None of the gas is actually sold before it leaves the gas fields in Louisiana. It is true that the appellee is transporting gas with a view to selling it, but, before it relinquishes the title and control of any of it by delivery to the distributor,

it must, under the very terms of its executory contract, prepare and treat it for sale and delivery. Appellee alone controls and operates its taps, regulators, thermometers and meters.

The sale is actually consummated at a time when the commodity is in Mississippi. This is not a case of delivery of an interstate shipment sent in response to an order. It is a case where the original package, being transported in interstate commerce, is broken, and the commodity prepared for sale and actually sold and delivered in Mississippi.

The method of measuring the tax by the number of miles of pipe line is reasonable. The tax can be validly imposed, even though it incidentally and indirectly affect and burden interstate business. *St. Louis R. Co.* v. *Arkansas,* 235 U. S. 350; *New York* v. *Sohmer,* 235 U. S. 549; *Cheney Bros.* v. *Massachusetts,* 246 U. S. 147; *Pullman Car Co.* v. *Adams,* 189 U. S. 420; *Hump Hair Pin Mfg. Co.* v. *Emmerson,* 258 U. S. 290; *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335; *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217; *Sprout* v. *South Bend,* 277 U. S. 163.

It was not within the power of the parties by the form of their contract to convert a local business into an interstate business protected by the commerce clause, when the contract achieved nothing else. *Superior Oil Co.* v. *Mississippi ex rel. Knox,* 280 U. S. 390; *General Oil Co.* v. *Crane,* 209 U. S. 211; *Sonneborn Bros.* v. *Keeling,* 266 U. S. 505; *Atlantic Coast Line R. Co.* v. *Standard Oil Co.,* 275 U. S. 254; *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95; *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465.

Distinguishing *Ozark Pipe Line Co.* v. *Monier,* 266 U. S. 555; *Missouri* v. *Kansas Gas Co.,* 265 U. S. 298; *Peoples Gas Co.* v. *Pennsylvania,* 270 U. S. 550; *Pennsylvania Gas Co.* v. *Public Service Comm.,* 252 U. S. 23; *Pennsylvania* v. *West Virginia,* 262 U. S. 533; *Public Utilities Comm.* v. *Landon,* 245 U. S. 236; *Eureka Gas*

Co. v. *Hallahan,* 257 U. S. 265; *United Fuel Gas Co.* v. *Hallahan,* 257 U. S. 277.

Mr. David Clay Bramlette for appellee.

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a decree of three Judges sitting according to statute in the District Court, by which the Tax Commission of the State of Mississippi is permanently enjoined from enforcing a Privilege Tax Law of that State, being c. 88 of the laws of 1930, against the Interstate Natural Gas Company, the plaintiff in this suit.

The facts are agreed. The plaintiff has a trunk line of pipe extending from gas fields in Louisiana through Mississippi and back to Louisiana; 72.42 miles having a diameter of 22 inches, 8.11 miles having a diameter of 12 inches and 4.99 miles a diameter of 10 inches. It sells daily to distributors in Louisiana about 70,000,000 cubic feet of natural gas in summer and about 75,000,000 feet in winter. In Mississippi it sells as will be explained from 204,000 to 520,000 feet according to the season. The gas flows continuously from the gas fields in Louisiana and obviously, for much the greater part at least, in interstate commerce. But the appellants rely upon business done under two similar contracts made in New York to show that there was intrastate commerce in Mississippi that may be taxed without burdening the main activity that the State cannot touch. *Ozark Pipe Line Corp.* v. *Monier,* 266 U. S. 555, 563. *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, 470. Distributing companies tap the plaintiff's pipes near Natchez and the town of Woodville. The gas withdrawn by the distributors is measured by a thermometer and a meter furnished by the plaintiff which is the only way in which it can be measured. The pressure of the gas is reduced by the plaintiff

before it passes into the purchaser's hands. The work done by the plaintiff is done upon the flowing gas to help the delivery and seems to us plainly to be incident to the interstate commerce between Louisiana and Mississippi. The plaintiff simply transports the gas and delivers it wholesale not otherwise worked over than to make it ready for delivery to the independent parties that dispose of it by retail. *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298. *Public Utilities Comm.* v. *Landon*, 249 U. S. 236, 245. *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555.

Decree affirmed.

CHESAPEAKE & OHIO RAILWAY CO. *v.* KUHN.

CERTIORARI TO THE SUPREME COURT OF OHIO, AND TO THE COURT OF APPEALS OF PIKE COUNTY, OHIO.

Nos. 34 and 35. Argued October 23, 1931.—Decided November 23, 1931.

1. The writ of certiorari properly goes to an intermediate appellate court where the supreme court of the State has declined to review its decision. P. 45.
2. In actions under the Federal Employers' Liability Act, where the undisputed evidence sustains the defense of assumption of risk, the trial judge should direct a verdict for the defendant. P. 46.

   The evidence clearly showed that an injury to plaintiff's eye (caused by a steel chip which flew into it when a rail was being cut by sledge-hammer and cold chisel) resulted from ordinary hazards of his employment, which he fully understood and voluntarily assumed; that there was no complaint against his exposure to the obvious danger unprotected by goggles, nor any promise by his superior to mitigate it.
3. In such actions, wherever brought, the rights and obligations of the parties depend upon the federal Act and applicable principles of the common law as interpreted and applied in the federal courts; a subordinate state tribunal should follow in such cases the views of this Court, though they conflict with those of the supreme court of the State. P. 46.

Reversed.

CERTIORARI, 283 U. S. 815, to review a judgment sustaining a recovery under the Federal Employers' Liability Act of damages for personal injuries. The Ohio Supreme Court refused to review the judgment. The opinion of the Court of Appeals is reported in 9 Oh. L. Abstract 378.

Mr. Henry Bannon, with whom *Mr. David H. Leake* was on the brief, for petitioner.

Mr. Homer H. Marshman, with whom *Messrs. David F. Anderson* and *George D. Nye* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

While employed in interstate commerce as a section hand by petitioner, an interstate carrier, (Acts April 22, 1908, 35 Stat. 65; April 5, 1910, c. 143, 36 Stat. 291; U. S. Code, Title 45, c. 2,) William Kuhn suffers serious injury. Thereafter he sued the Company for damages in the Court of Common Pleas, Pike County, Ohio. He alleged that the accident resulted from its negligence in the following matters—Ordering him to use a defective sledge hammer and chisel; failing to promulgate and enforce proper rules concerning the upkeep of tools ordinarily used, to furnish guards or goggles for workmen's eyes, to provide a reasonably safe place for him to work.

The Company denied negligence. It also set up in defense that the plaintiff voluntarily assumed the risk incident to his employment. At the trial it duly, but unsuccessfully, requested a directed verdict because of such assumption.

The jury returned a verdict for the respondent. Judgment upon this was affirmed by the Court of Appeals; the Supreme Court denied a review. This Court allowed writs of certiorari both to the Supreme Court (No. 34),

and the Court of Appeals (No. 35). The cause is properly here on the latter writ. Number 34 will be dismissed.

On the day of the accident, February 9, 1926, William Kuhn, an experienced section hand 54 years old, was engaged with others in repairing a side track leading from petitioner's main line to a steam shovel. It became necessary to remove two steel rails and shorten them some six or eight inches. They were first laid on the ground and then cut with a cold chisel. One man held the chisel while respondent and two others, acting in turn, struck it with a heavy hammer. None of them wore goggles; none asked for goggles or objected to the method of operation. The first rail had been severed; work had begun on the second. While respondent was standing by, awaiting his turn to strike, a steel chip from the chisel or rail struck and destroyed his eye. On other occasions he had assisted in cutting steel rails when goggles were used, and he knew chips would fly during such an operation. "That was the value of goggles," he testified. He understood the dangers incident to the undertaking. The job was a hurry-up one. The assistant foreman in charge had told the men "to gang up and go in a hurry, that he wanted to get through there." "Don't be afraid."

We think the evidence clearly discloses that Kuhn's injury resulted from the ordinary hazards of his employment, which he fully understood, and voluntarily assumed. There was no complaint, no promise by his superior to mitigate the obvious dangers. The trial judge should have directed a verdict for the Railway Company.

In cases like this, where damages are claimed under the Federal Employers' Liability Act, defense of the assumption of the risk is permissible, and where the undisputed evidence clearly shows such assumption, the trial judge should direct a verdict for the defendant. Moreover, in proceedings under that Act, wherever brought, the rights and obligations of the parties depend upon it

and applicable principles of common law as interpreted and applied in the federal courts. *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 508; *Chesapeake & Ohio Ry. Co.* v. *De Atley,* 241 U. S. 310; *Boldt* v. *Pennsylvania R. Co.,* 245 U. S. 441, 445; *New Orleans & N. E. R. Co.* v. *Harris,* 247 U. S. 367, 371; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Coogan,* 271 U. S. 472, 474.

The Court of Appeals acted upon the erroneous theory that it should follow the views of the Supreme Court of the State rather than those of this Court in respect of questions arising under the Liability Act. That statute, as interpreted by this Court, is the supreme law to be applied by all courts, federal and state. *Second Employers' Liability Cases,* 223 U. S. 1, 57, 58. Where this view is not accepted, as in the present cause, it is within the power of this Court to determine and apply the proper remedy.

The judgment below is reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed.

WESTERN PACIFIC CALIFORNIA RAILROAD CO. *v.* SOUTHERN PACIFIC CO.

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

No. 51. Argued October 27, 1931.—Decided November 23, 1931.

1. In order to constitute a railroad company a "party in interest" within the meaning of § 402, par. 18, of the Transportation Act, 1920, and thereby entitle it to maintain a suit to enjoin another railroad company from extending its line without having first obtained a certificate of public convenience and necessity from the Interstate Commerce Commission, it is not essential that the company suing have a legal right for which it might ask protection under the ordinary rules of equity; but it will suffice if the bill disclose either that some definite legal right of the plaintiff is seri-

ously threatened or that the unauthorized, and therefore unlawful, action of the defendant may directly and adversely affect the plaintiff's welfare by bringing about some material change in the transportation situation. P. 50.

2. A railroad company which had definitely located its line and whose application for authority to construct was pending before the Interstate Commerce Commission and was being opposed by a company operating a line substantially parallel to the one projected, *held* a "party in interest" entitled, under § 402, par. 20, of the Transportation Act to maintain suit to enjoin the second carrier from constructing, without authority from the Commission, what was alleged to be an "extension" of that carrier's line across the plaintiff's projected line and beyond, with the purpose of impeding and preventing the plaintiff's proposed construction and operation, and also of securing traffic from a district adjacent to plaintiff's projected line, the industrial development of which was anticipated. Pp. 49–52.

46 F. (2d) 729, reversed.

CERTIORARI, 283 U. S. 816, to review a decree which reversed a decree of the District Court enjoining railroad construction which that court found to be an "extension." The injunction was to continue unless and until a certificate of public convenience and necessity should be granted by the Interstate Commerce Commission.

Mr. F. M. Angellotti, with whom *Mr. H. P. Tyler* was on the brief, for petitioner.

Mr. J. R. Bell, with whom *Messrs. C. O. Amonette, H. C. Booth, C. W. Durbrow,* and *Guy V. Shoup* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

By an amended bill presented to the United States District Court, Northern District of California, April 5, 1929, petitioner sought to prevent respondent from constructing an alleged extension until permission should be obtained from the Interstate Commerce Commission as

provided by Transportation Act of 1920, c. 91, § 402, ¶¶ 18, 19, 20, 21, 22, 41 Stat. 456, 477, 478.[1]

The petitioner is a railroad corporation organized under the laws of California to construct and operate a standard steam railroad from San Francisco southward along the western shore of San Francisco Bay and to Redwood City in San Mateo County. The proposed line, approximately 25 miles in length, lies eastward of, near, and substantially parallel to, a line operated by the respondent. In July, 1928, petitioner's directors authorized application to the Interstate Commerce Commission for authority to construct the proposed road, and this was promptly presented. During the following August, September and October, surveys of the route were made; a definite location was adopted in March, 1929.

The Interstate Commerce Commission heard the application in January, 1929; the Southern Pacific Company appeared in opposition. Prior to the filing of the bill the

[1] Transportation Act 1920, § 402—

Paragraph "(18) . . . no carrier by railroad subject to this Act shall undertake the extension of its line of railroad . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction . . . of such . . . extended line . . ." Paragraph "(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, . . ." Paragraph "(20) . . . Any construction . . . contrary to the provisions . . . of paragraph (18) . . . may be enjoined by any court of competent jurisdiction at the suit of . . . any party in interest. . . ." Paragraph "(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities . . ., and to extend its line or lines . . ." Paragraph "(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction . . . of spur, industrial, team, switching or side tracks, . . . to be located wholly within one State, . . ."

Commission had taken no final action, nor had actual construction of the proposed road begun.

The respondent, as owner or lessee, operates an extensive interstate railroad system, including a double track line from San Francisco southward through Redwood City. In March, 1929, it began to lay tracks in San Mateo County with the intention that they should ultimately extend from its main line some eighty-two hundred feet easterly and across petitioner's proposed route to points along the Bay. Its purpose was to impede and prevent petitioner's proposed construction and operation; also to secure traffic from a district adjacent to the petitioner's proposed line, the industrial development of which was anticipated.

In defense to the bill respondent relied especially upon two grounds. First, that petitioner was not a "party in interest" within the meaning of the Transportation Act, and therefore could not maintain the suit. Second, that the line which it had commenced to construct would not become an extension, but a mere industrial, or spur, track. The trial court considered and rejected both grounds of defense and directed an injunction as prayed.

The Circuit Court of Appeals was of opinion that, in the circumstances, the petitioner was not "a party in interest," and upon that ground reversed the decree of the trial court. It expressed no opinion in respect of the second defense. This action, we think, was error; and its decree must be reversed. The cause will be remanded there for determination of the question of fact.

Paragraphs 18 to 22, *supra,* were considered here in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.,* 270 U. S. 266, and were declared to be part of the general plan by which Congress intended to promote development and maintenance of adequate railroad facilities. It was there said, p. 277: "It [Congress] recognized that preservation of the earning capacity, and conserva-

tion of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563; *New England Divisions Case,* 261 U. S. 184; *Chicago Junction Case,* 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.,* 264 U. S. 331. The Act sought, among other things, to avert such losses."

The Texas & Pacific Ry. sought to prevent an unauthorized competitor from building an extension into territory already served by it. Prior to the statute, it could not have maintained such a suit, since the competitor's proposed action did not threaten interference with any legal right. No carrier could then demand exemption from honest competition.

If, as the court below seems to have assumed, a "party in interest" must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the Congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See *Massachusetts* v. *Mellon,* 262 U. S. 447, 488. It will suffice, we think, if the bill discloses that some definite legal right possessed by complainant is seriously threatened or that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about

some material change in the transportation situation. Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened. It alleged the beginning of an unlawful undertaking by a carrier which might prove deleterious to it as well as to the public interest in securing and maintaining proper railroad service without undue loss. It relied upon the procedure prescribed by the statute to secure an orderly hearing and proper determination of the matter. The disclosures of the bill were enough to show that the respondent's intended action might directly and seriously affect the project which complainant was undertaking in good faith. There was enough to give the latter the standing of a "party in interest" within intendment of the Act.

Reversed.

PERMUTIT CO. *v.* GRAVER CORPORATION.

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

No. 3. Argued October 15, 16, 1931.—Decided November 23, 1931.

1. A patent which fails to describe in the specification, and to point out particularly and distinctly claim, an invention or discovery, is void. R. S. § 4888. P. 57.
2. While drawings may be referred to for illustration and may be used as an aid in interpreting the specification or claim, they are of no avail where there is an entire absence of description of the alleged invention or a failure to claim it. P. 60.
3. Patent No. 1,195,923 (Claims 1 and 5) to Gans, for an apparatus for softening water, is void, for want of disclosure and want of invention. Pp. 57–60.

   This apparatus employs the process of softening water by means of zeolites, which take up calcium and magnesium from hard water, giving up their sodium base, and are "regenerated" when washed by a solution of common salt. The light zeolite particles rest upon a filter-bed of sand and gravel within the container in which the water is treated. When the water, or the regenerating salt solution, is flowed through them from below, they are likely to be

washed away. To prevent this, in the earlier filters, a metal screen was placed close above the bed of zeolites. The patentee was alleged to have discovered that this "locking" of the zeolites interfered with their efficient action, and that it was necessary to have an open space above them in which they might rise or "boil" and spread out and reform in the bed; and the alleged invention chiefly relied upon in the litigation lay in removal of the close-fitting cover and in placing the screen some distance above the layer; but this was not mentioned in the specification or in either of the claims. A further contention, under Claim 5, that there was invention in placing the means for removing the salt solution at the lowest point of the casing is also rejected. "It does not require the exercise of the inventive faculty to place at the bottom of a receptacle the outlet through which it is to be drained."

43 F. (2d) 898, affirmed.

CERTIORARI, 283 U. S. 812, to review a decree affirming a decree of the District Court, 37 F. (2d) 385, dismissing a suit to enjoin alleged infringement of a patent.

Mr. Drury W. Cooper, with whom *Messrs. Graham Sumner, George A. Chritton,* and *Allan C. Bakewell* were on the brief, for petitioner.

Mr. Charles L. Byron, with whom *Mr. George L. Wilkinson* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Permutit Company is the owner of Gans Patent No. 1,195,923, for an apparatus for softening water, applied for August 5, 1911 and granted August 22, 1916. It brought, on February 23, 1928, this suit in the federal court for northern Illinois, against Graver Corporation, to enjoin infringement of Claims 1 and 5. The defendant denied both the validity of the patent and the infringement. The District Court held both claims invalid, 37 F. (2d) 385. The Circuit Court of Appeals for the Seventh Circuit affirmed that decision; and also held that the

defendant's "presently used structures" do not infringe Claim 5, 43 F. (2d) 898. Certiorari was granted because of conflict with earlier decisions in other circuits.[1]

Water is hard because it contains the salts of calcium and magnesium. It may be softened by distillation or by adding to the water certain other chemicals through which the hardening constituents in solution are changed to an insoluble form and precipitated. Such softening may also be effected by the use of zeolite, a hydrated alumino-silicate found in nature. When hard water is passed through zeolites they give up their sodium to the water and take from it the calcium and magnesium as a new base. Zeolites have the peculiar quality that, after becoming exhausted in such use, they may be regenerated by passing a solution of common salt through them, whereupon they give up their new base of calcium and magnesium and take back their sodium base. They retain indefinitely these valuable properties.

The chemical attributes of zeolites, and their effect upon hard water, had been known long before the application for the patent in suit. But zeolites were not employed commercially as a water-softener because, as then found in nature, they were ill adapted for use in filters and the expense of mining them was large. Gans invented a process for producing artificial zeolites and a process of softening water by means of them. The United States patents issued for those inventions had expired before

[1] The patent was first sustained by the District Court for western New York. *Permutit Co.* v. *Harvey Laundry Co.*, 274 Fed. 937; affirmed by the Second Circuit Court of Appeals, 279 Fed. 713; certiorari denied, 259 U. S. 588. It was then sustained by the District Court for southern New York. *Permutit Co.* v. *Paige & Jones Chemical Co.*, 292 Fed. 239; affirmed, 22 F. (2d) 916. It was also sustained by the Sixth Circuit Court of Appeals, *Permutit Co.* v. *Wadham*, 13 F. (2d) 454, 15 F. (2d) 20; reversing the decision in 294 Fed. 370, which had held the patent invalid.

the commencement of this suit, which is upon a patent for an apparatus "in which the zeolites or alumino silicates can be used in a filter and be regenerated therein so as to be capable of continuous use for the softening of water." The essential elements of the water-softening process in which this apparatus is employed are the passage of water through zeolites, their regeneration by recharging them with the sodium chloride solution and the rinsing of them thereafter, so that no noticeable tinge of salt will be found in the filtered water. A drawing was attached to the specification as an example of a filter provided according to the invention claimed.

As described in the specification, the apparatus consists of a cylindrical container within which are "a number of horizontally disposed perforated plates." Near the bottom is one upon which rests a layer of sand (or quartz). This supports a bed of zeolites. At some distance above the zeolites is another perforated bed of sand "through which the water to be softened may be first filtered." There are piping connections so that the hard water may be run into the casing through the zeolite bed and out to the soft-water service line. The chamber is also provided with means for cutting off the hard water and introducing a flow of salt water to regenerate the zeolites; and with means for washing out of the container the contaminated brine and any accumulated dirt. As so constructed, the filter may operate by letting the hard water flow either downward through the upper sand bed to the zeolites or upward to them through the lower sand bed. On March 2, 1920, The Permutit Company disclaimed from the scope of Claim 1 any apparatus "in which the water to be softened is so introduced into the casing that it passes upwardly through said layer of zeolites." It is conceded that Graver Corporation's 1927 type of water softener does not infringe Claim 1 as in it the water passes up-

ward. The specification also describes, and the drawing indicates, a modified form of apparatus provided with means for stirring the zeolites in washing. No stirrer is employed in the defendants' apparatus.

First. The apparatus described in the specification closely resembles sand filters long used. The elements enumerated above, alone and in combination, are confessedly old. The only invention seriously urged under Claim 1 is the substitution of a "free" for a "locked" zeolite bed—a matter which is not referred to either in the specification or in the claim. In earlier filters the zeolites had been held in place by locking the bed; that is, by placing a metal screen either immediately over the layer of zeolites or over a layer of burlap or excelsior resting upon them. The occasion for a screen is that zeolite grains are lighter than the sand and gravel on which they rest. In flowing the water or the regenerating solution upward through the zeolite bed in an upflow softener, or in backwashing the zeolites in a downflow softener, for the purpose of cleansing them of accumulated slime and dirt, the lighter grains may be washed out through the flow pipe unless impeded in some way. Gans is alleged to have discovered that a locked zeolite bed is erratic in action and will soon cease to give soft water; that through such a bed the hard water will flow unevenly; that preferred channels of flow will form; that the zeolites contiguous to them will be speedily exhausted and the hard water will pass through unaffected, although the great mass of zeolite material remains unexhausted; and that it is necessary to have an open space above the top of the zeolites in order to furnish opportunity for the zeolites to rise or boil, and to spread out and reform in the bed. The invention relied upon consists in removing the close-fitting cover from the zeolite bed and in providing ade-

quate rising space by placing the screen at some distance above the top of the layer of zeolites.

We have no occasion to consider whether this alleged Gans invention of a "free" zeolite bed rises to the dignity of invention or whether, as Graver Corporation contends,[2] it lacked novelty, and was anticipated by earlier apparatus and publications—defenses to which the evidence, the briefs and the oral arguments were mainly directed. For even if a patent for a "free" bed might have been valid, that sued on is invalid for lack of the disclosure prescribed by R. S. § 4888.[3] There is no mention in the specification of either a "free" or a "locked" zeolite bed; or of the alleged discovery that a rising space above the zeolite bed is necessary for the successful operation of the softener; or of the need of a device to prevent the lighter grains of zeolite from passing out in back washing. Nor does Claim 1 or Claim 5 make mention of a "free" zeolite bed. Claim 1 is for "a filter bed consisting of a layer of sand or quartz and a layer of zeolites or hydrated alumino-silicates disposed on the layer of sand or quartz."[4] Claim

[2] It was contended by defendant that the "free bed" had been fully described in prior printed publications more than two years before the time Gans filed his application for the patent sued on. Moreover, in this case (unlike the earlier ones), the defendant introduced much evidence of successful operation of "locked" beds.

[3] *Sewall* v. *Jones*, 91 U. S. 171, 184, 185; *Yale Lock Mfg. Co.* v. *Greenleaf*, 117 U. S. 554, 559; *Steward* v. *American Lava Co.*, 215 U. S. 161, 165–167; *Beidler* v. *United States*, 253 U. S. 447, 452, 453; *Fulton Co.* v. *Powers Regulator Co.*, 263 Fed. 578, 580; *Typewriters Hilliardized, Inc.*, v. *Corona Typewriter Co.*, 43 F. (2d) 961, 964.

[4] "Claim 1. A water softening apparatus comprising a casing, a filter bed consisting of a layer of sand or quartz and a layer of zeolites or hydrated alumino-silicates disposed on the layer of sand or quartz, means for permitting the passage of water through the casing, means for cutting off the supply of water on the exhaustion of the zeolites, and means for passing through the casing a solution of salt capable of regenerating the zeolites."

5 for "a filter bed consisting of a layer of zeolites or alumino-silicates, supporting means for said layer." [5] As the patentee has thus failed to give in the specification "a written description" and has likewise failed particularly to point out and distinctly claim the free zeolite bed, as "the part, improvement, or combination which he claims as his invention or discovery," the patent is void.

The question of compliance with the requirement of disclosure laid down by § 4888 was not adverted to in either opinion of the Second Circuit Court of Appeals sustaining the validity of the patent, 279 Fed. 713; 22 F. (2d) 916 [6]; nor was it called to the attention of this Court, which denied certiorari in the first case in 259 U. S. 588. In those cases both of the District Courts seem to have thought that the free surface of the zeolites was indicated by the attached drawing and to have deemed such indication sufficient, although the matter was nowhere mentioned in the description or claims, 274 Fed. 937, 942; 292 Fed. 239, 240. The opinion in the second case added that this feature was necessarily "presupposed" in the stirring device mentioned in the description as "advantageous" and included in other claims not now in suit, and that it was "involved" in the absence from Claims 1 and 5 of any upper sand filter. These con-

[5] "Claim 5. Water softening apparatus comprising a casing, a filter bed consisting of a layer of zeolites or alumino-silicates, supporting means for said layer, means for permitting the passage of water through the casing, means for cutting off the supply of water on the exhaustion of the zeolites, means for supplying and passing into the casing a solution of a salt capable of regenerating zeolites and means connected to the lowest point of the casing for removing the salt solution so introduced."

[6] In 22 F. (2d) 916, 918, the court, in rejecting a defense of anticipation by a German, Gebrauchmuster, stated that the earlier patentee did not have in mind back washing to which Gans referred in his specification. This was not said, however, in reference to the question of the adequacy of Gans's disclosure.

clusions were adopted by the Circuit Court of Appeals for the Sixth Circuit,[7] which invoked the doctrine that "if the specification and drawings of a patent show a structure clearly involving a certain theory of operation, it is not necessary that the patentee should expressly describe this theory, nor indeed that he should at that time clearly understand it."

We think that these views rest upon misconception. The absence in the claims of a sand bed placed above the zeolites does not imply that the zeolite bed is to be unconfined. The only normal inference from such silence is either that it was deemed immaterial whether the zeolite bed be locked or free, or that if a free bed is preferable, it was not claimed because it lacked novelty. The drawing annexed to the specification, it is true, shows a layer of sand or quartz at a point above the zeolites and an unoccupied space between it and the top of the zeolite bed. But there is no suggestion on the drawing or elsewhere that the upper plate bearing the layer of sand or quartz has any purpose except to serve as a mechanical filter through which "the water to be softened may be first filtered," or that the unoccupied space has any other purpose than that of similar spaces in sand filters long

[7] The court said: "The specification and drawing provide for the occasional descent into the zeolite bed from above of a revolving stirrer, and this makes it clear that the top of the zeolite must be free and unconfined, under the contemplation of these claims, like 1 and 5, which do not imply the non-use of the stirrer." 13 F. (2d) 454, 458. On the contrary, the drawing shows that a vertical movement of the stirrer was not contemplated and that the arrangement of shaft and gear would prevent it. Moreover, the stirrer was not an element in the combination claimed. It was not even an element in the filter shown in the drawing and referred to in the specification "by way of example." The specification states: "Fig. 2 is a similar, but fragmental, view of a modification carrying a stirring device; Fig. 3 is a horizontal section of the same." Nor would the presence of the stirrer in any event be inconsistent with a confined bed. See 37 F. (2d) 385, 392.

familiar.[8] Moreover, while drawings may be referred to for illustration and may be used as an aid in interpreting the specification or claim, they are of no avail where there is an entire absence of description of the alleged invention or a failure to claim it.[9] The statute requires the patentee not only to explain the principle of his apparatus and to describe it in such terms that any person skilled in the art to which it appertains may construct and use it after the expiration of the patent, but also to inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not.[10] The free bed was neither described in the specification nor claimed in either Claim 1 or Claim 5.[11]

Second. The further contention is that Claim 5 can be sustained on the ground that, in providing for "means connected to the lowest point of the casing for removing the salt solution," it introduced a novel element constituting invention. The only novelty suggested is that of placing the means at the lowest point of the casing. It does not require the exercise of the inventive faculty to place at the bottom of a receptacle the outlet through which it is to be drained, *Smith* v. *Springdale Amusement Park,* 283 U. S. 121, 123; *Carbice Corp.* v. *American Pat-*

[8] Such unoccupied space is exhibited in the drawings annexed to Jewel Patent No. 478,261; Bommarius No. 519,565; Driesbach No. 630,870; Bommarius No. 632,091; and Bachman No. 678,532, all relating to ordinary filters, and all introduced in evidence below.

[9] *McCarty* v. *Lehigh Valley R. Co.,* 160 U. S. 110, 116; *Tinker* v. *Wilber Eureka Mower & Reaper Mfg. Co.,* 1 Fed. 138, 139; *Gunn* v. *Savage,* 30 Fed. 366, 369; *Windle* v. *Parks & Woolson Machine Co.,* 134 Fed. 381, 384–5.

[10] *Merrill* v. *Yeomans,* 94 U. S. 568, 573; *Seymour* v. *Osborne,* 11 Wall. 516, 541.

[11] Compare *Keystone Bridge Co.* v. *Phoenix Iron Co.,* 95 U. S. 274, 278; *Alexander Milburn Co.* v. *Davis-Bournonville Co.,* 270 U. S. 390, 401.

ents Development Co., 283 U. S. 420, 421; *Concrete Appliances Co.* v. *Gomery*, 269 U. S. 177, 185.

Affirmed.

DE LAVAL STEAM TURBINE CO. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 6. Argued October 16, 1931.—Decided November 23, 1931.

Pursuant to the Act of June 15, 1917, empowering the President "to . . . cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material," the Government took over by requisition the purchasers' rights in certain private contracts for the manufacture and sale of marine steam turbines. Before the contracts were performed, it canceled them. *Held:*

1. That the manufacturer was entitled to just compensation, as for property taken by eminent domain, not to damages as for breach of contract. P. 70.

2. Just compensation is the value of the contracts at the time of their cancellation. P. 72.

3. It does not include an allowance of anticipated profits. *Russell Motor Car Co.* v. *United States*, 261 U. S. 514. Pp. 70–72.

4. The fact that the contracts, if carried out, would have been profitable, must be given proper weight in determining just compensation. P. 70.

5. The Act cited applies expressly to contracts made before its passage. P. 73.

6. Such contracts are entered into subject to future exertion of the power of eminent domain. *Id.*

70 Ct. Cls. 51, affirmed.

CERTIORARI, 283 U. S. 814, to review a judgment fixing compensation for contracts requisitioned and afterwards canceled by the Government.

Mr. John Spalding Flannery, with whom *Messrs. George C. Holton, George F. Losche*, and *Frank F. Nesbit* were on the brief, for petitioner.

Before the requisitions, the purchasers had the right to look to the petitioner to build and deliver the turbine equipment, and were obligated to pay the petitioner the unpaid balance of the purchase price; and, correlatively, petitioner had the right to build the turbine equipment for the purchasers with whom it had contracted, in the manner, at the times and at the prices fixed by the contracts, and to demand and receive from the purchasers the unpaid balance of the purchase price as provided in the contracts, or, if they failed to pay it, to recover from them compensation by way of damages for breach of the contracts, which damages would include the profits petitioner would have realized by full performance. By the requisitions, the contract rights and obligations of the purchasers passed to the Government, *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, and the purchasers were relieved of all their obligations under the contracts and petitioner was deprived of its corresponding rights founded on the purchasers' obligations. This situation was the direct result of the requisitions, and petitioner had no choice or say in the matter. *Liggett & Myers* v. *United States,* 274 U. S. 215, 220. The petitioner's contract rights went with the purchasers' rights and obligations just as in *Duckett* v. *United States,* 266 U. S. 149, the tenant's rights under its lease of a pier were taken when the Government took possession and control of the pier. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *International Paper Co.* v. *United States,* 282 U. S. 399.

By its requisitions, therefore, the Government took from petitioner:

(a) Physical property consisting of petitioner's materials acquired for use in manufacturing the turbines called for by the contracts.

(b) Intangible property consisting of petitioner's rights under the three private contracts. These rights were

definite, certain and non-cancelable. Such rights had a real and substantial value based upon the assured profits petitioner would have realized by performance.

Obviously petitioner's right to the compensation, assured to it by the Constitution, accrued by reason of the requisition and was not affected by what the Government did at a later date. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481. When the Government canceled the contracts, it did not thereby relieve itself of the legal consequences of its requisition. *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 122.

The *Russell Motor Car* case, 261 U. S. 514, deals with a cancellation by the Government of its own contract, whereas, in the present case, the three contracts involved are private contracts to which the Government was not, in any sense, a party.

The decision of this Court in that case, refusing to allow anticipated profits, was predicated upon the conclusion that the contract was entered into directly with the Government and, therefore, with the prospect of its cancellation in view, since the statute was binding and must be read into the contract, and the possible loss of profits must therefore be regarded as within the contemplation of the parties. In short, when the Russell Motor Car Company entered into its contract with the Government it impliedly agreed, because of the statute, that the Government should have the right to determine when the contract might be terminated. There was, therefore, a cancellation in the exercise of a contract right. In direct contrast, these three private contracts include no mutual agreement, express or implied, that the contracts may be terminated by either party.

The Court of Claims, in refusing to allow anticipated profits, misinterprets the decision of this Court in the *Brooks-Scanlon* case as holding that prospective profits constitute no part of just compensation in "such cases," to-wit, cancellation. But see page 123 of that report.

This error becomes more apparent when viewed in the light of the language of this Court in *Ingram-Day Co.* v. *McLouth,* 275 U. S. 471, 473.

The rule prescribed by this Court in the *Russell* case, that prospective profits are not to be included, is expressly confined in its scope and application to government contracts made after the enactment of the Act.

Any such limitation upon the obligation to pay just compensation for the taking or cancellation of private contracts results in a deprivation of the rights guaranteed by the Fifth Amendment to the Constitution. *Phelps* v. *United States,* 274 U. S. 341, 344.

Petitioner is entitled to just compensation in an amount which will put it in as good position pecuniarily as it would have been in if its contract rights and materials had not been expropriated. *Phelps* v. *United States,* 274 U. S. 341, 344; *Campbell* v. *United States,* 266 U. S. 368, 371; *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106; *Liggett & Myers* v. *United States,* 274 U. S. 215; *United States* v. *New River Collieries,* 262 U. S. 341; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *Bauman* v. *Ross,* 167 U. S. 548, 574; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 194.

In breach of contract and tort actions the same general principle that the injured party is entitled to compensation in money equivalent for the loss sustained is adhered to and applied. *United States* v. *Purcell Envelope Co.,* 249 U. S. 313; *United States* v. *Behan,* 110 U. S. 338, 344; *United States* v. *Spearin,* 248 U. S. 132, 135; *Guerini Stone Co.* v. *Carlin Construction Co.,* 248 U. S. 334, 347; Williston on Contracts, Vol. III, § 1338; *Standard Oil Co.* v. *Southern Pac. Ry. Co.,* 268 U. S. 146.

The just compensation should include the profits petitioner would have made by performance of the requisitioned contracts. Petitioner was deprived of the profits by the same acts of respondent that took the other prop-

erty for which allowance was made. Had there been no intervention by respondent, and had the purchasers failed to perform, such profits would certainly have been recoverable in an action for such breach, in their entirety, as an element of compensation for petitioner's loss. *Masterton* v. *Mayor,* 7 Hill. 61; *United States* v. *Behan,* 110 U. S. 338; *Hinckley* v. *Pittsburgh Steel Co.,* 121 U. S. 264; *United States* v. *Purcell Envelope Co.,* 249 U. S. 313.

Just compensation is compensatory in no truer or more exact sense than damages recoverable at law are compensatory. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 329.

Does not the value of contract rights such as these depend upon their productiveness? And is not their ultimate productiveness to the seller what they will net to him? And what is better evidence of that than the profits they would have made for him?

The refusal of the Court of Claims to allow profits is in direct conflict with *American Hawaiian S. S. Co.* v. *United States,* 283 Fed. 535; appeal dismissed, 263 U. S. 727. See also, *United States* v. *New River Collieres Co.,* 262 U. S. 341, 343; *Campbell* v. *United States,* 266 U. S. 368, 371; *Phelps* v. *United States,* 274 U. S. 341; *Duckett* v. *United States,* 266 U. S. 149; *Booth & Co.* v. *United States,* 61 Ct. Cls. 805.

Whether a profitable contract be appropriated for use or confiscated for destruction; whether it be breached, abandoned, or canceled, under the uniform course of decision in this Court the measure of compensation is always the same—what it would have produced to the owner.

Assistant Attorney General Rugg, with whom *Messrs. Arthur Cobb, Bradley B. Gilman* and *Erwin N. Griswold* were on the brief, for the United States.

The petitioner suffered no loss because of the requisition. By that requisition the Fleet Corporation was sub-

stituted on the contracts for the original purchasers. The petitioner no longer could look to the private contractors for performance. Its rights were against the United States, a party at least as responsible financially as the original purchasers. Cancellation, not requisition, caused the loss to the petitioner for which it is entitled to just compensation. *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106; *Omnia Commercial Co.* v. *United States,* 261 U. S. 502.

In *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *Duckett & Co.* v. *United States,* 266 U. S. 149; and *International Paper Co.* v. *United States,* 282 U. S. 399, the requisition of the third party's property resulted directly in the loss of property to the plaintiff. The requisition constituted a direct appropriation of the whole property, including the lesser estate of the claimant. But in the case at bar no property of the petitioner was taken; its rights against the purchasers were frustrated, and in their place were substituted rights against the United States.

After the passage of the Act of June 15, 1917, private parties were bound to know that under it the Government could modify, suspend, or requisition any contract for the production of war material. Under the rule of the *Russell Motor Car Co.* case, this statutory provision became a part of any subsequent contract.

As to the private contracts executed prior to June 15, 1917, the provisions of the Act of March 4, 1917, similar in effect to those of the Act of June 15, 1917, became a part of them. See *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106; *Grays Harbor Motorship Corp.* v. *United States,* 45 F. (2d) 259.

In any event the petitioner is not entitled to anticipated profits as compensation for the cancellation of its contracts, but only to the value of the contracts at the

date of the cancellation, and this sum was allowed by the Court of Claims. The statute, under which the duty to pay arose, obligates the Government to make " just compensation." This technical phrase, " just compensation," has been interpreted to include the value of the contracts at the date of cancellation and to exclude anticipated profits. The court below found as a fact that the value of the contracts at the date of cancellation was $8,500.00. This amount was included in the award of compensation. *Russell Motor Car Co.* v. *United States,* 261 U. S. 514, 523; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123–124; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312; *Barrett Co.* v. *United States,* 273 U. S. 227; *College Point Boat Corp.* v. *United States,* 267 U. S. 12.

The petitioner confuses just compensation for the requisition of property, the measure of damages for breach of contract, and just compensation for the cancellation of contracts. The first includes no costs and expenses of the former owner. Damages for breach of contract include anticipated profits. This claim is one for compensation for a lawful cancellation. Many of the authorities relied on by petitioner are breach of contract cases. None are in conflict with the decision below.

Attached to the brief for the United States was a statement by the Solicitor General:

It is not thought that the doctrine of *Russell Motor Car Co.* v. *United States,* 261 U. S. 514, can be so far extended as to import into the contracts of private parties a right of cancellation to be exercised by the Government in case of requisition, or that the requisition of the contracts for public use and the subsequent cancellation deprive the contractor of its contractual right to recover

the measure of damage which would have been recoverable upon breach by the original purchaser, unless the equivalent of such recovery be awarded as just compensation. These are the personal views of the Solicitor General. They do not accord with the considered judgment of the court below or with the views of counsel presented in the foregoing brief. The question is one of general importance which has not been determined in any other case and because of the constitutional rights involved should be determined by the judgment of this Court.

Mr. Justice Sutherland delivered the opinion of the Court.

Petitioner, a manufacturer of marine steam turbines, prior to January 12, 1918, had entered into thirteen written contracts with various firms and corporations for the manufacture of steam turbine propulsion units for ships. In the early part of 1918, after petitioner had commenced work under the contracts, the United States, acting through the Emergency Fleet Corporation, requisitioned these contracts, and advised the parties that it would make just compensation for the turbine equipment which the petitioner was required to complete, and that the Emergency Fleet Corporation would assume the responsibility of the contracts and make payment to petitioner.

The present controversy concerns three of these contracts (the other ten having been fully performed), the first for the construction of four marine turbine sets at the contract price of $150,000, the second for the construction of ten marine turbine sets at the contract price of $735,000, and the third for the construction of four marine turbine sets at the contract price of $216,000. Petitioner continued to perform its obligations under these contracts as directed by the Fleet Corporation, for about a year, at which time, following the signing of the Armistice, it became necessary in the public interest to suspend op-

erations under the contracts, and, upon the several orders of the Fleet Corporation, petitioner suspended operations, stored the materials on hand, which had been assembled for the performance of the contracts, until January 14, 1920, when, by agreement, they were released from the effect of the requisition and were taken over by petitioner at an agreed salvage value.

The Fleet Corporation awarded compensation to petitioner, but the latter thought the award insufficient and sought by this suit in the Court of Claims to have the amount of just compensation determined. The Court of Claims gave judgment in favor of petitioner for its actual costs and expenditures over the cash payments received, amounting to $116,231.66, together with $30,000 damages for extraordinary expenses resulting from the stopping of work, and $15,000 for expenses and rental incident to the storing of materials during the period after the order to stop work. From the total of these items, certain deductions, including a payment by the Fleet Corporation of 75% of the amount which it had awarded, were made, resulting in an award of $84,074.34, with interest thereon from August 17, 1920. To this award the court added $8,500, with interest from March 17, 1919, as the value of the three contracts at the time of their cancellation, and the loss sustained by the petitioner by reason thereof. According to the findings, the petitioner, if it had been allowed to complete the performance of the three contracts, would have realized a profit of over three hundred thousand dollars. But the court below declined to include any amount for anticipated profits. 70 Ct. Cls. 51.

The sole question presented for our determination is whether petitioner was entitled to an allowance of the amount, or any part of the amount, of these anticipated profits as a part of the just compensation.

In *Russell Motor Car Co.* v. *United States,* 261 U. S. 514, the contract involved had been made directly with the government for the manufacture of certain war supplies. Following the Armistice, and while the contract was in process of being performed, the Secretary of the Navy directed its cancellation. Suit was brought in the Court of Claims to recover just compensation. That court found that if the manufacturer had been permitted to complete the contract according to its terms, a very large amount would have been earned as profits, but refused to include in its award any part of these anticipated profits. We affirmed this determination and held that the statute, which empowered the President "(b) to modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material," applied to the government's own contracts as well as to private contracts, and that just compensation for the cancellation of such contracts should include " the value of the contract at the time of its cancellation, not what it would have produced by way of profits for the Car Company if it had been fully performed."

A distinction is sought to be drawn between the *Russell Company* case and the present case on the ground that there the contract was made directly with the government, and here they were made between private parties. The question, therefore, is whether this circumstance alters the rule in respect of just compensation. In determining that question the cardinal point to be borne in mind is that whether the contract requisitioned or canceled be one with the government or one between private individuals, the person whose property rights are taken or destroyed is entitled to receive just compensation, not damages as for a breach. A sufficient ground for the distinction lies in the fact that in the one case the requisition or cancellation is a

lawful act under the power of eminent domain, while in the other the act constituting the breach is unlawful.

In the present case the government requisitioned the purchasers' rights in the contracts, not for the purpose of putting an end to the contracts, but of keeping them alive for the benefit of the government. Its action being in pursuance of law, the government succeeded to all the rights of the purchasers under the contracts. The effect was the same as though the contracts had beeen assigned by the purchasers with the consent of the manufacturer. There resulted, by operation of law, a substitution of purchasers, and the government became possessed of the right to enforce the contracts as though it had been an original contracting party. In effect, the old contracts became new contracts between the government and the petitioner. See *F. Haag & Bro.* v. *Reichert,* 142 Ky. 298, 301; 134 S. W. 191. Compare *Wiggins Ferry Co.* v. *Ohio & M. Ry. Co.,* 142 U. S. 396, 408; *Chicago, R. I. & P. Ry. Co.* v. *Denver & R. G. R. Co.,* 143 U. S. 596, 608.

In this view, the government canceled its own contracts, and it is hard to see why the *Russell Company* case is not strictly applicable. Moreover, the Act of June 15, 1917, c 29, 40 Stat. 182, authorized the President to cancel "*any* existing or future contract," etc., and this language, as we have held, applies whether the contract is with the government or between private parties. In either case, cancellation is an exercise of the power of eminent domain, and the liability of the government is for just compensation. There is no warrant for saying that the elements to be considered in fixing just compensation are different in respect of the two classes of contracts. The *Russell Company* case dealt with a government contract, but *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, involved the requisition of a private contract, and this court, holding that the claimant was entitled to just compensation, defined the term as follows (p. 123):

"It is the sum which, considering all the circumstances—uncertainties of the war and the rest—probably could have been obtained for an assignment of the contract and claimant's rights thereunder; that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy."

Obviously, this does not justify the allowance of anticipated profits, although, of course, the fact that the contract, if carried out, would be profitable is one of the circumstances which naturally would be considered by one seeking an assignment of the contract, and must be given its proper weight in fixing just compensation. But that is very different from an *allowance* of anticipated profits as in the case of a breach. Whether the contract taken or canceled is one with the government or is a private contract, the result of the two cases is that just compensation means the same—"the value of the contract at the time of its cancellation, not what it would have produced by way of profits . . . if it had been fully performed." *Russell Motor Car Co.* v. *United States, supra,* p. 523.

The court below found that the value of the contracts at the time of their cancellation and the loss sustained by reason thereof was $8,500, and in its judgment included this amount as a separate item. In the course of its opinion the court said (p. 65) that the amount of this item was to be determined "from all of the facts and circumstances in the case which bear thereon, as shown by the evidence, and [the court] has fixed the amount thereof in the findings at $8,500." The amount, it is true, seems small, but the evidence is neither before us nor open for our consideration, and there is nothing in the findings which would justify this court in saying that the court below did not give weight to all proper elements entering into the determination of the amount of just compensation, including the fact that large profits would have

resulted from the full performance of the contract. To what extent, in the opinion of the lower court, the realization of profits was rendered highly improbable by other facts and circumstances does not appear and is not open to speculation. We perceive no basis for substituting our judgment in the matter for that of the court below.

The fact that the contracts were made prior to the passage of the Act of June 15, 1917, does not alter the situation. They were entered into subject to the power of Congress to enact legislation authorizing the government to take them over for its benefit, or to modify, suspend or cancel them, as required by the necessities of war, and an implied condition to that effect must be read into the contracts. See cases cited in *Omnia Co.* v. *United States,* 261 U. S. 502, 511-513. Congress, in the exercise of its lawful powers, provided by the act for such taking over, etc., and expressly included "existing" as well as "future" contracts. Whether the contracts here involved were entered into before or after the passage of that act, therefore, becomes immaterial. It is true that in the *Russell Company* case the contract was after the statute and it was said that the contract was entered into with the prospect of its cancellation in view, since the statute was binding and must be read into the contract; but it was not intended thereby, in the face of the precise terms of the statutory provision, to include within the reach of the implication only future contracts and exclude therefrom existing contracts. The contract there and the contracts here were entered into not only subject to statutes already in force, but to those which should thereafter be passed. *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467, 480. In that case this court held that the prohibition of the Act of February 4, 1887, c. 104, § 2, 24 Stat. 379, as amended, prohibiting a carrier from charging compensation differing from that specified in its published tariff, meant that transportation should be paid for by all alike

and only in cash, and that it had the effect of rendering invalid a contract, valid when made, for the issue of free transportation. The court said (p. 482):

"The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist."

There is nothing in the findings or in the circumstances to suggest that the manufacturer sustained any injury from the requisition itself, since the government undertook to carry out the contracts and its credit was certainly not inferior to that of the original purchaser. The injury resulted not from the requisition, but from the subsequent cancellation of the contracts.

Judgment affirmed.

CHICAGO & NORTH WESTERN RAILWAY CO. *v.* BOLLE.

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT.

No. 60. Argued October 28, 1931.—Decided November 23, 1931.

1. The test of whether an employee at the time of his injury was engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, is whether he was engaged in interstate transportation or in work so closely related to such transportation as to be practically a part of it. P. 78.
2. The plaintiff's employment, at the time of the injury, was confined to firing a stationary engine (or, as a substitute, a locomotive,)

to generate steam. The steam was used for heating a depot, a baggage room and rooms devoted to general railroad purposes. It was also used for heating suburban coaches while standing in the yards, including some that had been taken off of, and after heating were to be carried back by, interstate suburban trains, and for heating a way car and bunk cars converted into stationary structures and occupied by employees in track maintenance and in the bridge and buildings departments; and sometimes it was used to prevent the freezing of a turntable used for turning engines employed in interstate and intrastate traffic. On the occasion in question, he was directed to accompany the substitute locomotive to a place about four miles distant, to obtain coal, and, for that purpose, his engine was attached to and moved with other locomotives then being prepared for use in interstate transportation. While coal was being taken upon one of the locomotives, he was injured. *Held* not employed in interstate commerce, in the sense of the Act. P. 80.

258 Ill. App. 545, reversed.

CERTIORARI, 283 U. S. 818, to review a judgment of the Appellate Court of Illinois, which affirmed a recovery for personal injuries, in an action under the Federal Employers' Liability Act. The Supreme Court of the State refused to review the judgment. For earlier stages of the case, see 235 Ill. App. 380; 324 Ill. 479, 155 N. E. 287; 251 Ill. App. 623.

Mr. Samuel H. Cady, with whom *Messrs. Nelson J. Wilcox* (who was prevented by illness from arguing the case) and *Ray N. Van Doren* were on the brief, for petitioner.

Mr. Joseph D. Ryan argued the case, and *Mr. John P. Bramhall* also appeared, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioner is a common carrier by railroad engaged in the interstate and intrastate transportation of passengers and freight. Respondent was employed by petitioner to

fire a stationary engine which was utilized to generate steam for the purpose of heating the passenger depot, baggage room, and other structures and rooms used for general railroad purposes at Waukegan, Illinois. The steam was also used to heat suburban passenger coaches while standing in the yards. Some of these coaches, taken off of interstate trains moving out of Chicago, were heated when necessary before being taken up by other interstate trains to be carried back. A way car and bunk cars, converted into stationary structures and occupied by some of the employees engaged in the track maintenance and bridge and building departments, were likewise heated; and sometimes steam was used to prevent freezing of a turntable used for turning engines employed both in interstate and intrastate traffic.

On the occasion in question, the stationary engine was temporarily out of order, and, in accordance with the usual practice, respondent had been making use of a locomotive engine as a substitute. While thus employed he was directed to accompany this locomotive engine to a place about four miles distant to obtain a supply of coal. For that purpose the engine was attached to and moved with three other locomotive engines then being prepared for use in interstate transportation. While coal was being taken upon one of the locomotives, respondent was seriously injured, through what is alleged to have been the negligence of petitioner.

The sole object of the movement of the substitute engine was to procure a supply of coal for the purpose of generating steam. Its movement was in no way related to the contemplated employment of the other three locomotives in interstate transportation; and its use differed in no way from the use of the stationary engine when that was available.

There is evidence that respondent, at other times, had been engaged in supplying other engines with coal and

water, firing live engines, and turning a turntable; but his employment at the time of the injury was confined to firing the stationary or locomotive engine for the sole purpose of producing steam. The character of the work which he did at other times, therefore, becomes immaterial. *Shanks* v. *Delaware, L. & W. R. Co.*, 239 U. S. 556, 558; *Chicago, B. & Q. R. Co.* v. *Harrington,* 241 U. S. 177, 179.

The action was brought under the Federal Employers' Liability Act (c. 149, 35 Stat. 65; Title 45, c. 2, U. S. C.) to recover damages for the injury. There have been three trials of the case. In the first the verdict and judgment was for the respondent, which upon appeal was reversed by the intermediate appellate court, upon the ground that the evidence failed to show that respondent was engaged in interstate commerce when injured. 235 Ill. App. 380. This judgment of the appellate court was reversed by the supreme court. 324 Ill. 479; 155 N. E. 287. After remand, there was another trial, resulting in a directed verdict and judgment for petitioner; and this judgment the appellate court, following the decision of the supreme court of the state, reversed. 251 Ill. App. 623. Upon the third trial, judgment upon a verdict was entered in favor of the respondent. This the appellate court affirmed, 258 Ill. App. 545, and the supreme court refused certiorari to review the cause.

The appellate court, in holding upon the first appeal that respondent was not engaged in interstate commerce, applied the rule laid down in the *Shanks* case, *supra;* and in so doing was clearly right.

The railroad company which was sued in the *Shanks* case maintained a large machine shop for repairing locomotives used in both interstate and intrastate traffic. While employed in this shop, Shanks was injured through the negligence of the company. Usually he was employed in repair work, but on the occasion of the injury he was

engaged solely in taking down, and putting into a new location, an overhead countershaft through which power was communicated to some of the machinery used in the repair work. The Employers' Liability Act provides that "every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," if the injury be due to the negligence of the carrier, etc. This court, at page 558, after quoting the words of the act, laid down the following test for determining whether the employee, in any given case, comes within them:

"Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Co.* v. *United States,* 196 U. S. 375, 398), and that the true test of employment in such commerce in the sense intended is, was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

It will be observed that the word used in defining the test is "transportation," not the word "commerce." The two words were not regarded as interchangeable, but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower signification was chosen understandingly and deliberately as the appropriate term. The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce; and hence the test of whether an employee at the time of his injury was engaged in interstate commerce, within the meaning of the act, naturally must be whether he was engaged in interstate transportation or

in work so closely related to such transportation as to be practically a part of it.

Since the decision in the *Shanks* case, the test there laid down has been steadily adhered to, and never intentionally departed from or otherwise stated. It is necessary to refer to only a few of the decisions. In *Chicago, B. & Q. R. Co.* v. *Harrington, supra,* an employee engaged in placing coal in coal chutes, thence to be supplied to locomotives engaged in interstate traffic, was held not to have met the test. In *Illinois Central R. Co.* v. *Cousins,* 241 U. S. 641, as appears from the decision of the state court (126 Minn. 172; 148 N. W. 58), an employee was engaged in wheeling a barrow of coal to heat the shop in which other employees were at work repairing cars that had been, and were to be, used in interstate traffic. The state court held that the employee came within the act, on the ground that the work which he was doing was a part of the interstate commerce in which the carrier was engaged, and cited *Pedersen* v. *Delaware, L. & W. R. Co.,* 229 U. S. 146. This court, however, repudiated that view, and reversed in an opinion *per curiam* on the authority of the *Shanks* case. In *New York Central R. Co.* v. *White,* 243 U. S. 188, 192, it was held, applying the test of the *Shanks* case, that employment in guarding tools, intended for use in the construction of a new depot and tracks to be used in interstate commerce, had no such direct relation to interstate transportation as was contemplated by the Employers' Liability Act.

The rule announced by the *Shanks* case has been categorically restated and applied also in the following cases among others: *Southern Pacific Co.* v. *Industrial Accident Comm.,* 251 U. S. 259, 263; *Industrial Commission* v. *Davis,* 259 U. S. 182, 185; *Baltimore & O. S. W. R. Co.* v. *Burtch,* 263 U. S. 540, 543. The applicable test thus firmly established is not to be shaken by the one or two

decisions of this court where, inadvertently, the word "commerce" has been employed instead of the word "transportation."

Plainly, the respondent in the present case does not bring himself within the rule. At the time of receiving his injury he was engaged in work not incidental to transportation in interstate commerce, but purely incidental to the furnishing of means for heating the station and other structures of the company. His duty ended when he had produced a supply of steam for that purpose. He had nothing to do with its distribution or specific use. Indeed, what he produced was not used or intended to be used, directly or indirectly, in the transportation of anything. It is plain that his work was not in interstate transportation and was not so closely related to such transportation as to cause it to be practically a part of it. Certainly that work was no more closely related to transportation than was that of the employee in the *Harrington* case, who placed coal in the chutes for the use of locomotives engaged in interstate transportation; or that of the employee in the *Cousins* case, who supplied coal for heating the shop in which cars used in interstate traffic were repaired. The work of the employees in those cases and that of the respondent here are, in fact, so nearly alike in their lack of necessary relationship to interstate transportation, as to be in principle the same.

Judgment reversed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 69. Argued October 14, 1931.—Decided November 23, 1931.

Carriers operating most of the steam railroad mileage in the country and owning nearly all of the common carrier car equipment, be-

longed to the American Railway Association and subscribed to a car service and per diem agreement providing for interchange of freight cars under rules adopted by the Association. By these rules, subscribers were entitled to a daily rental of one dollar per car for their general service freight cars while on foreign lines; daily reports were to be made of all cars interchanged between subscribers; and provision was made for a "reclaim allowance," or refund, to the extent of the *per diem* expense incurred in handling cars in terminal switching service. Carriers operating less than 100 miles of railroad—"short lines"—were eligible to associate membership in the Association, but without voting rights. Generally, nonsubscribers to the agreement were railroads operating short lines and owning little or no freight-car equipment. No reclaim allowance for switching service was permitted them by the rules. In a general investigation of car hire settlements, in which all the common carrier railroads were respondents, the Interstate Commerce Commission found that all, whether subscribers to the agreement or not, were entitled to reasonable compensation for use of their general service freight cars on foreign lines and that a *per diem* of $1.00 per car was reasonable; and it laid down certain rules to govern the subject, some of which, referred to below, were assailed as operating to take property without compensation, as not being justified by the evidence, and as being discriminatory, unequal, arbitrary and unreasonable. It was not disputed that the Commission had authority, under the Interstate Commerce Act as amended, to institute the investigation on its own motion, to prescribe reasonable rules relating to car service, and to prescribe reasonable compensation for the use of the cars of one railroad by another railroad, nor that, in the operation of through routes, common carriers subject to the Act may be obliged to permit their cars to be carried beyond their own lines. *Held:*

1. That the Commission was authorized to require, not only that the same daily rental be paid to nonsubscribers as is paid to subscribers to the above-mentioned agreement (which is not disputed), but also, as a corollary, that nonsubscribers, like subscribers, shall be entitled to reclaim such portions of the car rentals paid by them as represent their own terminal switching charges, the nonsubscribers being also required to assume the like obligation in respect of reclaim allowances when they in turn are owners of the cars used. P. 92.

2. A rule laid down by the Commission providing "That short-line railroads which are less than 100 miles in length, and which return railroad-owned equipment to the road from which received,

shall not be required to report per diem accruals to numerous car owners throughout the country, but shall be attached to their connecting carriers for purpose of car-hire settlement," was not invalid. P. 93.

3. It is not arbitrary or unreasonable, in this connection, to classify the short lines, owning an almost negligible proportion of the country's car equipment, in a different category from the trunk lines, which own substantially all of it, and which have classified themselves apart from the short lines by permitting the latter only an associate membership in the American Railway Association, without voting rights. P. 93.

4. As, under the *per diem* agreement, subscribers must report to each car owner as to cars used, and pay the *per diem* charges to such owner, but nonsubscribers,—which are not bound by the agreement—report and make payment to their immediate connecting subscriber carriers, the effect of the Commission's action is to extend this privilege to the subscribing short lines as well, so that all the short lines are put in a separate class and relieved from the burden of keeping account of a multitude of *per diem* charges and of reporting them separately to the various trunk lines. P. 94.

5. The power of the Commission to establish reasonable rules, regulations, and practices with respect to car service, conferred by § 1 (14) of the Act, includes the power to make reasonable rules prescribing forms and methods of accounting, reporting and distributing payments in respect of such service. P. 94.

6. In requiring the trunk lines, which generally own the cars, and which are best equipped to perform the clerical work and will receive the most in the way of compensating benefits, to assume, without substantial burden to themselves, this added service of keeping and rendering accounts, thereby relieving the short lines of an excessive and unnecessary burden, the Commission did not transcend the limits of reasonable administrative regulation. *Id.*

7. Public regulation of the use of railroad property which is so arbitrary and unreasonable as to become an infringement upon the right of ownership, violates the due process clause of the Fifth Amendment. P. 96.

8. In the face of its express finding that all railroads are entitled to receive, as reasonable compensation, a fixed sum per day for the use of every car when on foreign lines, a rule ordered by the Commission favoring short lines by giving them two days' free time for interchanged loaded cars and relieving them from payment on coal cars received for return loading with coal from mines

customarily dependent upon connecting carriers for car supply,—is arbitrary and unreasonable. Pp. 96–98.

9. The vice of this exemption is that it finds no justification in the Commission's own findings. The Court is not called upon to consider the evidence upon which the Commission made its findings; and, in disapproving that part of the order, it does not mean, for the present, to go beyond the precise case presented, or to pass upon the question of the authority of the Commission to make proper apportionment of car-hire costs, or, in special cases, to make adjustments and afford proper measure of relief in the matter of payment of charges for the use of cars. Pp. 96, 100.

10. The general rule obliging a railroad to furnish equipment for transporting freight tendered to it applies to short lines, and to the case of coal loaded at coal mines as well as to other traffic. P. 98.

11. Section 1 (12) of the amended Interstate Commerce Act relates to car distribution to coal mines, and does not touch the question of compensation for the use of cars by non-owning railroads. That subject is covered by § 1 (14). P. 99.

Reversed.

APPEAL from a decree of the District Court of three judges, which dismissed a bill to set aside parts of a general order of the Interstate Commerce Commission regulating car-hire settlements.

Mr. Frank H. Towner, with whom *Messrs. Alfred P. Thom, W. F. Dickinson, R. N. Van Doren, R. V. Fletcher, Herbert Fitzpatrick, George F. Brownell, C. C. Paulding, Ben C. Dey, F. Barron Grier, Edward S. Jouett, W. R. C. Cocke,* and *L. E. Jeffries* were on the brief, for appellants.

It is doubtless true that in this case the Commission had jurisdiction to institute the proceeding on its own motion and to prescribe such reasonable and proper rules relating to car service as were justified by the evidence, and also to prescribe the reasonable compensation to be received by each railroad for the use of its cars by another railroad. The Commission, however, does not have unlimited power to regulate interstate commerce through the making of orders relating to matters within its juris-

diction. While this Court will not weigh the evidence and substitute its judgment for that of the Commission, orders entered by that body will be set aside if they are unsupported by the evidence, were made without a hearing, exceed constitutional limits, or amount to an abuse of power.

Paragraphs (2), (3), and (5) of the order operate to take the property of appellants and other railroads similarly situated without compensation or without adequate compensation. Neither the reports of the Commission nor its order indicate that any benefit or payment will move to appellants and other railroads similarly situated, to compensate them for the losses imposed upon them by those paragraphs of the order. Without more, the decisions of this Court necessarily require that those paragraphs be set aside. The issues before the Commission involved no question of rates, divisions, costs of transportation, car service, car distribution or the obligation of railroads to own freight cars. There is no public interest to be considered, and no such interest will be affected by the decision herein. Thus, those decisions of this Court modifying property rights and requiring the performance of some service without compensation have no application.

The evidence before the Commission does not justify the requirements of paragraphs (2), (3), and (5) of the order. It consisted of nothing more than the requests of individual witnesses that the railroads represented by them be allowed the concessions now extended to them under those paragraphs. No reasons are assigned, either in the evidence or in the reports of the Commission, which constitute a legal justification for the requirements of those paragraphs. Moreover, it is obvious that the only purpose of the Commission in making those paragraphs of the order was to effect a transfer of revenue as between railroads. This was not an issue in the case, and the record does not contain the evidence upon which an order having this effect must be predicated.

The classifications of railroads made in the order are not supported by any evidence in the record of the proceedings before the Commission, bear no logical relation to any lawful result sought to be accomplished, are not uniform in their application, create discriminations and inequalities between railroads, are arbitrary and unreasonable, and operate to confiscate the property of appellants in violation of their constitutional rights. They are not justified by those decisions of this Court sustaining statutory classifications of railroads as legitimate exercises of a State's power to regulate in the public interest.

Assistant to the Attorney General O'Brian, with whom *Solicitor General Thacher* and *Messrs. Charles H. Weston, Hammond E. Chaffetz, Daniel W. Knowlton,* and *H. L. Underwood* were on the brief, for the United States et al., appellees.

Paragraph 14 of § 1 of the Interstate Commerce Act authorizes the Commission to establish reasonable car-hire regulations and to fix proper car-hire compensation. Paragraph 1 of the Commission's order directs the payment of the same car rental to nonsubscribers as to subscribers, and paragraph 2 requires that similar switching reclaim allowances shall be made to nonsubscribers as to subscribers. The effect of these two paragraphs is to remove the discrimination existing under the per diem rules whereby cars of nonsubscribers were rented on a mileage basis and cars of subscribers on a per diem basis, and whereby switching reclaims allowed to subscribers were forbidden to nonsubscribers. In removing this discrimination the Commission was not required to give appellants an election between abandoning switching reclaims and extending them to all, since the authority of the Commission is not merely to remove discrimination, but affirmatively to establish reasonable rules.

The language and purpose of the Commission's order clearly indicate that nonsubscribers are required to allow switching reclaims to subscribers. The manifest object of the order in this respect is to establish uniformity and equality of treatment as between subscribers and nonsubscribers.

Paragraph 3 of the order provides that short lines less than 100 miles in length which return freight equipment to the road from which received shall be attached to their connecting carriers for the purpose of car-hire settlement. Paragraph 3 thus requires subscribers to treat these short lines just as nonsubscribers are required to be dealt with under Rule 6 (b) of the per diem code. The effect of this paragraph of the order is to relieve these short lines of the burden of keeping small accounts with the countless car owners of the country. No substantial burden, if any, is imposed on any other class of railroad; and the saving in accounting expense to the railroad system as a whole may amount to $500,000 a month. Paragraph 3 would seem therefore to be reasonable.

Paragraph 5 of the Commission's order requires that short lines referred to in paragraph 3 (other than switching lines) be granted two days' free time on all loaded freight cars interchanged with them, and totally exempts them from the payment of car hire on cars received for return loading with coal from coal mines which are customarily dependent upon the connecting trunk lines for car supply. Paragraphs 5 and 3 taken together allocate to the trunk line connections part of the cost to the short lines of the free time granted to shippers and consignees under the National Demurrage Rules. Paragraph 14 of § 1 of the Act does not indicate the considerations which are to govern the distribution of car-hire costs, thus leaving it to the Commission upon investigation to determine the question. *Chesapeake & O. Ry. Co.* v. *United States,* 283 U. S. 35, 42; *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F.*

Ry. Co., 270 U. S. 266, 273. The Commission found that short lines were essentially feeders to their trunk line connections. They perform, principally, only terminal services and receive a small proportion of the line haul, while cars remain upon their tracks a disproportionate length of time. The Commission can not be said to have acted arbitrarily in giving consideration to this relationship and to the nature of the services performed by each of the parties thereto, and in deciding that by virtue of these facts the trunk lines should, to some extent, relieve their feeders of the cost of the free-time allowances made to shippers and consignees under the Demurrage Rules. Further support for the Commission's determination that free-time allowances to short lines are both proper and necessary is found in the history of the operation of the per diem rules.

Mr. Robert E. Quirk for the South Manchester R. Co., appellee.

Mr. Justice Sutherland delivered the opinion of the Court.

This suit was brought in the federal district court for the northern district of Illinois to set aside parts of an order of the Interstate Commerce Commission made in a proceeding instituted by that body on its own motion. The purpose of the proceeding was to investigate "the rules for car-hire settlement between common carriers by railroad in the United States for the use and detention of freight cars while on the lines of carriers other than their owners, with a view to making such order or orders in the premises as may be warranted by the record." All common carriers by railroad in the United States were made parties respondent. The Commission reopened and consolidated with the proceeding a number of cases theretofore pending before it, some of which had already been

heard and decided. Elaborate hearings were had, at which, generally, the trunk line railroads were represented by the American Railway Association, and the short lines, by the American Short Line Railroad Association. A large amount of testimony was submitted, together with several hundred exhibits. The Commission filed two reports. The first will be found in 160 I. C. C. 369–448, and the second or supplemental report in 165 I. C. C. 495.

The original report discussed the case and concluded with nine specific findings, the first of which follows:

"1. Common-carrier railroads, whether subscribers to the per diem agreement of the American Railway Association or nonsubscribers, are entitled to receive reasonable compensation in the form of a daily rental for the use of their general-service freight cars when on foreign lines, and that the present per diem charge of $1 per car-day reasonably compensates car owners for average car ownership and maintenance costs. The reasonableness of this per diem rate is not questioned."

No order was then made, but the carriers affected were expected to conform to the findings and were left to modify their rules and practices accordingly. The carriers having failed and refused to do so, the Commission issued its supplemental report and entered an order giving effect to its findings, by which order the respondents in the proceedings before the Commission were required, on or before October 1, 1930, to cease and desist, and thereafter to abstain, from applying rules for car-hire settlements in conflict with those prescribed by the Commission's order, and were required to establish, on or before that date, and thereafter to maintain and observe, rules with respect to car-hire settlements which shall provide:

"(1) That the same daily car rental shall be paid to common-carrier nonsubscribers as respondents contemporaneously pay to subscribers to the per diem rules agree-

ment of the American Railway Association, for the use of general-service freight cars.

" (2) That similar reclaim allowances shall be made to nonsubscribers as to subscribers of the per diem rules agreement, in connection with cars handled in terminal switching service, as the latter term is defined by the switching reclaim rules of the American Railway Association.

" (3) That short-line railroads which are less than 100 miles in length, and which return railroad-owned equipment to the road from which received, shall not be required to report per diem accruals to numerous car owners throughout the country, but shall be attached to their connecting carriers for purpose of car-hire settlement.

" (4) That common-carrier railroads which interchange freight cars with more than one subscriber railroad, and which deliver to one or more subscribing carriers, freight cars which are received from another such carrier, and railroads 100 miles or more in length, regardless of the number of railroads with which they connect, shall make car-hire settlements direct with car owners in accordance with the per diem rules.

"(5) That common-carrier railroads outside switching districts, other than those referred to in paragraph 4 hereof, shall pay per diem to connecting carriers on railroad-owned freight cars after deducting an average of two days free time per loaded freight car interchanged, settlements to be made at the end of each calendar month, except that no car hire need be paid on cars received for return loading with coal from coal mines which are customarily dependent upon connecting carriers for car supply."

Thereupon, appellants, on behalf of themselves and other carriers similarly situated, brought this suit to set aside paragraphs (2), (3) and (5) of the order. No complaint was made in respect of paragraphs (1) and (4).

The case was heard by a court of three judges, constituted as required by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 220, U. S. C., Title 28, § 47. That court, without an opinion, made findings and conclusions sustaining the order of the Commission in all respects, and entered a decree of dismissal without prejudice to further applications to the Commission for modification of the order, if, subsequently, injury or unfair results follow from the application of the order.

In the early history of railroad operation, through freight was transferred from the cars of one road to those of the connecting line at junction points. This resulted in waste of time and money, and the railroads themselves soon adopted the practice of permitting the loaded cars to pass from their own tracks to those of the connecting roads, making a charge therefor. See In the Matter of Car Shortage, 12 I. C. C. 561, 573. For many years charges for interchanged cars were on a mileage basis, but this was found impracticable, and a per diem rate generally was substituted. Finally, an agreement was entered into, known as the "Car Service and Per Diem Agreement," which provided for an interchange of cars subject to a code of rules adopted by the American Railway Association, the general principle of which was that payment should be made to the car-owning railroad for each day the car was off its lines. The railroads subscribing to this agreement are known as "subscribers," and other roads, as "nonsubscribers." The subscribers, all members of the American Railway Association, comprise nearly 78 per cent. of the steam railroads in the United States; and these operate nearly 98 per cent. of the entire railroad mileage, and own 99.81 per cent. of all the railroad common carrier car equipment of the country. Carriers operating less than 100 miles of railroad are eligible for associate membership but without voting rights. At the time this case was heard by the

Commission, the per diem rate was fixed at $1.00 per car. The rules required daily interchange reports in respect of all cars interchanged between subscribers. Generally, nonsubscribers were railroads operating short lines and owning little or, in some cases, no freight car equipment. Provision was made in the rules for a "reclaim allowance," that is to say, a refund, to railroads which had paid car rental, to the extent of the per diem expense incurred in handling cars in terminal switching service. This rule was confined to subscribers, and no reclaim allowance was permitted to nonsubscribers for such service.

That the order of the Commission falls within the scope of its statutory powers is clear. Interstate Commerce Act, as amended by Transportation Act, 1920, c. 91, § 402, 41 Stat. 456, 476; U. S. C., Title 49, § 1 (10)–(14). Subdivision (14) provides:

"The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices."

The authority of the Commission to institute the proceeding on its own motion, and to prescribe reasonable rules relating to the subject of car service, and to prescribe reasonable compensation for the use of the cars of one railroad by another railroad, is conceded. Nor is it disputed that under the law, in the operation of through routes, common carriers subject to the Interstate Commerce Act may be obliged to permit their car equipment to be carried beyond their own lines. See Missouri & Illinois Coal Co. *v.* Illinois Central R. Co., 22 I. C. C. 39. Appellants assail paragraphs (2), (3), and (5) of the order on the grounds

that their provisions operate to take property without compensation, are not justified by the evidence, and are discriminatory, unequal, arbitrary, and unreasonable.

First—Paragraph (2). Paragraph (1) of the order, which is not challenged, requires the same daily car rental to be paid to nonsubscribers as is paid to subscribers to the per diem rules agreement. Of this, paragraph (2) is the logical corollary. If nonsubscribers are entitled to be put on terms of equality with subscribers in the matter of liability for car rental payments, it is hard to see why they should not also be entitled to the same equality in respect of refunds of such portions of the payments as represent switching charges, provided, of course, that the nonsubscribers are also required to assume like obligation in respect of reclaim allowances when they in turn are owners of the used cars. The two paragraphs, taken together and fairly interpreted, we think justify the conclusion that the obligations imposed and the benefits to be received are intended to be reciprocal, and put subscribers and nonsubscribers, in respect thereof, upon terms of equality. That this is the view of the Government and of the Commission appears from the language of their brief, as follows:

"The Commission's obvious purpose was to place nonsubscribers on an equal footing with subscribers. The order is directed against all the common-carrier railroads in the United States, including both subscribers and nonsubscribers. The requirement that 'similar reclaim allowances shall be made to nonsubscribers as to subscribers' can only mean that nonsubscribers and subscribers are to be treated alike. . . . The order in any event does not prevent appellants and the other subscribers from modifying the per diem rules so as to require nonsubscribers to pay such allowances to the subscribers. Since appellants can themselves cure the defect which they allege in the

Commission's order, they are not in a position to challenge the order on this ground."

This virtually amounts to a construction by the Commission of its own order in accordance with the view we have expressed. The suggestion that in so far as the short line railroads can bring themselves within paragraph (5) of the order, this equality of treatment will fail, will be found to disappear when we come to deal with that paragraph.

Second—Paragraph (3). This paragraph relieves the short line railroads of the class defined, i. e., those returning cars of other carriers to the road from which received, from the burden of reporting per diem accruals to numerous car owners, and in effect requires such reports to be made only to their immediate connecting carriers. The objection urged to the paragraph is that it requires the connecting carrier to expend its money in keeping accounts and making reports and payments in respect of operating expenses of the short line carrier, and thus amounts to confiscation in the guise of regulation.

The classification which results in exempting railroads less than 100 miles in length from the necessity of making reports of per diem accruals separately to each of the numerous car owners throughout the country is attacked as arbitrary and unreasonable. We think it is neither. It is of a kind frequently made and frequently upheld by this court. *St. Louis & I. M. Ry. Co.* v. *Arkansas,* 240 U. S. 518, 520; *Wilson* v. *New,* 243 U. S. 332, 354, and authorities cited. Moreover, the car equipment of the country is substantially in the hands of the trunk lines, that owned by the short lines being almost a negligible proportion of the whole. And this fact affords some additional ground for the classification. Indeed, the classification was recognized as legitimate by appellants themselves, when they subscribed to the provision that such short lines should be permitted to become associate mem-

bers only of the American Railway Association, but without voting rights.

Under the per diem agreement subscribers must report to each car owner as to cars used, and pay the per diem charges to such owner; but in the case of nonsubscribers—who are not bound by the rules—the reports and payments are made to the immediate connecting subscriber carrier. The effect of paragraph (3) is to extend this privilege to the subscribing short line carriers as well. In other words, all short line railroads, whether subscribers or not, are put in a separate class and relieved from the burden of keeping account of a multitude of separate per diem charges, and reporting them separately to the various trunk lines.

Each of the trunk lines already maintains a large accounting force, and is obliged to keep account of cars received from other lines, including those turned over to, and returned by, its connecting short lines. It fairly may be said that it will entail relatively little additional service to keep the accounts and make the reports, as required by paragraph (3). Each of these trunk lines in turn will be relieved from much of the burden and expense of dealing directly with non-connecting short lines; and it is not improbable that the benefits received will counterbalance the burdens, or at least go very far in that direction. On the whole, we are unable to conclude that this part of the order imposes upon the connecting lines anything of substance that as a matter of law constitutes a part of the work of operating the short lines, or that the required change adds anything to the operating expenses of such connecting carriers. On the other hand, as the record clearly shows, the keeping of these additional accounts, and the making of the vast number of reports to the numerous car owners throughout the country which would be required in the absence of paragraph (3), would put upon these short lines an excessive and disproportionate burden. It was estimated by one witness, and not

contradicted, that if the short lines were required to keep their accounts as they are kept by the trunk lines, it would impose an unnecessary burden upon the traffic of the country of approximately $500,000 per month.

The power to "establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad," conferred by subdivision (14) of section 1, hereinbefore quoted, undoubtedly includes the power to make reasonable rules prescribing forms and methods of accounting, reporting and distributing payments in respect of such service. The Commission is here dealing with the railroad system of the country as a whole. A multitude of interrelated interests is concerned. The trunk lines, as owners, furnish in the main all the car equipment used by the short lines. These are legitimate facts to be considered by the Commission in exercising its authority in respect of accounts; and these facts, and other facts and circumstances, justly may require that more of the clerical work shall be done by one of these classes than by the other.

The Commission is a body of trained and experienced experts, and in respect of such matters a reasonable degree of latitude must be allowed for the exercise of its judgment. The mere fact that, in application, mathematical accuracy in the adjustment of the burden may not be attained is not enough to put upon the Commission's order the stamp of invalidity. Primarily, the question is an administrative one, and unless the limits of reasonable regulation be transcended, the courts may not interfere. The Commission concluded that the circumstances afforded warrant for requiring that class of railroads which generally owned the cars, which was best equipped to perform the clerical work, and which would receive the most in the way of compensating and offsetting benefits, to perform a larger proportion of the service of keeping and rendering the accounts. In doing so, we are

of opinion that it did not transcend the limits of reasonable regulation, and that the claim of confiscation is not sustained.

Third—Paragraph (5). This paragraph stands upon a different footing from those just considered. We do not find it necessary to review the various arguments made for and against the power of the Commission to make this part of the order. Section 1 (14), *supra,* authorizes the Commission to fix the compensation to be paid for the use of cars, etc., not owned by the carrier using them. This the Commission undertook to do, and expressly found that, whether subscribers or not, all common carrier railroads were "entitled to receive reasonable compensation in the form of a daily rental for the use of their general-service freight cars when on foreign lines, and that the present per diem charge of $1 per car-day" was such reasonable compensation. In so doing it followed the direction of the statute. It then proceeded, however, by an order to grant to the short line railroads two days free time for interchanged loaded cars, and denied compensation altogether in the case of cars received for return loading with coal from coal mines customarily dependent upon connecting carriers for car supply.

That exceptions of this character could be made if applied to all railroads, may be conceded, but that is not what was done. Here the Commission, having found that *all* railroads were entitled to receive a definitely fixed sum per day for every car used by a foreign line, entered an order relieving some of the railroads, in whole or in part, from such payments. Plainly this order is in flat opposition to the finding and cannot be permitted to stand.

Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title. *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418, 458; *Reagan* v. *Farmers' Loan*

& Trust Co., 154 U. S. 362, 410, 412; *Chicago, M. & St. P. R. Co.* v. *Wisconsin,* 238 U. S. 491, 498–499. The use of railroad property is subject to public regulation, but a regulation which is so arbitrary and unreasonable as to become an infringement upon the right of ownership constitutes a violation of the due process of law clause of the Fifth Amendment. *Atlantic Coast Line* v. *No. Carolina Corporation Comm.,* 206 U. S. 1, 20. And certainly a regulation permitting the free use of property in the face of an express finding that the owner is entitled to compensation for such use cannot be regarded otherwise than as arbitrary and unreasonable.

If, as claimed, the earnings of the short lines are insufficient to enable them to make full payment of car hire costs, the Commission may be able to afford a remedy by increasing the rates, or by a readjustment of the division of joint rates. *New England Divisions Case,* 261 U. S. 184; *Beaumont, S. L. & W. Ry* v. *United States,* 282 U. S. 74. It cannot be done by confiscating for their benefit the use of cars of other railroads. Short lines, as well as trunk lines, participating in joint rates, must furnish their share of the equipment. If they do not own cars, they must rent them. The Commission itself has pointed out very clearly the basis for this requirement. Virginia Blue Ridge Ry. *v.* Southern Ry Co., 96 I. C. C. 591, 593:

"The per diem that complainant pays for car hire is merely equivalent to interest, depreciation, insurance, taxes, and other car-ownership costs which it would have to bear if it owned the cars used in interline traffic. The car owner incurs these costs in the first instance, and is reimbursed by complainant [a short line] through the per diem or rental charges, thereby relieving the latter of the necessity of investing in equipment for this service."

The case does not present a question of apportionment of car hire costs. The Commission undertook to deter-

mine, and did determine, what was a reasonable compensation for the use of cars, and definitely fixed that compensation on a per diem basis. It then, by its order, denied such reasonable compensation in certain cases. This is in no proper sense an apportionment of expense, but a plain giving of the free use of property for which, the Commission had concluded, the owner should be paid. We must deal with cases as they are made, not as they might have been made. To do otherwise, if we had the power, would be only to invite confusion. What the Commission would do in a proper case of apportionment, involving many elements for consideration not now before us, we are not advised; and it has made no findings suitable to a determination of that matter.

We find no reason for applying a different rule in respect of the clause of paragraph (5) which altogether relieves the short lines from the payment of car hire on coal cars received for return loading with coal from mines customarily dependent upon connecting carriers for car supply. This is a blanket order in opposition to the express finding of the Commission quite as much as that part of the paragraph which grants to the short lines two days free use of cars. The general rule in respect of the obligation of a railroad, whether a short line or a trunk line, to furnish equipment for the transportation of freight tendered to it, applies to the case of coal loaded at coal mines as well as to other traffic. Demurrage on Coal and Coke, 102 I C. C. 554, 557, 558, citing Brick from Michigan City, Ind., 42 I. C. C. 509, 511, where the general rule is stated.

In the first named case the Tennessee Railroad, a short line, undertook, by a proposed tariff, to make a demurrage charge against cars held at coal mines, as an offset to per diem charges paid by it to the Southern Railway. The Commission, however, regarding the tariff as an attempt

to transfer the railroad's car-hire expense to the coal operators, required the tariff to be canceled, saying:

"Although respondent states that the proposed schedule was published for the sole purpose of recovering its car-hire cost on cars under load, it would be applicable to all cars. In other words, it would have the effect of largely offsetting respondent's cost of car hire by assessing shippers an amount equal thereto beyond a certain time. Respondent is under obligation to furnish the equipment necessary for the transportation of traffic tendered to it, and if it does not possess such equipment the charges paid for the revenue [evidently meaning rental] thereof can not be considered as an item of expense which is not included in the rate."

There is nothing in § 1 (12) of the Interstate Commerce Act, as amended, which affords a basis for this part of paragraph (5), although the terms of the order might suggest that this subdivision was relied upon. Section 1 (12) has relation only to the subject of car distribution, that is, to a "just and reasonable distribution of cars" by each railroad "for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply." See *Assigned Car Cases*, 274 U. S. 564, 577. The object of this provision was to insure a proportional distribution of all available coal cars so as to afford a fair and equal opportunity to each mine to enjoy their use on the basis of its rating. *Baltimore & O. R. Co.* v. *Lambert Run Coal Co.*, 267 Fed. 776, 779.* It has nothing to do with the question of compensation for the use of cars by non-owning railroads. That subject, as already appears, is covered by § 1 (14).

* This case came to this court by appeal from the Circuit Court of Appeals and was remanded with a direction to dismiss for want of jurisdiction and without prejudice. *Lambert Co.* v. *Baltimore & O. R. Co.*, 258 U. S. 377.

The part of the order [paragraph (5)] now under consideration creates an exemption in favor of all short lines and against all connecting carriers, irrespective of varying circumstances, in the face of a general finding that *all* common carrier railroads are entitled to compensation in the form of daily rental for the use of cars *when on foreign lines*. The language of the finding could not be more comprehensive. If followed, it necessarily compels payment of rental by the lines exempted as well as all other lines. It affords no justification for any exemption. We are not called upon to consider the evidence, since the Commission, upon the evidence, has made its findings. The vice of the situation is that the order of the Commission, that is to say, its judgment, does not conform to its conclusions upon the facts. In disapproving this paragraph, we do not mean, for the present, to go beyond the precise case presented, or to pass upon the question of the authority of the Commission to make fair apportionment of car-hire costs, or, in special cases, to make adjustments and afford a proper measure of relief in the matter of payment of charges for the use of cars. Compare Ohio Farm Bureau Federation *v.* Ahnapee & W. Ry. Co., 89 I. C. C. 489, 499; Kanawha Black Band Coal Co. *v.* Chesapeake & O. Ry. Co., 142 I. C. C. 433, 442.

It follows that the court below should have set aside paragraph (5) of the order.

Decree reversed.

MR. JUSTICE STONE, dissenting.

Acting under authority conferred by the Esch Car Service Act [§ 1 (14) of the Interstate Commerce Act, as amended by Transportation Act, 1920, February 28, 1920, c. 91, § 402, 41 Stat. 456, 476], the Interstate Commerce Commission, after a nation-wide investigation, has prescribed certain rules which affect compensation for the

use and detention of freight cars on lines of common carriers other than their owners. The principal subject of controversy here is the validity of so much of the Commission's order as relates to the apportionment of car-hire charges upon cars interchanged between a designated class of short line carriers and their trunk line connections. This part of the order, as well as that which the Court has sustained, should, I think, be held valid.

At the outset it should be pointed out that the part of the order held void does not deny to car owners the right to compensation for the first two days that a car is on the rails of a short line of the designated class. Regardless of the ownership of the car the order determines only which of the connecting carriers shall bear the burden of that compensation. The connecting trunk line may or may not own the car, but in either case the purpose and effect of the order is to determine the fair share of the *per diem* car-hire expense to be borne, respectively, by a trunk line and its connecting short line of the particular class, participating in a through route.

An adequate appreciation of the nature of the problem with which the Commission was required to deal by § 1 (14) involves an examination of the history and present day practices of car interchange between connecting carriers in the United States. In their early history the railroads in this country did not permit freight cars which they owned to leave their rails, and freight to be transported over more than one line was unloaded and reloaded at junction points.[1] With the development of more efficient transportation methods after the Civil War, this uneconomical and time-wasting practice was gradually abandoned. In 1886, the adoption by the southern rail-

[1] For discussions of early practices of car supply, see Matter of Car Shortage and Other Insufficient Transportation Facilities, 12 I. C. C. 561, 573; Matter of Private Cars, 50 I. C. C. 652, 656, 657; Henry S. Haines, Efficient Railroad Operation (1919) 335.

roads of standard gauge track removed the last physical barrier to free interchange of equipment throughout the nation; and in 1911 a rule which the railroads had long before come to recognize as a necessity of commerce was declared to be an obligation of law, when the Interstate Commerce Commission, under the amended Interstate Commerce Act, decided that carriers could not refuse to permit their freight cars to pass onto rails of connecting carriers. Missouri & Illinois Coal Co. *v.* Illinois Central R. Co., 22 I. C. C. 39; see *St. Louis Southwestern Ry Co.* v. *Arkansas,* 217 U. S. 136, 145, 146, 148. The obligation has never since been doubted, and the power to regulate it is exclusively vested in the Commission. *Assigned Car Cases,* 274 U. S. 564; *United States* v. *New River Co.,* 265 U. S. 533.

This freedom of car movement has been attained without impairment of the basic obligation of rail carriers to furnish equipment for carriage, either by owning it or hiring it, and, if by hiring it, to pay proper compensation.[2] Until comparatively recent years, the standard of compensation has been fixed by the railroads themselves, by custom or agreement. Before 1902 the prevailing and customary basis was mileage; but this proved unsatisfactory. The then existing mileage rates are said to have been inadequately compensatory; the car owner had no means of verifying mileage on foreign lines; and no incentive was furnished for the prompt handling of cars. The first

[2] On the obligation of a common carrier (as respects other railroads) to furnish its own equipment or pay reasonable compensation for foreign cars, see *Louisville & Nashville R. Co.* v. *Central Stock Yards Co.,* 212 U. S. 132, and also Virginia Blue Ridge Ry. *v.* Southern Ry. Co., 96 I. C. C. 591, 593; Western Pine Lumber Co. *v.* Director General, 96 I. C. C. 625, 628; Morehead & North Fork R. Co. *v.* Chesapeake & Ohio Ry. Co., 100 I. C. C. 45, 48; Jefferson & Northwestern Ry. Co. *v.* Missouri, K. & T. Ry. Co., 102 I. C. C. 72, 75.

difficulty might, with some exceptions, have been removed by increasing the rates, but the second and third were inherent in the system, and the last involved, not the adequacy of the compensation for the use of cars, but the failure of the rate to exercise any controlling influence on car movements.

To meet these objections, the American Railway Association, in 1902, after many years of discussion and investigation, formulated a radically different method of car-hire settlement, a method which, as steadily elaborated and modified in the light of experience, has remained in force ever since. The basis of this plan is the requirement that every carrier using a car belonging to another shall pay to the owner a flat sum (fixed at one dollar since 1920) *per diem,* the liability for the following twenty-four hours to attach to the carrier holding the car at midnight.[3] Other provisions pertinent to this controversy are the agreement exacted of each member road to report daily to car owners all cars currently interchanged,[4] and the exemption granted to switching railroads, under certain circumstances, from the otherwise unvarying liability of the carrier in possession of a foreign car to pay *per diem* charges on it.[5] Under this exemption, denominated " switching reclaim," a carrier using cars in so-called " terminal switching service," pays *per diem* costs in due course on each car, but is entitled to recover from the connecting line haul carrier an amount per car based on the average detention period of cars in such service.

The American Railway Association is, and has been since its inception, a purely voluntary organization. No carrier is bound to subscribe to its Code of Per Diem

[3] Per Diem Rules, 1, 2, 9a.
[4] Per Diem Rules, 9a.
[5] Per Diem Rules, 5.

Rules; and no carrier operating less than one hundred miles of road is eligible to voting membership, although it may become an associate member, subject to the reciprocal rights and obligations of the Code, which the Association, by its voting members, prescribes. Subscription to the Per Diem Code entails substantial burdens, some of them peculiarly onerous for short lines.[6]

Of the 1731 steam railroads in the United States, 384 do not subscribe to the agreement, and of these nearly all are short-line, Class III roads, that is, roads having annual operating revenues of less than $100,000. Many of them are less than ten miles in length. Several important rules of the Association deal with relations between subscribers and this group of non-assenting lines. It is the frankly admitted aim of the Association to coerce the non-assenting lines into joining it, by subjecting them to treatment substantially less favorable than that accorded to subscribers. The cars of nonsubscribers are not paid for on a *per diem,* but on a mileage basis, concededly less remunerative. They are denied the privilege, granted to Association members, of the switching reclaim. In addition, since 1922, trunk line members have been expressly prohibited from making car-hire arrangements with their nonsubscribing connections on any other than a strict *per diem* basis—arrangements to which the short lines assert their special situation entitles them, and which many trunk line members of the Association have granted in spite of the Code; others have expressed their willingness to grant it, were it not for the prohibition of the Code. This coercive use of the regulations, together with the asserted unfair-

[6] Annual dues of associate members are $40. They are required to abide by all the rules of the Association, which include the maintenance of daily accounting reports with car owners throughout the country. They must become members of the Bureau for the Safe Transportation of Explosives, and parties to the Interchange Agreement, and must put in force the National Car Demurrage Rules.

ness of the *per diem* basis generally to short lines, forms the background of the Commission's order now under review.

By the Esch Car Service Act, the Interstate Commerce Commission was given sweeping control over rules of car interchange and car-hire settlement,[7] and the authority conferred by it in respect to compensation for use of cars has been exercised by the Commission in numerous instances upon complaint by individual carriers.[8] With such complaints pending before it, together with a petition by the American Short Line Railroad Association, the Commission, on January 4, 1926, instituted a general investigation upon its own motion, reopening many of the decided cases and consolidating pending ones with the general inquiry. An extended record was made up, embracing some 5000 pages of testimony and more than 500 exhibits. The order ultimately issued by the Commission, embodied in five numbered paragraphs, was addressed to all common carriers by railroad in the United States. Rules for Car-Hire Settlement, 160 I. C. C. 369, 165 I. C. C. 495.

In this order the Commission made no effort to replace in their entirety the *per diem* rules of the American Railway Association. Instead it removed the discrimination complained of by bringing all common carriers by railroad, subscribers or nonsubscribers, within those rules, as modified, to meet certain of the objections growing out of the special circumstances of the short lines. Para-

[7] Section 1 (14) of this Act provides: "The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices, with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices."

[8] Cases cited in notes 15 and 16, *infra*.

graph (1) of the order entitles nonsubscribers to *per diem* payment for the use of their cars upon the same terms as the Association prescribes for cars of its members. Paragraph (4) requires all carriers, whether members of the Association or not, whose lines are more than 100 miles long or who receive cars from one subscriber and deliver them to another, to make car-hire settlements direct with car owners in accordance with the *per diem* rules. These provisions are not attacked by any of the appellant railroads. Paragraph (2) entitles nonsubscribers to switching reclaim, on account of cars handled in terminal switching service, upon the same terms as hitherto received by subscribers. The practical effect of this paragraph is to compel allowance of the switching reclaim to nonsubscribing short lines, since the existing practice of allowing the reclaim to subscribers is generally approved and regarded as necessary, as the revenue from switching services is insufficient to meet the car-hire cost of the carriers performing them. Paragraph (3) attaches short line railroads which return cars to the road from which received, to their connecting carriers for purposes of car-hire accounting and settlement. Paragraph (5) requires the same class of short line roads to pay *per diem* to their connecting carriers, but with the deduction of two days' free time per loaded freight car, and with the proviso that in the case of short line roads, " no car-hire need be paid on cars received for return loading with coal from coal mines which are customarily dependent upon connecting carriers for car supply."

This Court now holds that paragraphs (2) and (3) are valid, but, without considering the evidence, that paragraph (5) is void, being on its face so arbitrary and unreasonable as to deprive the appellants of property without due process of law. In support of this conclusion, it is said that, the Commission having found generally " that the present *per diem* charge of $1 per car-day reasonably

compensates car owners for average car ownership and maintenance costs," its order granting to the short lines the two days' allowance is in such flat opposition to this finding that the order cannot be allowed to stand as an exception to the general rule.

But there is no such opposition. The Commission was concerned and dealt with far more important questions than the determination of the reasonable *per diem* rental of a freight car. Its declared purpose in instituting the proceeding was to investigate the rules of car-hire settlements and to make "such order . . . in the premises as might be warranted by the record." The reasonableness of the two days' free time allowance and that of the switching reclaim were the chief subjects of its inquiry. The one which the Court has disapproved is no more an exception to the general finding than the other which it approves. Both were expressly found reasonable by the Commission and both are consistent with its adoption of the *per diem* as a standard for measuring the rental value of cars for purposes of car-hire settlements. The real issue presented upon the evidence, the findings and the order of the Commission is not whether the *per diem* is a fair method of compensating the car owner—all agree that it is—but whether it is a fair method of apportioning the burden of car-hire necessarily incident to a through route; not whether compensation should be paid, but who shall pay it. Upon the record, the Commission's findings and order cannot justly be characterized as declaring in the same breath that the two days' free time allowance is both reasonable and unreasonable. See *United States* v. *Wells*, 283 U. S. 102, 111, 120.

The Commission's investigation embraced all the elements which affect the use of the *per diem* as an instrument of regulation of the movement of interchanged cars and as a means of apportioning car-hire costs between trunk line carriers and connecting short line carriers of

the designated class participating in the joint haul. The findings of the Commission are based on the investigation which it made and support its order. For the following reasons, the fifth paragraph of the order is not open to the objections urged against it.

First. The very language of the Esch Car Service Act, authorizing the Commission to establish "rules, regulations and practices with respect to car service . . . including the compensation to be paid," treats car-hire as one form of regulation of the service. It is but a recognition of the historic fact that the car-hire charge may serve to penalize the unnecessary detention of cars and thus to regulate car movement, one of the considerations which led to the substitution of the *per diem* charge for the mileage system of car-hire payments.[9] In this respect it is analogous to demurrage, in which the penalty element of the money payment imposed is emphasized over the element of compensation.[10] It is for this reason, among

[9] As bearing on the primary purpose and function of the *per diem* system see the statement in Matter of Private Cars, 50 I. C. C. 652, 661, that during the years immediately following 1902 the mileage rates were actually more remunerative than *per diem,* and the suggestion that this was a main cause of many railroads forming subsidiary corporations to own and lease private cars on a mileage basis. See also the early statement that the compensatory aspect of the mileage system was a minor one, since it was to be expected that, with a proper balance of car ownership, debits and credits for car hire would equalize themselves. Burton Stock Car Co. *v.* Chicago, Burlington & Quincy R. Co., 1 I. C. C. 132, 140. In later cases the Commission has adverted to the punitive aspect of *per diem,* New England Divisions, 62 I. C. C. 513, 537, 538, and has stressed also the element of reciprocity as distinguishing the situation of the line-haul carriers and that of many of the short lines. Virginia Blue Ridge Ry. *v.* Southern Ry. Co., 96 I. C. C. 591, 593; Lake Erie & Fort Wayne R. Co., 78 I. C. C. 475, 489; Marcellus & Otisco Co. *v.* New York Central R. Co., 104 I. C. C. 389, 392.

[10] For discussions of the nature and purpose of demurrage, important for its analogy to *per diem,* see *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.,* 271 U. S. 259, aff'g.

others, that the Commission has generally refused to consider car-hire costs in fixing divisions,[11] and in this case the Commission found that divisions had not customarily been adjusted with relation to such costs.

That the *per diem* charge in its aspect as a penalty was an important element in the determination of the Commission, appears from its opinion and order. As the two days' free time allowance applies only to those cars which the short line receives from and returns to the line carrier, it is in practical effect limited to those cars with respect to which the short line renders terminal and originating services. Under the national demurrage rules, the terminal lines are compelled to allow to shippers two days' free time for loading and unloading before demurrage attaches. There is nothing in the Fifth Amendment to preclude the Commission, in apportioning car-hire costs, from giving consideration to the operation of the *per diem* charge as a penalty for the detention of cars and from making some allowance for the fact that the terminal carrier is in turn required to allow to shippers time free of demurrage charges. The two days which it did allow are by no means an exact offset of the free time allowed

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2 F. (2d) 291; *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281; *Pennsylvania R. Co.* v. *Kittanning Iron & Steel Mfg. Co.*, 253 U. S. 319, 323. See also Investigation and Suspension of Advances in Demurrage Charges, 25 I. C. C. 314, 315.

[11] The Commission in its most extended discussion of the point said that car-hire costs never had been, and should not be, an element in the fixing of divisions. New England Divisions, 62 I. C. C. 513, 538. Other cases in which the Commission has discussed the relation of *per diem* to fair divisions are Chaffee R. Co. *v.* Western Md. Ry. Co., 156 I. C. C. 471; Western Md. Ry. Co. *v.* Maryland & Pa. R. Co., 167 I. C. C. 57, 63. In some exceptional circumstances, the Commission has weighed car-rental expenses when determining divisions of the freight rate. See Chaffee R. Co. *v.* Western Md. Ry. Co., 102 I. C. C. 53, 59; Middle Creek R. Co. *v.* Baltimore & Ohio R. Co., 168 I. C. C. 110, 117 (the fact that no car-hire was charged a short line was considered in fixing divisions).

under the demurrage rules.[12] The amount of time to be allowed was a matter for the judgment of the Commission, influenced by this, together with all other relevant considerations. The Commission gave some, but not controlling, weight to the fact that the short lines, when thus serving as terminals, would be unduly penalized if no allowance were made to offset the time allowed to shippers. There was ample evidence supporting its conclusion, and its order no more deprives the carrier of its property than would a corresponding determination that time free of demurrage should be allowed to the shipper, and that it should be two rather than one or three days.

Second. In any aspect, the Commission's order cannot be viewed as requiring trunk lines to furnish their short line connections with free cars. As stated, the part of the order with which we are now concerned deals with the problem of just apportionment, between certain connecting carriers, of the car-hire cost of a joint haul. The Per Diem Rules of the American Railway Association make that apportionment according to the length of time the car is upon the rails of the respective carriers. The Commission found, and the evidence supports its finding, that such an apportionment is in many respects unfair to short lines, engaged in time-consuming terminal and originating services. The Commission's modification of the Railway Association's formula is based upon the necessary detention of cars in the performance of such services by the short line for the benefit of both carriers. The assumption is inadmissible that in so far as trunk lines are thus re-

[12] The terminal carrier may be required to allow four days' demurrage for a single car while on its line, two days for unloading and two for loading. The demurrage rules do not count Sundays or holidays, nor, for certain commodities, days of stormy weather. On the other hand, the short line terminal carrier may benefit if the shipper does not use his two days, although under the average demurrage agreement the unused portion is likely to be inconsiderable.

quired to pay *per diem* while a car is on a connecting carrier's rails, they are necessarily compelled to assume an operating cost of the connection. It presupposes the answer to the very question to be decided—whether the *per diem* without allowances is a just basis for apportioning car-hire costs in the case of the short lines. The fallacy of the similar assumption, once commonly made, that mileage should be the sole test of the reasonableness of divisions of joint rates, was repeatedly pointed out both by the Commission and by this Court, before Congress specifically enumerated other elements for consideration.[13] In both cases, the reduction of the broad statutory injunction of reasonableness to a single one of its constituent elements, disregarding all others, produces a result with a false appearance of reasonableness, which, when gauged by the standard which the regulatory statute sets up, is unreasonable and unjust.

Far from representing any universal standard of natural justice for the fair apportionment of car-hire costs, the *per diem* system is of recent origin, and adopted with purposes primarily in view quite foreign to the simple end of accurate compensation.[14] The completely disparate measure of mileage prevailed until 1902. Mileage is still the basis upon which owners of private railroad cars are compensated,[15] and until the orders issued by the

[13] See, e. g., *O'Keefe* v. *United States*, 240 U. S. 294, 303, 304; Star Grain & Lumber Co. *v.* Atchison, T. & S. F. Ry. Co., 14 I. C. C. 364, 370; Stacy & Sons *v.* Oregon Short Line R. Co., 20 I. C. C. 136, 138; Divisions of Joint Rates and Fares of Missouri & North Arkansas R. Co., 68 I. C. C. 47, 59. Compare Transportation Act, 1920, February 28, 1920, c. 91, § 418, 41 Stat. 456, 486; *New England Divisions Case*, 261 U. S. 184, 195; New England Divisions, 126 I. C. C. 579, 667.

[14] See note 9, *supra;* Haines, *loc. cit. supra,* note 1; L. F. Loree, Railroad Freight Transportation (2d ed. 1929), pp. 383, 390.

[15] Under § 1 (14), the Commission has several times prescribed reasonable rates of compensation on a mileage basis for private cars. In Matter of Private Cars, 50 I. C. C. 652, 684–686, it considered

Commission in the present controversy, it was the measure of payment stipulated by members of the American Railway Association for cars of non-members. The *per diem* is admittedly but a rule of thumb, though the best which experience has devised to meet all the complex requirements growing out of the average car-hire situation. In a large number of instances the Interstate Commerce Commission, to secure a more just apportionment, has ordered that car-hire costs of certain short-line industrial common carriers be computed with a varying number of days of "free time"; [16] and in a still larger num-

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the *per diem* basis at length and concluded that for private cars the mileage system was preferable. See also Armour & Co. *v.* El Paso & Southwestern Co., 52 I. C. C. 240; Paragon Refining Co. *v.* Alton & Southern R. Co., 118 I. C. C. 166; Assigned Cars for Bituminous Coal Mines, 80 I. C. C. 520, 556; *Assigned Car Cases,* 274 U. S. 564, 575.

[16] The Commission has many times, apparently acting under § 1 (14), prescribed terms of car compensation for industrial common carriers. Compare the approval, prior to 1917, of the placing of short lines on a demurrage basis, in Drummond & S. W. Ry. Co. *v.* Chicago, etc. Ry. Co., 21 I. C. C. 567. These cases took their starting point, before the passage of the Esch Car Service Act, in the Industrial Railways Case, 29 I. C. C. 212, 231–233, in which the Commission found that the switching reclaims under the *per diem* system were a fertile source of rebates and exemptions from demurrage for shippers who maintained independently incorporated railroads which were in substance plant facilities. Following the announcement in the *Tap Line Cases,* 234 U. S. 1, of a rule giving many of the roads involved in the Industrial Railways Case the status of common carriers, the Commission in a supplemental report, modified its original findings as to such carriers, and permitted them to reëstablish *per diem* and reclaims. 32 I. C. C. 129, 133. See also Second Industrial Railways Case, 34 I. C. C. 596, 600. Subsequently, however, in a long series of cases the *per diem* system as applied to industrially owned common carriers was condemned, and different methods of car hire compensation prescribed. In the Northampton & Bath R. Co. Case, 41 I. C. C. 68, 74, the effect of the arrangement prescribed was to give the carrier two days' free time counterbalancing the two days accorded shippers under the demurrage rules, plus one day in addition. In the Owasco River Ry. Case, 53 I. C. C. 104, 113, a straight *per diem* system was ordered;

ber of instances trunk lines themselves have voluntarily

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but this basis of settlement was disapproved soon after in Birmingham Southern R. Co. *v.* Director General, 61 I. C. C. 551. In this case an industrial common carrier specifically besought the Commission to fix reasonable charges under § 1 (14), asking for a *per diem* system with reclaims for all cars, whether handled under switching rates or under joint rates with divisions. The Commission denied this relief, and condemned reclaims, but prescribed a demurrage system, giving the short line 72 hours free time on cars loaded one way, credits for cars sooner returned to be averaged against debits, and the short line to be free to execute average demurrage agreements with shippers. The Birmingham Southern was not eligible for switching reclaims under the A. R. A. rules in respect to traffic handled under joint rates. Its average detention of foreign cars was shown to be 3.2 days.

The so-called Birmingham Southern Rules were subsequently prescribed for other industrial common carriers in National Tube Co. *v.* Pittsburgh, C., C. & St. L. R. Co., 61 I. C. C. 590; Illinois Northern Ry., 61 I. C. C. 629; Pullman Railroad Co., 61 I. C. C. 637; Benwood & Wheeling Connecting Ry. Co. *v.* Pittsburgh, C., C. & St. L. R. Co., 62 I. C. C. 357; Tionesta Valley Ry. Co., 62 I. C. C. 473; Genesee & Wyoming R. Co., 62 I. C. C. 680; Lake Erie & Fort Wayne R. Co., 63 I. C. C. 122 (determining questions left open in 58 I. C. C. 558, 561, 666, 671, 677, 680); Moshassuck Valley R. Co. *v.* N. Y., N. H. & H. R. R. Co., 69 I. C. C. 368. See also Mount Hope Mineral R. Co. *v.* Central R. Co. of N. J., 74 I. C. C. 195, 199, 200. The question was reëxamined with respect to several of the roads involved in the preceding cases in Lake Erie & Fort Wayne R. Co., 78 I. C. C. 475, and the Birmingham Southern rules somewhat modified. In this case the notion that the object was to relieve the industrial common carrier altogether of car hire was specifically repudiated. *Ibid.* at 489. The Birmingham Southern Rules were again prescribed in Valley & Siletz R. Co. *v.* Southern Pac. Co., 80 I. C. C. 724; Hanging Rock Iron Co. *v.* Norfolk & Western Ry. Co., 87 I. C. C. 373; Lime Rock R. Co. *v.* Maine Central R. Co., 102 I. C. C. 48.

For other examples of the Commission's approval of the relief of short lines from strict *per diem*, see Mount Hood R. Co. *v.* Director General, 60 I. C. C. 116, 117; New York Dock Ry. *v.* Baltimore & Ohio R. Co., 89 I. C. C. 695, 696, 702, 706. Compare Jones & Laughlin Steel Co. *v.* Director General, 60 I. C. C. 325, 331.

With Virginia Blue Ridge Ry. *v.* Southern Ry. Co., 96 I. C. C. 591, there began a series of cases denying non-industrially owned

instituted such arrangements.[17] The device of "switching reclaim" itself, elsewhere concerned in this case, pointedly exemplifies the admitted inapplicability of the *per diem* system to certain special operating conditions. In this instance carriers engaged in a time-consuming switching service are in effect relieved altogether of car-hire costs; and the Court has sustained this departure by the Commission from the single standard of time of detention. Perhaps the most striking example of all is the operation of the rule imposing upon the carrier in possession of a car at midnight liability for *per diem* for the following twenty-four hours. Under this rule an intermediate carrier, incurring no delays for loading or unloading, may receive a car shortly after midnight, haul

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short lines relief from the straight *per diem* rules of the A. R. A. The series was continued in Western Pine Lumber Co. *v.* Director General, 96 I. C. C. 625; Morehead & North Fork R. Co. *v.* Chesapeake & Ohio Ry. Co., 100 I. C. C. 45; Chaffee R. Co. *v.* Western Md. Ry. Co., 102 I. C. C. 53; and Jefferson & Northwestern Ry. Co. *v.* Missouri, K. & T. Ry. Co., 102 I. C C. 72; and concluded in Marcellus & Otisco Co. *v.* New York Central R. Co., 104 I. C. C. 389. See also Superior & S. E. Ry. Co. *v.* Director General, 63 I. C. C. 431; Carnegie Steel Co. *v.* Director General, 80 I. C. C. 269, 270, 274.

This last group of cases states that the application of the Birmingham Southern Rules is to be restricted to industrial common carriers, and that their purpose is to prevent undue favoritism to the proprietary industries through the payment of switching reclaims. Many of the roads in question, however, were operating at least in part under joint rates and divisions, and thus were not eligible for reclaims; and the allowance to them of a modified demurrage basis was much more favorable than *per diem*. In the present investigation the Commission abandoned its distinction between industrial and non-industrial common carriers, revoked its determination in cases of both the Birmingham Southern and the Virginia Blue Ridge types, and substituted the provisions of paragraph (5) of its order.

[17] The following table, taken from the Commission's Report (Record, p. 39), illustrates the extent to which non-subscribing railroads out-

it several hundred miles, and by delivering it to a third road before the following midnight escape car-hire altogether. The seeming unfairness, when measured in terms of the period of detention alone, disappears when that element is examined in comparison with the compensating effects of the reciprocal operation of the rule between connecting carriers and the difficulties and expense of accounting for less than twenty-four hour periods. Freedom from the *per diem*, when all relevant considerations are taken into account, is therefore not necessarily a gratuity.

side of Chicago, have settled on some basis other than *per diem* with the trunk lines with which they exchange traffic:

Trunk line	Nonsubscriber connections		
	Total	Which pay straight per diem	Which settle on some other basis
Burlington	18	2	16
Chesapeake & Ohio	10	5	5
Great Northern	21	0	21
L. & N	10	2	8
Missouri Pacific	20	3	17
New Haven	8	5	3
Northwestern	9	6	3
Pennsylvania	55	6	49
Soo Line	12	4	8
Southern	27	20	7
Southern Pacific (Pacific Lines)	46	24	22
Southern Pacific (Texas and Louisiana)	14	10	4
St. L. S. W.	7	3	4
Union Pacific	15	6	9
B. & O.[a]			

[a] Exact number not given.

This table includes 67 industrial roads among the nonsubscriber roads and is therefore not a wholly accurate reflection of the relations of other short lines with the trunk line carriers; but even when the industrial roads are eliminated from the table, it is still apparent that the trunk lines disregard the Code with respect to a large proportion of the total nonsubscriber connections. Settlement with industrial roads on other than the *per diem* basis does not violate the Code. But the present order of the Commission, it may be noted, does not distinguish between industrial and other short lines.

In attempting to find a measure of the just apportionment of car-hire costs, the railroads and the Commission have had to face a condition of extraordinary complexity, and not a theory. The Fifth Amendment does not command the impossible. It does not demand that the power and duty of the Commission to make the apportionment be thwarted by requiring it to adopt a standard of unattainable exactness. The validity of what is of necessity a rule of thumb, best adapted to secure a just apportionment, can hardly depend upon a perfect precision in its application; its imperfections in this respect are themselves compensated by an advisedly sought simplicity and convenience of operation.

Under these circumstances, it is not to be supposed that in a special situation such as that of the short lines, the mere departure by the Commission from the *per diem* basis for apportioning car-hire costs between parties to a joint haul, can of itself constitute either a taking of the property of the carrier affected by it, or a taking of it without compensation. The appellants have no vested right not to pay their share of the hire of cars engaged in a joint service to which they are parties, simply because those cars are temporarily off their own rails. They are entitled only to have the Commission make reasonable rules for car-hire apportionment; and the reasonableness of any rule which it may adopt is a question wholly independent of its conformity to the measure of time of detention or to the Per Diem Rules of the American Railway Association. The reasons which support that part of the order allowing switching reclaims, as well as those advanced by the Court to justify that imposing on the trunk lines the burden of accounting for car-hire settlements on cars exchanged with the short lines, do not differ in principle from those which support the two day allowance, and at least should have led to some consideration by the Court of the evidence warranting the latter.

Third. The appellants have not sustained their burden of establishing that the Commission's rule is unreasonable. The principles to which courts ordinarily adhere in reviewing orders of the Commission do not admit of dispute. If the Commission does not refuse to consider relevant evidence, if it does not proceed upon a mistake of law, if it acts upon evidence sufficient to support its findings, the Court will not itself undertake to weigh such evidence, to inquire into the soundness of the reasoning which induced the Commission's conclusions, or to question the wisdom of regulations which it prescribes. *New England Divisions Case,* 261 U. S. 184, 203, 204.

But the position of appellants is that the question is not one of the reasonableness of the Commission's action. They insist that as the *per diem* is an operating expense, like any other which the short line must pay, no evidence can justify an order that it should be paid by any other railroad.[18] Their position ignores the fact that the action of the Commission is no more than the exercise of its undoubted power to apportion the car-hire costs of a joint service by connecting lines, and is based upon a fundamentally erroneous theory of the powers of the Commission to prescribe reasonable rules for car-hire settlement. The *per diem* principle adopted by the American Railway Association in 1902 is not embedded in the Fifth Amendment adopted by this nation in 1791. Departures from it are not forbidden any more than any other action which may be taken under Section 1 (14), if reasonable and supported by adequate evidence. See *Assigned Car Cases, supra,* p. 580.

Nevertheless, appellants have presented no argument either here or below upon the reasonableness of the present departure or upon the issue of the adequacy of the evidence. During the Commission's hearings they

[18] Appellant's brief, p. 95.

steadily opposed the introduction of testimony relating to comparative proportions of car-hire expense and operating costs as between short lines and trunk lines, or to the comparative proportions of car-hire expenses and operating revenues. They offered no such evidence themselves; nor did they attempt to defend the fairness to the short line carriers of the *per diem* basis of apportioning car-hire costs, beyond asserting that a fair apportionment of such costs was necessarily an apportionment *per diem,* an assertion unsupported by any evidence to establish the unfairness of any other of the formulae proposed. The appellants having confined their entire case to this contention, it suffices for this Court to point out their error.

Fourth. Even assuming the question of the sufficiency of the evidence to be open, it is clear that the Commission had ample evidence before it to show that short lines were being compelled to bear a disproportionate burden of car-hire costs. It was undisputed that the *per diem* system was adopted by the larger carriers in disregard of protests of the short lines, and that the *per diem* rules had been modified and elaborated by members of the American Railway Association without giving the short lines a voice in the decisions. The evidence left no possible question that the short lines lost heavily by the replacement of the mileage system, which imposed no car hire whatever for equipment not in motion, by the *per diem* system, which emphasizes the period of detention. Short line witnesses presented a mass of evidence of the time-consuming character of the services performed by short lines in terminal and originating operations, including spotting and weighing cars, issuing through bills of lading, maintaining joint tariffs and computing rates, and most important of all, the allowance to shippers of two

days' free time for loading and unloading, as provided under the National Demurrage Rules.[19]

It was urged that with the two days' allowance to short line feeders, the trunk lines could still derive more net revenue from the haul than would accrue if the shipments originated on their own lines at the points of interchange. There was evidence that operating conditions of short lines, because of the very shortness of the haul and physiographical and other difficulties, are characteristically unfavorable to speed in handling. Many witnesses testified that the measurement of car-hire costs by time of detention imposes a peculiarly heavy burden upon a class of carriers benefited by paragraph (5) of the Commission's order, that is, short lines engaged in returning loaded cars empty, or empty cars loaded, to trunk line connections, because, unlike other lines engaged only in part in such operations, they never have the opportunity of averaging gains and losses, the advantage of a long haul with the disadvantage of a short.[20]

In corroboration of this testimony a great amount of evidence was received, as a result of a questionnaire sent to all short lines desiring to be heard, to show that the ratio of car-hire expenses to total expenses, and of car-hire costs to revenues was substantially higher for the short lines than for their trunk line connections. Upon

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[19] Note 10, *supra*. See Loree, *op. cit. supra*, note 14, p. 322 *et seq.*; also pp. 264, 268 *et seq.*, showing a great preponderance of car time occupied by loading and unloading and terminal and delivery movement. "There is general agreement between (*sic*) the railroad men that the time consumed by an average car on the road is very insignificant in comparison with that in the terminal and intermediate yard and for loading and unloading." Shih-Hsuan King, Railroad Freight Car Service—Control by the Car Service Division of the American Railway Association, p. 67.

[20] See note 14, *supra*.

such a record it cannot be said that the Commission could give no weight to those considerations and could not reasonably conclude that the short lines were entitled to relief; on the contrary, the evidence justified the conclusion that the *per diem* basis enforced or threatened to be enforced against them by the American Railway Association would, in fact, result in transferring to larger roads part of the legitimate revenues of the short lines, and thus would deprive them of their property without any process of law whatever.

Fifth. The Commission's order does not go beyond the relief to which the short lines showed themselves entitled, nor does it prescribe a formula unreasonably burdensome upon their trunk line connections, nor is it based upon an improper classification. Paragraph (5) is strictly limited to cars which are used by short lines in terminal or originating services; and to that extent is accurately framed to meet the only substantial complaint which the short lines made. It is also apparently limited to *carriers* engaged *exclusively* in such service; and appellants suggest that the resulting exclusion of roads performing any amount of intermediate service, however slight, is arbitrary and unreasonable. Whatever the proper construction of the order, and whatever the justice of any complaint by a carrier of the class excluded, it is sufficient answer here that appellants do not themselves belong to that class, *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50, 54, 55, and cannot complain that the Commission's order was not given a wider application.

The order also excludes terminal or originating carriers of more than one hundred miles in length, a class to which appellants do belong. The opinion of the Court concedes that the two-day allowance would be valid if made to all railroads, but insists that an allowance which could be made to all cannot be made to a selected class, the short lines which perform terminal services. The contention is

in effect that the Commission, confronted with evidence of the peculiarly onerous operation of *per diem* charges on terminal and originating movements, had power to relieve it, if at all, only by establishing a system of universal reclaim for terminal and originating car-hire costs, analogous to switching reclaim, and running in favor of all carriers engaged in such service. But the Commission's authority is not restricted either by § 1 (14) or by the Constitution to granting relief to all or none, regardless of their need. There was abundant evidence that the *per diem* system equalized itself for trunk line carriers through the averaging of gains and losses from long and short hauls. There was no evidence that the trunk lines regarded that system as unfair. The limitation of the order to carriers of less than 100 miles engaged exclusively in terminal or originating services, whose special situation rendered the *per diem* peculiarly burdensome to them, falls well within the bounds of reasonable classification marked out by the decisions of this Court. *Wilson* v. *New*, 243 U. S. 332, 354, and cases cited.

Nor was the Commission's action within the class chosen unreasonable. A remedy may, and, in the present case, must be shaped to meet the evil. Instead of abandoning the *per diem* system altogether for the benefit of the comparatively few roads prejudiced by it, the Commission lightened its burden upon them by a rule of thumb no more crude or arbitrary than the principle of *per diem* itself. Had it returned all roads to a mileage basis, or, as the opinion of the Court suggests, allowed the two days to all roads, the short lines would equally have been relieved of the disadvantages of *per diem*, but the trunk lines would have lost its advantages. The remedy given by the Commission retains the benefits of *per diem* and relieves the short lines of the brunt of the burden arising from the two free days accorded shippers, while leaving them to bear the other special costs created

by a time measure for short hauls, and conforms to the urgent suggestions of trunk line witnesses that any practicable rule must be simple of statement and ready of application. It is less extreme in result than the device of switching reclaim, in approval of which this Court and the Commission agree, and which was designed to relieve carriers whose services, many witnesses testified, are distinguishable from those of these short lines only by being performed under a switching rather than a line haul rate. Virtually all the 141 short line witnesses testified to the average detention period of cars on their lines, and many of them to the amount of car-hire which would be incurred under the Commission's proposed rule. The record justifies the opinion that only rarely would the short lines escape the payment of substantial sums, and then only under circumstances as exceptional as those created by the midnight rule already mentioned. The weighing of evidence of this sort is peculiarly a matter to be left to the administrative "tribunal appointed by law and informed by experience." *Illinois Central R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454. No adequate reason has been advanced for rejecting the conclusion which that tribunal drew from the evidence presented to it.

Sixth. The Commission, under the authority conferred by paragraph (14) to establish reasonable rules and practices for car service, "including the compensation to be paid for the use of any . . . car," is empowered to make orders of the character issued in this investigation without instituting a divisions case to review the rate structure and financial condition of every carrier in the country. The contention of appellants to the contrary is based upon grounds so sweeping as either to deny the existence of the power or to render impossible its effective exercise. It is urged that the effect of the Commission's order is

to require a transfer of revenue from appellants and other roads similarly situated to the designated short-line carriers; that rates, divisions, and financial condition of the railroads were not in issue; and that the Commission cannot avoid the rules governing the fixing of divisions by effecting a redistribution of revenue between carriers under the guise of regulation of car-hire. But as any alteration in the rules governing compensation for the use of cars authorized by § 1 (14) necessarily affects the revenues of the carriers concerned, the argument amounts to an assertion that there can be none except in a divisions case.

In so far as the appellants' imputation is that the Commission was less concerned with fair apportionment of car-hire costs than with financial rehabilitation of weak lines, it may be said shortly that this is without support in the record. The Commission did consider, and properly so, the relation between car costs and total operating costs of short lines, and between car costs and revenues from joint hauls. It found that the short lines were paying disproportionately large sums for the use of cars; and it found further that their rates and divisions had not customarily been adjusted with relation to such costs.[21] The Commission's power to remedy an unfair basis of car-hire apportionment is not confined to remitting the injured carriers to the uncertainties of rate litigation which, but for that unfairness, would be unnecessary, and which opens up a multitude of unrelated questions serving only to obscure the immediate issue. Many of the short lines are not able financially to litigate a divisions case. Rates established to absorb unduly heavy car-hire costs, moreover, must themselves be unduly high; and in many instances would defeat the object of relief. Finally, the

[21] See note 11, *supra*.

Commission is without jurisdiction to adjust many divisions of intrastate rates. Its authority over car-hire charges is without such limitation.

The Commission considered at length its power and duty to apportion car-hire costs independently of divisions. Its judgment that they should be dealt with under the authority conferred by § 1 (14), was in accordance with the unvaried practice of the trunk lines, whose traffic and transportation departments have customarily kept divisions and car-hire rigidly divorced. There is no basis, either in fact or law, for the assumption that the questions involved in an apportionment of car-hire, at least in cases like the present, are not separable from those involved in a divisions case, or for the assertion that the power conferred on the Commission by § 1 (14) cannot be exercised independently of its power to order a division of a joint rate.

Considerations especially applicable to coal cars placed on mine sidings on the short lines for loading, but analogous to those which led to the two-day allowance for cars of other types, support the conclusion of the Commission that the *per diem* rule should not operate at all in the case of the former. It suffices to say that the difference is based upon the peculiar character of this traffic and of the originating service rendered, and particularly upon the fact that under the applicable demurrage rules short lines are forbidden to collect any demurrage on coal cars so placed. See Demurrage on Coal & Coke, 102 I. C. C. 554. The principle involved being the same as that underlying each of the other provisions of the order, this one, like the others, should not have been disturbed unless an examination of the evidence disclosed that it was not reasonable.

The judgment should be affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS join in this opinion.

LOUISIANA PUBLIC SERVICE COMMISSION ET AL. *v.* TEXAS & NEW ORLEANS RAILROAD CO. ET AL.*

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

No. 36. Argued October 13, 1931.—Decided November 23, 1931.

1. An order of the Interstate Commerce Commission requiring that certain freight rates fixed by state authority be increased to correspond with interstate rates on the same kind of traffic, fixed by the Commission, *held* within the power of the Commission to prescribe intrastate rates in place of those found unduly to discriminate against persons or localities in interstate commerce, or against that commerce. Interstate Commerce Act, § 13 (3) (4). P. 130.
2. The evidence before the Commission is examined and is found sufficient to sustain its action. P. 132.
3. The order of the Commission fixing interstate and intrastate rates on transportation of road material in Arkansas, Oklahoma, Texas, and a part of Louisiana, added an allowance of eight cents per ton for ferrying such of the traffic as crosses the Mississippi in Louisiana to and from certain points on the east bank of the river. *Held:*

   (1) That inclusion of this allowance does not violate Art. I, § 9, cl. 6 of the Constitution, even though in effect it may benefit ports in Texas, to the incidental disadvantage of ports in Louisiana. P. 131.

   (2) Neither the failure of the Commission separately to ascertain and state, nor the absence of evidence to show, the cost to carriers of the ferry service requires annulment of the rates in which the allowance for that service is included. P. 132.

41 F. (2d) 293, affirmed.

APPEALS from a decree enjoining the Louisiana Public Service Commission from interfering with application to intrastate traffic of rates fixed for the plaintiff carriers by the Interstate Commerce Commission, and from a decree dismissing a bill against the United States by which the State and its commission sought to annul the order of the federal commission establishing the rates.

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* Together with No. 37, *Louisiana et al.* v. *United States et al.*

Mr. Wylie M. Barrow, with whom *Messrs. Percy Saint,* Attorney General of Louisiana, *Lewis L. Morgan,* and *Michel Provosty* were on the brief, for the Louisiana Public Service Commission et al., appellants.

There was no investigation or finding by, or evidence before, the Commission as to the cost of performing the service in the territory involved in this proceeding; and the full hearing contemplated by § 13 (4) has not been had.

Discrimination against interstate commerce growing out of a rate disparity should not be held as undue, unreasonable, or unjust unless it be shown that the intrastate rates are so low as to place an undue burden upon interstate commerce, and this requires an investigation into the remunerativeness of the intrastate rates, especially in view of the controlling language of § 15a (2). *Florida* v. *United States,* 31 F. (2d) 580, 581; 282 U. S. 194; 1 Interstate Commerce Acts Annotated, p. 379.

There is no finding or reference to evidence by the Commission as to the cost of performing the ferry transfer service, although separate ferry arbitrary charges are established by the Commission to apply on intrastate traffic.

The ferry services for which additional charges are prescribed are parts of the transportation services of the railroads, operating these ferries or using them as parts of their through lines.

The Commission has treated the ferry charges as divisions of through rates, by prescribing separate charges for ferry services performed, in an arbitrary and illegal manner, and without investigation or consideration of § 15 (6).

There is no authority vested in the Commission to fix an "arbitrary" rate or charge of any sort. The word "arbitrary" is not used in the Interstate Commerce Act, as amended.

The ferries across the Mississippi operated by the railroads form a part of their continuous through lines, and are included in the term "railroad" as used in the Act. There is no authority in the Commission to accord them special treatment, especially in the absence of any evidence of their value, the cost of performing the service, or of other essential elements of rate-making.

"Allowances" are only authorized under § 15 (13), for services or instrumentalities of commerce, furnished by the owner of the property to be transported. The ferry charges are not allowances. They form a part of the through rate. The procedure to be followed in making through rates is laid down in § 15 (5), (6), which require a full hearing, and provide that in determining the divisions of joint rates, the Commission shall give due consideration to certain specified things. *Brimstone R. Co.* v. *United States,* 276 U. S. 104; *Beaumont, S. L. & W. R. Co.* v. *United States,* 282 U. S. 74.

There was no finding or reference to evidence by the Commission showing a real and substantial burden upon interstate commerce growing out of the disparity between the Louisiana intrastate rates and interstate rates on the said commodities in the territory herein involved. The undue preference of intrastate shippers and undue prejudice against interstate shippers, as well as the unjust discrimination against interstate commerce which the proceeding was intended to correct were confined by the Commission's findings to northern Louisiana.

Distinguishing: *Shreveport Case,* 234 U. S. 342; *American Express Co.* v. *South Dakota,* 244 U. S. 617; *Illinois Central R. Co.* v. *Public Util. Comm.,* 245 U. S. 493.

If § 15a is to be considered by the Commission in disturbing intrastate rates, then there must be findings under that section and a showing of the revenue needs of

the carriers involved, as well as the cost of performing the service. Obviously, without such a showing there is no proof upon which it can be determined that the intrastate rates cast an undue burden upon interstate commerce. *Wisconsin Case,* 257 U. S. 563; *New York Case,* 257 U. S. 591.

The harsh exercise of power by the federal commission was beyond the necessities of the case, and violative of the principle announced in *Lawrence* v. *St. Louis-S. F. Ry. Co.,* 274 U. S. 588, 594, 595.

It is stretching the law too far to say that the Commission can step in and fix intrastate rates in one State to conform with those in another State. The disparity in rates which the Commission is authorized to end by directly removing it is, " a disparity of intrastate rates as compared with interstate rates." *Florida Log Cases,* 282 U. S. 194; *New York* v. *United States,* 257 U. S. 591.

This arbitrary ferry charge applies on all traffic to and from the ports of New Orleans and Baton Rouge, both ports of entry. No such charges are made on traffic to and from any Texas ports, although there are bridges, ferries, and a causeway to be crossed by the railroads serving Texas ports. The charges therefore give a direct preference to the Texas ports over the Louisiana ports, and consequently violate the Constitution. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. 421, 435; *Morgan's R. Co.* v. *Louisiana,* 118 U. S. 455; *Munn* v. *Illinois,* 94 U. S. 238; *Armour Packing Co.* v. *United States,* 209 U. S. 56.

The fact that the investigation by the Commission was a Hoch-Smith investigation did not add any power to that which it derived from the provisions of § 13 (4) and § 15a of the Interstate Commerce Act as amended. The requirements of § 13 (4) and of § 15a both must be met before state rates can be disturbed by the federal commission.

There must be basic findings by the Commission under both § 13 (4) and § 15a, based upon substantial evidence, before it may destroy the exercise of state authority and set aside intrastate rates. *Florida* v. *United States,* 282 U. S. 194.

Assistant to the Attorney General O'Brian, with whom *Solicitor General Thacher* and *Messrs. Charles H. Weston, Daniel W. Knowlton,* and *J. Stanley Payne* were on the brief, for the United States et al., appellees.

Mr. Harry McCall, with whom *Messrs. Victor Leovy, Esmond Phelps,* and *R. E. Milling, Jr.,* were on the brief, for the Texas & New Orleans R. Co. et al., appellees.

Mr. Justice Butler delivered the opinion of the Court.

The Interstate Commerce Commission, June 3, 1929 (155 I. C. C. 247) and September 30, 1929 (157 I. C. C. 498) prescribed rates for the transportation of sand, gravel and other named commodities, hereafter referred to as road materials, in Arkansas, Oklahoma, Texas and that part of Louisiana west of the Mississippi, including certain points on the east bank of the river. The rates were based on straight mileage. Eight cents per ton was added for ferrying such of the traffic as crosses the Mississippi to and from the named points on the east bank. The rates were made to apply alike to interstate and intrastate transportation.

The commissions of Arkansas, Oklahoma and Texas, respectively, adopted for application therein the intrastate rates so prescribed. The carriers applied to the Louisiana Public Service Commission for authority to give them effect in that State. October 12, 1929, the commission adopted them as to traffic between points on and north of the Vicksburg, Shreveport & Pacific Railroad, and between that territory and points in western Louisi-

ana south of the railroad. It refused to apply them on traffic wholly within the territory south of the railroad or on the traffic between that part of the State and the specified places on the east bank of the river.

The first of these suits was brought by the carriers against the commission and its members to enjoin them from interfering with the application of these intrastate rates. The other was brought by the State and the commission to annul them. 28 U. S. C., § 47. A court of three judges heard the cases, held the rates valid, granted a permanent injunction in the first suit, No. 36, and dismissed the other, No. 37. 41 F. (2d) 293. The cases are here on direct appeal. § 345 (4).

Appellants seek reversal on the grounds that the inclusion of the allowance for ferrying the Mississippi gives preference to Galveston, Houston and other ports of Texas over New Orleans and Baton Rouge in Louisiana in violation of the Constitution, Art. I, § 9, cl. 6; that the Interstate Commerce Commission made no findings and had no evidence as to the cost of the ferry service; and that there is no evidence to warrant a finding that the lower intrastate rates in effect under state authority operate as a real and substantial obstruction to, burden upon or discrimination against interstate commerce.

The power of Congress to regulate interstate and foreign commerce is exclusive and has no limitations other than such as arise from the Constitution itself. *Gibbons* v. *Ogden,* 9 Wheat. 1, 197. The Congress may adopt measures effectually to prevent every unreasonable, undue or unjust obstruction to, burden upon or discrimination against interstate commerce whether it results from state regulation or the voluntary acts of carriers. *Shepard* v. *Northern Pac. Ry. Co.* (C. C. Minn.) 184 Fed. 765, 795; *Minnesota Rate Cases,* 230 U. S. 352, 398, 403, 432. *Texas & Pac. Ry. Co.* v. *United States* (Commerce Court) 205 Fed. 380, 388; affirmed *sub nom. Houston & Texas*

Ry. v. *United States,* 234 U. S. 342, 353. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 624. *Illinois Central R. Co.* v. *Public Utilities Comm.,* 245 U. S. 493, 506. And it has empowered the Interstate Commerce Commission to prescribe intrastate rates in place of those found unduly to discriminate against persons or localities in interstate commerce or against that commerce, § 13 (3) (4), and to require the carriers to make and apply on intrastate transportation such reasonable charges as will produce its fair share of the amounts needed to pay operating expenses, provide an adequate railway system and yield a reasonable rate of return on the value of the property used in the transportation service. § 15a. *Wisconsin Railroad Comm.* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 585, 588. *Florida* v. *United States,* 282 U. S. 194, 210, 211.

The clause of the Constitution invoked is: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; Nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another." The specified limitations on the power of Congress were set to prevent preference as between States in respect of their ports or the entry and clearance of vessels. It does not forbid such discriminations as between ports. Congress, acting under the commerce clause, causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States. The establishing of ports of entry, erection and operation of lighthouses, improvement of rivers and harbors and the providing of structures for the convenient and economical handling of traffic are examples. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. 421, 433–5. And see *Armour Packing Co.* v. *United States,* 209 U. S. 56, 80. The construction for which appellants contend would strip Congress of much of the power that it long has been accustomed to exert

and which always has been held to have been granted to it by the commerce clause. It is clear that the Constitution does not forbid the allowance for ferrying the Mississippi at Louisiana ports.

Neither the failure of the Commission separately to ascertain and state, nor the absence of evidence to show, the cost to carriers of the ferry service requires annulment of the rates prescribed for transportation between the places on the east bank of the Mississippi and points west of the river.

Those rates were made by adding eight cents per ton to the mileage scale which was applied generally throughout the above mentioned States. No rate specifically applies to the carriage across the river. The orders do not relate to divisions under § 15 (6) or to allowances under § 15 (13). Every railroad shipment requires two terminal services and the line haul. Shipments moving in carloads require switching at places of loading and unloading and frequently at intermediate points. Some require the use of floating equipment and other special facilities. Some are moved on stretches of line where, by reason of physical conditions, the service is performed at costs per mile much in excess of the average on other parts of the haul. Straight mileage schedules appropriately may be applied where conditions affecting transportation are reasonably uniform, but substantial additions to rates so made are necessary to cover extraordinary costs of service. While in the making of reasonable rates all the material facts are to be regarded, it has never been deemed necessary or practicable—if indeed it is at all possible—to ascertain in advance the cost to carriers of each of the various elements embraced in the transportation service. The Act does not require any such determination.

There was evidence to show:

The commodities in question are used chiefly for the construction, improvement and maintenance of highways.

Each of the States mentioned has an extensive system of highways and contemplates much construction, improvement and maintenance work. There are more than 300 sources of supply in the territory, and by far the larger part of the materials used in each State is produced therein. These commodities move in great volume and constitute substantially more than ten per cent. of the carriers' tonnage. In Louisiana there are many places where such materials are produced. About 98% of the improved highways in that State are constructed with gravel. There is a large part of western Louisiana in which no gravel is produced. Some road materials are hauled intrastate more than 240 miles, large quantities move from 100 to more than 140 miles and, as calculated by the Commission, the average is from 75 to 80 miles.

In Texas, Arkansas, and Oklahoma there is a number of places, not far from Louisiana boundaries, where large quantities of such materials available for use in that State are produced. Notwithstanding the relatively low applicable Louisiana intrastate rates, substantial quantities are shipped from these outside sources for use on roads in various parts of the State including the territory as to which the state authorities refused to adopt the scale of rates prescribed by the Interstate Commerce Commission. The Louisiana highway commission constructs about 500 miles of road annually and the parishes construct considerable additional mileage. In each year great quantities of road materials are and in the future will be required for road work in that State south of the Vicksburg, Shreveport & Pacific Railroad and west of the Mississippi. At shipping points throughout the whole territory prices per ton range about as follows: Washed gravel, from $0.60 to $1.15; clay gravel, $0.40 to $0.60; sand, $0.45 to $0.70; crushed stone, $1.00 to $1.50; shells, $1.20 to $1.40; chat, $0.25 to $0.35.

The Commission found in Louisiana three scales of intrastate rates applicable to these commodities. One applies to commercial shipments and is higher than that prescribed by the orders under consideration. One somewhat lower and on which comparatively little moves, covers shipments to municipalities for the construction of public buildings. The one here under consideration is the lowest; it applies to materials used in the construction of state and parish highways and city streets when the shipments are consigned to and the freight charges are paid by federal, state, parish or municipal governments. From 80% to 85% of all the traffic in such materials in western Louisiana moves on that scale. There is printed in the margin a comparison of these rates with those ordered by the Commission.[1]

[1] Comparison of Louisiana good-roads single-line scale and interstate single-line scale approved by the Commission in this proceeding.

1 Distance	2 Louisiana good-roads scale	3 Commission's scale	Per cent that column 2 is less than column 3
10 miles	40	50	20
20 miles	40	56	29
30 miles	50	62	19
40 miles	50	68	26
50 miles	50	74	32
60 miles	50	80	38
70 miles	50	85	41
80 miles	60	90	33
90 miles	60	95	37
100 miles	60	100	40
110 miles	60	105	43
120 miles	60	110	45
130 miles	60	115	48
140 miles	80	120	33
150 miles	80	125	36
160 miles	80	130	38
170 miles	90	135	33
180 miles	90	140	36
190 miles	90	145	38
200 miles	90	150	40
Average			35.25

The latter are about 150% of the former. For 80 miles, about the average intrastate haul, the prescribed rates are higher by 30 cents per ton, for 100 miles 40 cents, 120 miles 50 cents, 140 miles 40 cents, and 200 miles 60 cents. Producers outside Louisiana are necessarily at disadvantage in respect of the sale and delivery within that State of such materials to the extent that the State rates are lower than the prescribed scale. In the course of the Commission's report it is said that the disparity between the two scales is bound to operate as a real discrimination against, and obstruction to, interstate commerce, and result in interstate shippers being unduly prejudiced and interstate commerce unjustly burdened. And in its ultimate findings the Commission states that the intrastate rates to the extent that they are lower, distance considered, than corresponding interstate rates would result in undue preference and advantage to shippers and receivers of freight in intrastate commerce within western Louisiana and in undue prejudice to shippers and receivers of freight in interstate commerce between points in Arkansas, Oklahoma and Texas and points in western Louisiana, and in unjust discrimination against interstate commerce.

The facts above stated are adequately supported by the evidence and are clearly sufficient to warrant the Interstate Commerce Commission in prescribing, under § 13(3)(4), the schedule of intrastate rates under consideration. *Florida* v. *United States, supra,* 208. *Alabama* v. *United States,* 279 U. S. 229; 283 U. S 776.

Decrees affirmed.

HANDY & HARMAN *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE.

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

No. 14. Argued October 19, 1931.—Decided November 23, 1931.

Section 240 of the Revenue Act of 1918 provides that "affiliated" corporations shall make a consolidated return of net income and invested capital; and domestic corporations shall be deemed affiliated if substantially all their stock "is owned or controlled by the same interests." *Held:*

1. That the purpose was to require taxes to be levied according to the true net income and invested capital resulting from and employed in a single business enterprise, even though it were conducted by means of more than one corporation, and to secure substantial equality as between shareholders who ultimately bear the burden. P. 140.

2. Such returns will not make against inequality or evasion unless the same interests are the beneficial owners in like proportions of substantially all of the stock of each of such corporations; an indefinite and uncertain control of stock, without title, beneficial ownership or legal means to enforce it, but resting solely on acquiescence, the exigencies of business or other considerations having no binding force, is not sufficient. P. 141.

47 F. (2d) 184, affirmed.

CERTIORARI, 283 U. S. 813, to review a judgment affirming a decision of the Board of Tax Appeals. 17 B. T. A. 980.

Mr. William C. Breed for petitioner.

Where two or more corporations are operating as a business and economic unit, actual control of the stock of the minority is sufficient whether or not based upon legally enforceable means. *Kile & Morgan Co.* v. *Commissioner,* 41 F. (2d) 925; *J. Rogers Flannery & Co.* v. *Commissioner,* 42 F. (2d) 11; *Pelican Ice Co.* v. *Commissioner,* 37 F. (2d) 285; *Great Lakes Hotel Co.* v. *Com-*

missioner, 30 F. (2d) 1; *Burnet, Commissioner,* v. *Wilshire Oil Co.,* 46 F. (2d) 975, C. C. A.–9; *Commissioner* v. *Richfield Oil Co.,* 42 F. (2d) 360; *Mahoning Coal R. Co.* v. *United States,* 41 F. (2d) 533; *Eby Shoe Co.* v. *United States,* 44 F. (2d) 273; *Ullman Mfg. Co.* v. *United States,* 67 Ct. Cls. 104; Appeal of Hagerstown Shoe Co., 1 B. T. A. 666; Appeal of Isse Koch & Co., 1 B. T. A. 624.

The word "controlled" as it appears in the statute is unqualified. The court below, in restricting that word to a control based upon legally enforceable means, refused to give to it its accepted meaning and made it practically synonymous with the word "owned." Statutory words are presumed to be used in their ordinary sense. The legislature is presumed to have used no superfluous words, and every word in a statute must be accorded a meaning. In construing taxing statutes, it is most important that they be given their literal meaning. *United States* v. *Merriam,* 263 U. S. 179, 187; *Lynch* v. *Alworth-Stephen Co.,* 267 U. S. 364, 370.

The legislative history of the Act furnishes abundant evidence that Congress used these words in their broad and natural sense.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Sewall Key,* and *John H. McEvers* were on the brief, for respondent.

Mr. Justice Butler delivered the opinion of the Court.

Petitioner claims that it and Hamilton & DeLoss, Inc., were affiliated corporations as defined by § 240 of the Revenue Act of 1918 and that it is entitled to have its net income and invested capital for 1918 and the first month of 1919 determined on the basis of consolidated returns. The Commissioner of Internal Revenue held

them not affiliated, rejected petitioner's claim for abatement for 1918 and asserted a deficiency for 1919. The Board of Tax Appeals approved the Commissioner's determination (17 B. T. A. 980) and upon petition for review the Circuit Court of Appeals affirmed. 47 F. (2d) 184. That decision being in conflict with decisions of other Circuit Courts of Appeals,[1] this Court granted certiorari. 283 U. S. 813.

The pertinent provisions of the section follow (40 Stat. 1081):

"§ 240 (a). That corporations which are affiliated within the meaning of this section shall, under regulations to be prescribed by the Commissioner with the approval of the Secretary, make a consolidated return of net income and invested capital for the purposes of this title [Title II] and Title III, and the taxes thereunder shall be computed and determined upon the basis of such return: . . .

"(b). For the purpose of this section two or more domestic corporations shall be deemed to be affiliated . . . (2) if substantially all the stock of two or more corporations is owned or controlled by the same interests."

Petitioner carried on the business of dealing in gold and silver bullion and specie and furnishing to silversmiths silver rolled into sheets or coils. In 1916 its officers caused Hamilton & DeLoss, Inc., to be organized, to erect a factory and to take over the work of its stamping depart-

[1] *Ice Service Co.* v. *Commissioner,* 30 F. (2d) 230, and *Commissioner* v. *Adolph Hirsch & Co.* 30 F. (2d) 645. (C. C. A.–2.) *United States* v. *Cleveland, P. & E. R. Co.,* 42 F. (2d) 413. (C. C. A.–6.) *American Auto Trimming Co.* v. *Lucas,* 37 F. (2d) 801. (App. D. C.)

J. Rogers Flannery & Co. v. *Commissioner,* 42 F. (2d) 11. (C. C. A.–3.) *Pelican Ice Co.* v. *Commissioner,* 37 F. (2d) 285. (C. C. A.–5.) *Great Lakes Hotel Co.* v. *Commissioner,* 30 F. (2d) 1. (C. C. A.–7.) *Burnet* v. *Wilshire Oil Co.,* 46 F. (2d) 975. (C. C. A.–9.)

ment. During the taxable periods six men owned 93.71 per cent. of the stock of petitioner. The same men owned over 75 per cent. of the stock of Hamilton & DeLoss, Inc. Hamilton did not own or control any of the stock of petitioner. Twenty per cent. of the stock of the new company was issued to him and he became its president. He gave to a bank his notes endorsed by DeLoss to obtain money to pay for the stock. Before the beginning of 1918 he executed an irrevocable stock power to one Higgins, and the latter, by like instrument, assigned the stock to DeLoss, who deposited it with the bank as collateral security for the payment of Hamilton's notes. Hamilton failed to pay and, February 1, 1919, after the expiration of the tax periods, DeLoss paid the notes and took over the stock.

Prior to that time Hamilton attended all the stockholders' meetings but never voted in opposition to the owners of the majority stock of both corporations. Hamilton & DeLoss, Inc., paid him a salary at the rate of $10,000 per year, but the other officers of that corporation, being officers, directors or employees of the petitioner, received their compensation from the latter, although a large part of their time was devoted to the business of the former. During the taxable periods the corporations were operated as a business unit, and Hamilton & DeLoss, Inc., sustained a net loss.

It may be assumed that the pledge as collateral was also to protect DeLoss as endorser. But it does not appear that, as between him and Hamilton, he was entitled to control voting power, or to have the stock transferred to him of record, or to have any use or benefit therefrom unless and until required to pay the notes. It was not held by or for him. The losses sustained by Hamilton & DeLoss, Inc., did not, in respect of that stock, directly or indirectly result to his disadvantage. The section requires control of substantially all of the stock; control of

the corporations is not enough.[2] The carrying on of a business unit by two or more corporations does not in itself constitute affiliation. The shares of Hamilton & DeLoss, Inc., owned by the six shareholders did not constitute substantially all of its stock.[3] We assume in favor of petitioner that they, through their power over Hamilton's official position and salary, their ability to dominate both corporations or by other means, were in position effectually to influence him in respect of the voting, use or disposition of the stock issued to him, and thus as a practical matter to exert a kind of control called by counsel "actual" to distinguish it from a legally enforceable control.

The purpose of § 240 was, by means of consolidated returns, to require taxes to be levied according to the true net income and invested capital resulting from and employed in a single business enterprise, even though it was conducted by means of more than one corporation. Subsection (b) clearly reflects the intention, by means of such returns, to secure substantial equality as between shareholders who ultimately bear the burden. That intention is shown by the legislative history and was given effect by the regulations contemporaneously promulgated.[4] It re-

[2] It was so held in *Ice Service Co.* v. *Commissioner,* 30 F. (2d) 230, 231; *Commissioner* v. *Adolph Hirsch & Co.,* 30 F. (2d) 645, 646; *American Auto Trimming Co.* v. *Lucas,* 37 F. (2d) 801, 803; *United States* v. *Cleveland, P. & E. R. Co.,* 42 F. (2d) 413, 419; *Commissioner* v. *Gong Bell Mfg. Co.,* 48 F. (2d) 205, 206; *Onondaga Co.* v. *Commissioner,* 50 F. (2d) 397, 399.

[3] *United States* v. *Cleveland, P. & E. R. Co.,* 42 F. (2d) 413, 419. *Burnet* v. *Bank of Italy,* 46 F. (2d) 629, 630. *Jos. Denunzio Fruit Co.* v. *Commissioner,* 49 F. (2d) 41. *Wadhams & Co.* v. *United States,* 67 Ct. Cl. 235.

[4] Treasury Regulations 41, Art. 77; § 1331 (a), Revenue Act of 1921, 42 Stat. 319. § 336, House Bill 12863; § 240 (b), same Bill; Senate Report No. 617 (Senate Documents, Vol. 4, Document 310, 65th Congress, 3d Session); H. R. Conference Report No. 1037, p. 15, same session. Regulations 45 (1920 ed.) Arts. 631, 633.

quires no discussion to show that such returns will not make against inequality or evasion unless the same interests are the beneficial owners in like proportions of substantially all of the stock of each of such corporations. *Alameda Investment Co.* v. *McLaughlin,* 28 F. (2d) 81. *Montana Mercantile Co.* v. *Rasmusson,* 28 F. (2d) 916. *Commissioner* v. *Adolph Hirsch & Co.*, 30 F. (2d) 645, 646. *Commissioner of Internal Revenue* v. *City Button Works,* 49 F. (2d) 705. Affiliation on any other basis would not make against inequality or evasion. It would require very plain language to show that Congress intended to permit consolidated returns to depend on a basis so indefinite and uncertain as control of stock without title, beneficial ownership or legal means to enforce it. Control resting solely on acquiescence, the exigencies of business or other considerations having no binding force is not sufficient to satisfy the statute.

Judgment affirmed.

UNITED STATES *v.* MURDOCK.

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

No. 38. Argued October 23, 26, 1931.—Decided November 23, 1931.

1. A judgment of the District Court sustaining, on demurrer, a plea to an indictment, and the effect of which, if not reversed, will be to bar further prosecution for the offense charged, is within the jurisdiction of this Court under the Criminal Appeals Act, without regard to the particular designation or form of the plea, or its propriety. P. 147.
2. The offense of wilfully failing to supply information for the purposes of computing and assessing taxes, under the Revenue Acts of 1926, § 114 (a) and of 1928, § 146 (a), is complete when the information, lawfully demanded, is refused; and prosecution may thereupon be had without first determining, in proceedings to compel

answer, the question whether the witness's claim of privilege under the Fifth Amendment was well taken. P. 147.

3. To justify under the Fifth Amendment a refusal to give information in an investigation under a federal law in respect of a federal matter, the privilege from self-incrimination must be claimed at the time when the information is sought and refused and must be invoked as a protection against federal prosecution; danger and claim that disclosure may lead to prosecution by a State is not enough. P. 148.
4. In a prosecution for wilful failure to supply information for the computation, etc., of a tax (Revenue Acts, *supra,*) the claim that defendant was privileged to keep silent, by the Fifth Amendment, is a matter of defense under the general issue of not guilty; and the use of a special plea to single this question out for determination in advance of trial is improper. P. 150.

51 F. (2d) 389, reversed.

APPEAL, under the Criminal Appeals Act, from a judgment of the District Court sustaining a special plea in bar and discharging the defendant.

Solicitor General Thacher, with whom *Mr. Robert P. Reeder* was on the brief, for the United States.

The ascertainment of facts upon which to base a tax assessment is with propriety committed to the tax-collecting agencies. *Interstate Commerce Comm.* v. *Baird,* 194 U. S. 25, 42, 43; *Interstate Commerce Comm.* v. *Brimson,* 154 U. S. 447, 474, 477, 478, 486; 39 Harv. L. Rev. 697, 698. The internal revenue agent properly examined the witness in order to find out what persons received the twelve thousand dollars expended by the witness in 1927 and 1928, so that taxes might be imposed upon such persons. The recipients were subject to taxation even though the money had been paid to them for failure to enforce the laws. *United States* v. *Sullivan,* 274 U. S. 259.

The agent was entitled to seek judicial aid to compel the witness to testify, but was not required to do so.

There was nothing to suggest any reason for refusal to answer the questions other than that the witness had been

violating the gambling laws of Illinois and had been paying officials of the State for permission to do so.

A witness is not relieved from answering questions merely because he declares that to do so might incriminate him. *Mason* v. *United States,* 244 U. S. 362, 366, 367. The claim of privilege against self-incrimination must be weighed. In weighing it, the explanations given by the witness may be quite material, and in the present case they were conclusive, for the witness modified his broad claim and testified that he did not fear any prosecution under federal law.

The Constitution does not relieve a witness before a federal tribunal of the duty of testifying because he might thereby incriminate himself under the laws of a State. *Hale* v. *Henkel,* 201 U. S. 43, 68, 69; *Brown* v. *Walker,* 161 U. S. 591, 597; *Queen* v. *Boyes,* 1 B. & S. 311; *Jack* v. *Kansas,* 199 U. S. 372, 382; *King of the Two Sicilies* v. *Willcox,* 7 State Trials (N. S.) 1050; *State* v. *March,* 1 Jones (46 N. C.) 526; Wigmore on Evidence, 2d ed., vol. 4, §§ 2251, 2258, pp. 830, 831. See *Counselman* v. *Hitchcock,* 142 U. S. 547; *United States* v. *Saline Bank,* 1 Pet. 100; *Ballmann* v. *Fagin,* 200 U. S. 186; *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 113.

We perceive no logical basis for the application of one rule in measuring the adequacy and scope of an immunity statute as a basis for compelling testimony that discloses acts criminal under state law, and the application of a contrary rule where, as in this case, it is apparent that incrimination is confined to offenses under state law. *In re Willie,* 25 Fed. Case No. 14692e; *Mason* v. *United States,* 244 U. S. 362, 364.

The claim of immunity as made at the hearing may not be enlarged after the hearing and when the witness is under prosecution for having refused to testify.

The offense denounced by the statute was complete when the witness refused to testify without giving an

excuse which was sufficient at law. He did not then offer a sufficient excuse. The circumstances show that there was none. There is nothing to support the suggestion of the District Court that there was a conspiracy to defraud the United States. Certainly the witness knew of no such conspiracy, for he swore that he did not have in mind any violation of federal law.

The decision is controlled not merely by the appellee's failure to claim incrimination under federal law, but upon a showing affirmatively made and incorporated in the special plea that there was no possible basis for any such claim. *Mason* v. *United States,* 244 U. S. 362.

The formal allegation in the special plea that the information withheld would have caused the appellee to be subjected to prosecution for violations of various laws of the United States is of no importance, because the plea incorporates a correct and authentic transcript of the questions asked and answers given before the revenue agent, and this transcript discloses that no claim was made of incrimination under federal law, and, further, that any such claim would have been utterly without foundation.

Messrs. Edmund Burke and *Harold J. Bandy* for appellee.

The case is almost identical with *Counselman* v. *Hitchcock,* 142 U. S. 547, and *Brown* v. *Walker,* 161 U. S. 591.

The transcript of the proceedings before the internal revenue agent shows that appellee's fear was well founded. The agent attempted to extract information from him showing that he had paid certain persons protection money in order that he might operate gambling machines in violation of law. If the money was paid for this unlawful purpose, he had no right to deduct the amounts from his taxable income; and if the information obtained from his testimony disclosed that he had made improper and

unwarranted deductions from his taxable income and had thereby defrauded the Government of tax, he would have been subjected to prosecution in a federal court for violation of certain penal sections of the Revenue Act. Moreover, inasmuch as he swore to his income tax returns, he could have been prosecuted in a federal court for perjury. In addition to this, if the testimony had shown that he acted in concert with the recipients of the money to conceal their identity in order that they might be saved from paying income tax, he could have been indicted and prosecuted jointly with them for conspiracy.

His refusal to answer was based upon solid fact, and he was protected in that refusal by the Fifth Amendment. He was the judge of whether his answers might tend to incriminate him. The courts should sustain the witness's claim of privilege unless it is clear that the evidence obtainable from his testimony could not by any possibility incriminate him. *Ballman* v. *Fagin,* 200 U. S. 186; *Internal Revenue Agent* v. *Sullivan,* 287 Fed. 138.

The indictment of appellee was premature. He was not guilty of refusing to supply information as alleged in the indictment, even if his answers would not have incriminated him. His claim of constitutional privilege asserted before the revenue agent was of no avail because the agent was vested with no judicial power and could not pass upon his claim of privilege. He could not have been adjudged guilty of refusing to supply information and of violating these sections of the revenue law until he had first been summoned and required to appear and be interrogated in the District Court as provided for by §§ 1122 (a) and (b) of the Revenue Act of 1926, and §§ 617 (a) and (b) of the Act of 1928, and until there had been a judicial determination of his claim of constitutional privilege and the court had decided the question adversely to him and commanded him to answer the questions. Section 1114 (a) of the Act of 1926, and § 146 (a)

of the Act of 1928, upon which this indictment is based are not complete in themselves. Although providing that persons who wilfully fail to supply information shall be punished, they do not set forth the procedure that the department must take in order to obtain the information. Section 1114 (a) of the 1926 Act must be read with § 1122 (a) of that Act; and § 146 (a) of the 1928 Act must be read with § 617 (a) of that Act.

There is no merit in the contention that appellee limited his claim of privilege to a danger of being prosecuted in a state court for violation of a state law. He could only assert his claim in a court of competent jurisdiction. Section 1122 (a) of the 1926 Act and § 617 (a) of the 1928 Act provided the proper and only procedure to be followed.

The truth of appellee's claim, as sworn to by him in his special plea, is admitted by appellant's demurrer.

Examination of the transcript of his testimony will show that in each instance when he refused to answer he covered the complete field of federal and state law and did not in any instance limit the grounds of his refusal. Whatever limitation seems to appear in appellee's answers was placed in his mouth by the attorney representing the department.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Appellee filed his individual federal income tax returns for 1927 and 1928, and in each year deducted $12,000 which he claimed to have paid to others. An authorized revenue agent summoned appellee to appear before him and disclose the recipients. Appellee appeared but refused to give the information on the ground that to do so might incriminate and degrade him.

He was indicted for such refusal and interposed a special plea averring that he ought not to be prosecuted under the indictment because, if he had answered the ques-

tions put to him, he would have given information that would have compelled him to become a witness against himself in violation of the Fifth Amendment and caused him to be subjected to prosecution in the court below for violation of various laws of the United States, as shown by a transcript of the questions asked and answers given which he included in his plea. The United States demurred to the plea on the grounds that it fails to show that the information demanded would have incriminated or subjected defendant to prosecution under federal law, and that defendant waived his privilege under the Fifth Amendment. The court overruled the demurrer and entered judgment discharging defendant.

The judgment necessarily determined that to require defendant to supply the information called for would be to compel him to incriminate himself and that therefore he did not unlawfully or willfully refuse to answer. Its effect, unless reversed, is to bar further prosecution for the offense charged. It follows unquestionably that, without regard to the particular designation or form of the plea or its propriety, this court has jurisdiction under the Criminal Appeals Act.[1] *United States* v. *Barber,* 219 U. S. 72, 78. *United States* v. *Oppenheimer,* 242 U. S. 85. *United States* v. *Thompson,* 251 U. S. 407, 412. *United States* v. *Storrs,* 272 U. S. 652, 655. *United States* v. *Goldman,* 277 U. S. 229, 236.

The offense charged is defined: "Who willfully fails to . . . supply such information [for the computation of any tax imposed by the Act] at the time or times required

[1] "A writ of error may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit: . . .

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." 18 U. S. C., § 682. 34 Stat. 1246. See also 28 U. S. C., § 345 (2).

by law or regulations, shall . . . be guilty of a misdemeanor." [2] Other provisions authorize resort to the district courts to compel attendance, testimony and production of books.[3] While undoubtedly the right of a witness to refuse to answer lest he incriminate himself may be tested in proceedings to compel answer, there is no support for the contention that there must be such a determination of that question before prosecution for the willful failure so denounced. By the very terms of the definition the offense is complete at the time of such failure.

Immediately in advance of the examination, appellee's counsel discussed with counsel for the Internal Revenue Bureau the matter of appellee's privilege against self-incrimination and stated that he had particularly in mind incrimination under state law. And at the hearing appellee repeatedly stated that, in answering "I might incriminate or degrade myself," he had in mind "the violation of a state law and not the violation of a federal law." The transcript included in the plea plainly shows that appellee did not rest his refusal upon apprehension of, or a claim for protection against, federal prosecution. The validity of his justification depends, not upon claims that would have been warranted by the facts shown, but upon the claim that actually was made. The privilege of silence is solely for the benefit of the witness and is deemed waived unless invoked. *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 113.

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[2] "Any person required . . . to . . . supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to . . . supply such information, at the time or times required by law or regulations, shall . . . be guilty of a misdemeanor . . ." 26 U. S. C., § 1265. § 1114 (a), Revenue Act of 1926, 44 Stat. 116; 26 U. S. C., § 2146; § 146 (a), Revenue Act of 1928, 45 Stat. 835.

[3] 26 U. S. C., §§ 1257, 1258; 1122 (a) (b), Revenue Act of 1926, 44 Stat. 121. Superseded by 26 U. S. C., § 2617; § 617, Revenue Act of 1928, 45 Stat. 877.

The plea does not rest upon any claim that the inquiries were being made to discover evidence of crime against state law. Nothing of state concern was involved. The investigation was under federal law in respect of federal matters. The information sought was appropriate to enable the Bureau to ascertain whether appellee had in fact made deductible payments in each year as stated in his return, and also to determine the tax liability of the recipients. Investigations for federal purposes may not be prevented by matters depending upon state law. Constitution, Art. VI, § 2. The English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country. *King of the Two Sicilies* v. *Willcox,* 7 State Trials (N. S.) 1050, 1068. *Queen* v. *Boyes,* 1 B. & S. 311, 330. This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him, and also that the lack of state power to give witnesses protection against federal prosecution does not defeat a state immunity statute. The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination. *Counselman* v. *Hitchcock,* 142 U. S. 547. *Brown* v. *Walker,* 161 U. S. 591, 606. *Jack* v. *Kansas,* 199 U. S. 372, 381. *Hale* v. *Henkel,* 201 U. S. 43, 68. As appellee at the hearing did not invoke protection against federal prosecution, his plea is without merit and the government's demurrer should have been sustained.

We are of opinion that leave to file the plea should have been withheld. The proceedings below are indi-

cated by a chronological statement printed in the margin.[4] After demurrer—not shown by the record to have been disposed of—and motions for a bill of particulars and to suppress evidence which were denied, a plea of not guilty was entered. The case should then have been tried without further form or ceremony. 18 U. S. C., § 564. The matters set forth in the plea were mere matters of defense determinable under the general issue. Federal criminal procedure is governed not by state practice but by federal statutes and decisions of the federal courts. *United States* v. *Reid,* 12 How. 361. *Logan* v. *United States,* 144 U. S. 263, 301. *Jones* v. *United States,* 162 Fed. 417, 419. *United States* v. *Nye,* 4 Fed. 888, 890. Neither requires such piecemeal consideration of a case.

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[4] *1930*

January	23	Indictment returned.
February	6	Demurrer to indictment.
February	19	Additional special ground for demurrer.
February	25	Motion for bill of particulars.
May	27	Motion to suppress evidence and to restrain its use at trial.
		Motion for bill of particulars denied.
		Arraignment and plea of not guilty.
June	10	Argument on motion to suppress.
June	21	Motion to suppress denied.
July	1	Leave granted to file special plea.
		Special plea filed.
October	1	Demurrer to plea filed and hearing thereon set for October 13.
October	13	Second and third special pleas filed.
October	17	Demurrer to second and third special pleas filed.
		Hearing on demurrers.
October	18	Demurrer to first special plea overruled; demurrers to second and third special pleas sustained.
October	28	Opinion on demurrers.
1931		
February	3	Plea of not guilty withdrawn.
		Judgment for defendant on first special plea.
March	4	Appeal allowed.

A special plea in bar is appropriate where defendant claims former acquittal, former conviction or pardon, 2 Bishop New Criminal Procedure (2d ed.) §§ 742, 799, 805 *et seq.*, but there is no warrant for its use to single out for determination in advance of trial matters of defense either on questions of law or fact. That such a practice is inconsistent with prompt and effective administration of the law and is likely to result in numerous hearings, waste of courts' time and unnecessary delays is well illustrated by the record in this case. The indictment was returned January 23, 1930, the judgment before us was entered more than a year later, and it seems certain that more than two years will have elapsed after indictment before the case can be reached for trial.

Judgment reversed.

HARDWARE DEALERS MUTUAL FIRE INSURANCE CO. *v.* GLIDDEN CO. ET AL.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 4. Argued October 16, 1931.—Decided November 23, 1931.

Minnesota, by statute, requires all fire insurance companies licensed for business in the State to use a prescribed form of standard policy in which are provisions for determining by arbitration the amount of any loss (except total loss on buildings), when the parties fail to agree upon it. Where one party declines to select an appraiser, the other party may secure, upon due notice, a judicial appointment of an "umpire" to act with the appraiser selected by himself. The decision of this board, if not grossly excessive or inadequate, or procured by fraud, is conclusive as to the amount of the loss, in an action on the award, but does not determine the judicial question of liability under the policy. *Held:*

1. That the enforcement of such an award against an insurance company, which had declined to join in the arbitration, does not violate its rights under the due process and equal protection clauses of the Fourteenth Amendment, although it be assumed that the

company's action in issuing the statutory policy, with the arbitration provisions, was not voluntary and that it was not estopped by long acquiescence in the statute. P. 157.

2. Legislation otherwise within the scope of acknowledged state power, not unreasonably or arbitrarily exercised, cannot be condemned because it curtails the power of the individual to contract. P. 157.

3. The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. In the exercise of that power and to satisfy a public need, a State may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice be not unreasonable or arbitrary, and the procedure it adopts satisfy the constitutional requirements of reasonable notice and opportunity to be heard. P. 158.

4. A statute dealing with a subject within the scope of legislative power is presumed to be constitutional. *Id.*

5. The Court notices judicially that an arbitration clause has long been voluntarily inserted by insurers in fire policies; that the amount of loss is a fruitful and often the only subject of controversy between insured and insurer; that speedy determination of the policy liability such as may be secured by arbitration of this issue is a matter of wide concern; that in the appraisal of the loss by arbitration, expert knowledge and prompt inspection of the damaged property may be availed of to an extent not ordinarily possible in the course of the more deliberate processes of a judicial proceeding. P. 159.

181 Minn. 518; 233 N. W. 310, affirmed.

APPEAL from a judgment sustaining a recovery from an insurance company in an action on an award fixing the amount of a loss by fire.

Mr. Mortimer H. Boutelle, with whom *Mr. Nathan H. Chase* was on the brief, for appellant.

Purely superficial considerations may suggest that the general welfare is subserved by some form of compulsory process requiring the prompt adjustment of insurance losses. The same might be said with equal force of relatively large classes of obligations arising in different branches of business. Claims for personal injury and

property losses in cases of common carriers are sufficiently illustrative.

In one form or another, legislative efforts have been exerted in this direction; but with the exception of two early state cases, viz.: *Graves* v. *Northern Pac. Ry. Co.,* 5 Mont. 566, and *Wadsworth* v. *Union Pac. Ry. Co.,* 18 Colo. 600, no instance has been called to our attention and no precedent has been cited in which a scheme of compulsory arbitration has been prescribed.

In *St. Louis Ry. Co.* v. *Williams,* 49 Ark. 492, the statute differed from those in the cases last indicated in providing that, if arbitration of the claim were refused after demand, the claimant should be entitled to recover his attorney's fees in the event of suit. The statute was held unconstitutional.

Various expedients have been resorted to by the legislatures of different States to avoid delays in the settlement of claims against common carriers by the imposition of penalties. These cases are fully reviewed in *Chicago & Northwestern Ry. Co.* v. *Nye Schneider Fowler Co.,* 260 U. S. 36, in which the limitations of the legislative authority are expounded.

It is unnecessary to consider the broader phases of legislation ostensibly directed at the compulsory arbitration of controversies. That no such power exists is settled. *Wolff Co.* v. *Industrial Court,* 262 U. S. 522; *Dorchy* v. *Kansas,* 264 U. S. 286.

It is, of course, admitted that the business of insurance is affected with a public interest and therefore subject to state regulation in the exercise of the State's legitimate power of police. *Northwestern Ins. Co.* v. *Riggs,* 203 U. S. 243; *German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389; *National Ins. Co.* v. *Wanberg,* 260 U. S. 71.

The authorities are quite fully reviewed in the case last cited. In each instance where the exercise of the power has been sustained, with the exception of certain of the

earlier authorities in which it was erroneously predicated of the unlimited control over foreign corporations, it has been directed at the correction of some evil and its justification postulated for the public welfare.

The statute with which we are here concerned cannot be assigned to the class thus indicated. There is a broad distinction between prescribing the form or terms of a contract and prescribing the methods by which the obligation of such contract may be enforced. A similar distinction may be made between the class of cases in which limitations on the effect of applications for insurance have been sustained and the right of interposing certain defenses denied.

It will not do to ascribe a system of compulsory arbitration, committed to the jurisdiction of an extra-judicial tribunal, to the domain of remedial law. The latter obviously has reference to instances of judicial procedure. The system with which we are here concerned, on the contrary, is wholly foreign to anything pertaining to judicial procedure. No principle has been suggested and none occurs that justifies assigning denial of right of recourse to the courts, respecting an ordinary contractual obligation, to the field or domain of police power. The segregation of a single class of business of ordinary commercial character from all other classes, with the imposition on the former of conditions denying the right of judicial redress accorded the latter, presents a discrimination which contravenes both the due process and equal protection provisions of the fundamental law. *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150.

As applied to appellant, the exaction of compliance with the statutory condition was tantamount to the requirement of the surrender of a constitutional right as the condition of the privilege of doing business within the State. *Terral* v. *Burke Construction Co.,* 257 U. S. 529; *Doyle* v. *Continental Ins. Co.,* 94 U. S. 535; *Security Mutual Life*

Ins. Co. v. *Prewitt,* 202 U. S. 246; *Southern Pacific Co.* v. *Denton,* 146 U. S. 202, 207; *Frost* v. *Railroad Commission,* 271 U. S. 583; *Hanover Ins. Co.* v. *Harding,* 272 U. S. 494; *United States* v. *Chicago, M. & St. P. Ry. Co.,* 282 U. S. 311.

Messrs. Homer C. Fulton and *Eugene M. O'Neill,* with whom *Messrs. Arthur E. Nelson* and *Edward L. Boyle* were on the brief, for appellees.

Mr. Justice Stone delivered the opinion of the Court.

This case is here on appeal, § 237a of the Judicial Code, from a judgment of the Supreme Court of Minnesota, upholding the constitutionality of the arbitration provisions of the standard fire insurance policy prescribed by Minnesota statutes. 181 Minn. 518; 233 N. W. 310.

Appellant, a Wisconsin corporation licensed to carry on the business of writing fire insurance in Minnesota, issued, within the state, its policy insuring appellees' assignor against loss, by fire, of personal property located there. The policy was in standard form, the use of which is enjoined by statutes of Minnesota on all fire insurance companies licensed to do business in the state. Mason's Minn. Stat. 1927, §§ 3314, 3366, 3512, 3515, 3711. Failure to comply with the command of the statute is ground for revocation of the license to do business, § 3550, and wilful violation of it by any company or agent is made a criminal offense, punishable by fine or imprisonment. §§ 3515, 9923.

A fire loss having occurred, the insured appointed an arbitrator and demanded of appellant that the amount be determined by arbitration as provided by the policy.[1]

[1] Mason's Minn. Stat. 1927, § 3512. ". . . In case of loss, except in case of total loss on buildings, under this policy and a failure of the parties to agree as to the amount of the loss, it is mutually agreed that the amount of such loss shall, as above provided, be

The appellant having refused to participate in the arbitration, the insured, in accordance with the arbitration clause, procured the appointment of an umpire to act with the arbitrator designated by the insured. The arbitrator and umpire thus selected proceeded to determine the amount of the loss and made their award accordingly.

In the present suit, brought to recover the amount of the award, the appellant set up by way of defense, the single point relied on here, that so much of the statutes of Minnesota as requires the use by appellant of the arbitration provisions of the standard policy infringes the due process and equal protection clauses of the Fourteenth Amendment. In rejecting this contention and in sustaining a recovery of the amount of the award, the Supreme Court of Minnesota, consistently with its earlier decisions, ruled that the authority of the arbitrators did not extend to a determination of the liability under the policy, which

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ascertained by two competent, disinterested and impartial appraisers who shall be residents of this state, the insured and this company each selecting one within fifteen days after a statement of such loss has been rendered to the company, as herein provided, and in case either party fail to select an appraiser within such time, the other appraiser and the umpire selected, as herein provided, may act as a board of appraisers, and whatever award they shall find shall be as binding as though the two appraisers had been chosen; and the two so chosen shall first select a competent, disinterested and impartial umpire; provided, that if after five days the two appraisers cannot agree on such an umpire, the presiding judge of the district court of the county wherein the loss occurs may appoint such an umpire upon application of either party in writing by giving five days' notice thereof in writing to the other party. Unless within fifteen days after a statement of such loss has been rendered to the company, either party, the assured or the company, shall have notified the other in writing that such party demands an appraisal, such right to an appraisal shall be waived; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of the loss; . . ."

was a judicial question, reserved to the courts, but that their decision as to the amount of the loss is conclusive upon the parties unless grossly excessive or inadequate, or procured by fraud. See *Glidden Co.* v. *Retail Hardware Mut. Fire Ins. Co.,* 181 Minn. 518, 521, 522; 233 N. W. 310; *Abramowitz* v. *Continental Ins. Co.,* 170 Minn. 215; 212 N. W. 449; *Harrington* v. *Agricultural Ins. Co.,* 179 Minn. 510; 229 N. W. 792.

This type of arbitration clause has long been commonly used in fire insurance policies, both in Minnesota and elsewhere, and, when voluntarily placed in the insurance contract, compliance with its provisions has been held to be a condition precedent to an action on the policy. *Gasser* v. *Sun Fire Office,* 42 Minn. 315; 44 N. W. 252; *Hamilton* v. *Liverpool, London & Globe Ins. Co.,* 136 U. S. 242; *Scott* v. *Avery,* 5 House of Lords 811, 854; see *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 121.

Appellees insist that the use of the clause here was voluntary, since the appellant was not compelled to write the policy, and that in any case appellant, by long acquiescence in the statute, is estopped to challenge, after the loss, the right of the insured to rely upon it. Without stopping to examine these contentions, we assume that appellant's freedom of contract was restricted by operation of the statute, and pass directly to the question decided by the state court, whether the Fourteenth Amendment precludes the exercise of such compulsion by the legislative power.

The right to make contracts embraced in the concept of liberty guaranteed by the Fourteenth Amendment is not unlimited. Liberty implies only freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. *Chicago, Burlington & Quincy R. Co.* v. *McGuire,* 219 U. S. 549, 567. Hence, legislation otherwise within the scope of acknowledged state power, not unreasonably

or arbitrarily exercised, cannot be condemned because it curtails the power of the individual to contract. *McLean* v. *Arkansas,* 211 U. S. 539; *Schmidinger* v. *Chicago,* 226 U. S. 578; *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389; *Erie R. Co.* v. *Williams,* 233 U. S. 685; *Keokee Cons. Coke Co.* v. *Taylor,* 234 U. S. 224.

The present statute substitutes a determination by arbitration for trial in court of the single issue of the amount of loss suffered under a fire insurance policy. As appellant's objection to it is directed specifically to the power of the state to substitute the one remedy for the other, rather than to the constitutionality of the particular procedure prescribed or followed before the arbitrators, it suffices to say that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. See *Missouri ex rel. Hurwitz* v. *North,* 271 U. S. 40. In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard.

The record and briefs present no facts disclosing the reasons for the enactment of the present legislation or the effects of its operation, but as it deals with a subject within the scope of the legislative power, the presumption of constitutionality is to be indulged. *O'Gorman & Young, Inc.,* v. *Hartford Fire Ins. Co.,* 282 U. S. 251; see *Standard Oil Co.* v. *Marysville,* 279 U. S. 582, 584; *Ohio ex rel. Clarke* v. *Deckebach,* 274 U. S. 392, 397. We cannot assume that the Minnesota legislature did not have knowledge of conditions supporting its judgment that the legislation was in the public interest, and it is enough that,

when the statute is read in the light of circumstances generally known to attend the recovery of fire insurance losses, the possibility of a rational basis for the legislative judgment is not excluded.

Without the aid of the presumption, we know that the arbitration clause has long been voluntarily inserted by insurers in fire policies, and we share in the common knowledge that the amount of loss is a fruitful and often the only subject of controversy between insured and insurer; that speedy determination of the policy liability such as may be secured by arbitration of this issue is a matter of wide concern, see *Fidelity Mut. Life Assn.* v. *Mettler,* 185 U. S. 308; *Farmers' & Merchants' Ins. Co.* v. *Dobney,* 189 U. S. 301; that in the appraisal of the loss by arbitration, expert knowledge and prompt inspection of the damaged property may be availed of to an extent not ordinarily possible in the course of the more deliberate processes of a judicial proceeding. These considerations are sufficient to support the exercise of the legislative judgment in requiring a more summary method of determining the amount of the loss than that afforded by traditional forms. Hence the requirement that disputes of this type arising under this special class of insurance contracts be submitted to arbitrators, cannot be deemed to be a denial of either due process or equal protection of the laws.

Granted, as we now hold, that the state, in the present circumstances, has power to prescribe a summary method of ascertaining the amount of loss, the requirements of the Fourteenth Amendment, so far as now invoked, are satisfied if the substitute remedy is substantial and efficient. See *Crane* v. *Hahlo,* 258 U. S. 142, 147. We cannot say that the determination by arbitrators, chosen as provided by the present statute, of the single issue of the amount of loss under a fire insurance policy, reserving all other issues for trial in court, does not afford such a remedy, or

that in this respect it falls short of due process, more than the provisions of state workmen's compensation laws for establishing the amount of compensation by a commission, *New York Central R. Co.* v. *White,* 243 U. S. 188, 207–208; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 235; or the appraisal by a commissioner of the value of property taken or destroyed by the public, made controlling by condemnation statutes, *Dohany* v. *Rogers,* 281 U. S. 362, 369; *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, 695; *Crane* v. *Hahlo, supra,* p. 147; or findings of fact by boards or commissions which, by various statutes, are made conclusive upon the courts if supported by evidence, *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; *Interstate Commerce Comm.* v. *Union Pacific R. Co.,* 222 U. S. 541; *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 663; *Silberschein* v. *United States,* 266 U. S. 221; *Ma-King Products Co.* v. *Blair,* 271 U. S. 479.

Affirmed.

PHILLIPS, COLLECTOR OF INTERNAL REVENUE, *v.* DIME TRUST & SAFE DEPOSIT CO., EXECUTOR.

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

No. 18. Argued October 20, 1931.—Decided November 23, 1931.

1. The tax imposed under § 302 of the Revenue Act of 1924, determined by including in the gross estate of the decedent subject to tax property held by the decedent and spouse as tenants by the entirety, and bank deposits in their joint names, is not a direct tax in violation of the constitutional requirement of apportionment (Art. I, § 2, cl. 3, and § 9, cl. 4). Following *Tyler* v. *United States,* 281 U. S. 497. P. 165.
2. As to property held upon tenancies by the entirety created after the effective date of the 1924 Act, the validity of the tax is conceded. *Tyler* v. *United States,* 281 U. S. 497. *Id.*

3. As to property held upon tenancies by the entirety created before the effective date of the 1924 Act, but after that of the 1916 Act, and as to joint bank accounts the balances in which at the time of the death are not shown to have been derived from deposits made before the date of the 1916 Act, although the accounts were opened earlier,—the tax is not arbitrarily retroactive. *Milliken* v. *United States*, 283 U. S. 15. P. 166.
4. In a suit to recover taxes already paid, the presumption is that they were lawfully assessed, and the burden rests upon the taxpayer to prove the facts that establish their illegality. P. 167.

CERTIFICATE from the Circuit Court of Appeals, upon appeal from a judgment of the District Court, involving questions as to the validity of the federal estate tax as applied to property held by a decedent and spouse as tenants by the entirety. This Court ordered up the entire record.

Mr. Claude R. Branch, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist* and *Messrs. Sewall Key, J. Louis Monarch, Erwin N. Griswold, Clarence M. Charest,* and *Wm. T. Sabine, Jr.,* were on the brief, for Phillips.

Mr. Charles C. Lark for the Dime Trust & Safe Deposit Co.

An estate by entirety in Pennsylvania takes effect from its inception. It cannot be affected by the actions of either spouse, and is not subject to the debts of either. *Sloan's Estate,* 254 Pa. 346. *Leach's Estate,* 282 Pa. 545.

Paragraphs (a) and (e) of § 302 of the Revenue Act of 1924 must be read and construed together.

The property rights of the parties having become fixed at the inception of the estate by reason of the original instrument creating it, and that act having been fully consummated before the taxing statute was passed, there was no retreat open to decedent. He was not able to change it without the consent of his co-tenant.

At the time of the creation of these estates there was no law taxing an estate by the entirety upon the death of one of the spouses. The *Tyler* case is the first decision of this Court holding that an estate of that kind can be taxed under any Act of Congress.

The decisions of the Board of Tax Appeals and of the courts before which the question arose prior to that decision all held that an estate by entirety could not be taxed under any of the Acts of Congress. *Blount* v. *United States,* 59 Ct. Cls. 328; Dyer, Executor, 5 B. T. A. 711; Murphy, Executor, 5 B. T. A. 952; Smith, Executor, v. Commissioner, 6 B. T. A. 341; *United States* v. *Provident Trust Co.,* 35 F. (2d) 339; *Lynch* v. *Congdon,* 1 F. (2d) 133.

The estates referred to in Group 2 were fully created before the taking effect of the Act of 1924 under which the tax is here claimed.

Reviewing: *Blodgett* v. *Holden,* 275 U. S. 142; *Nichols* v. *Coolidge,* 274 U. S. 531; *Untermyer* v. *Anderson,* 276 U. S. 440; *Lewellyn* v. *Frick,* 268 U. S. 238.

This Court has consistently placed its stamp of disapproval on retroactive construction of taxing statutes in cases where another construction was open. *Shwab v. Doyle,* 258 U. S. 529; *Lewellyn* v. *Frick,* 268 U. S. 238; *Levy* v. *Wardell,* 258 U. S. 542; *Knox* v. *McElligott,* 258 U. S. 546; *Union Trust Co.* v. *Wardell,* 258 U. S. 537; *Coolidge* v. *Long,* 282 U. S. 582.

Milliken v. *United States,* 283 U. S. 15, was decided upon the ground that the gift was made in contemplation of death, and this Court says, "That is controlling here, since it is not challenged by any facts appearing of record." See further: *Sturges* v. *Carter,* 114 U. S. 511; *Re Pell,* 171 N. Y. 48; *National Bank* v. *Jones,* 12 L. R. A. (N. S.) 310, 314; *Crump* v. *Guyer,* 2 A. L. R. 331; 6 R. C. L., p. 304.

Distinguishing: *Chase Nat. Bank* v. *United States,* 278 U. S. 327; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, upon the ground that a tenancy by the entirety involves property rights which are beyond recall. *Knox* v. *McElligott,* 258 U. S. 546; *In re Lyons Estate,* 233 N. Y. 208; *In re McKelways Estate,* 221 N. Y. 15; *In re Carnegie Estate,* 203 App. Div. 91.

The saving and checking accounts in bank were opened in 1910, and in that sense acquired at that time.

The Acts of 1916, 1918, and 1921, were repealed without any saving clauses. The repeals were absolute. The general rule is that where a statute is repealed without a reënactment of the repealed law in substantially the same terms, and there is no saving clause or a general statute remitting the effect of the repeal, the repealed statute in regard to its operative effect is considered as if it had never existed except as to matters and transactions passed and closed, 25 R. C. L. 932, and there can be no vested right in any law which precludes its change or repeal. *Id.* 910; Endlich on Statutes, § 478; *Yeaton* v. *United States,* 5 Cranch 281; *Hamilton Bank* v. *Dudley,* 2 Pet. 492.

The Government acquired no vested rights whatever in the Acts of 1916, 1918, and 1921. The Act of 1916 is not retroactive. Those Acts were repealed absolutely and the provisions thereof stricken from the statutes. The provisions of those Acts could not be invoked except as to transactions passed and closed at the dates of their repeal. *Knox* v. *McElligott,* 258 U. S. 546. None of the prior Acts, as shown above, were retroactive. *Nichols* v. *Coolidge,* 274 U. S. 531. The Act of 1924 is the first Act which attempts to legislate retroactively. In so far as it attempts to do this, it is unconstitutional and void in that it is capricious and confiscates the property of the surviving spouse.

MR. JUSTICE STONE delivered the opinion of the Court.

This suit was brought in the District Court for the Middle District of Pennsylvania, by the executor, to recover federal estate taxes alleged to have been illegally exacted. A jury having been waived, the court found the facts as stipulated and gave judgment against the collector. 30 F. (2d) 395. Upon appeal, the Court of Appeals for the Third Circuit, without deciding the case, certified here the questions involved, and, on joint motion of the parties, this Court ordered up the entire record. Jud. Code 239.

The only controversy presented relates to taxes levied and collected with respect to thirteen items of property, real and personal, concededly held by decedent and his wife as tenants by the entirety at his death in 1925. The applicable taxing statute is § 302 of the Revenue Act of 1924, 43 Stat. 253, 304, which provides that the gross value of the decedent's estate subject to tax shall include all property:

" (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: . . ."

This provision, without any variation of present significance, was in force under the 1916 and successive revenue acts. § 202, Rev. Act of 1916, 39 Stat. 756, 777-778; Rev. Act of March 3, 1917, 39 Stat. 1000; § 402, Rev. Act of 1918, 40 Stat. 1057, 1097; § 402, Rev. Act of 1921, 42 Stat. 227, 278.

The thirteen items of property with respect to which the tax was imposed may be classified in three groups, (1) property held upon tenancies by the entirety created after the effective date of the Revenue Act of 1924, (2) property held upon tenancies by the entirety created after the Revenue Act of 1916 and before the effective date of the Revenue Act of 1924, and (3) bank accounts opened in 1910 in the joint names of decedent and his wife, in which there were deposit balances at the date of his death.

The district court accepted the contention of the taxpayer that the nature of the estate by the entirety, and particularly the interest in it of a surviving tenant, are such as to preclude the imposition of death or transfer taxes measured by the value of the interest which ceases at the death of either tenant, and that the tax, if deemed to be upon property, is a direct tax not apportioned, forbidden by Art. I, § 2, Clause 3, and § 9, Clause 4, of the Constitution. After the decision of the district court, this contention was considered and rejected by this Court in *Tyler* v. *United States,* 281 U. S. 497, holding that a like tax imposed under § 202 (c), Rev. Act of 1916, was a valid indirect tax, measured by the value of the property, rights in which devolved upon the surviving tenant upon the happening of an event, the death of the other tenant by the entirety.

The controlling force of that decision is acknowledged as to the items of property in Group (1), acquired after the passage of the taxing act, and as to them it is conceded that the tax was rightly levied.

But it is urged that the tax imposed with respect to Groups (2) and (3) is invalid. As the creation of the tenancies by the entirety antedated the taxing act, and the earlier corresponding sections had been repealed, it is insisted that the statute is given a retroactive operation, such as that condemned by this Court in *Nichols* v. *Cool-*

idge, 274 U. S. 531; *Untermyer* v. *Anderson,* 276 U. S. 440; *Coolidge* v. *Long,* 282 U. S. 582. As § 302 (h) of the Act of 1924 specifically makes the quoted provision of subdivision (e) applicable to estates created or existing before the passage of the statute, the question presented is not one of its construction or applicability, but of the power of Congress to impose the tax. The Government argues that the tax was laid on the devolution of rights upon the wife at the death of her husband after the passage of the Act, and that therefore the statute was not applied retroactively, even though the estate was created before its enactment. Without foreclosing consideration of this contention at another time, we find it unnecessary now, in view of the facts of the present case, to pass upon it.

Group 2. The tenancies in all of the items of the second group were created after the passage of the 1916 Revenue Act. Congress had by that act adopted a system of death taxes, embracing, as it lawfully might, estates by the entirety. As was pointed out in *Tyler* v. *United States, supra,* pp. 503, 505, such estates are appropriate subjects of death taxes and the taxation of them is a suitable measure to prevent evasion of a system of taxation levied on estates passing at death by will or inheritance. In both respects they resemble gifts made in contemplation of death, likewise taxed by the estate tax provisions of the 1916 and later revenue acts. The considerations which led us, in *Milliken* v. *United States,* 283 U. S. 15, to uphold taxation of gifts in contemplation of death, made after the 1916 Act and before that of 1918, at the higher rate of the latter act, are equally applicable here. The knowledge available before the creation of the estate that it was embraced within an established taxing system and that its taxation, on the same basis and in the same manner as decedents' estates, was an essential part of the

system to prevent evasions, relieves the present tax of the objection that it is arbitrarily retroactive.

Group 3. Although the bank accounts were opened before the passage of the Revenue Act of 1916, the record does not disclose whether the deposits, which were the sources of the credit balances at the time of the decedent's death, were made before or after 1916. If after, the tax was rightly laid, for reasons already stated, which support the tax with respect to the items in Group 2. As the suit is brought to recover taxes already paid, the presumption is that they were lawfully assessed and the burden rests on the taxpayer to prove the facts which establish their illegality. *Niles Bement Pond Co.* v. *United States,* 281 U. S. 357, 361; *Reinecke* v. *Spalding,* 280 U. S. 227, 232. As the taxpayer has failed to sustain the burden in this respect or to show that the wife had originally owned or paid for any of the items or to present any facts to support a recovery other than those stated, the judgment is

Reversed.

UNITED STATES *v.* RYAN.

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

No. 49. Argued October 26, 27, 1931.—Decided November 23, 1931.

1. Statutes designed to prevent fraud on the revenue are construed less narrowly, even though a forfeiture results, than penal statutes and others involving forfeitures. P. 172.
2. In R. S. § 3453, which provides for forfeiture of (1) taxable articles found in the possession, custody or control of any person for the purpose of being sold or removed by him in fraud of the internal revenue laws, (2) raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax, with intent to defraud the revenue, and (3) all tools, implements, instruments, and personal property whatsoever, in the

place or building, or within any yard or inclosure where such articles or raw materials are found, the phrase "such articles" in the third clause refers to the articles mentioned in both of the other clauses of the section, so that chattels associated with illicit possession, as well as those associated with illicit manufacture, are subject to forfeiture under the statute. P. 173.

3. The uniform construction given to a statute by the lower federal courts for more than sixty years is persuasive in determining its true meaning. P. 174.
4. In adopting § 3453 in the Revised Statutes without substantial change of the section as amended seven years previously, Congress must be deemed to have adopted the consistent interpretation theretofore given the amended section by the courts. P. 175.
5. A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose. *Id.*
6. The general words "all personal property whatsoever," as used in R. S. § 3453 to define what property is subject to forfeiture, must be construed, by application of the principle *noscitur a sociis*, to be limited in their meaning to chattels which have some relation to the tax evasion aimed at by the statute. P. 176.
7. Bar fixtures and other saloon furnishings and equipment of a room in which tax-unpaid intoxicating liquors were dispensed are subject to forfeiture under R. S. § 3453. *Id.*
8. A forfeiture under R. S. § 3453 of saloon furnishings and equipment seized in a place where tax-unpaid liquor was possessed for sale is not barred by the arrest and prosecution of the offender under the National Prohibition Act. *Id.*

44 F. (2d) 951, reversed.

CERTIORARI, 283 U. S. 816, to review a judgment reversing a judgment for the Government in a forfeiture proceeding under R. S. § 3453.

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. George D. Toole, with whom *Mr. C. S. Wagner* was on the brief, for respondent.

Section 3453 of the Revised Statutes contains three sentences. In 1864 and as amended in 1866, the section consisted of a single sentence. Conflicting judicial constructions were placed upon it. When carried forward into the Revised Statutes it was punctuated as it now stands. It declares the law as of December 1, 1873, the effective date of the Revised Statutes. *Dwight* v. *Merritt,* 140 U. S. 213; *Bate Refrigerating Co.* v. *Sulzberger,* 157 U. S. 1; *United States* v. *Bowen,* 100 U. S. 508. Under it only objects on which taxes are imposed, and evaded, are subject to seizure and forfeiture, as declared in the first sentence. Tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure, are subject to seizure and forfeiture only when associated with a manufactory of some kind, as declared in the second sentence of the statute. *In re Hurley,* 37 F. (2d) 397; *United States* v. *One Ice Box,* 37 F. (2d) 120; *United States* v. *Ten Bottles of Scotch Whiskey,* 48 F. (2d) 545; *United States* v. *Thirty-three Barrels of Spirits,* Fed. Cas. No. 16470; *United States* v. *Sixteen Barrels of Distilled Spirits,* Fed. Cas. No. 16300.

Contemporaneous construction is controlling. For a half century (1879–1930) the Bureau of Internal Revenue did not avail itself of the provisions of the statute to seize other than articles *per se* contraband, unless associated with a manufactory of some kind, so far as the reported cases disclose.

The language of the statute supports the construction given to it by the Circuit Court of Appeals.

In this case there was an election of remedies by the United States and the Government is bound thereby,

though the Circuit Court found it unnecessary to base its decision upon this ground, urged in the trial court.

A prosecution was instituted under the National Prohibition Act. The property involved herein was seized by a prohibition enforcement agent armed with a search warrant issued under the provisions of the National Prohibition Act. The seizure was adopted and the property was in *custodia legis,* stored in a public warehouse, when it was again seized by the United States Marshal under a warrant and monition issued in this libel proceeding. The person in charge of the place where the property was first seized was indicted by the grand jury for violation of the National Prohibition Act, the fourth count charging him with the maintenance of a common nuisance in violation of Title II of that Act.

Under the facts the National Prohibition Act governs as it does in transportation cases. *Richbourg Motor Co.* v. *United States,* 281 U. S. 528; *Commercial Credit Co.* v. *United States,* 276 U. S. 226. Distinguishing *Various Items of Personal Property* v. *United States,* 282 U. S. 577. See also *United States* v. *One Ford Coupe,* 272 U. S. 321; *Herter* v. *United States,* 33 F. (2d) 400–402.

Mr. Justice Stone delivered the opinion of the Court.

Upon a libel filed by the United States in the District Court for Montana, praying the forfeiture of a bar, back bar, and other saloon furnishings and equipment, seized by federal prohibition agents, it was averred that, at the time and place of seizure, one Lewis had in his possession tax-unpaid intoxicating liquors for the purpose of selling or removing them in fraud of the revenue laws.

Respondent Ryan intervened, claiming the seized property as owner, and set up that none of it was designed for the manufacture of intoxicating liquors, or intended for use in violation of the National Prohibition Act, or subject

to forfeiture. At the trial it appeared from the evidence that at the time and place of seizure, the place being a so-called soft drink parlor, in fact used for the sale of intoxicating liquors as beverages, tax-unpaid liquor was possessed for sale and was being sold by Lewis. At the close of the evidence, both sides having moved for a directed verdict, the court withdrew the case from the jury and gave judgment for the Government, which the Court of Appeals for the Ninth Circuit reversed, holding that the forfeiture authorized by R. S. § 3453, 26 U. S. C. § 1185, is confined to chattels seized in places in which raw materials are manufactured into taxable articles in fraud of the revenue. 44 F. (2d) 951. This Court granted certiorari, 283 U. S. 816, to resolve the conflict between the decision below and that of the Court of Appeals for the Second Circuit, in *United States* v. *Ten Bottles of Scotch Whiskey,* 48 F. (2d) 545.

The only questions presented here are whether the seized articles are within the definition of the statute and whether forfeiture of them under § 3453 is barred by the arrest and prosecution of Lewis, who controlled or possessed them, for his violation of the National Prohibition Law.

Section 3453 [1] contains three clauses. The first authorizes forfeiture of taxable "articles" found in the posses-

[1] R. S. § 3453. "All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal-revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and shall be forfeited to the United States. And all raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such

sion, custody or control of any person "for the purpose of being sold or removed by him in fraud of the internal revenue laws." The second authorizes forfeiture of "raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax," with intent to defraud the revenue. The third forfeits "all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found." To support the respondent's contention it is necessary to read the phrase "such articles" in the third clause as not referring to the taxable "articles" possessed with intent to defraud the revenue described in the first, but only to the "articles of a kind subject to tax" mentioned in the second, read to mean taxable articles which have been manufactured on the premises. That the phrase should be taken to refer to the articles mentioned in both clauses would seem to be an admissible construction, less restrictive of its natural meaning than that urged.

We are not called upon to give a strained interpretation in order to avoid a forfeiture. Statutes to prevent fraud on the revenue are construed less narrowly, even though a forfeiture results, than penal statutes and others involving forfeitures. *United States* v. *Stowell,* 133 U. S. 1, 12; *Smythe* v. *Fiske,* 23 Wall. 374, 380; *United States* v. *Hodson,* 10 Wall. 395, 406; *Cliquot's Champagne,* 3 Wall. 114, 145; *Taylor* v. *United States,* 3 How. 197, 210.

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manufactured articles, or with design to evade the payment of said tax; and all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited as aforesaid. The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the circuit court or district court of the United States for the district where such seizure is made."

Section 3453 is a reënactment of § 9 of the Act of July 13, 1866, c. 184, 14 Stat. 98, 111, amending § 48 of the Act of June 30, 1864, c. 173, 13 Stat. 223, 240. The earlier sections, like the present one, are each made up of three clauses, connected by the conjunction "and." In the first two acts, they constitute a single sentence; but in the present section the first clause appears as one sentence and the other two are combined in a second sentence. The first two clauses of all three acts are substantially the same. The third clause of the Act of 1864 provided for forfeiture of "all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or enclosure where such articles on which duties are imposed, as aforesaid, and intended to be used by them [persons intending to manufacture] in the fraudulent manufacture of such raw materials, shall be found . . ." The apparent purpose was to embrace within the forfeiture at least all personal property seized in the place where taxable articles are found, but the further qualification of the taxable articles as those "intended to be used . . . in the fraudulent manufacture of such raw materials," seems meaningless unless the phrase be transposed and read as meaning "and such raw materials intended to be used . . . in the manufacture of such articles." This is the substance of the amendment of 1866, when the third clause took its present form. We think the purpose of it was to remove the ambiguity and uncertainty of the quoted phrase, and not to restrict the forfeiture to chattels associated with the illicit manufacture, to the exclusion of those associated with taxable articles possessed with the purpose to sell or remove in fraud of the revenue, which were evidently intended to be confiscable by the section as originally drawn. We cannot assume that so radical a change, if intended, would have been expressed by language so plainly capable of the opposite construction as that of the Act of 1866.

Nothing in the legislative history is suggested to indicate that such was the intention and there is no such plain or obvious distinction to be made, in a section devised for the protection of the revenue, between articles associated with illicit manufacture and those associated with illicit possession, each equally frauds upon the revenue, as to be persuasive that the present act was designed to hit the first and not the second. The companion section, 3450, authorizing the forfeiture of vehicles and horses used for propelling them, made no such distinction. By it, vehicles used for transporting or concealing taxable articles with the prescribed intent are forfeitable, as well as those used to transport or conceal contraband raw material or implements of manufacture. See *Goldsmith-Grant Co.* v. *United States,* 254 U. S. 505; *United States* v. *One Ford Coupe,* 272 U. S. 321.

The separation by the revisers of the first clause from the other two by a period instead of a semicolon, retaining the conjunction "And," and the dropping of the conjunction " also " from the second and third clauses, are changes hardly substantial enough to warrant any changed construction of the section. *McDonald* v. *Hovey,* 110 U. S. 619, 629; *Anderson* v. *Pacific S. S. Co.,* 225 U. S. 187, 199; see *Buck Stove Co.* v. *Vickers,* 226 U. S. 205, 213.

If the point were more doubtful, we should hesitate to set aside, at this late date, the uniform construction given to the section with respect to this question by the lower federal courts for more than sixty years. *United States* v. *Quantity of Rags,* Fed. Cas. No. 16103 (1868); *Quantity of Distilled Spirits,* Fed. Cas. No. 11494 (1868); compare *United States* v. *Thirty-Three Barrels of Spirits,* Fed. Cas. No. 16470 (1868); *United States* v. *Thirty-Six Barrels of High Wines,* Fed. Cas. No. 16468 (1870); see *United States* v. *Eighteen Barrels High Wines,* Fed. Cas. No. 15033 (1871); *United States* v. *Quantity of Tobacco,* Fed.

Cas. No. 16106 (1872); compare *United States* v. *Distillery at Spring Valley,* Fed. Cas. No. 14963 (1873); *United States* v. *Sixteen Barrels of Distilled Spirits,* Fed. Cas. No. 16300 (1879); *United States* v. *One Ice Box,* 37 F. (2d) 120 (N. D. Ill. 1930); *contra, In re Hurley,* 37 F. (2d) 397 (W. D. N. Y. 1930); *United States* v. *Ten Bottles of Scotch Whiskey,* 48 F. (2d) 545 (C. C. A. 2d, 1931). By the adoption of § 3453 in the Revised Statutes, as of December 1, 1873, without substantial change of the section as amended in 1866, Congress must be considered to have adopted the consistent interpretation of the latter as authorizing forfeiture of non-taxed articles found in a place in which taxed articles are either possessed or manufactured with intent to defraud the revenue. *Sessions* v. *Romadka,* 145 U. S. 29, 41–42; see *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488.

It is said that the construction urged by the Government is inadmissible because so broad as to lead to absurd results; that it would permit seizure of chattels having no relation to the taxable articles or their intended sale or removal, if anywhere in the same building or enclosure, and might include chattels possessed on the premises by others having no connection with the taxable articles or their intended sale or removal. But we do not so construe it. To do so would be to justify penalties having no relation to the offense, and the infliction of hardship on innocent persons unnecessary for the protection of the revenue. All laws are to be given a sensible construction. A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose. *United States* v. *Katz,* 271 U. S. 354; *United States* v. *Jin Fuey Moy,* 241 U. S. 394; *United States* v. *Palmer,* 3 Wheat. 610, 631.

Notwithstanding the broad language of the section, we think it may be given a reasonable construction, and the

one most consistent with its apparent purpose, by the application of the principle *noscitur a sociis*. The taxed articles and the raw materials intended for manufacture are the principal things aimed at by the statute. Tools and implements by their use are connected incidents. By reason and analogy, as well as by context, we conclude that the general words "all personal property whatsoever" were intended to include chattels other than the specified tools and implements, but to be restricted to those which, like tools or implements, are related to one or the other of the principal things, or incident to their intended use or disposition in fraud of the revenue. See *United States* v. *Thirty-Three Barrels of Spirits, supra.* Here the seized articles, being the furnishings and equipment of a room in which tax-unpaid intoxicating liquors were dispensed, were incident to the sale, and were so related to the tax evasion at which the statute was aimed as to be clearly embraced within both its purpose and its words.

Respondent's objection that forfeiture under R. S. § 3453 is barred by the arrest and prosecution of the offender under the National Prohibition Act is without force. It is true that by the express command of § 26 of the National Prohibition Act, in all cases of arrest for transportation of intoxicating liquors, the transporting vehicle must be seized and proceedings for its forfeiture had under that section and not under R. S. § 3450. *Commercial Credit Co.* v. *United States,* 276 U. S. 226; *Richbourg Motor Co.* v. *United States,* 281 U. S. 528. But by § 5 of the Willis-Campbell Act of November 23, 1921, c. 134, 42 Stat. 222, 223, all penalties for violation of the revenue laws, not directly in conflict with any provision of the National Prohibition Act, are continued in force. See *United States* v. *One Ford Coupe, supra.* There is no question here of use of a vehicle for transportation, and there is nothing in the National Prohibition Act nec-

essarily or directly in conflict with the application given here to the provisions of § 3453.

Reversed.

SUN INSURANCE OFFICE *v.* SCOTT.*

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

No. 28. Argued October 22, 1931.—Decided November 23, 1931.

1. A provision in a policy of fire insurance prohibiting the placing of a chattel mortgage on the insured property without the consent of the insurer endorsed on the policy is valid, and its violation constitutes a complete defense to an action upon the policy for a loss. P. 180.
2. A loss payable clause attached to a policy of fire insurance, providing that any loss that may be proved due the assured shall be payable to the assured and a named bank, does not imply knowledge on the part of the insurer of the existence of a chattel mortgage on the insured property, nor does it constitute a waiver of a condition in the policy against mortgaging or a consent to a mortgage. P. 180.
3. The fact that an agent of the insurers, with knowledge of a chattel mortgage on the insured property, attached to each of three policies of fire insurance a loss payable rider making any loss under the policies proved due the assured payable to the assured and a named bank, is not sufficient to establish a custom giving to such a clause the effect of a consent on the part of the insurer to change of title or encumbrance of the insured property. P. 181.
4. Under § 9586 of the Ohio General Code, which makes a person who solicits or takes an application for insurance the agent of the company, "anything in the application or the policy to the contrary notwithstanding," knowledge of the insurer's agent of a chattel mortgage on property insured under policies of fire insurance containing chattel mortgage clauses may not be imputed to the insurers so as to constitute a consent on the part of the latter that the policies should remain in force notwithstanding the encumbrance. P. 182.

46 F. (2d) 10, reversed.

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* Together with No. 29, *Norwich Union Fire Insurance Society, Ltd.*, v. *Scott*, and No. 30, *Home Insurance Co.* v. *Scott*.

CERTIORARI, 283 U. S. 814–815, to review judgments affirming judgments against the insurance companies in three cases involving policies of fire insurance.

Mr. Rolland M. Edmonds for petitioners.

Mr. F. S. Monnett, with whom *Messrs. James Joyce* and *Elwood Murphy* were on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The respondent instituted five actions in a common pleas court in Ohio on as many policies of fire insurance. The causes were removed to the District Court for Southern Ohio, where they were consolidated, tried together, and resulted in verdicts and judgments for respondent. On appeal two of these judgments were reversed, and the three here under review were affirmed.[1] We granted certiorari.

Each suit seeks recovery upon a fire policy issued upon wool belonging to respondent. In each, defense was made that he placed a chattel mortgage on the property in violation of a provision of the policy as follows:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be . . . personal property and be or become incumbered by a chattel mortgage."

It is admitted that on June 19, 1926, the respondent executed a chattel mortgage on the insured property to a bank, and that the mortgage continued in force at the time of the fire. The policies of the Sun Insurance Office and the Norwich Union Fire Insurance Society, Ltd., were is-

[1] 46 F. (2d) 10.

sued on June 14, 1926. That of The Home Insurance Company of New York bore date July 6, 1926. Each of the policies had attached to it a "loss payable clause" reading substantially as follows:

"Any loss under this policy that may be proved due the assured shall be payable to the assured and Cumberland Savings Bank Co., Cumberland, Ohio, subject, nevertheless, to all the terms and conditions of the policy."

These riders were attached by the local agent of petitioners, to the Sun and Norwich policies after their issuance, and to the Home policy on the date it was issued.

To the petitioners' defense of violation of the chattel mortgage clause, the respondent answered that the loss payable clause, as a matter of law, constituted a waiver and a recognition of the interest of the bank as chattel mortgagee. He averred, moreover, that by custom in the community in which the policies were written such clause was so understood and was customarily used for the purpose of giving the insurers' consent to chattel mortgages. In the alternative he insisted that under § 9586 of the Ohio General Code a person who solicits insurance and procures the application therefor must be held to be the agent of the party, company or association thereafter issuing a policy upon such application or a renewal thereof, anything in the application or policy to the contrary notwithstanding; and that if the loss payable clause did not have the effect for which he contended, nevertheless the agent who wrote the policies and attached the clause knew of the existence of the chattel mortgage, and his knowledge was to be imputed to the insurers and constituted an agreement on their part that notwithstanding the mortgage the insurance should remain in force.

To this petitioners replied by denying any such custom as was alleged, and quoted a provision appearing in each of the policies that "no officer, agent, or other representative of this Company shall have power to waive any pro-

vision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto."

The Court of Appeals held that under the law of Ohio the chattel mortgage was valid as between respondent and the bank, and would have avoided the policies except for the loss payable clause, which it held either by its own force or by its customary use for the purpose constituted a waiver and consent on the part of the insurers. On this ground it affirmed the judgments.

We are of opinion that upon the uncontradicted facts the petitioners made out a valid defense to the suits and were entitled to directed verdicts in their favor. The provision in the policies prohibiting chattel mortgages without consent endorsed on the policy is intended to reduce the moral hazard, and is a valid stipulation, the violation of which constitutes a complete defense. *Hunt* v. *Springfield Fire & Marine Insurance Co.,* 196 U. S. 47. The loss payable clause above quoted is not informative to the insurer of the existence of a chattel mortgage, but performs the office of protecting a creditor of the insured who has no interest in the insured property by mortgage or otherwise against the eventuality of fire loss.

In *Bates* v. *Equitable Insurance Co.,* 10 Wall. 33, a policy contained a covenant that if the property were sold the insurance should cease unless consent of the insurer to the sale were given in writing. The policy was endorsed, " payable, in case of loss, to E. C. Bates," to whom it appeared the insured goods had been sold. There was no evidence except the endorsement of any consent to accept Bates, the purchaser, as the party whose interest

was insured. It was said of the practice of making such loss payable endorsements [p. 37]:

"It is a mode of appointing that the loss of the party insured shall be paid by the company to such third person. This transaction is a very common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, his skill and success in trade, but who requires indemnity against such accidents as loss by fire, or the perils of navigation. . . .

"In the face of this frequent use of the two indorsements on the policy, it cannot be held that they imply of themselves a knowledge of the sale or a consent to insure the purchaser."

We are of opinion that the doctrine announced in the *Bates* case is controlling here; that the attachment of a loss payable clause is entirely consistent with the condition against change of interest, or encumbrance of the insured property, and does not constitute a waiver of the condition against sale or mortgaging, or a consent thereto.

We find nothing in the record evidencing any customary use in the community where the policies were written of a loss payable clause as a consent to change of title or encumbrance of the subject-matter of the insurance, beyond the fact that in the three instances in question the agent of the insurers did, with alleged knowledge of the chattel mortgage, attach to each of the policies a loss payable rider. This is clearly insufficient to establish a custom or to change the normal office of such an endorsement.

The respondent insists that laying the loss payable endorsement out of view, the uncontradicted evidence that Bracken, the insurers' local agent, knew of the chattel mortgage, constitutes a consent on the part of the insurers that the policies should remain in force notwithstanding the encumbrance. He claims that for this pur-

pose the knowledge of the agent is that of his principals. Reliance is placed upon § 9586 of the Ohio General Code, which makes a person who solicits or takes an application for insurance the agent of the company, "anything in the application or the policy to the contrary notwithstanding." He asserts that the decisions of the Ohio courts interpreting this statute are to the effect that the agency thus imputed to the solicitor extends to all matters of contract with respect to the policy, including consent to the alteration of its terms.

On its face the statute does not go so far. We have examined the authorities cited and fail to find that they give it any such force or effect.[2] They do not, as respondent claims, define the scope of the agency created by the statute, but leave it to be defined by applicable principles of common law. In the present cases the policy limits its scope, and we think the written contract must control.

For the reasons given it is clear that the petitioners did not waive the condition against encumbrance nor consent to the giving of the chattel mortgage, and that there was nothing in the situation which deprived them of their defense based upon that condition.

In the petition for the writ of certiorari and in the argument other defenses made by the petitioners, which the courts below overruled, were pressed upon us. It is unnecessary to consider them, as what we have said disposes of the cases.

The judgments must be reversed and the causes remanded for further proceedings in accordance with this opinion.

Reversed.

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[2] *Foster* v. *Insurance Co.*, 101 Ohio St. 180; 127 N. E. 865; *Hartford Fire Ins. Co.* v. *Glass*, 117 Ohio St. 145; 158 N. E. 93.

MECOM, ADMINISTRATOR, *v.* FITZSIMMONS DRILLING CO., INC., ET AL.

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

No. 32. Argued October 22, 23, 1931.—Decided November 23, 1931.

1. Where, under a statute giving a right to recover for death by wrongful act, the administrator, if one is appointed, is required to bring the suit, is charged with responsibility for its conduct or settlement and the distribution of its proceeds to the persons entitled under the statute, and is liable upon his official bond for failure to act with diligence and fidelity, he is the real party in interest and his citizenship rather than that of the beneficiaries is looked to in determining whether the suit is removable to the federal court. P. 186.
2. In the case of suits by administrators to recover for death by wrongful act, the same rule as to federal jurisdiction on the ground of diversity of citizenship applies whether the statute provides that the amount recovered shall be for certain relatives of the decedent or be general assets of the estate. *Id.*
3. Statutes of Oklahoma make the administrator (if there be one) the trustee of an express trust and require suit to recover for death by wrongful act to be brought and controlled by him. Comp. Stats., Okla., 1921, § 824. *Id.*
4. In determining the right to remove to the federal court an action brought by an administrator who was regularly appointed by a state probate court, the appointment cannot be attacked collaterally, nor the removal be sustained, upon the ground that his selection was brought about by collusion between him, his predecessor and an attorney for the purpose of preventing removal by reason of his citizenship. P. 189.

47 F. (2d) 28, reversed.

CERTIORARI, 283 U. S. 815, to review a judgment affirming a judgment against the administrator in a suit to recover for a death by wrongful act. The case is stated fully in the opinion.

Mr. Roy F. Ford, with whom *Messrs. S. J. Montgomery, Theodore H. Haugh,* and *A. H. Meyer* were on the brief, for petitioner.

Messrs. T. Austin Gavin and *George F. Short,* with whom *Messrs. Horace H. Hagan, Ray S. Fellows, Thomas R. Freeman,* and *Joseph A. Gill, Jr.,* were on the brief, for respondents.

Mr. Justice Roberts delivered the opinion of the Court.

Smith, a citizen and resident of Oklahoma, died as a result of injuries alleged to have been negligently inflicted by the respondents. His widow was appointed administratrix of his estate by an Oklahoma probate court, and, as such, instituted an action for damages in a district court of that state, against the respondents and certain individuals, under a statute [1] creating a cause of action for death by wrongful act. Such a proceeding is required to be brought by the administrator, if there be one. The amount recovered does not constitute assets of the estate, but is to be divided between the widow and children.

The cause was removed to the United States District Court. The administratrix filed a motion to remand, which was overruled. She then dismissed the action. Subsequently she brought a second suit as administratrix, against the respondents and certain of their employees, upon the same cause of action, in a district court of Oklahoma; and a little later brought a third against the same or some of the same defendants in another state district court. Both were removed into the appropriate United States District Courts. Motions to remand were

[1] §§ 822–825, Comp. Stat. Okla. 1921.

overruled, and both were thereupon dismissed by the plaintiff.

The widow resigned as administratrix and upon her request the probate court appointed petitioner as administrator. He was and is a resident and citizen of Louisiana, of which state the respondent Fitzsimmons Drilling Company is also a citizen. He filed the present action in a state court, and the respondents again removed to the United States District Court. The petitioner having moved to remand, the respondents answered charging fraud and collusion on the part of the widow, her attorney, and the petitioner, the alleged object of which was to prevent removal by having an administrator appointed whose citizenship was the same as that of one of the defendants. A hearing was had at which it was proved that the motive for the appointment was to obviate the diverse citizenship of the parties which had justified the removal of the earlier suits, and that petitioner had, as a favor to the widow and her attorney, agreed to act as administrator. The District Court refused to remand. To this refusal the petitioner saved proper exceptions.

It should perhaps be remarked that in this last suit there was included a second cause of action for pain and suffering caused the deceased between the date of his injury and that of his death; but no question here arises in respect of this cause of action, and for present purposes it may be disregarded.

At the trial on the merits a demurrer to petitioner's evidence was sustained, and judgment for respondents resulted. On appeal the Circuit Court of Appeals affirmed, holding that the cause was properly removed.[2] This Court granted certiorari.

[2] 47 F. (2d) 28.

It is settled that the federal courts have jurisdiction of suits by and against executors and administrators if their citizenship be diverse from that of the opposing party, although their testators or intestates might not have been entitled to sue or been liable to suit in those courts for want of diversity of citizenship. *Childress* v. *Emory,* 8 Wheat. 642; *Coal Co.* v. *Blatchford,* 11 Wall. 172; *Rice* v. *Houston,* 13 Wall. 66; *Amory* v. *Amory,* 95 U. S. 186; *Blake* v. *McKim,* 103 U. S. 336; *American Bible Society* v. *Price,* 110 U. S. 61; *Continental Insurance Co.* v. *Rhoads,* 119 U. S. 237. It was, however, held by the court below that this principle is inapplicable to a case, like the present, where the administrator sues not for the benefit of the estate, but of certain named beneficiaries amongst whom the amount recovered must be divided. That court likened such a case to one where suit by the beneficiary is required to be brought in the name of a state, county, or official body, although such nominal plaintiff has no interest in the result and is not permitted to control the litigation (*McNutt* v. *Bland,* 2 How. 9; *Maryland* v. *Baldwin,* 112 U. S. 490); or to actions instituted by a next friend, where it has been held that the infant is the real party in interest, whose citizenship determines the question of diversity. *Voss* v. *Neineber,* 68 Fed. 947; *Blumenthal* v. *Craig,* 81 Fed. 320.

The petitioner insists that where an administrator is required to bring the suit under a statute giving a right to recover for death by wrongful act, and is, as here, charged with the responsibility for the conduct or settlement of such suit and the distribution of its proceeds to the persons entitled under the statute, and is liable upon his official bond for failure to act with diligence and fidelity, he is the real party in interest and his citizenship, rather than that of the beneficiaries, is determinative of federal jurisdiction. This we think is the correct view. The applicable statutes make the administrator the trustee of an

express trust and require the suit to be brought and controlled by him.[3]

Under these circumstances the rule laid down in *Mexican Central Ry. Co.* v. *Eckman,* 187 U. S. 429, is applicable. That was an action in a federal court in Texas by a guardian, a citizen of that state, against a Massachusetts corporation, to recover for an injury to a minor which occurred in Mexico. A plea in abatement averred that the ward and his parents were citizens of Illinois and that the court was therefore without jurisdiction. This Court examined the state law and ascertained that it authorized a guardian to bring suit in his own name. It was held that his citizenship, not that of his ward, determined the right to resort to the federal court. At page 434 it was said:

"If in the State of the forum the general guardian has the right to bring suit in his own name as such guardian, and does so, he is to be treated as the party plaintiff so far as Federal jurisdiction is concerned, even though suit might have been instituted in the name of the ward by guardian *ad litem* or next friend. He is liable for costs in the event of failure to recover and for attorneys' fees to those he employs to bring the suit, and in the event of success, the amount recovered must be held for disposal according to law, and if he does not pay the same over to the parties entitled, he would be liable therefor on his official bond."

See also *Detroit* v. *Blanchfield,* 13 F. (2d) 13.

It has been held that the same rule applies in the case of suits by administrators to recover for death by wrongful act, whether the statute provides that the amount recovered be for certain relatives of the decedent or be

[3] Ch. 3, Art. XXVII, §§ 824–825, Comp. Stat. Okla. 1921; *Sanders* v. *Chicago, R. I. & P. Ry. Co.,* 66 Okla. 313; 169 Pac. 891; *Aetna Casualty & Surety Co.* v. *Young,* 107 Okla. 151; 231 Pac. 261. Ch. 3, Art. V, § 211, Comp. Stat. Okla. 1921.

general assets of the estate. *Harper* v. *Norfolk & W. R. Co.*, 36 Fed. 102; *Popp* v. *Cincinnati H. & D. Ry. Co.*, 96 Fed. 465; *Cincinnati H. & D. R. Co.* v. *Thiebaud*, 114 Fed. 918; *Bishop* v. *Boston & M. R. Co.*, 117 Fed. 771; *Memphis St. Ry. Co.* v. *Bobo*, 232 Fed. 708.

The court below relied on *Stewart* v. *Baltimore & O. R. Co.*, 168 U. S. 445. That authority is not in point. It dealt with the question whether an administrator appointed in the District of Columbia could bring suit there for a death occurring in Maryland,—the latter's statute providing that such suit should be brought in the name of the state. It was held that the suit might be maintained, as the administrator would be required to make distribution of the amount recovered in accordance with the laws of Maryland. No question of a fraudulent attempt to avoid jurisdiction by reason of lack of diversity of citizenship arose or was considered in the case.

The respondents assert that the present case is taken out of the general rule by its peculiar facts, which it is alleged demonstrate that a fraud was perpetrated to avoid federal jurisdiction. They point out that, after the widow in her capacity as administratrix had repeatedly failed to prevent the removal of her successive actions, her attorney had her resign and nominate in her stead the petitioner, who did not know her, had not known the decedent, knew of no assets in Louisiana, and consented to be substituted for her as a favor to her attorney; that petitioner did not sign his own bond, did not come to the state of Oklahoma to be appointed, and upon his appointment at once named the widow as his state agent in Oklahoma. They concede, as they must, that as a nonresident he was qualified under the Oklahoma law, if appointed by the probate court, to act as administrator.[4]

[4] See the following sections of the Compiled Statutes Oklahoma 1921: 1141, 1153, 1159, 1188, 1189, Ch. 5, Art. III.

His appointment was regular and in accordance with the statutes; and the decree of the probate court may not be collaterally attacked in the present proceeding. See *McGehee* v. *McCarley,* 91 Fed. 462; *American Car & Foundry Co.* v. *Anderson,* 211 Fed. 301. It is nevertheless insisted that if the petitioner's appointment was accomplished for the purpose of avoiding diversity of citizenship and consequent removal into the United States court, the parties to that proceeding,—the petitioner, the widow, and her attorney,—were in a conspiracy to defeat federal jurisdiction.

But it is clear that the motive or purpose that actuated any or all of these parties in procuring a lawful and valid appointment is immaterial upon the question of identity or diversity of citizenship. To go behind the decree of the probate court would be collaterally to attack it, not for lack of jurisdiction of the subject-matter or absence of jurisdictional facts, but to inquire into purposes and motives of the parties before that court when, confessedly, they practiced no fraud upon it. The case falls clearly within the authorities announcing the principle that in a removal proceeding the motive of a plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined. While those cases involve a somewhat different situation,—that where a plaintiff joins defendants in order to avoid federal jurisdiction,—they are in principle applicable to the present case, where it is claimed a plaintiff was procured for the same purpose. It has been uniformly held that where there is a *prima facie* joint liability, averment and proof that resident and nonresident tort feasors are jointly sued for the purpose of preventing removal does not amount to an allegation that the joinder was fraudulent, and will not justify a removal from the state court. *Illinois Central R. Co.* v. *Sheegog,* 215 U. S. 308; *Chicago, B. & Q. R. Co.* v. *Willard,* 220 U. S. 413; *Chicago, R. I. & P.*

Ry. Co. v. *Schwyhart,* 227 U. S. 184. The facts disclosed in this record fall far short of proof of actual fraud such as was held sufficient to justify removal in *Morris* v. *Gilmer,* 129 U. S. 315; *Lehigh Mining & Mfg. Co.* v. *Kelly,* 160 U. S. 327; *Lake County Commissioners* v. *Dudley,* 173 U. S. 243; *Wecker* v. *National Enameling & Stamping Co.,* 204 U. S. 176; and *Wilson* v. *Republic Iron Co.,* 257 U. S. 92.

The case comes to no more than this: There being, under Oklahoma law, a right to have a nonresident appointed administrator, the parties in interest lawfully applied to an Oklahoma court, and petitioner was appointed administrator, with the result that the cause of action for the wrongful death of the decedent vested in him. His citizenship being the same as that of one of the defendants, there was no right of removal to the federal court; and it is immaterial that the motive for obtaining his appointment and qualification was that he might thus be clothed with a right to institute an action which could not be so removed on the ground of diversity of citizenship.

We are of opinion that the petitioner's motion to remand the cause to the state court should have been granted. The judgment must be reversed and the cause remanded to the United States District Court with directions to set aside the judgment and remand the case to the state court.

Reversed.

SOUTHERN RAILWAY CO. *v.* WALTERS.

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

No. 52. Argued October 27, 28, 1931.—Decided November 23, 1931.

Upon review of an action against a railroad company to recover damages for personal injuries sustained in an accident at a crossing, the

case having been submitted to the jury upon an issue under a specification of negligence charging the defendant with failure to stop the train and flag the crossing before proceeding over it, as required by an order of a state commission, *held:*

1. The contention that an inference that the train could not have made a full stop at the crossing in question might be drawn from its speed at other crossings as observed by witnesses and from a guess of the engineer as to its acceleration, was, under all the circumstances, mere speculation. P. 194.

2. The evidence in the record on the issue whether the train was stopped before going over the crossing was so insubstantial and insufficient that it did not justify submission of that issue to the jury. *Id.*

3. There being no proof whatever that the alleged failure to stop at the crossing was the proximate cause of the injury, a directed verdict in favor of the defendant should have been given. Pp. 194–195.

47 F. (2d) 3, reversed.

CERTIORARI, 283 U. S. 815, to review a judgment affirming a judgment against the railroad company in an action in damages for personal injuries. The action had been removed to the District Court on the ground of diversity of citizenship.

Mr. Bruce A. Campbell, with whom *Messrs. H. O'B. Cooper, Rudolph J. Kramer, L. E. Jeffries* and *S. R. Prince* were on the brief, for petitioner.

Mr. Charles A. Lich, with whom *Mr. Louis E. Miller* was on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This action was instituted in a state court and removed to the District Court for Eastern Missouri. Respondent, the minor plaintiff, averred in his declaration, that as he was in the act of crossing defendant's track on Bond Avenue, East St. Louis, he was struck by a train and seriously injured. The negligence alleged was failure to sound a

bell or other signal when the train was approaching the crossing, failure to maintain a proper and sufficient lookout, and failure to comply with an order of the Illinois Commerce Commission requiring defendant to stop all trains and flag the crossing before they crossed Bond Avenue. The answer was a general denial.

At the trial both parties presented proofs, and at the close of the plaintiff's case, as well as at the conclusion of all the evidence, the defendant moved for a binding direction, which was refused. The trial judge withdrew from the jury's consideration all the specifications of negligence except that which charged a failure to stop the train and flag the crossing before proceeding over Bond Avenue. He charged the jury that if these precautions were omitted the verdict should be for plaintiff, but if they were observed, they should find for defendant. The jury found for the plaintiff, and on appeal the Circuit Court of Appeals affirmed a judgment entered upon that verdict. 47 F. (2d) 3. This Court granted certiorari. We need consider only whether upon the whole case defendant was entitled to a binding direction.

The tracks on which the accident occurred extend from the railway company's main line to a freight yard and run approximately north and south, almost parallel with, and some seventy-five feet west of, Eighth Street. Bond Avenue, which extends eastwardly and westwardly, crosses the tracks at a right angle. The train involved in the accident consisted of a locomotive running tender-first and pulling fifty freight cars in a northerly direction from the freight yard towards the main tracks.

The plaintiff called four adult witnesses who were at the scene of the accident, none of whom saw its actual occurrence. Each of them was to the east of the train and each first noticed the plaintiff lying to the west of it after the locomotive and several cars had completely crossed Bond Avenue.

The plaintiff, who was between five and six years of age at the time of the accident, testified that he was about to cross the railroad tracks from west to east and was struck by the front of the locomotive. He stated repeatedly that the train was coming from the north, whereas it is beyond question that it was coming from the south; and he described the portion of the locomotive which struck him as the front end which had the cowcatcher and headlight on it, although it is beyond question that the tender was in front. He twice denied that he saw the train before he was struck, then said he saw it half a block distant when he was on the first track (there were three tracks at this point and the train was on the easternmost) and did not see it again until just as he was struck. He did not testify whether or not the train stopped.

A boy, nine years old at the date of the occurrence, who was standing near the crossing, deposed that several boys traversed the tracks before the train reached Bond Avenue, and that the plaintiff, following these boys, was hit by it and thrown back. He stated there was a box car in front of the locomotive, and that the car had passed before the plaintiff received his injury. He probably confused the tender with a box car, and his description of the accident would indicate that the plaintiff collided with the side of the locomotive near the cab.

A girl, who was ten years old at the time of the accident, testified that she saw the occurrence from the vestibule of a school house located south of Bond Avenue and west of the railroad tracks. She stated that she was able to see what happened by looking through an aperture in a board fence caused by the falling down of a gate in the fence. The only gate to which her testimony could have referred was at a point so situated with reference to the crossing as to render it impossible for one standing where she was to see the crossing through the gateway. She says the locomotive struck the plaintiff, but does not say

what part of it came into contact with him. She also states that the train did not stop before entering upon the crossing.

Only one of the adult witnesses stated the train did not come to a stop. She was a passenger in an automobile, traveling west on Bond Avenue, which was held up by the passing train. This testimony was shown to have no adequate foundation by her admission that when she first noticed the train the locomotive and several cars had crossed Bond Avenue.

It is argued that it may be inferred from the speed of the train when some of the witnesses observed it crossing other streets as well as Bond Avenue, and from a guess of the engineer as to the time required to get up such speed after a full stop, that none could have been made at Bond Avenue. But the argument amounts to mere speculation in view of the limited scope of the witnesses' observation, the down grade of the railway tracks at the point, and the time element involved. (Compare *Chicago, M. & St. P. R. Co.* v. *Coogan,* 271 U. S. 472.) Five witnesses for defendant testified that a full stop was made and the crossing flagged, and that no one was hit by the rear of the tender, which was the front of the train.

An examination of the record requires the conclusion that the evidence on the issue whether the train was stopped before crossing Bond Avenue was so insubstantial and insufficient that it did not justify a submission of that issue to the jury. *Gulf M. & N. R. Co.* v. *Wells,* 275 U. S. 455; *Kansas C. S. Ry. Co.* v. *Jones,* 276 U. S. 303; *New York Central R. Co.* v. *Ambrose,* 280 U. S. 486; *Gunning* v. *Cooley,* 281 U. S. 90, 93; *Atchison, T. & S. F. Ry. Co.* v. *Toops,* 281 U. S. 351.

There is no proof whatever that the alleged failure to stop before entering the crossing was the proximate cause of the plaintiff's injury. Such direct testimony as there is on his behalf indicates a collision between him and the side

of the train after the front part of it, which in this case was the rear end of the tender, had passed him; and all of the evidence both for plaintiff and for defendant is consistent with this view of what happened. It is clear that on this ground also a binding direction in favor of the defendant should have been given.

The judgment is reversed and the case remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

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

UNITED STATES ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

No. 33. Argued October 23, 1931.—Decided November 30, 1931.

1. An order of the Interstate Commerce Commission prescribing a new division of joint rates can not be made retroactive to the date of filing complaint if the rates were established by agreement of the parties and not pursuant to any finding or order of the Commission. Interstate Commerce Act, § 15 (6); *Brimstone R. Co.* v. *United States*, 276 U. S. 104. P. 199.
2. Under § 15 (2) of the Act, which requires that all orders of the Commission other than orders for the payment of money, "shall take effect within such reasonable time, not less than thirty days . . . according as shall be prescribed in the order," an order prescribing a division of joint rates, which was invalid because retroactive, could not be deemed valid as an order to become operative thirty days after it was made, nor could it be made so operative, retroactively, by a subsequent order. P. 203.

43 F. (2d) 603, affirmed.

APPEAL from a decree of the district court of three judges in a suit brought to set aside certain orders of the Interstate Commerce Commission.

Mr. J. Stanley Payne, with whom *Solicitor General Thacher, Assistant to the Attorney General O'Brian,* and *Mr. Daniel W. Knowlton* were on the brief, for the United States et al., appellants.

The order of November 5, 1927, though beyond the Commission's jurisdiction in its retroactive part, was valid for the future. *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.,* 269 U. S. 217, 225; *Interstate Commerce Comm.* v. *Diffenbaugh,* 222 U. S. 42, 49.

Section 16a of the Act expressly authorizes the Commission to reverse, change, or modify an order when, after rehearing, it appears that the order is in any respect unwarranted.

The amendatory order of May 7, 1929, was within the power of the Commission under § 16a.

The order of November 5, 1927, was supported by substantial evidence introduced at the first hearing, clearly establishing that the Hoboken's division was unreasonably low, and, indeed, so far below the actual cost of its service that, if prescribed, it would have been confiscatory.

That evidence developed the matters to which the Commission is required to give due consideration by § 15 (6) of the Act.

Mr. Parker McCollester for the Hoboken Mfrs. R. Co., appellant.

The invalid portion was separable and the court therefore erred in enjoining the order in its entirety. *Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42, 49; *Chicago & A. R. Co.* v. *Interstate Commerce Comm.,* 173 Fed. 930, reversed on other grounds in *Interstate Commerce Commission* v. *Illinois Central R. Co.,*

215 U. S. 452; *Chicago, M. St. P. & P. R. Co.* v. *United States,* 33 F. (2d) 582.

At most, since the order was valid for the future, the invalidity of the last paragraph made it an order issued without an effective date named therein, and it therefore took effect on the earliest date when under the Act it could become operative, namely, thirty days from its issuance. Interstate Commerce Act, § 15 (2). It was analogous to a legislative act without an effective date, which takes effect upon passage or upon the earliest date permitted by constitutional provisions. *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 226; *Terminal Railroad Assn.* v. *United States,* 266 U. S. 17, 30; *Matthews* v. *Zane,* 7 Wheat. 164, 211; *State* v. *Milroy,* 88 Ohio 301; *Ross* v. *New England Mortgage Co.,* 101 Ala. 362.

The Commission in making its order of May 7, 1929, fully complied with the requirements of § 15 (6) as to the matters to be considered by it, and this order was amply supported by substantial evidence including sufficient evidence as to the matters referred to in said section.

The order of May 7, 1929 properly amended the former order so as to make it effective December 5, 1927, instead of August 6, 1926. Section 16 (a) authorizes the Commission to reverse, change, or modify its original orders. *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.,* 269 U. S. 217; *Pennsylvania R. Co.* v. *United States,* 288 Fed. 88. This is also contemplated by § 15 (2).

Section 15 (6) does not except orders fixing divisions from the operation of the general provisions of the Act such as §§ 15 (2) and 16 (a).

The decision in the *Brimstone* case with respect to the lack of power of the Commission to make a retroactive order relating to divisions does not apply to an order merely correcting a previous order, issued after full hearing.

Even if the second order was invalid in so far as it modified the first order, nevertheless, being supported by ample evidence, it constituted a valid determination of the Hoboken's division for the future.

Mr. Henry S. Drinker, Jr., for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The appellant Railroad Company operates a mile and one-quarter of main line (with convenient sidings and terminals) along the Hoboken front, New York harbor, which connects directly with the Erie Railroad and interchanges freight with other roads through the former or by car floats. It owns locomotives and electric trucks, but no cars, and is primarily devoted to switching and terminal operations.

Prior to August 6, 1926, that Company, by agreement among the carriers, received 5.25 cents from the through rail rate of $9.00 per hundred pounds upon silk moving from Pacific coast points to destinations on its line. On that date it asked the Interstate Commerce Commission to allow a larger share. After hearing, and on November 5, 1927, the Commission found the agreed division unfair and made the following entry—

"It is ordered, That of the joint eastbound transcontinental rates on silk from points on the Pacific coast to destinations on the line of complainant, at Hoboken, N. J., said complainant shall receive a division of 22 cents per 100 pounds, which division shall be apportioned among all defendants which participate in the revenues derived from this traffic.

"It is further ordered, That this order take effect as of August 6, 1926, and shall continue in force until the further order of the commission."

February 20, 1928, *Brimstone Railroad Co.* v. *United States,* 276 U. S. 104, was decided. We there held that before the Commission could prescribe a new division of joint rates among carriers it must carefully observe the sundry requirements set out in § 15 (6), Transportation Act 1920. Also that where joint rates had been agreed on by the parties and were not " established pursuant to any finding or order," the statute confers no power to require adjustment for any period prior to final order.[1]

[1] " Sec. 15, par. (6). *Commission to establish just divisions of joint rates, fares, or charges; adjustments.* Whenever, after full hearing upon complaint or upon its own initiative, the commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them or otherwise established), the commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. 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."

May 14, 1928, upon its own motion the Commission re-opened for further hearing the proceeding instituted by appellant. Much additional evidence was presented. A second report and order, entered May 7, 1929, again held and directed that it should receive 22 cents for each hundred pounds of silk delivered to points on its line. The following is from the report—

"It will be noted that the order [Nov. 5, 1927] prescribes a division from the date of the filing of the complaint, and for the future. The rate of which the division is here in issue was not 'established pursuant to a finding or order of the commission,' and under the holding in the *Brimstone* case, *supra,* the basis for retroactive application of the division is lacking. The order was, therefore, beyond our jurisdiction in so far as it attempted to prescribe a retroactive adjustment, but it was and is valid as to the future. Its effective date under the circumstances here present must be found to be the date upon which said order could have become effective under the act. By paragraph 2 of section 15 of the act 'all orders of the commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order.' An order prescribing a division for the future is not an order for the payment of money. Accordingly, the original order prescribing the division for the future should have become effective on December 5, 1927.

"Defendants take the position that the facts to which we are required to give consideration under section 15 (6) of the act were not present in the original record; that, therefore, the original order herein was null and void; and that any order herein must speak from the date of a final decision upon the entire record. We do not agree with this contention. The former finding as to the future

division is amply supported by the evidence upon the original record.

"We find that on and since December 5, 1927, the division received by complainant out of joint rates on silk from points on the Pacific coast to Hoboken, N. J., on its line has been, is, and for the future will be unjust, unreasonable, and inequitable to the extent that it has been, is, or may be less than 22 cents per 100 pounds.

"An appropriate order will be entered modifying the order herein of November 5, 1927, to the extent indicated."

The second order follows—

"It appearing, That on November 5, 1927, division 1 entered its report and order in the above-entitled proceeding, and that on May 14, 1928, this case was reopened for rehearing;

"It further appearing, That such rehearing has been had and that the commission on the date hereof has made and filed a report on rehearing containing its findings of fact and conclusions thereon, which said report and the report and order of November 5, 1927, are hereby referred to and made a part hereof:

"It is ordered, That the said order of November 5, 1927, be and it is hereby modified to read as follows:

"It is ordered, That on and after December 5, 1927, said complainant shall receive a division of 22 cents per 100 pounds out of the joint eastbound transcontinental rates on silk from points on the Pacific Coast to destinations on the line of complainant at Hoboken, N. J., which division shall be apportioned among all defendants which participate in the revenues derived from this traffic east of Chicago and Peoria, Ill., St. Louis, Mo., and related gateways.

"And it is further ordered, That this order shall continue in force until the further order of the commission."

The appellees refused to obey the May 7th order, and, upon motion, February 4, 1930, the Commission entered a third directing an allowance of not less than 22 cents per hundred pounds on shipments on and after March 10th. Also that "this order shall not be construed as modifying, amending or rescinding said orders of November 5, 1927, and May 7, 1929, in so far as they relate to and determine the matters in controversy in this proceeding or the rights of the parties hereto prior to March 10, 1930, or with respect to the division of rates on any shipment delivered to or transported by complainant prior to said date."

March 11, 1930, by petition in the United States District Court for New Jersey appellees challenged the three orders above mentioned and asked that each be declared ineffective. The cause was duly heard and determined, three judges sitting.

Of the Commission's final action the court said—"This [third] order, we understand, is accepted by the plaintiffs because of the fact that it becomes effective not less than thirty days after its entry." Relief in respect of it was accordingly denied. As this part of the decree is not now challenged, we need not further consider the effect of that order.

Relying upon *Brimstone Railroad Co.* v. *United States, supra,* the court held that the evidence presented to the Commission prior to November 5, 1927, did not meet the statutory requirements. And upon that ground, as well as because of its retroactive feature, the first order was declared ineffective. The court further declared that in view of the additional testimony introduced subsequent to the re-opening on May 5, 1928, the second order might have been lawful but for the retroactive provision; this rendered the whole invalid.

As the cause will be decided upon another point, we need not inquire whether there was proper consideration

of the sundry elements enumerated in § 15 (6), Transportation Act 1920, prior to the first order. The applicable rule was definitely pointed out by *Brimstone Railroad Co.* v. *United States, supra.* The court below was of opinion that the statutory requirements were not met; and the Commission's own action in re-opening the proceedings indicates rather plainly that it then accepted the same view.

Section 15, par. (2), Transportation Act, provides that "all orders of the commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction."

The only provision in the first order in respect of the effective date is this—"It is further ordered, That this order take effect as of August 6, 1926, and shall continue in force until the further order of the commission." The Commission had no power to put this order into effect as of a prior day; no future day was prescribed; the designated date was not a lawful one. Accordingly, the order did not become operative and was wholly ineffective.

"Orders . . . shall take effect . . . according as shall be prescribed in the order." The courts may not usurp the function of the Commission and say one of its orders shall become effective thirty days, a hundred days, or at any other time after entry. An order must take effect as prescribed; its effective date, if any, is the one actually appointed, not one which might have been. Unless and until the Commission duly designates a lawful date no carrier can know what is required and the courts can not command obedience. It follows that, notwithstanding

the first order, the agreed division of the through rate continued to be the lawful one.

Under the guise of putting a former one into effect, the second order likewise undertook retrospectively to change an existing agreed rate. This was beyond the power conferred. The order was not divisible; it specified no lawful date upon which it should become effective and was invalid. The division as originally agreed by the carriers remained the lawful one.

The third order appointed a definite time, as the statute requires not less than thirty days after entry, upon which it should go into effect; it also definitely stated that nothing therein should be construed as modifying, amending, or rescinding the previous ones. Appellees do not question its validity.

The decree of the court below is

Affirmed.

MR. JUSTICE STONE, dissenting.

The first order of the Commission, without regard to its later ones, should, I think, be held valid and operative thirty days from its date. Dated November 5, 1927, it directed that the "complainant shall receive a division of 22¢ per hundred pounds" of the joint rate on silk from Pacific coast points to destinations on its line. It specified that it should take effect as of an earlier date, August 6, 1926, "and shall continue in force until the further order of the commission." For present purposes, we must assume that it was supported by evidence and was intended to remove a division of the joint rate, which was grossly unfair to appellant.

The Commission, as this Court later decided in *Brimstone Railroad & Canal Co.* v. *United States,* 276 U. S. 104, was without authority to order a division of rates as to the past, but it did possess the power to order a division for the future, and sought, by an unambiguous use of words,

to exercise it. Yet, it is held by the Court that the order is invalid in its entirety and, in consequence, the appellants lose the benefit of it, not only for the designated period antedating the Commission's action, but for the four years which have since elapsed, because the order did not, as required by § 15 (2) of the Transportation Act of 1920, prescribe a time at least thirty days from its date when it was to take effect. The section provides that orders of the Commission "shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order or for a specified period of time, according as shall be prescribed by the order." On its face the statute would seem merely to curtail the power of the Commission to make its order effective within thirty days, rather than to require the order to specify some particular date beyond the thirty day period when it should be effective.

But granting that the latter is the requirement of the statute, I fail to perceive in the present order any such failure to specify the time of its operation as would render it invalid as to the divisions which the Commission had power to make. It would not, I think, occur to anyone unfamiliar with legal niceties that the order failed to prescribe a time for its operation with respect to the future. It bore a date and in terms said that the division ordered should take effect as of an earlier named date and should continue in force until further order of the Commission. Thus the order prescribed that it should operate in the future as well as in the past, on the 31st and future days as well as on the 30th and each earlier day after its date. In view of the nature of the subject matter, the removal of an unjust apportionment of a through rate, it cannot be said that the Commission did not intend it to operate on the 31st and later days, even though it should turn out that there was a lack of power to

order the division as to earlier dates. See *United States* v. *Chicago, M., St. P. & P. R. Co.,* 282 U. S. 311.

But it is said, in effect, that since the order is void so far as it applied to a past period, identified by named dates, that part of it is as though it had never been written and, hence, the order when applied to the future must be read as though it specified no time for its operation. But the mere fact that the Commission commanded, in a single writing, some things which were beyond its power, together with others that were not, could not erase from the document either the dates or the words or change their meaning or preclude our looking at them to see in what manner and to what extent the Commission exercised the power it did possess. Looking at the words I cannot say that the order, so far as it directed the division after thirty days from its date, did not comply with § 15 (2), or that it can rightly be set at naught regardless of the nature and amount of the evidence supporting it.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur in this opinion.

HOEPER *v.* TAX COMMISSION OF WISCONSIN ET AL.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 17. Submitted October 15, 1931.—Decided November 30, 1931.

1. A Wisconsin income tax statute which authorizes an assessment against a husband of a tax computed on the combined total of his and his wife's incomes and augmented by surtaxes resulting from the combination, although under the laws of the State the husband has no interest in or control over the property or income of his wife, *held* violative of the due process and equal protection clauses of the Fourteenth Amendment. P. 215.

2. The statute as so applied cannot be justified either as necessary to prevent frauds and evasions or, since it is essentially a revenue measure, as a regulation of the marriage relation. Pp. 216, 217.

202 Wis. 493; 233 N. W. 100, reversed.

APPEAL from a judgment of the Supreme Court of Wisconsin which affirmed a judgment upholding the validity under the Fourteenth Amendment of statutes of the State imposing taxes upon incomes.

Mr. Claire B. Bird was on the brief for appellant.

In Wisconsin, a husband has no interest in or control over his wife's property, earnings, or income.

R. S. 71.05 (2)(d), which authorizes collection of a tax from a husband solely because his wife has separate income from a separate estate, takes his property without due process of law. *Union Transit Co.* v. *Kentucky,* 199 U. S. 194; *Home Savings Bank* v. *Des Moines,* 205 U. S. 503, 510; *Atchison, T. & S. F. Ry. Co.* v. *O'Connor,* 223 U. S. 280, 285; *Western Union* v. *Kansas,* 216 U. S. 1, 38; *Pullman Co.* v. *Kansas,* 216 U. S. 56, 62; *State Tax on Foreign Held Bonds,* 15 Wall. 300.

An income tax may be levied only on the owner or legal beneficiary of income. *Corliss* v. *Bowers,* 281 U. S. 376; *Poe* v. *Seaborn,* 282 U. S. 101. See also *United States* v. *Robbins,* 269 U. S. 315, 326–7; *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716.

No classification can make appellant liable for the tax on this income of his wife. Classification deals with discrimination, not fundamental liabilities. If the subject matter is not taxable at all to the person in question, then such taxation is the taking of property without due process of law. A valid tax may be made void by discriminatory classification. A void tax cannot be validated by classification.

The claim of opportunities for fraud and colorable transfers cannot avail to validate this tax. *Schlesinger* v. *Wisconsin,* 270 U. S. 228, 240.

Under the laws of Wisconsin, marriage affects only the social, and not at all the financial status of the parties.

A tax law based on property, which taxes one because of property rights of another with whom he has social but no financial relations, makes an arbitrary and unreasonable classification, having no relation to the subject matter of the tax law, and is void. *Smith* v. *Cahoon,* 283 U. S. 553; *Air Way Elec. App. Corp.* v. *Day,* 266 U. S. 71, 85; *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 417.

R. S. 71.09 (4)(c), pursuant to which the State levied and collected from appellant a tax on his own income at a rate greater than collected of others of like income, also violates the Fourteenth Amendment. We see no need of separate discussion under this head. If the State may tax a husband because of separate estate and income of his wife, it may impose an increased rate on him on his own income for the same reason. If, on the other hand, the Fourteenth Amendment prohibits taxing him on his wife's income, the same reasoning prohibits increasing his own tax for that reason. The excess added to his proper tax is a tax on him solely because of his wife's income. It is a difference in amount or degree only, not a difference in principle.

Messrs. John W. Reynolds, Attorney General of Wisconsin, and *Harold M. Wilkie* were on the brief for the Tax Commission of Wisconsin, appellee.

Practical considerations upon which the legislature may well have relied are sufficient to sustain the law in question.

The statute permits the rate of tax and average income on which the tax is to be paid by the husband to be greater (by reason of his wife's income) than he otherwise

would pay only where the husband and wife are living together. If the wife were living apart, she would have a separate exemption, be assessed separately, and so would he; and the rate would be somewhat lower. In such case, they would not be living in the same family establishment and the same reason would not exist for taxing him on the basis of greater ability to pay because of each spouse having an income. Greater ability to pay is of course a justification for requiring larger contributions by way of income taxation. *Shaffer* v. *Carter,* 252 U. S. 37, 51.

It is true that Wisconsin has modified some of the common law incidents of the status of husband and wife. It has given the wife the right to her separate earnings and property, enlarged the right to sue, and given her other privileges.

But these changes were within the legislative power to modify the relative duties and rights of husband and wife. The legislature can make more changes. The very law here under consideration fixes a certain changed legal consequence from the relation of marriage. In view of this right of the state legislature to modify the duties and responsibilities in the marriage relation, we are unable to see even the presence of a federal question in this case.

Moreover, if there were technically a federal question here, we think the right of the state legislature to use the presence of the marriage relation as a ground for classification is so clear as to preclude the view that there is a substantial federal question here.

Practical considerations affecting ability to pay, and affecting the amount which the head of a family ought to contribute and can contribute by way of taxation without jeopardizing the support of his family, are surely at least as much for the consideration of the legislature and the court as the more technical considerations of strictly legal rights.

Whatever may be the situation as to strangers or collateral relatives, we all know that in fact the family burdens on a husband are greatly lightened by the possession and receipt of substantial income by his wife. The family unity is a fact which has not and probably cannot be changed by legislation. The relation in fact existing between husband and wife, with its practically universal accompaniment of assistance to each from the income of the other in the performance of the common family duties and in sustaining the common family burdens, would seem in itself quite sufficient to acquit a legislature, in respect of legislation such as is here involved, of a charge of having passed a law making unfair and arbitrary discriminations without any reasonable basis.

Under Wisconsin laws the husband still has substantial pecuniary advantages from the property and income of the wife which are not possessed by other persons.

The Wisconsin statutes provide that the father, mother, husband, children, and wife of any poor person who is so old or decrepit as to be unable to maintain himself, shall relieve and maintain him so far as they are able, and further, that the county judge on notice shall "by order require relief and maintenance from such relatives . . . if living and of sufficient ability . . . in the following order: first the husband or wife; then the father; then the children; and lastly the mother." Section 49.11 Wis. Stats.

In cases of divorce, where the custody of the children is awarded to the husband "the court may adjudge to the husband out of the separate estate of the wife, such sums for the support and education of such minor children as it shall deem just and reasonable." Sec. 247.27 Wis. Stats.

As to judicial separation, it is specifically provided that the court may divide between the parties the estate of the husband and so much of the estate of the wife as shall have been derived from the husband, having *always* due

regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties and all the circumstances of the case. Sec. 247.26.

He may still maintain an action for injury to or death of the wife in which the damages are measured, not only by the value of her services in the household, but also by other earnings which have aided in the support of the family. *Herro* v. *Malleable Iron Co.*, 181 Wis. 198, 200.

That in exceptional cases a husband may possibly derive no benefit from the income of his wife does not invalidate this law. *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 62; *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, 69.

Why should not marriage be a basis for classification? A court need not close its eyes to facts which everyone else knows. The fact that there may be some hard cases under this or any other law is not sufficient reason for condemning it.

The fact that evasion of just income taxation (higher rates for higher incomes) would be easier if the incomes of husband and wife were not combined and tax assessed on this basis is a further consideration supporting this law. The law has recognized almost from time immemorial that the marriage relationship offers peculiar opportunities for evasion. This is shown by statutes regulating transfers between husband and wife, by decisions holding that transactions between them should be closely scrutinized, and by other similar laws and decisions.

In *Schlesinger* v. *Wisconsin,* 270 U. S. 228, the gift taxed could not, as a gift *inter vivos,* have been subjected at all to the graduated tax involved, even if all gifts *inter vivos* were so subjected. And further, all gifts *inter vivos* except those within six years of death, escaped the tax.

Here the income of the wife can unquestionably be made the subject of a graduated tax just as that of the husband.

No presumption is resorted to to make her income a partial measure of the tax. She and her husband both could be taxed at a higher rate because they each had income and they had each less burden to bear because they were husband and wife and lived in the same household. The rate is higher, but no subject matter is taxed which in a similar situation is not taxed the same way. In the *Schlesinger* case of *inter vivos* gifts, only gifts within six years of death were taxed. Here the rule is absolutely the same as to every husband and wife living together and as to all their income. In every family the same rule applies as to all income. We therefore think this case is easily distinguishable. And if it were not, that case would only destroy one of the several grounds on which this statute should be sustained.

Poe v. *Seaborn,* 282 U. S. 101; *Corliss* v. *Bowers,* 281 U. S. 376; *United States* v. *Robbins,* 269 U. S. 315; *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; and *Lucas* v. *Earl,* 281 U. S. 111, are clearly distinguishable.

Mr. Justice Roberts delivered the opinion of the Court.

Appellant, a resident of Marathon County, Wisconsin, married in the year 1927. Subsequently to his marriage he was in receipt of income taxable to him under the income tax statute of the state. His wife, during the same period, received taxable income, composed of a salary, interest and dividends, and a share of the profits of a partnership with which her husband had no connection. The assessor of incomes assessed against the appellant a tax computed on the combined total of his and his wife's incomes as shown by separate returns, treating the aggregate as his income. The amount so ascertained and assessed exceeded the sum of the taxes which would have been due had their taxable incomes been separately as-

sessed.[1] The authority for the assessor's procedure is found in the following sections of the act:

Section 71.05 (2) (d): ". . . In computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under eighteen years of age shall be added to that of the husband or father, or if he be not living, to that of the head of the family and assessed to him except as hereinafter provided. The taxes levied shall be payable by such husband or head of the family, but if not paid by him may be enforced against any person whose income is included within the tax computation."

Section 71.09 (4) (c): " Married persons living together as husband and wife may make separate returns or join in a single joint return. In either case the tax shall be computed on the combined average taxable income. The exemptions provided for in subsection (2) of section 71.05 shall be allowed but once and divided equally and the amount of tax due shall be paid by each in the proportion that the average income of each bears to the combined average income."

Appellant paid the tax under protest, and after complying with requisite conditions precedent, instituted proceedings to recover so much thereof as was in excess of the tax computed on his own separate income. He asserted that the statute as applied to him violates the Fourteenth Amendment. The Supreme Court of Wisconsin overruled this contention and affirmed a judgment for appellees. The question is whether the state law as interpreted and applied deprives the taxpayer of due process and of

[1] This resulted from the fact that the act provides for surtaxes graduated according to the amount of the taxpayer's net income. While the excess would have been less if returns and assessments had been made under section 71.09 (4) the total would still have been greater than the sum of the husband's and wife's taxes if separately assessed on their individual incomes.

the equal protection of the law. The appellant says that what the state has done is to assess and collect from him a tax based in part upon the income received by his wife, and that such exaction is arbitrary and discriminatory, and consequently violative of the constitutional guaranties.

At common law the wife's property, owned at the date of marriage or in any manner acquired thereafter, is the property of her husband. Her earnings and income are his, he may dispose of them at will, and he is liable for her debts. Were the status of a married woman in Wisconsin that which she had at common law, the statutory attribution of her income to her husband for income tax would, no doubt, be justifiable. But her spouse's ownership and control of her property have been abolished by the laws of the state. Women are declared to have the same rights as men in the exercise of suffrage, freedom of contract, choice of residence for voting purposes, jury service, holding office, holding and conveying property, care and custody of children, and in all other respects.[2] Under the title "Property Rights of Married Women" it is enacted that a wife's real estate and its rents, issues and profits shall be her sole and separate property as if she were unmarried, and shall not be subject to the disposal of her husband; [3] and this is true of her personal property as well, whether owned at the date of marriage or subsequently acquired.[4] She may convey, devise or bequeath her property, real and personal, as if she were unmarried, and her husband has no right of disposal thereof, nor is it liable for his debts.[5] Either spouse may convey his or her property to the other or create a lien thereon in favor of the other.[6] The individual earnings

[2] Wis. Stats. 1929, § 6.015 (1).
[3] *Ibid.* § 246.01.
[4] Wis. Stats. 1929, § 246.02.
[5] *Ibid.* § 246.03.
[6] *Ibid.* § 246.03.

of every married woman, except those accruing from labor performed for her husband, or in his employ or payable by him, are her separate property, and are not subject to his control or liable for his debts.[7] She may sue in her own name and have all the remedies of an unmarried woman in regard to her separate property or business and to recover her earnings, and is liable to suit and to the rendition of a judgment, which may be enforced against her separate property as if she were unmarried.[8]

Since, then, in law and in fact, the wife's income is in the fullest degree her separate property and in no sense that of her husband, the question presented is whether the state has power by an income-tax law to measure his tax, not by his own income but, in part, by that of another. To the problem thus stated, what was said in *Knowlton* v. *Moore,* 178 U. S. 41, 77, is apposite:

"It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. Compare *Nichols* v. *Coolidge,* 274 U. S. 531, 540.

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[7] *Ibid.* § 246.05.

[8] *Ibid.* § 246.07.

It is incorrect to say that the provision of the Wisconsin income tax statute retains or reëstablishes what was formerly an incident of the marriage relation. Wisconsin has not made the property of the wife that of her husband, nor has it made the income from her property the income of her husband. Nor has it established joint ownership. The effort to tax B for A's property or income does not make B the owner of that property or income, and whether the state has power to effect such a change of ownership in a particular case is wholly irrelevant when no such effort has been made. Under the law of Wisconsin the income of the wife does not at any moment or to any extent become the property of the husband. He never has any title to it, or controls any part of it. That income remains hers until the tax is paid, and what is left continues to be hers after that payment. The state merely levies a tax upon it. What Wisconsin has done is to tax as a joint income that which under its law is owned separately and thus to secure a higher tax than would be the sum of the taxes on the separate incomes.

The court below assigned two reasons which it thought removed the constitutional objections to the application of the statute in the instant case. It cited and followed the *Income Tax Cases,* 148 Wis. 456; 134 N. W. 673; 135 N. W. 164, where the statute here in question was sustained on the ground that the provisions under attack are necessary to prevent frauds and evasions of the tax by married persons, and stated that the decision of this Court in *Schlesinger* v. *Wisconsin,* 270 U. S. 230, was not inconsistent with the views expressed by the Supreme Court of Wisconsin in its earlier decision. To this we cannot agree. In the *Schlesinger* case this Court held invalid a statute which, for purposes of inheritance tax, classified all gifts *inter vivos,* effective within six years of death, as gifts made in contemplation of death. To the

argument of the necessity for such classification to prevent frauds and evasions, it was answered [p. 240]:

"That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B.' Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

The claimed necessity cannot justify the otherwise unconstitutional exaction.

The second reason assigned as a justification for the imposition of the tax is that it is a regulation of marriage. It is said that the marital relation has always been a matter of concern to the state, and has properly been the subject of legislation which classified it as a distinct subject of regulation. It is suggested that a difference of treatment of married as compared with single persons in the amount of tax imposed may be due to the greater and different privileges enjoyed by the former, and, if so, the discrimination would have a reasonable basis, and constitute permissible classification. This view overlooks several important considerations. In the first place, as is pointed out above, the state has, except in its purely social aspects, taken from the marriage status all the elements which differentiate it from that of the single person. In property, business and economic relations they are the same. It can hardly be claimed that a mere difference in social relations so alters the taxable status of one receiving income as to justify a different measure for the tax.

Again, it is clear that the law is a revenue measure, and not one imposing regulatory taxes. It levies a tax on "every person residing within the state" and defines the word "person" as including "natural persons, fiduciaries and corporations," and "corporations" as including "cor-

porations, joint stock companies, associations or common law trusts." It lays graduated taxes on the incomes of natural persons and corporations at different rates. It is comprehensive in its provisions regarding gross income and allowable deductions and exemptions, and is in most respects the analogue of the federal income tax acts in force since 1916. It is obvious that the act does not purport to regulate the status or relationships of any person, natural or artificial. Arbitrary and discriminatory provisions contained in it cannot be justified by calling them special regulations of the persons or relationships which are the object of the discrimination. The present case does not fall within the principle that where the legislature, in prohibiting a traffic or transaction as being against the policy of the state, makes a classification, reasonable in itself, its power so to do is not to be denied simply because some innocent article comes within the proscribed class. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 204. Taxing one person for the property of another is a different matter. There is no room for the suggestion that *qua* the appellant and those similarly situated the act is a reasonable regulation, rather than a tax law.

Neither of the reasons advanced in support of the validity of the statute as applied to the appellant justifies the resulting discrimination. The exaction is arbitrary and is a denial of due process.

The judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE HOLMES, dissenting.

This is an appeal from a judgment of the Supreme Court of Wisconsin sustaining the constitutionality of a tax levied under the laws of the State. The appellant married a widow. Both parties had separate incomes, and made separate returns. A tax was assessed upon the appellant for the total of both, as if both belonged to

him. By R. S. Wis. § 71.05 (2) (d), "In computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under eighteen years of age shall be added to that of the husband or father, or if he be not living, to that of the head of the family and assessed to him except as hereinafter provided. The taxes levied shall be payable by such husband or head of the family, but if not paid by him may be enforced against any person whose income is included within the tax computation." By R. S. § 71.09 (4) (c), "Married persons living together as husband and wife may make separate returns or join in a single joint return. In either case the tax shall be computed on the combined average taxable income. The exemptions provided for in subsection (2) of section 71.05 shall be allowed but once and divided equally and the amount of tax due shall be paid by each in the proportion that the average income of each bears to the combined average income." The result of adding the incomes was to increase the rate of the plaintiff's income tax and to charge him with a portion of the tax otherwise payable by Mrs. Hoeper. He sets up the Fourteenth Amendment and says that he has been deprived of due process of law.

This case cannot be disposed of as an attempt to take one person's property to pay another person's debts. The statutes are the outcome of a thousand years of history. They must be viewed against the background of the earlier rules that husband and wife are one, and that one the husband; and that as the husband took the wife's chattels he was liable for her debts. They form a system with echoes of different moments, none of which is entitled to prevail over the other. The emphasis in other sections on separation of interests cannot make us deaf to the assumption, in the sections quoted, of community when two spouses live together and when usually each

would get the benefit of the income of each without inquiry into the source. So far as the Constitution of the United States is concerned, the legislature has power to determine what the consequences of marriage shall be, and as it may provide that the husband shall or shall not have certain rights in his wife's property, and shall or shall not be liable for his wife's debts, it may enact that he shall be liable for taxes on an income that in every probability will make his life easier and help to pay his bills. Taxation may consider not only command over, but actual enjoyment of, the property taxed. See *Corliss* v. *Bowers,* 281 U. S. 376, 378. In some States, if not in all, the husband became the owner of the wife's chattels, on marriage, without any trouble from the Constitution; and it would require ingenious argument to show that there might not be a return to the law as it was in 1800. It is all a matter of statute. But for statute, the income taxed would belong to the husband, and there would be no question about it.

I will add a few words that seem to me superfluous. It is said that Wisconsin has taken away the former characteristics of the marriage state. But it has said in so many words that it keeps this one. And when the legislature clearly indicates that it means to accomplish a certain result within its power to accomplish, it is our business to supply any formula that the *elegantia juris* may seem to require. *Sexton* v. *Kessler & Co.,* 225 U. S. 90, 97.

The statute is justified also by its tendency to prevent tax evasion. No doubt, if, as was held in *Schlesinger* v. *Wisconsin,* 270 U. S. 230, with regard to the measure then before the Court, there was no reasonable relation between the law and the evil, the statute could not be upheld. But the fact that it might reach innocent people does not condemn it. It has been decided too often to be open to question, that administrative necessity may justify the inclusion of innocent objects or trans-

actions within a prohibited class. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201, 204. *Ruppert* v. *Caffey,* 251 U. S. 264, 283. *Hebe Co.* v. *Shaw,* 248 U. S. 297, 303. *Pierce Oil Corp.* v. *Hope,* 248 U. S. 498, 500. *Euclid* v. *Ambler Co.,* 272 U. S. 365, 388, 389. *Tyler* v. *United States,* 281 U. S. 497, 505. *Milliken* v. *United States,* 283 U. S. 15, 20.

Mr. Justice Brandeis and Mr. Justice Stone concur in this opinion.

BRADFORD ELECTRIC LIGHT CO., INC., *v.* CLAPPER, ADMINISTRATRIX.

APPEAL FROM AND PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 423. Jurisdictional statement submitted November 23, 1931.—Decided December 7, 1931.

1. A decision of a Circuit Court of Appeals that the policy of a State allowing actions for personal injuries due to negligence sustained within her territory can not be changed by contract of the parties, made by their acceptance of the workmen's compensation statute of another State doing away with such actions,—*held* not a decision against the validity of the statute and therefore not reviewable by appeal. Jud. Code, § 240 (b). *Public Service Commission* v. *Batesville Telephone Co., ante,* p. 6. P. 222.
2. In a case from the Circuit Court of Appeals where appeal does not lie but has been improvidently taken, application may be made for a writ of certiorari under § 240 (a). The application must be made within the time limit. P. 223.

Appeal from 51 F. (2d) 992, 999, 1000, dismissed.
Certiorari granted.

Appeal and application for certiorari to review a judgment of the Circuit Court of Appeals affirming a recovery in an action for personal injuries, which had been removed from the state court.

Messrs. Wm. E. Leahy and *George T. Hughes* were on the brief for appellant.

Mr. John E. Benton was on the brief for appellee.

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

This action was brought in the Superior Court of New Hampshire by the respondent, a citizen of that State, to recover damages for injuries resulting in the death of the respondent's intestate, upon the ground of the negligence of his employer, the defendant (appellant and petitioner here). The case was removed to the District Court of the United States for the District of New Hampshire. The defendant is a corporation organized under the laws of Vermont and is engaged in supplying electric current in both Vermont and New Hampshire. It appeared that the respondent's intestate was a resident of Vermont and received his injuries in New Hampshire in the course of his employment. The contract of employment was made in Vermont and the defendant contended that the parties were bound by the Workmen's Compensation Act of Vermont and that the acceptance of the provisions of that Act was a bar to the common law action. Upon appeal from the judgment in favor of the respondent, the Circuit Court of Appeals first sustained the defense and directed reversal, but on rehearing affirmed the judgment. The court said that its attention had been called to the fact that the defendant had accepted the Workmen's Compensation Act of New Hampshire which reserved to the employee or his legal representative an action at law for death caused by negligence; "that no contract made in Vermont purporting to release an employer from liability for future negligence can bar an action brought in New Hampshire for an injury there sustained, and thus change the public policy of New Hampshire." 51 F. (2d) 992, 999, 1000. As the decision of the Circuit Court of Appeals was not against the validity of the statute of Vermont, the ap-

peal to this Court must be dismissed for the want of jurisdiction. *Public Service Commission of Indiana* v. *Batesville Telephone Co., ante*, p. 6; *Baxter* v. *Continental Casualty Co., post*, p. 578.

The question is presented whether, as an appeal has been taken, the petition for writ of certiorari can be entertained. Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938, 939; U. S. C., Tit. 28, § 347), provides:

"SEC. 240. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

"(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such state statute, be taken to the Supreme Court for review on writ of error or appeal, but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the federal questions presented in the case.

"(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section."

The question is whether the general authority of this Court, under paragraph (a) of this section, "in any case

. . . in a circuit court of appeals . . . to require by certiorari" that the cause be certified to this Court for determination, is limited in a case like the instant one by the concluding clause of paragraph (b). Under the latter paragraph an appeal[1] may be taken to this Court "at the election" of the party relying on the state statute the validity of which has been denied by the decision of the circuit court of appeals on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and "in that event" a review on certiorari is not to be allowed at the instance of such party. This provision is in obvious contrast with that of § 237 (c) of the Judicial Code as amended by the Act of February 13, 1925, U. S. C., Tit. 28, § 344 (c), relating to appeals from judgments of state courts and providing in such cases that papers on an appeal improvidently sought may be treated as a petition for certiorari. But the event to which the limitation of § 240 (b) applies, in the case of appeals from the circuit court of appeals, is that an appeal will lie as provided and has been taken. If the case is one in which the circuit court of appeals has not denied validity to a statute of a State upon the ground specified, no appeal will lie and the bringing of the appeal in such a case has no effect save to invite its dismissal. As this Court has no jurisdiction to entertain the appeal it leaves the parties as they were. There is no ground for concluding that it was the intent of the Congress to penalize a party by depriving him of a right granted because he had made a mistake in asserting a right not granted. Accordingly, we conclude that in a case in a circuit court of appeals, where no appeal lies, although one has been improvidently taken, application may be made for a writ of certiorari under § 240 (a). The application must be made within

[1] Writ of error was abolished by the Act of January 31, 1928, c. 14, 45 Stat. 54, as amended by Act of April 26, 1928, c. 440, 45 Stat. 466; U. S. C., Tit. 28, §§ 861a, 861b.

the time limited. Act of February 13, 1925, § 8; U. S. C., Tit. 28, § 350. It was so made in this case.

The petition for writ of certiorari is granted.

Appeal dismissed. Writ granted.

VAN HUFFEL *v.* HARKELRODE, TREASURER.

CERTIORARI TO THE COURT OF APPEALS OF TRUMBULL COUNTY, AND TO THE SUPREME COURT OF OHIO.

Nos. 54 and 55. Argued October 28, 1931. Decided December 7, 1931.

1. The bankruptcy courts have power to sell real estate of bankrupts free from liens of state taxes, transferring the liens from the property to the proceeds of sale. P. 227.
2. Objections that the notice given the state treasurer in this case was insufficient and that the proceeding to determine priority of liens should have been plenary rather than summary,—*held* not open in this Court, not having been made in, or discussed by, the courts below. P. 229.
3. A decision of a state supreme court dismissing a petition in error as of right to review a judgment of an intermediate court, upon the ground that the constitutional question raised, and upon which the jurisdiction of the higher court depended, was not debatable, is a decision of the merits, so that a writ of certiorari from this Court should go to the supreme court if it has the record, and not to the intermediate court. P. 230.
4. In reviewing the judgment of a state supreme court, a transcript of the record in that court, certified by its clerk and filed here with the petition for certiorari is, by Rule 43, to be treated as sent up in response to a formal writ, and in such case there is no occasion to direct a writ to the intermediate state court to which, under the rules of the state supreme court, the record may have been returned. P. 230.

123 Oh. St. 674; 177 N. E. 587, reversed.

CERTIORARI, 283 U. S. 817, to review a judgment of the Supreme Court of Ohio, which, by declining to review, in effect affirmed on the merits a judgment of the Court of Appeals of the State, which had reversed a decree quiet-

ing title to land against a tax lien asserted by a county treasurer. This Court granted certiorari to both the appellate courts, but the writ sent to the Court of Appeals is now discharged. Of the transcripts filed here in support of the respective petitions, one was certified by the clerk of the Court of Appeals, and the other, six days later, by the clerk of the Supreme Court of the State.

Messrs. H. H. Hoppe and *Alonzo M. Snyder* for petitioner.

Messrs. Gilbert Bettman, Attorney General of Ohio, and *G. H. Birrell,* Prosecuting Attorney of Trumbull County, with whom *Mr. George W. Secrest,* Assistant Prosecuting Attorney, was on the brief, for respondent.

Mr. Justice Brandeis delivered the opinion of the Court.

Van Huffel brought this suit in the Court of Common Pleas of Trumbull County, Ohio, to quiet his title to two parcels of real estate acquired from the purchaser at a sale made by the bankruptcy court for that district. The defendant, the county treasurer, asserts a lien for unpaid state taxes which had accrued prior to the bankruptcy. The sale was made pursuant to an order of the bankruptcy court which directed that all liens be marshalled; that the property be sold free of all encumbrances; and that the rights of all lien holders be transferred to the proceeds of the sale. The trial court entered a decree quieting the title. Its judgment was reversed by the Court of Appeals of the county. The Supreme Court of the State declined to review the case. 177 N. E. 587. This Court granted certiorari. 283 U. S. 817.

Section 5671 of the Ohio General Code provides: "The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes

on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid." The bankruptcy court, having held two mortgages executed by the bankrupt to be prior in lien to the taxes, applied all of the proceeds of the sale toward the satisfaction of one of them; and left the state taxes unpaid. The treasurer did not by any proceeding in that court question the propriety of such action. Van Huffel admits that the decision of the bankruptcy court was erroneous in denying priority to the taxes, but insists that it is *res judicata.* The treasurer contends that the judgment of the bankruptcy court authorizing and confirming the sale free from the tax lien is a nullity, because the court was without power to sell property of the bankrupt free from the existing lien for taxes; and also because it did not acquire jurisdiction over the State in that proceeding.

First. The present Bankruptcy Act (July 1, 1898, 30 Stat. 544, c. 541), unlike the Act of 1867,[1] contains no provision which in terms confers upon bankruptcy courts the power to sell property of the bankrupt free from encumbrances. We think it clear that the power was granted by implication. Like power had long been exercised by federal courts sitting in equity when ordering sales by receivers or on foreclosure.[2] *First National Bank* v. *Shedd,* 121 U. S. 74, 87; *Mellen* v. *Moline Malleable Iron Works,* 131 U. S. 352, 367. The lower federal courts have consistently held that the bankruptcy court possesses the

[1] Act of March 2, 1867, 14 Stat. 517, c. 176, §§ 1, 20; *Ray* v. *Norseworthy,* 23 Wall. 128, 134. See as to Act of August 19, 1841, 5 Stat. 440, c. 9, *Houston* v. *City Bank of New Orleans,* 6 How. 486, 504.

[2] Compare *City of New Orleans* v. *Peake,* 52 Fed. 74, 76; *Mercantile Trust Co.* v. *Tennessee Cent. R. Co.,* 294 Fed. 483, 485–6; *Murray Rubber Co.* v. *Wood,* 11 F. (2d) 528; *Broadway Trust Co.* v. *Dill,* 17 F. (2d) 486; *Seaboard Nat. Bank* v. *Rogers Milk Products Co.,* 21 F. (2d) 414, 416.

power, stating that it must be implied from the general equity powers of the court and the duty imposed by § 2 of the Bankruptcy Act to collect, reduce to money and distribute the estates of bankrupts, and to determine controversies with relation thereto.[3]

No good reason is suggested why liens for state taxes should be deemed to have been excluded from the scope of this general power to sell free from encumbrances. Section 64 of the Bankruptcy Act grants to the court express authority to determine "the amount or legality" of any tax. To transfer the lien from the property to the proceeds of its sale is the exercise of a lesser power; and legislation conferring it is obviously constitutional. Realization upon the lien created by the state law must yield to the requirements of bankruptcy administration. Compare *International Shoe Co.* v. *Pinkus,* 278 U. S. 261; *Isaacs* v. *Hobbs Tie & Timber Co.,* 282 U. S. 734; *Straton* v. *New,* 283 U. S. 318. In many of the cases in the lower federal courts the order of sale entered was broad enough to authorize a sale free from tax liens as well as from others;[4] and in some of them it appears affirmatively that liens for taxes were treated as discharged by the order.[5]

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[3] See, *e. g., In re Pittelkow,* 92 Fed. 901, 902; *Southern Loan & Trust Co.* v. *Benbow,* 96 Fed. 514, 527, rev'd on other grounds, 99 Fed. 707; *In re Union Trust Co.,* 122 Fed. 937, 940; *In re Keet,* 128 Fed. 651; *In re Harralson,* 179 Fed. 490, 492; *In re E. A. Kinsey Co.,* 184 Fed. 694, 696; *In re Roger Brown & Co.,* 196 Fed. 758, 761; *In re Hasie,* 206 Fed. 789, 792; *In re Codori,* 207 Fed. 784; *In re Franklin Brewing Co.,* 249 Fed. 333, 335; *Gantt* v. *Jones,* 272 Fed. 117, 118; *In re Theiberg,* 280 Fed. 408, 409; *In re Gimbel,* 294 Fed. 883, 885; *In re King,* 46 F. (2d) 112, 113.

[4] Compare *In re New York & Philadelphia Package Co.,* 225 Fed. 219, 222; *In re Gerry,* 112 Fed. 958, 959.

[5] *In re National Grain Corp.,* 9 F. (2d) 802, 803; *Delahunt* v. *Oklahoma County,* 226 Fed. 31, 32; *In re New York & Philadelphia Package Co.,* 225 Fed. 219, 222; *In re Reading Hat Mfg. Co.,* 224 Fed. 786, 789, 790; *In re Torchia,* 185 Fed. 576, 578, 584; *In re Kohl-*

No case has been found in which the power to sell free from the lien of state taxes was denied.

Second. The treasurer contends that the order authorizing a sale free from encumbrances was void as against the State for lack of notice and opportunity to be heard. He asserts that he had no knowledge of the ruling of the court determining the priority of the liens; that neither he nor his counsel, the prosecuting attorney, was present at any of the proceedings; and that the notice of the public sale, mailed to him after the order of sale had been made by the referee, did not state that the property was to be sold "free and clear of encumbrances." But it appears that prior to any action by the court, notice of the filing of the application to sell free and clear of encumbrances was mailed to the treasurer; and that thereafter he mailed to the referee a statement of the taxes due. It is urged that such notice was insufficient; and also that a proceeding to determine the priority of liens is plenary, whereas the order now complained of was entered in a summary proceeding. Compare *Ray* v. *Norseworthy,* 23 Wall. 128. We have no occasion to pursue the argument. So far as appears, neither of these objections was made by the treasurer below, nor were they discussed by any of the state courts. They cannot, therefore, be urged here. Compare *Peck* v. *Heurich,* 167 U. S. 624, 628, 629; *Virginian Ry. Co.* v. *Mullens,* 271 U. S. 220, 227, 228; *New York* v. *Kleinert,* 268 U. S. 646, 650.

Hepp Brick Co., 176 Fed. 340, 342; *In re Prince & Walter,* 131 Fed. 546, 549; Matter of Hilberg, 6 A. B. R. 714, 717. Compare *Dayton* v. *Stanard,* 241 U. S. 588, 589, aff'g 220 Fed. 441; *In re Florence Commercial Co.,* 19 F. (2d) 468, 469; *In re Stamps,* 300 Fed. 162, 163; *In re Tri-State Theatres Corp.,* 296 Fed. 246; *C. B. Norton Jewelry Co.* v. *Hinds,* 245 Fed. 341, 343; *In re Haywood Wagon Co.,* 219 Fed. 655, 657; *In re Crowell,* 199 Fed. 659, 661; *In re Vulcan Foundry & Machine Co.,* 180 Fed. 671, 675; *In re Keller,* 109 Fed. 131, 134. See also *Little* v. *Wells,* 29 F. (2d) 1003; *Heyman* v. *United States,* 285 Fed. 685, 688.

Third. There remains for consideration a question of practice. After the adverse judgment in the Court of Appeals, Van Huffel filed in the Supreme Court of Ohio a petition in error as of right, claiming that a constitutional question was involved; and he filed there also a motion requesting that the Court of Appeals be directed to certify its record for review. The Supreme Court dismissed the petition in error on the ground that no debatable constitutional question was involved; and it overruled the motion to certify the record for review. An application for rehearing was denied, as to both. Van Huffel filed two petitions for certiorari, one (No. 54) directed to the Court of Appeals, the other (No. 55) directed to the Supreme Court. He states that he did this because he was uncertain to which of the state courts the certiorari from this Court should be directed.

The question which we have discussed is a federal constitutional question. The Constitution of Ohio, Article IV, § 2, confers upon the Supreme Court of the State "appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state." The order of the Supreme Court dismissing the petition in error as of right, on the ground that no debatable constitutional question was involved, was not, in law, a dismissal of the petition for want of jurisdiction. It was a decision of the case on the merits. *Hetrick* v. *Village of Lindsey,* 265 U. S. 384, 386; *Matthews* v. *Huwe,* 269 U. S. 262, 265. Under the federal practice a writ of certiorari would, therefore, have to be directed to that court if it had possession of the record to be reviewed. *Atherton* v. *Fowler,* 91 U. S. 143, 146. The petition in error as of right was necessarily accompanied by a transcript of the final record in the Court of Appeals. Ohio General Code, § 12,263. It is suggested in the brief for the treasurer, however, that such record went out of the possession of the Supreme Court after it dismissed

the petition in error and denied the motion for certiorari; and in support of this allegation we are referred to Rule IX of the Supreme Court, 122 O. S. lxxii, which provides for the return of the record to the lower court "after the decision of a cause . . . in which a final record is not required to be made in" the Supreme Court. But we have obtained the record from the court whose decision we are to review, and so have no occasion to resort to any other court in order to get it. *Atherton* v. *Fowler, supra.* Our Rule 43 provides that the certified transcript of the record on file here shall be treated as though sent up in response to a formal writ. The case at bar should, therefore, properly be considered on the writ (in No. 55) issued to the Supreme Court of Ohio; and the writ (in No. 54) issued to the Court of Appeals should be discharged.

In No. 55, Judgment reversed.

In No. 54, Writ of Certiorari discharged.

WILBUR, SECRETARY OF THE INTERIOR, *v.* U. S. EX REL. VINDICATOR CONSOLIDATED GOLD MINING CO.*

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

No. 66. Argued October 28, 29, 1931.—Decided Dec. 7, 1931.

1. Under § 5 of the War Minerals Relief Act, as amended, providing for the adjustment and payment of losses suffered in producing or preparing to produce, at the request of specified governmental agencies, certain minerals for the Government, the Secretary of the Interior is empowered to take into account, in arriving at the amount, if any, to be allowed and paid, the losses arising out of expenditures for the purchase of property to which claimant retains title. P. 235.

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* Together with No. 67, *Wilbur, Secretary of the Interior,* v. *U. S. ex rel. Chestatee Pyrites & Chemical Corp.*

2. The purpose of § 5 is merely to reimburse; loss resulting from speculative investments is excluded; allowance of profits is forbidden. P. 236.
3. Where the language and meaning of a statute are clear, it is not permissible to resort to the legislative history as an aid to construction. P. 237.
4. Under § 5 of the War Minerals Relief Act, as amended, interest on money borrowed and lost in producing or preparing to produce minerals under the conditions specified, should be taken into account in determining the amount of a net loss; but the Secretary is not warranted in making any allowance therefor unless it is shown clearly that such interest was paid or the obligation incurred at the instance of one of the specified governmental agencies and he is satisfied that an allowance on account of such interest is just and equitable. P. 238.

47 F. (2d) 422, 424, affirmed.

CERTIORARI, 283 U. S. 817, to review judgments of the Court of Appeals of the District of Columbia reversing judgments of the Supreme Court of the District which dismissed petitions for mandamus against the Secretary of the Interior in two cases involving claims under the War Minerals Relief Act.

Assistant Attorney General Richardson, with whom *Solicitor General Thacher* and *Messrs. Whitney North Seymour, G. A. Iverson,* and *E. C. Finney* were on the brief, for petitioner.

As a matter of law, a claim based upon expenditures by the respondent for the purchase of property to which it retained title was not allowable, and the petitioner properly disallowed respondent's claim. See 35 Op. A. G. 426, 430; Sen. Doc. 385, 66th Cong., 3d Sess.; H. R. 2250, 70th Cong., 2d Sess.; Sen. Rep. 475, 69th Cong., 1st Sess.

Even if the terms of the statute do not explicitly require this disposition of the claim, the uniform action of successive Secretaries of the Interior in disallowing similar claims is an administrative construction of the statute which should not be disturbed unless it is clearly

wrong. *United States* v. *Finnell,* 185 U. S. 236; *Hall* v. *Payne,* 254 U. S. 343.

The statute related to the granting of a new and unusual gratuity, the limitations of which were not explicitly prescribed, and it invited and required administrative construction. The construction of statutes, general in their directions, has been held to be for the Secretary, without review by mandamus. *Hall* v. *Payne,* 254 U. S. 343; *Wilbur* v. *United States,* 281 U. S. 206; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549; *Ness* v. *Fisher,* 223 U. S. 683, 693. The provision of the Act of February 13, 1929, authorizing a review of questions of law, certainly did not authorize the court below to reverse the decision of petitioner unless it clearly violated the express provisions of the statute.

Under the Act of March 2, 1919, petitioner was vested with discretion in the allowance and disallowance of claims which was not removed by the Act of February 13, 1929. *Work* v. *Rives,* 267 U. S. 175; *Work* v. *Chestatee Corp.,* 267 U. S. 185; *Work* v. *U. S. ex rel. Rives,* 54 App. D. C. 84.

Mr. Edgar Watkins, with whom *Messrs. Marion Smith, Mac Asbill,* and *J. C. Trimble* were on the brief, for respondents.

Mr. Justice Butler delivered the opinion of the Court.

No. 66

May 31, 1919, the relator, under § 5 of the Act of March 2 of that year, 40 Stat. 1272, known as the War Minerals Relief Act, filed with the Secretary of the Interior a claim for net losses alleged to have been suffered by reason of producing or preparing to produce chrome in compliance with the request of the Secretary. The claim included an item of $16,259 asserted to be a net loss by

reason of the expenditure of that amount for the purchase of land upon which the mine was located. Relator still holds the title. May 15, 1922, the Secretary held that under the Act he was not authorized to adjust or pay losses by reason of expenditures for the purchase of property, and on that ground denied any award on account of that item.

In *Work* v. *Rives* (1925), 267 U. S. 175, we held that the Act made the Secretary's decisions conclusive. But Congress, by the Act of February 13, 1929, 45 Stat. 1166, authorized the Supreme Court of the District of Columbia to review the final decision of the Secretary upon any question of law which had arisen or might thereafter arise in the adjustment of such claims, expressly leaving his decisions on questions of fact conclusive.

February 18, 1929, relator sued for a writ of mandamus directing the Secretary to take jurisdiction and to adjust and pay relator its net losses suffered by reason of the purchase of such property. The court held the Secretary rightly decided the question of law and dismissed the petition. The Court of Appeals, following its earlier decision in *Work* v. *United States,* 295 Fed. 225 (reversed here on the ground that under the Act of 1919 the Secretary's construction was not subject to review) held the Secretary erred in law and reversed the judgment. 47 F. (2d) 422. This court granted a writ of certiorari. 283 U. S. 817.

The question for decision is: To what extent, if at all, does the statute empower the Secretary in respect of net loss incurred by relator by reason of its expenditure for such land?

During the World War certain mineral substances and products, including chrome, became essential to the nation's defense. The need having become very great, Congress by the Act of October 5, 1918, 40 Stat. 1009, declared a large number of such materials to be necessaries, em-

powered the President, through such agencies as he should designate, to acquire and distribute the same and also to requisition, develop and operate lands, mines and plants capable of producing them, and appropriated $50,000,000 to carry out the purpose of the statute. The Armistice, November 11, 1918, ended the emergency.

By § 5 of the Relief Act the Secretary is empowered "to adjust . . . and pay such net losses as have been suffered by any person . . . by reason of producing or preparing to produce either, manganese, chrome, pyrites, or tungsten in compliance with the request or demand of the Department of the Interior, the War Industries Board, the War Trade Board, the Shipping Board, or the Emergency Fleet Corporation to supply the urgent needs of the Nation in the prosecution of the war . . ." And the section limits the authority of the Secretary to such "adjustments and payments in each case as he shall determine to be just and equitable." It requires that all disbursements shall be made out of funds appropriated by the Act of 1918, and shall not exceed $8,500,000. A proviso declares that no claim shall be allowed or paid unless it shall appear to the satisfaction of the Secretary that the expenditures so made were made in good faith "for or upon property which contained either manganese, chrome, pyrites, or tungsten in sufficient quantities to be of commercial importance."

The Act of November 23, 1921, 42 Stat. 322, amends and broadens § 5 of the Relief Act by adding to its first paragraph a provision that "all claimants who, in response to any personal, written, or published request, demand, solicitation, or appeal from any of the Government agencies mentioned in" the Act of October 5, 1918,[1] "in good faith expended money in producing or preparing to produce any of the ores or minerals named therein and have

[1] ". . . officer or officers, department or departments, board or boards, agent, agents, or agencies as he [the President] shall create or designate from time to time." See § 7, 40 Stat. 1011.

heretofore mailed or filed their claims or notice in writing thereof within the time and in the manner prescribed by said Act, if the proof in support of said claims clearly shows them to be based upon action taken in response to such request, demand, solicitation or appeal, shall be reimbursed such net losses as they may have incurred and are in justice and equity entitled to from the appropriation in said Act." And by the Act of June 7, 1924, 43 Stat. 634, the limitation of the aggregate amount to be disbursed under the Act of 1919 was repealed.

Section 5, the proviso referring to expenditures " for or upon property " containing the minerals, and the amendment of 1921 are plainly broad enough to include net losses resulting by reason of expenditures for the purchase of property and leave no room to doubt that it was the purpose of Congress to empower the Secretary to take them into account in arriving at the amount, if any, to be allowed and paid.

The petitioner argues that the phrase " such net losses as have been suffered " excludes claims where, at the time of the enactment, the purchaser still retained title to the property. But the net losses mentioned are not thus limited. Losses by reason of expenditures for property, real or personal, still owned by claimants are not excepted. The purpose is merely to reimburse; loss resulting from speculative investments is excluded; allowance of profits is forbidden. In determining actual net loss the value of the property purchased and retained by claimant is necessarily to be taken into account. The construction for which petitioner contends necessarily rests upon the hypothesis that one may not suffer loss by reason of expenditures for land while he continues to own it. No such assumption can be entertained, for it is everywhere known that the contrary is true, and that the value of lands and plants purchased and constructed to produce

minerals and other things needed wholly or principally to carry on the war was liable to, and in fact generally did, greatly and permanently decline when the struggle ended. And, in support of his contention, petitioner invokes history of the legislation, but that is not here permissible, for the language and meaning of the statute in respect of the question under consideration are clear. *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 278.

The conclusion is plain. The Secretary is required to proceed to ascertain whether relator, on March 2, 1919, had incurred net loss by reason of the expenditure of $16,259 for such land; and, if he shall find that relator has suffered such a loss, then the Secretary, having regard to the safeguards and limitations specified in the statute, shall determine how much, if any, of the net loss so found the relator is "in justice and equity entitled to from the appropriation in said Act."

No. 67

March 5, 1919, relator filed with the Secretary of the Interior a claim for losses by reason of expenditures for the production of pyrites under the conditions specified in § 5. The claim included items of interest on money borrowed, so expended and lost by relator. The Secretary and his successors, including petitioner, have uniformly held that the statute prohibits any award on account of such interest and have disallowed all claims therefor. After the passage of the Act of 1929, relator brought this suit for mandamus to compel the Secretary to take jurisdiction and allow such interest.[2] The court held the

[2] An earlier application for mandamus was granted by the Supreme Court. The Court of Appeals affirmed. 298 Fed. 839. But this court reversed (267 U. S. 185) following its contemporaneous decision in *Work* v. *Rives*, 267 U. S. 175.

Secretary rightly construed the statute and dismissed the petition, the Court of Appeals reversed, 47 F. (2d) 424, and we granted a writ of certiorari, 283 U. S. 817.

The amount of interest that at the time of the passage of the Relief Act March 2, 1919, had been paid or incurred by relator for money borrowed and lost in producing and preparing to produce pyrites upon the specified conditions is to be taken into account in determining the amount of its net loss as of that date. It constitutes a part of relator's expenditures and cost of the undertaking and so is within the terms of the section as amended. *United States* v. *New York,* 160 U. S. 598, 621–624. But the mere fact that such interest was lost does not entitle relator to have, or warrant the Secretary in allowing, any part of it. It must be shown clearly that such interest was paid or the obligation incurred by relator at the instance of one of the specified governmental agencies. And the Secretary, upon a consideration of all the circumstances and with due regard to the provisions of the section as amended, must be satisfied, and determine as a matter of fact, that an allowance on account of such interest is just and equitable and that the loss is one for which relator in justice and equity is entitled to be reimbursed from the appropriation.

As we sustain the construction placed upon the statutes by the Court of Appeals, the cases will be remanded to the Supreme Court of the District of Columbia with directions to award a writ of mandamus requiring the Secretary of the Interior to proceed to an examination and adjustment of the claim in question conformably to the statutes as here construed. Subject to this direction the judgment of the Court of Appeals in each case is

Affirmed.

Counsel for Parties.

IOWA-DES MOINES NATIONAL BANK *v.* BENNETT, CHAIRMAN, ET AL.*

CERTIORARI TO THE SUPREME COURT OF IOWA.

No. 15. Argued October 19, 20, 1931.—Decided December 14, 1931.

1. A state tax on the shares of stock of a national bank at rates greater than those applied in exacting payment of domestic corporations in competition with it, exceeds the permission of Rev. Stats. § 5219, and is therefore invalid. P. 244.
2. Intentional, systematic discrimination on the part of a State in exacting taxes on the shares of national and state banks at a higher rate than is applied to domestic corporations in competition with them, violates the equal protection clause of the Fourteenth Amendment. P. 245.
3. Though discrimination in assessing and collecting state taxes be not due to inequality in the state law itself, but to the unauthorized and illegal acts of subordinate taxing officials in applying it, the State is none the less chargeable with the discrimination, where it insists upon retaining the higher tax exacted in its name, and is sustained in so doing by its highest court. *Barney* v. *New York City*, 193 U. S. 430, distinguished. Pp. 244–246.
4. A taxpayer who has been subjected to discriminatory state taxation through the favoring of others in violation of his federal right, is entitled to recover the excess paid. He is not required to assume the burden of seeking to have the others' taxes increased; nor need he await such action by the state officials on their own initiative. P. 247.

— Iowa —; 232 N. W. 445, reversed.

CERTIORARI, 283 U. S. 813, to review judgments sustaining state taxes in mandamus proceedings brought by two banks against county officers to compel refunds.

Messrs. J. G. Gamble and *A. B. Howland* for petitioners.

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* Together with No. 16, *Central State Bank* v. *Bennett, Chairman, et al.*

Messrs. Eskil C. Carlson and *Charles Hutchinson*, with whom *Messrs. Maxwell A. O'Brien* and *George A. Wilson* were on the brief, for respondents.

Mr. Justice Brandeis delivered the opinion of the Court.

These cases are here on certiorari to the Supreme Court of Iowa. They were argued together and involve, in the main, the same questions. The petitioner in No. 15 is the Iowa-Des Moines National Bank. The petitioner in No. 16 is the Central State Bank, an Iowa corporation. In each case, it is charged that, for the years 1919, 1920, 1921 and 1922, the taxing officers of Polk County exacted from petitioner taxes on shares of its stock at rates higher than were exacted of competing moneyed capital; and that in 1923 petitioner paid the taxes with interest and penalties under protest, after threat of seizure of its property. In each case it is alleged that this unequal taxation contravened both the state law and the equal protection clause of the Fourteenth Amendment. In No. 15, it is also charged that § 5219 of the Revised Statutes of the United States was violated. In each case the petitioner seeks by an action of mandamus to compel the appropriate county officers to refund the part of the taxes alleged to have been illegally exacted, and the interest and penalties. The county officers denied the discrimination charged and also set up many special defenses.

The trial court, after hearings which occupied more than sixteen weeks, denied relief in each case without making findings of fact or rendering an opinion. Its judgments were affirmed in the highest court of the State by a divided bench. 232 N. W. 445. The case is before us on an extensive record; but we have no occasion to examine the controverted issues of fact and of state law.

The Supreme Court found, or assumed, that the systematic discrimination charged was in fact made; that the shares of the favored domestic corporations constituted a relatively material part of other moneyed capital employed in substantial competition with the business of the banks; and that the unequal exaction complained of violated the laws of Iowa. We have to consider only the legal effect under the federal law of this wrongful administration of the state law. There is no challenge of the validity of any state statute.

The taxes exacted from the petitioners were laid under Iowa Code, § 1322–1a, Supplement 1913. That section imposes upon "state, savings and national bank stock and loan and trust company stock and moneyed capital," an *ad valorem* tax based upon twenty per cent. of the actual value thereof, computed at the same rate at which tangible property is taxed under the consolidated levy for local, county and state purposes. Compare *First National Bank* v. *Anderson,* 269 U. S. 341, 343. For the years in question, this levy ranged from 137.8 mills to 164 mills—the equivalent of 27.5 mills to 32.8 mills on the actual value. By the terms of § 1322–1a, taxes on the same basis should also have been laid upon shares of competing domestic corporations and upon other moneyed capital coming similarly into competition with both the national and the state banks. But the taxes laid upon shares of such competing domestic corporations were, in fact, at the rate of only 5 mills on the actual value. This discrimination occurred because to them was applied, not § 1322–1a, but § 1310, Supplement 1913. The latter section prescribes a tax of 5 mills on the dollar upon the full value of "moneys, credits and corporation shares of stock, except as otherwise provided, . . . and notes, including those secured

by mortgage, . . ." [1] Thus the taxes laid upon the shares of the competing domestic corporations were at a rate only one-fifth to one-seventh of that applied to the shares of the petitioners.

The wrongful discrimination so effected was not attributable to any act of the assessing body.[2] The shares in such competing domestic corporations had, in each year, been properly classified by the assessor in compliance with § 1322–1a; but the county auditor, in making up the tax list subsequently, changed these assessments and wrongfully extended them upon the books as "moneys and credits" subject to the 5 mill levy. In this form the tax was certified by the auditor to the county treasurer for collection; and the treasurer exacted taxes in accordance with the auditor's certification.

The Supreme Court of Iowa, having found or assumed that there was systematic discrimination, as charged, in favor of shares in the competing domestic corporations, denied relief because it held that the auditor's acts in disregarding assessments properly made were a usurpa-

[1] Section 1310 expressly excepts from its operation "all moneyed capital within the meaning of section fifty-two hundred nineteen of the Revised Statutes of the United States," and provides that such capital "shall be listed and assessed . . . at the same rate as state, savings, national bank and loan and trust company stock is taxed . . ., and at the actual value of the moneyed capital so invested."

[2] Other competing moneyed capital in the form of investments held by individuals and by a few foreign corporations was wrongfully classified by the assessor as "moneys and credits," and so returned upon the assessment rolls to the county auditor, who extended the assessments upon the tax books accordingly, and applied to them the 5 mill levy. The Supreme Court of Iowa held that the right to complain of this discrimination had been lost by failure to avail of the method of review prescribed by the State. We have no occasion to consider this matter, as we hold that the more favorable taxation of the competing domestic corporations entitles the petitioners to the relief sought.

tion of power and a nullity; that the county treasurer was not bound to accept the auditor's unauthorized certification; and that his exaction of the taxes in accordance therewith was, therefore, also unauthorized.[3] The Court declared that, since the wrongful exaction was made without authority from the State, it did not constitute discrimination by the State; declared that, since neither the auditor nor the treasurer had power to discharge a legally assessed tax, the competing domestic corporations remain, so far as appears, liable for the balance of the assessments; and held that the petitioners had no other remedy than to await action by the taxing authori-

[3] The Iowa court describes (232 N. W. at p. 451) the functions of the several taxing officers: "The assessment is made in the first instance by the local assessor, who lists and classifies the property and makes valuations. He then lays the assessment rolls before the local board of review. The local board of review adjusts the assessments, 'in such manner as to secure the listing of property at its actual value and the assessment of property at its taxable value' and adds 'to the assessment rolls any taxable property not included therein . . . as the assessor should have done.' Code Supp. 1913, §§ 1360, 1370. When the corrections have been made, the assessor makes up the assessor's book and returns it to the county auditor together with the assessment rolls. *Id.* § 1366. The county board of review equalizes class valuations between political subdivisions of the county, and the state board of review equalizes between the counties. *Id.* Code 1897, §§ 1375, 1379. The classification and assessment by the assessor, as approved by the board of review, determines the levy or rate to be applied. . . The assessments and the rate to be paid by the several taxpayers as between themselves are complete and are determined when the assessor returns the assessment rolls and assessment book to the county auditor, subject to class modification by the county and state boards of review and to change by the court if appeal has been taken. The remainder of the process of taxation is one of collection and enforcement of the taxes as so assessed. This is ministerial. The auditor's duty is to transcribe the assessments into the tax book and make the necessary computations and extensions and clerical corrections. This duty is merely clerical and ministerial."

ties to collect the taxes remaining due from their competitors or to initiate proceedings themselves to compel such collection. In other words, it held that no right of petitioners under the state law was violated, because they were not overassessed; that no right under the federal law was violated, because the lower taxation of their competitors due to usurpation by officials was not an act of the State; and that the discrimination thus effected was remediable only by correcting the wrong under the state law in favor of the competitors and not "by extending . . . the benefits as of a similar wrong" to the petitioners. The decision rests upon a misconception of the scope and effect of the federal rights involved.

First. The Iowa-Des Moines National Bank is an instrumentality of the United States, and but for § 5219 the State would be without power to tax its shares. *First National Bank* v. *Anderson,* 269 U. S. 341, 347. That section permits a State to tax national bank shareholders if, and only so far as, the taxation is not at a rate greater "than is assessed upon other moneyed capital in the hands of individual citizens of such State." The limits of this permission were transgressed when the treasurer exacted from this petitioner taxes at rates greater than those applied in exacting payment from the competing domestic corporations. *Supervisors* v. *Stanley,* 105 U. S. 305, 318; *Stanley* v. *Supervisors of Albany,* 121 U. S. 535, 550, 551. Compare *First National Bank of Hartford* v. *Hartford,* 273 U. S. 548, 560. The discrimination was none the less action by the State although the auditor and the treasurer, in failing to give equal treatment, acted without authority and contrary to the law of the State. "It is a question of the power of the State as a whole;" [4]

[4] *Rippey* v. *Texas,* 193 U. S. 504, 509, citing *Missouri* v. *Dockery,* 191 U. S. 165, 171. Compare *Coulter* v. *Louisville & Nashville R. Co.,* 196 U. S. 599, 609; *Hayman* v. *Galveston,* 273 U. S. 414, 416.

and for the purpose of determining whether the limitations imposed by § 5219 have been observed, the powers of the several state officials must be treated as if merged in a single officer. The condition imposed by the federal law was not satisfied by the enactment by the State of appropriate legislation for the taxation of other moneyed capital, and the commitment to subordinate officers of the duty of determining what constitutes such capital. The responsibility of the State for the propriety of that determination remained. Moreover, since the State now insists upon retaining the higher tax exacted from the national bank, and is sustained in so doing by its highest court, the discriminatory action cannot be said to be the act of the individual officials. *Montana National Bank* v. *Yellowstone County,* 276 U. S. 499, 504, 505.

Second. Both petitioners claim that they have been subjected to intentional, systematic discrimination in violation of the equal protection clause of the Fourteenth Amendment. The federal right of the Central State Bank rests wholly upon that clause. It is assumed that there was such inequality of treatment as the Constitution prohibits. *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 37; *Sioux City Bridge Co.* v. *Dakota County,* 260 U. S. 441, 446; *Cumberland Coal Co.* v. *Board of Revision, ante,* p. 23. Compare *Sunday Lake Iron Co.* v. *Wakefield,* 247 U. S. 350, 353. But the Iowa court, without denying the lack of power of the State to authorize the discrimination effected, holds that such discrimination does not violate the federal Constitution because it resulted from the act of private individuals and not of the State. The prohibition of the Fourteenth Amendment, it is true, has reference exclusively to action by the State, as distinguished from action by private individuals. *Virginia* v. *Rives,* 100 U. S. 313, 318; *United States* v. *Harris,* 106 U. S. 629, 639. But acts done "by virtue of a public position under a State Government

. . . and in the name and for the State," *Ex parte Virginia,* 100 U. S. 339, 347, are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law. When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law.[5] Here, the exaction complained of was made by the treasurer in the name of and for the State, in the course of performing his regular duties; the money is retained by the State; and the judicial power of the State has been exerted in justifying the retention. Compare *Montana National Bank* v. *Yellowstone County, supra; Carpenter* v. *Shaw,* 280 U. S. 363, 369.

Respondents rely upon *Barney* v. *City of New York,* 193 U. S. 430, 438. The question there decided was that the lower federal court had properly dismissed a bill in equity since it appeared upon its face that the act complained of was forbidden by the state legislation. We have no occasion to discuss that case.[6] Here the petition-

[5] *Neal* v. *Delaware,* 103 U. S. 370, 397; *Yick Wo* v. *Hopkins,* 118 U. S. 356, 373, 374; *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U. S. 278, 287, 288; *Cuyahoga Power Co.* v. *Akron,* 240 U. S. 462, 464. Compare *Raymond* v. *Chicago Union Traction Co., supra; Greene* v. *Louisville & Interurban R. Co.,* 244 U. S. 499, 507, 508; *Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, 434; *Hopkins* v. *Southern California Telephone Co.,* 275 U. S. 393, 398. See also *Chicago Great Western Ry. Co.* v. *Kendall,* 266 U. S. 94, 98. Cases discussing the question of what constitutes a suit against the State within the meaning of the Eleventh Amendment, such as *Ex parte Young,* 209 U. S. 123; *Western Union Telegraph Co.* v. *Andrews,* 216 U. S. 165; *Looney* v. *Crane Co.,* 245 U. S. 178; *Public Service Co.* v. *Corboy,* 250 U. S. 153, have no bearing upon the power of this Court to protect rights secured by the federal Constitution.

[6] See Samuel Shepp Isseks, "Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials," 40 Harv. L. Rev. 969.

ers sued in a state court. Some expressions in the opinion in the *Barney* case, said to be inconsistent with the conclusions stated above, have been disapproved by this Court. *Home Telephone & Telegraph Co.* v. *Los Angeles,* 227 U. S. 278, 294.

Third. The fact that the State may still have power to equalize the treatment of the petitioners and the competing domestic corporations by compelling the latter to pay hereafter the unpaid balance of the amounts assessed against them in 1919, 1920, 1921 and 1922 is not material. The petitioners' rights were violated, and the causes of action arose, when taxes at the lower rate were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the petitioners' grievances would have been redressed; for these are not primarily overassessment. The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. *Cumberland Coal Co.* v. *Board of Revision, supra; Greene* v. *Louisville & Interurban R. Co.,* 244 U. S. 499, 514–518; *Chicago Great Western Ry. Co.* v. *Kendall,* 266 U. S. 94, 98; *Sioux City Bridge Co.* v. *Dakota County, supra.* Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative. *Montana National Bank* v. *Yellowstone County, supra.*

The petitioners are entitled to obtain in these suits refund of the excess of taxes exacted from them.

Reversed.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.

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

No. 287. Argued December 3, 4, 1931.—Decided January 4, 1932.

1. Pursuant to the "Hoch-Smith Resolution," of January 20, 1925, c. 120, 43 Stat. 801, the Interstate Commerce Commission made a general investigation of rate structures in the Western District, including those on grain. Exhaustive hearings, productive of a very voluminous record, were closed in September, 1928. Later the Commission made its order, prescribing maximum rates on grain and grain products, the effective date of which was postponed from time to time. In February, 1931, before the order became effective, the carriers petitioned for a reopening of the case, setting up in detail, and offering to prove, that, since the closing of the record, in 1928, economic changes had seriously impaired their earnings and their credit; that the order would reduce their revenues greatly, and regardless of the question of its validity and propriety when made, it would no longer be valid and proper in the existing circumstances, and would threaten the maintenance of an adequate system of transportation. They insisted upon the reopening as a right guaranteed to them not only by the Act of Congress but by the Constitution itself. *Held:*

   (1) The petition was not an ordinary petition for rehearing, but was of the nature of a supplemental bill, presenting a new and radically different situation, which had supervened since the record before the Commission had been closed. P. 259.

   (2) The Court takes judicial notice of the economic depression amounting to a changed economic level, severely affecting the railroads, which has come about since the Commission closed its hearings in this case in September, 1928; and of the existence of this depression in February, 1931, when the carriers' petition was filed. P. 260.

   (3) Denial of the petition exceeded the permitted range of the Commission's discretion and can not be sustained. P. 262.

2. While in fixing future rates the Commission doubtless must act upon the conditions disclosed in the record before it and can not accurately provide for future fluctuations, this does not justify denial of a petition to reopen a case when overruling economic forces have produced a new economic level to which the record before the Commission is irresponsive. P. 261.

3. The prospect that the hearing before the Commission may be long does not justify its denial, if the hearing be required by the essential demands of justice. P. 262.
4. The legal standards governing the Commission in determining the reasonableness of rates were not altered by the "Hoch-Smith Resolution"; and a fair hearing is a fundamental requirement. *Id.*

51 F. (2d) 510, reversed.

APPEAL from a decree denying applications for a preliminary injunction to restrain the enforcement of an order of the Interstate Commerce Commission.

Mr. Frederick H. Wood, with whom *Messrs. Walter McFarland, Elmer A. Smith, P. F. Gault, H. H. Larimore, J. N. Davis, A. B. Mason, R. J. Hagman, M. L. Countryman, Jr., R. S. Outlaw, Leslie Craven, A. B. Enoch, Frank A. Leffingwell, William D. Whitney,* and *G. Howland Chase* were on the brief, for appellants.

The report discloses that the Commission proceeded upon the assumption that it was required by the Hoch-Smith resolution to establish the lowest possible lawful rates on agricultural products, affected by depression.

The effect of the order is materially to reduce the general level of the rates on a major description of traffic without any finding that the carriers' rate of return was, or, in the near future, would be in excess of that contemplated by § 15a, but, on the contrary, at a time when such rate of return was materially below the statutory requirement, and without any finding, or basis for finding, that such reduction would result in increased revenues through stimulating an increased volume of traffic.

The purpose of § 15a was to insure the receipt of an aggregate revenue by the carriers as a whole sufficient to support an adequate system of transportation. Congress itself fixed the standard by which such adequacy is to be determined, viz., the Fifth and Fourteenth Amendments.

The Commission may not consistently with the requirements of § 15a prescribe the lowest possible lawful rates

in the absence of a finding that the group rate of return received by the carriers exceeds the statutory standard, or at a time when it is materially below the same, where the effect of such action is to deprive the carriers *pro tanto* from earning such rate of return.

The Commission's misconstruction of § 15a and of the effect of the resolution upon its duties thereunder appears on the face of the report.

The Commission, if it did not wholly misconceive its duties under § 15a, proceeded upon the erroneous assumption that because of the resolution it was directed to establish the lowest possible lawful rates in this proceeding, although at or after the conclusion of the general investigation, of which it was a part, it might be required to advance the general level of all rates, including grain rates, in order to discharge the duty imposed by § 15a.

The Commission is not empowered by the Act to establish the lowest possible lawful rates, because of a depression in the industry affected, and certainly not at a time when the carriers' rate of return is far below the statutory standard.

The order of the Commission cannot be sustained by reason of the fact that the Commission at the same time readjusted many inequalities in rates, thereby removing discrimination.

The action of the Commission in overruling the carriers' petitions for rehearing and thus requiring the order to become effective, and in failing to discharge the affirmative duty imposed by § 15a to protect the carriers' revenues, is so arbitrary and unreasonable as to render its order void and as to entitle the petitioners to enjoin its enforcement.

If there ever was a case in which the action of the Commission may be set aside because arbitrary and unreasonable, although taken within the form of its delegated powers, *Interstate Commerce Comm.* v. *Illinois Central*

R. Co., 215 U. S. 452, 470; *Interstate Commerce Comm.* v. *Union Pacific R. Co.*, 222 U. S. 541, 547, this would appear to be such a case. If the facts set forth in the petition are true, and they must be taken to be so, the making of these reductions effective at this time is a palpable disregard of the continuing duty imposed upon the Commission by § 15a.

Rate orders of the Commission operate *in futuro*. It is contemplated that they should be responsive to present and future conditions and not to those of the past, when unrepresentative of present and future conditions. While the granting or refusing of a petition for rehearing rests, in the first instance, within the discretion of the Commission, that discretion must not be abused. The substance of the allegations in the petition for rehearing was matter of common knowledge, although the precise figures were not. In such a case, to refuse to rehear and reconsider, and in the meantime to postpone the effective date of the order, puts the Commission in the position of declaring that, despite the provisions of § 15a, the Commission may reduce the net railway operating income of the carriers $20,000,000 per year, at a time when their rate of return is approximately but 3%, and their net railway operating income $234,000,000 less than the return contemplated by that section, and at a time when their gross and net revenues are still falling, and notwithstanding that the credit as well as the financial condition of the carriers has been adversely affected. If the Commission in any report should so state this conception of its duties under § 15a, an order based thereon would be clearly void. Cf. Fifteen Per Cent. Case, 178 I. C. C. 539.

Mr. Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, with whom *Solicitor General Thacher, Assistant to the Attorney General O'Brian* and *Messrs. E. M. Reidy* and *H. L. Underwood* were on the brief, for the United States et al., appellees.

The Commission did not base its orders upon a misconception of powers conferred by the Hoch-Smith Resolution.

The Commission's statement of the issues to be determined and the findings made upon those issues are responsive to applicable provisions of the Interstate Commerce Act, and neither they nor any discussions in the report suggest that other than the usual standards of rate reasonableness and relations entered into the determination.

The changes in rates and practices effected by the orders afford positive showing that the determination was reached under the Interstate Commerce Act.

There was no abuse of discretion in denying the several motions for rehearing and reconsideration.

In most of its larger proceedings the Commission is confronted with petitions for rehearing and reconsideration based (as here) on alleged changed conditions. The statute necessarily leaves the matter of reopening to the discretion of the Commission. See § 16a. Sound reasons must appear therefor, because reopening may mean further long drawn-out proceedings with the possibility that when the Commission again reaches a determination it will be again petitioned on the same grounds.

The special reason advanced by appellants for rehearing was the falling off of their revenue due to diminishing traffic, which in turn was due to sharp general industrial depression. At the same time appellants call attention to the Fifteen Per Cent. Case, 178 I. C. C. 539, in which the Commission, although denying the horizontal increase asked for, suggested to the carriers certain measures to meet the situation. The contention is, then, in reality that, with respect to a situation calling for general emergency relief, the Commission abused its discretion in not reopening a particular docket wherein a determination had been reached after regularly conducted hearings. The

question involved in the Fifteen Per Cent. Case was how general emergency relief could best be given without further depressing business, traffic, and revenues, and without disturbing rate relationships, interstate and state, which to many shippers are more important than the level of rates. That question of general emergency relief is not the question here.

The determination here involved was reached after more than a year of hearings, and another of study, and on a record in the making of which carriers and shippers throughout western territory coöperated to the full. The readjustment was urgently needed, correcting as it did not only the level but the relation of rates, and discriminatory and wasteful practices under the rates. The increases in coarse-grain rates went generally where most needed. Unquestionably, reopening would have meant further lengthy proceedings, since the very condition of diminishing traffic would have been used in evidence and argument against a higher level of rate; and when a new determination had been reached, general conditions might again have become normal.

In performing its legislative function of prescribing reasonable rates, the Commission necessarily projects into the future the results of a decision based on the conditions disclosed in the record. That determination can not accurately reflect fluctuating conditions.

Even in the record brought here there is much to show that the petitions for rehearing were rightly denied; and in view of the absence of the evidence before the Commission, it would seem that it should be concluded, not only that the Commission did not abuse the discretion reposed in it, but that the evidence as a whole impelled denial of the petitions for rehearing.

Mr. John E. Benton, with whom *Mr. Clyde S. Bailey* was on the brief, for the Arizona Corporation Commission et al., interveners and appellees.

Mr. Hugh LaMaster, Assistant Attorney General of Nebraska, with whom *Mr. C. A. Sorensen,* Attorney General, was on the brief, for the Nebraska State Railway Commission, appellee.

Messrs. Charles W. Steiger and *Ralph Merriam* submitted for the Public Service Commission of Kansas, appellee.

Mr. Chief Justice Hughes delivered the opinion of the Court.

These suits, which were consolidated, were brought by carriers by railroad in the Western District, and by certain shippers, to restrain the enforcement of an order of the Interstate Commerce Commission made July 1, 1930, as amended by a supplemental order of April 10, 1931. The order prescribed maximum rates for the transportation of grain and grain products on domestic shipments within the Western District [1] and for export, as described, and directed the carriers to desist from certain practices (164 I. C. C. 619; 173 *id.* 511). Other carriers were permitted to intervene as parties petitioners, and state commissions and certain state organizations were admitted as intervening defendants. This appeal is from the order of the District Court, as specially constituted,[2] denying the applications of the petitioners for an interlocutory injunction. 51 F. (2d) 510.

Following the passage of the Joint Resolution of the Congress of January 30, 1925 [3] known as the Hoch-Smith Resolution, the Interstate Commerce Commission insti-

[1] The Western District was defined in the order of July 1, 1930, as that part of continental United States "on and west of the Mississippi River, west of Lakes Superior and Michigan, and west of and including Illinois."

[2] U. S. C., Tit. 28, § 47.

[3] C. 120, 43 Stat. 801.

tuted a general investigation [4] of the rate structures of common carriers to determine whether their rates, charges, regulations and practices were unjust, unreasonable, unjustly discriminatory or unduly preferential, or otherwise in violation of law. The investigation was divided into separate parts, and the proceeding in one of them (Part VII) terminated in the order under review. In connection with this proceeding there were a large number of formal complaints and suspension proceedings which, considered together, brought into issue all phases of the grain rate structure involved in the Commission's general investigation. Many state commissions, chambers of commerce, and trade and traffic associations participated in the proceeding. Hearings were held in many cities and extended over a year. The record was closed on September 22, 1928, and after protracted argument the matter was submitted, on July 1, 1929, to the Commission for its decision. The first report of the Commission, made on July 1, 1930, emphasized the magnitude of its task, in dealing with " three score and more of major issues, affecting every part of a vast territorial domain," and the thorough examination that had been made of the exceptionally voluminous record. The order of July 1, 1930, was to go into effect on October 1, 1930, but because of mechanical difficulties in the preparation and printing of the tariffs, containing the great number of the revised rates, the effective date was postponed from time to time.

In September, 1930, the carriers asked for a rehearing, which was denied in November, 1930. Prior to its denial, a statement was submitted to the Commission on behalf of the Western Association of Railway Executives, directing attention to the serious financial condition of the carriers. A further petition for rehearing was pre-

[4] Docket No. 17,000.

sented to the Commission on February 18, 1931. This petition described in great detail the situation then existing. The carriers alleged that since the closing of the record before the Commission in September, 1928, there had been material and important changes in the operating, traffic and transportation conditions in the Western District, which affected adversely the revenues of the carriers, and that, regardless of the question of the validity and propriety of the order when made, it would no longer be valid and proper in the light of the existing circumstances. The carriers alleged and offered to prove that, if the order became effective, it would reduce the gross and net operating revenues of the carriers in the Western District not less than $20,000,000 annually; that their aggregate revenues in the first eleven months of 1930 were 14.92 per cent. lower than in the corresponding period of 1929; that the complete figures in respect of the revenues for December, 1930, were not yet available but that the volume of traffic then carried was substantially less than that of December, 1929; that the revenue freight car loadings in January, 1931, showed a substantial decline (14.06 per cent.) from those of 1930 and an even greater decline (20.98 per cent.) as compared with those of 1929; that the net operating income of these carriers for 1930 was over $100,000,000 less than their average annual net operating income for the five preceding years; that the changes in conditions since the record before the Commission was closed had been such as seriously to impair the credit of the carriers; that not only had the market price of their common and preferred stock declined to such a level that it would be impossible for them to secure additional capital through the sale of stock, but that their bond issues also, in many instances, had ceased to command the credit which they formerly enjoyed; that the decrease of railroad earnings had been such as to jeopardize the eligibility of these bonds for savings bank investments, and that there had been a large decline in the holdings of the secu-

rities of these carriers by both savings banks and life insurance companies; and that if the order of the Commission should become effective, it would, under the conditions then present, threaten the maintenance of an adequate system of transportation. In support of their allegations as to changed conditions, the petitioners submitted many other facts and statistical tables of traffic and revenues.

The Commission denied the application for rehearing on March 3, 1931. On April 10, 1931, the Commission made its supplemental report and order, modifying and supplementing in certain particulars its original report and order, and provided that the order as thus modified should become effective on June 1, 1931. Thereupon, these suits were brought.

The petition in the carriers' suit challenged the order as having been made in disregard of the provisions of the Interstate Commerce Act. The original and supplemental reports of the Commission, and the above-mentioned petitions for rehearing, were annexed to the petition and made a part of it. Reference was made to the statement of the Commission, in its special report of January 21, 1931, to the Senate Committee on Interstate and Foreign Commerce, that the railroads had "never been able, since 1920, to obtain the aggregate earnings contemplated by section 15a" (of the Interstate Commerce Act) "and they are faced with continually increasing competition from other forms of transportation." Reciting earlier orders of the Commission bearing upon rates for the transportation of grain and grain products,[5] the carriers averred that the order of

[5] Increased Rates, 1920, 58 I. C. C. 220; Rates on Grain, Grain Products and Hay, 64 I. C. C. 85; Reduced Rates, 1922, 68 I. C. C. 676; Rates on Grain, Grain Products and Hay, 80 I. C. C. 362; Kansas Public Utilities Commission *v.* A. T. & S. F. Ry. Co., 83 I. C. C. 105; Rates and Charges on Grain and Grain Products, 91 I. C. C. 105.

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the Commission was a complete reversal of its previous action; that the Commission had found that the revenue of the carriers for the Western District from the carriage of grain and grain products amounted to 12.1 per cent. of their total revenues in 1924, that year being used in the report as representative, and that the effect of the order in question would be to reduce the general level of rates on this traffic approximately 13 per cent., causing a serious diminution (to the amount of $20,000,000 annually) in the gross and net operating income of these carriers. The petition set forth the passage of the Hoch-Smith Resolution and the order of the Commission in relation to the rates on deciduous fruits from California, which had been held by this Court to be invalid because based upon an erroneous construction of the Resolution,[6] and the carriers charged that, in making the reports and order here in question, the Commission had proceeded upon a like misconception of its powers. Stating the substance of their petition (February, 1931) for rehearing, the carriers further charged that the denial of that petition, in view of changed conditions, was itself an abuse of administrative discretion and, by depriving the carriers of the hearing to which they were entitled, constituted a denial of due process in violation of the Fifth Amendment of the Constitution of the United States.

In their answers, the United States and the Commission denied that the action of the Commission was in any respect unauthorized or unlawful, and on the contrary alleged that the Commission had carefully considered the evidence before it in the light of its experience and that the evidence fully supported its order.

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[6] California Growers' and Shippers' Protective League *v.* Southern Pacific Co., 129 I. C. C. 25; 132 *Id.* 582; *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658.

On the application for an interlocutory injunction, the evidence taken before the Commission was not presented to the District Court. Affidavits were submitted by the carriers which were addressed to the effect of the order upon their revenues. The District Court made findings of fact, reciting the findings set forth in the report of the Commission and, in the view that these were conclusive in the absence of the evidence, and that no errors of law had been committed, the application was denied.

The appellants contest this conclusion, contending that the report of the Commission and concurring opinions of Commissioners disclosed that the Commission had misapprehended its authority under the Hoch-Smith Resolution and that the Commission had failed to make the findings which were essential to support its decision under the applicable law; that this was shown by the special and extended consideration given by the Commission to the depression of agriculture and the lack of other and proper foundation for the order; that the Commission had not performed its duty to consider and apply the provisions of § 15a of the Interstate Commerce Act and had exceeded its power by resorting to different standards from those established by §§ 1 and 15 of the Act; and that the ultimate finding of the Commission, expressed in the words of the statute, that the existing rates were unreasonable to the extent that they exceeded the rates prescribed, was not in itself sufficient to support the order, as it otherwise appeared to have been erroneously based.

We do not find it to be necessary to consider these contentions, and the counter arguments advanced on behalf of the Commission, or to review the Commission's reports, as it is sufficient for the present purpose to deal with the fundamental question presented by the action of the Commission in denying the appellants' second application for a rehearing. Ordinarily, a petition for rehearing is for

the purpose of directing attention to matters said to have been overlooked or mistakenly conceived in the original decision and thus invites a reconsideration upon the record upon which that decision rested. The second petition for rehearing, in this proceeding, was not of that character. It was of the nature of a supplemental bill. It presented a new situation, a radically different one, which had supervened since the record before the Commission had been closed in September, 1928. It asserted that whatever might be the view of the order when made, and upon that record, a changed economic condition demanded reopening and reconsideration. The carriers insisted upon this reopening as a right guaranteed to them not only by the Act of Congress but by the Constitution itself.

There can be no question as to the change in conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstanding contemporary fact, dominating thought and action throughout the country. As the Interstate Commerce Commission said in its recent report to the Congress,[7] " a depression such as the country is now passing through is a new experience to the present generation." The Commission also recognized in that report " the very large reductions in railroad earnings which have accompanied the economic depression," and stated that " the chief cause of these reductions has been loss of traffic." For " in such depressions the railroads suffer severely. Their traffic is a barometer of general business conditions." [8]

It is plain that a record which was closed in September, 1928—relating to rates on a major description of the traffic of the carriers in a vast territory—cannot be regarded as representative of the conditions existing in

[7] 45th Annual Report, December 1, 1931; House Doc. No. 30, 72d Cong., 1st Sess., p. 114.

[8] *Id.*

1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements. While the effects of the widespread economic disturbance have had a progressive manifestation, they had been sufficiently revealed in February, 1931, when the second petition for rehearing was made, to compel the conclusion that the record of 1928 afforded no sufficient basis for the order of the Commission. The facts were set forth in the carriers' petition. They pointed out the grave reductions, in traffic and earnings, from which they were suffering, that their net operating income for 1930 was over $100,000,000 less than their average annual net operating income for the five years preceding, and that their credit was seriously impaired. At the time of this petition, the order revising the rates on grain and grain products in the Western District had not yet become effective, but the Commission stood upon the record of 1928 and, without reopening the proceeding or taking further evidence, provided that its order should become effective on June 1, 1931. In justification of this course, it is urged on behalf of the Commission that its determination had been reached after regularly conducted and protracted hearings in which carriers and shippers had coöperated and that the adjustments related not only to the level of rates but to the relation of rates and to discriminatory and wasteful practices, and that a reopening would have meant further lengthy proceedings. It is said that 'in performing its legislative function of prescribing reasonable rates, the Commission necessarily projects into the future the results of a decision based on the conditions disclosed in the record,' and that its determination 'cannot reflect accurately fluctuating conditions.' These suggestions would be appropriate in relation to ordinary applications for rehearing, but are without force when overruling economic forces have made

the record before the Commission irresponsive to present conditions. This is not the usual case of possible fluctuating conditions, but of a changed economic level. And the prospect that a hearing may be long does not justify its denial if it is required by the essential demands of justice.

We are thus brought to the fundamental considerations governing the authority of the Commission. It has broad powers and a wide extent of administrative discretion, with the exercise of which, upon evidence, and within its statutory limits, the courts do not interfere. The important and salutary functions of the Commission to enforce public rights are not to be denied or impaired. But the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements. Its duty under §§ 1 (5), 3 (1) and 15 (1) of the Interstate Commerce Act with respect to the prescribing of reasonable rates and the preventing of unreasonable or unjustly discriminatory or unduly preferential practices, has not been changed by the Hoch-Smith Resolution. *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, 669. The legal standards governing the action of the Commission in determining the reasonableness of rates are unaltered. In the discharge of its duty, a fair hearing is a fundamental requirement. *Interstate Commerce Comm.* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 91. In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right. The order of the Commission which was thus made effective, and the ensuing supplemental order, cannot be sustained.

The order of the District Court refusing an interlocutory injunction is reversed, and the cause is remanded with direction to grant the injunction as prayed.

Reversed.

MARINE TRANSIT CORP. ET AL. *v.* DREYFUS ET AL.

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

No. 172. Argued December 10, 11, 1931.—Decided January 4, 1932.

Cargo was lost through the alleged fault of the carrier while being towed in a canal—a navigable water of the United States—under a maritime contract providing that all disputes under it should be arbitrated before a designated board, whose decision should be final and binding. The cargo owners, proceeding in a District Court of the United States in admiralty, filed a libel for damages against the carrier and also libeled the tug belonging to the carrier which was charged with having occasioned the loss. The carrier answered as respondent and also as claimant of the tug, and released the latter by a stipulation for value. *Held:*

1. The proceedings were within the jurisdiction of the court of admiralty. P. 271.

2. Under the United States Arbitration Act, the court had authority to direct that the issues arising under the contract between the cargo owners and the carrier be arbitrated, as provided by the contract, and to confirm the award of the arbitrators. Pp. 274, 276.

3. Under the agreement that the award should be "final and binding," the carrier was bound by the award against it, both as respondent and as owner and claimant of the tug, and a decree against it upon the award was authorized by § 8 of the Act. P. 276.

4. The fact that the award in this case was signed by only four of the five arbitrators is not a valid objection to the decree enforcing it, since it does not appear by the record that the agreement required unanimity (the statute being silent on the subject,) or that any specific objection raising the point was made on the motion for confirmation. P. 276.

5. Whether the admiralty court committed error in decreeing against the stipulator as well as the respondent-claimant, will not be decided when the stipulator has not sought review in this Court. P. 277.

6. In authorizing admiralty courts to require specific performance of valid stipulations for arbitration in maritime contracts, and to enter decrees on awards found to be regular and in accordance with the agreements, Congress did not infringe upon the judicial power as extended to cases of admiralty and maritime jurisdiction. P. 277.

49 F. (2d) 215, affirmed.

CERTIORARI, *post*, p. 601, to review a decree in admiralty, in a loss-of-cargo case, enforcing an agreement to arbitrate and the award of the arbitrators.

Mr. Horace L. Cheyney for petitioners.

The Arbitration Act is unconstitutional because it deprives the federal courts of their judicial power and gives it to laymen.

When those courts are created by Congress, they are automatically vested with the judicial power under § 1 of Art. III of the Constitution. Congress may fail to create inferior federal courts; but, when created, they can not be deprived by it of the judicial power under the Constitution. *Nashville* v. *Cooper*, 6 Wall. 247; *Kline* v. *Burke Construction Co.*, 260 U. S. 226; *United States* v. *Burlington County Ferry Co.*, 21 Fed. 331; *Harrison* v. *Hadley*, 2 Dill. 229, Fed. Cas. No. 6,137; *Manley* v. *Olney*, 32 Fed. 708; *Schrauger & Johnson* v. *Phillips Bernard Co.*, 240 Fed. 131; *In re Hollins*, 229 Fed. 349; *Farrell* v. *Waterman S. S. Co.*, 291 Fed. 604; *Ex parte Bakelite Corp.*, 279 U. S. 438.

Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109, arose under the arbitration laws of the State of New York and does not concern the Federal Arbitration Act at all. We find nothing in the opinion sustaining the statement that this Court held there was no constitutional impediment against an arbitration clause.

The court below erred in holding that Congress had the power to enlarge the jurisdiction of the admiralty courts, by conferring upon them the equitable power of specific performance. The power to enforce specific performance of a contract is certainly one which is not vested in a

court of admiralty, under the well established law as to its jurisdiction. *The Eclipse,* 135 U. S. 599; *Kynoch* v. *The S. C. Ives,* Fed. Cas. No. 7,958; *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109.

Congress can not enlarge the jurisdiction of the courts of admiralty. The determination of what matters fall within their jurisdiction is a purely judicial question. *The Lottawanna,* 21 Wall. 558; *The Black Heath,* 195 U. S. 361.

There is nothing in the decisions of this Court supporting the contention that a court of admiralty has power to enforce specific performance as a remedy incident to its jurisdiction. Distinguishing: *Hartford Accident Co.* v. *Southern Pacific Co.,* 273 U. S. 277; *Morse Dry Dock Co.* v. *The Northern Star,* 271 U. S. 552; *Norwich & N. Y. Transp. Co.* v. *Wright,* 13 Wall. 104.

The court below erred in holding that the provisions of § 8 of the Act are independent of the other sections, instead of construing the Act as a whole. Section 8 has no application to this case.

As the provisions of § 8 have application only in proceedings *in rem* and to cases where there is an attachment of the property of the respondent, the District Court had no power under that section to make an order for arbitration of the proceeding against the Marine Transit Corporation *in personam.*

The libellants' only method of obtaining arbitration, under the terms of the Act, was by an independent proceeding by petition under the provisions of § 4.

Under § 9, a judgment may be entered upon the award of the arbitrators only if the parties have so agreed by their contract for the arbitration.

Under § 1, the courts have jurisdiction only over maritime transactions and contracts involving either interstate or foreign commerce. The contract here was for intrastate carriage only.

All sections of the Act were to be construed together and harmonized, if possible, and no arbitration could be ordered except in cases falling within the terms of §§ 1 and 2. *Zip Mfg. Co.* v. *Pep Mfg. Co.*, 44 F. (2d) 184. Neither of these sections applies to purely intrastate transactions or commerce.

Here the contract was for intrastate carriage, and under § 1 the question was as to the character of the contract and not the nature of the shipment.

Issuance of execution against the stipulator for the tug, although no decree was entered against the tug, was clearly erroneous, in conflict with the uniform law upon the subject.

The court erred in holding that it was not necessary that the award should be signed by all the arbitrators.

In the absence of any provision on the subject in the Arbitration Act, it is fairly to be assumed that Congress intended that the award of arbitrators, like the verdict of a jury, should be unanimous.

Mr. George V. A. McCloskey for respondents.

The Arbitration Act is constitutional. *Berkovitz* v. *Arbib & Houlberg*, 230 N. Y. 261; *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109; *Marchant* v. *Mead-Morrison Mfg. Co.*, 29 F. (2d) 40, certiorari denied, 278 U. S. 655; *Atlantic Fruit Co.* v. *Red Cross Line*, 5 F. (2d) 218; *The Gansfjord*, 25 F. (2d) 736, 767, affirmed 32 F. (2d) 236; *Jackson* v. *The Magnolia*, 20 How. 296, 300; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233, 234; *Mayor* v. *Cooper*, 6 Wall. 247, 251, 252. Cf. *Washington* v. *W. C. Dawson & Co.*, 264 U. S. 219.

The Act, so far from depriving the district courts of jurisdiction—for all their jurisdiction is purely statutory and not by constitutional grant—has enlarged their jurisdiction to embrace the enforcement of arbitration agreements, not only by ordering such arbitration to proceed

but by entering decree upon the award. Petitioners argument against arbitrators is equally applicable against the use of special commissioners—a practice of admiralty since the organization of the Government. Even the merits of a cause may by consent of parties, (though not otherwise save in exceptional conditions, as in *The P. R. R. No. 35,* 48 F. (2d) 122), be referred to a commissioner (*The Bronx,* 246 Fed. 809; *Luckenbach* v. *Delaware, L. & W. R. Co.,* 168 Fed. 560); and it is precisely such consent that supports a reference to arbitrators. Cf. *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden Co.,* 284 U. S. 151.

Congress had the constitutional power to confer upon admiralty courts the procedural power to require specific performance of arbitration agreements affecting causes within their jurisdiction. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 215; *The No. 6,* 241 Fed. 69, 71; *The Northern Star,* 271 U. S. 552; *Bogart* v. *The John Jay,* 17 How. 399, 402; *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.,* 273 U. S. 207, 217, 218; *Norwich Co.* v. *Wright,* 13 Wall. 104, 123.

The action was *in rem* within § 8 of this Act. Sections 4 and 8, authorizing suit to enforce a violated agreement to arbitrate, are independent of § 9, which relates, not to proceedings to compel the arbitration, but to proceedings instituted after award.

The shipment was in fact an international shipment, and in any event the Act is applicable.

Decree with direction for issuance of execution was properly entered against the petitioner and its stipulator.

The objection that the award was not signed by all the arbitrators is insubstantial, was not taken in the District Court, and was not assigned as error.

Messrs. Julius Henry Cohen and *Kenneth Dayton,* by special leave of Court, filed a brief on behalf of the Cham-

ber of Commerce of the State of New York et al., as *amici curiae.*

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

The petitioner, Marine Transit Corporation, entered into a written booking agreement with the respondents, Louis Dreyfus & Company, to furnish insurable canal tonnage for about 200,000 bushels of wheat, to be carried from Buffalo to New York. The contract provided that it should be "subject to New York Produce Exchange Canal Grain Charter Party No. 1 as amended." That charter party contained the following provision as to disputes:

"All disputes arising under this contract to be arbitrated before the Committee on Grain of the New York Produce Exchange whose decision shall be final and binding."

Under this contract, the Marine Transit Corporation, in September, 1928, provided the barge *Edward A. Ryan* to carry 19,200 bushels of the above-stated amount. This was a shipment, as the bill of lading of the Marine Transit Corporation shows, to the order of the Bank of Nova Scotia and was from Fort William, Ontario, 'in bond, for export,' to be delivered 'on surrender of original Lake bill of lading properly endorsed.' While in tow of the petitioner's tug *Gerald A. Fagan* on the New York Barge Canal, and approaching the federal lock at Troy, the *Edward A. Ryan* struck the guide wall and sank with its cargo. The respondents, Louis Dreyfus & Company, filed a libel in admiralty against the Marine Transit Corporation *in personam,* and against the tug *Gerald A. Fagan, in rem,* to recover damages for the loss of the wheat. The libel was also against a barge *John E. Enright,* one of the boats in the tow, but the action as to that boat was subsequently discontinued. A claim for

the tug *Gerald A. Fagan* was made by the Marine Transit Corporation and a stipulation for value was filed by it, as claimant, in the sum of $26,000, with the usual provision that the stipulation should be void if the claimant and the stipulator (the Continental Casualty Company) should abide by all orders of the court and pay the amount awarded by its final decree, and that otherwise the stipulation should remain in full force.

After answer to the libel had been filed by the Marine Transit Corporation, as respondent and as claimant of the tug *Gerald A. Fagan,* the libellants moved for a reference of the dispute to arbitration in accordance with the provision of the booking contract. This motion was granted " only as to the issues raised by the contract between the libellants and the Marine Transit Corporation," and the latter was ordered to submit to arbitration as to these issues before the Committee on Grain of the New York Produce Exchange. The arbitration proceeded and resulted in an award against the Marine Transit Corporation for the sum of $23,016, with interest and the costs and expenses of the arbitration. The award was confirmed by the District Court and an order—in substance, a final decree—was entered for the recovery by the libellants against the Marine Transit Corporation of the amount of the award, with the further provision that, if payment was not made within ten days, execution should issue against the Marine Transit Corporation and the stipulator. A motion to restrain the libellants from recovering from the claimant or its stipulator on behalf of the tug *Gerald A. Fagan* was denied. The decree entered upon the award was affirmed by the Circuit Court of Appeals, 49 F. (2d) 215, and the case comes here on writ of certiorari.

There is no question that the controversy between the petitioner and the respondents was within the arbitration clause of the booking contract. That provision was valid,

Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109, 122, and, as it related to all disputes arising under the contract, it applied to the controversy with the Marine Transit Corporation as operating owner of the tug *Gerald A. Fagan*, which was used for the agreed transportation. The questions presented are (1) whether the action of the District Court was authorized by the United States Arbitration Act,[1] and (2) whether that Act, as thus applied, is constitutional.

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[1]Act of February 12, 1925, c. 213, 43 Stat. 883; [U. S. C., Title 9, §§ 1–15]. The title of the Act and §§ 1 to 4, inclusive, and §§ 6, 7, 8, a portion of § 9, and §§ 13 and 14 are as follows:

"CHAP. 213.—An Act To make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That 'maritime transactions,' as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce,' as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

"Sec. 2. That a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

First. In construing the statute, we deal only with the questions raised by the present record. The loss occurred

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"Sec. 3. That if any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

"Sec. 4. That a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement: *Provided,* That the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration

upon a waterway which was part of the navigable waters of the United States, *The Robert W. Parsons,* 191 U. S. 17, and while the cargo was being transported by the petitioner under a maritime contract. The subject matter of the controversy thus lay within the jurisdiction of admiralty. The ambiguities of the statute have been

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was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

. . . . . .

"Sec. 6. That any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

"Sec. 7. That the arbitrators selected either as prescribed in this Act or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States court in and for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner now provided for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

"Sec. 8. That if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty

stressed in argument, but we think that its provisions embrace a case such as the one before us[2] and it is not necessary to discuss others. Section 4 authorizes a court, which would otherwise have jurisdiction in admiralty 'of the subject matter of a suit arising out of the contro-

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proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

"Sec. 9. If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in the next two sections. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

. . . . . .

"Sec. 13. That the party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

"(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

"(b) The award.

"(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

"The judgment shall be docketed as if it was rendered in an action.

"The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

"Sec. 14. That this Act may be referred to as 'The United States Arbitration Act.'"

[2] The Commitee on the Judiciary of the House of Representatives, in its report upon the bill, which with the Senate amendment became the Act in question, said:

versy between the parties' to a written agreement for arbitration, to 'make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.' Section 8 explicitly provides that where a cause of action is 'otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings,' and the court may then 'direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.'

In this instance, the libel against the vessel came directly within the provision of § 8. But the petitioner insists that the District Court 'had no power under that section to make an order for arbitration of the proceeding against the Marine Transit Corporation, *in personam.*' Section 8, it is said, applies 'only to proceedings *in rem* or proceedings *in personam* where there has been an attachment of the property of the respondent,' and there was no such attachment in this case. And it is contended that, aside from § 8, the Act does not provide for the granting of an order for arbitration 'in a pending suit.' With respect to the last contention, it may be observed that § 3 provides for a stay in a pending suit until arbitration has been had in accordance with the terms of the agreement, and it would be an anomaly if the court could grant such a stay and could not direct the arbitration to proceed,

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"The purpose of this bill is to make valid and enforcible agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction of admiralty, or which may be the subject of litigation in the federal courts. . . . The remedy is founded also upon the federal control over interstate commerce and over admiralty." House Rep. No. 96, 68th Cong., 1st sess. See, also, Cong. Rec., vol. 66, pt. 3, 68th Cong., 2d sess., pp. 3003, 3004.

although the court, admittedly, could have made an order for the arbitration if no suit had been brought. We think that the petitioner's argument is based upon a misconception of the statute. The intent of § 8 is to provide for the enforcement of the agreement for arbitration, without depriving the aggrieved party of his right, under the admiralty practice, to proceed against 'the vessel or other property' belonging to the other party to the agreement. The statutory provision does not contemplate 'the vessel or other property,' which may be seized, as being the party to the arbitration agreement. By the express terms of § 8, the libel and seizure are authorized as an initial step in a proceeding to enforce the agreement for arbitration, and it is the parties to that agreement who may be directed to proceed with the arbitration. Here, the Marine Transit Corporation was the party to the arbitration agreement. It had used the tug as a facility for the transportation of the libellants' wheat, and the dispute as to liability was within the promise to arbitrate. If there was to be an order for arbitration, it would appropriately run against the Marine Transit Corporation to enforce that obligation. It was not necessary or proper that the order should run against the tug. Nor was it necessary that the court in directing the arbitration should attempt to split the proceeding with respect to the demand in the suit *in personam* against the corporation and that *in rem* against the tug. The Marine Transit Corporation was before the court both as respondent and as owner and claimant of the vessel seized, and the agreement to arbitrate bound the corporation in both capacities. We conclude that the order directing the arbitration of the issues arising under the contract between the libellants and the Marine Transit Corporation was authorized by the statute.

We do not conceive it to be open to question that, where the court has authority under the statute, as we find

that it had in this case, to make an order for arbitration, the court also has authority to confirm the award or to set it aside for irregularity, fraud, *ultra vires* or other defect.[3] Upon the motion to confirm the award in this case, objections to the proceedings before the arbitrators were overruled by the District Court and are not pressed here. It is, however, urged against the award that it was signed by only four of the five arbitrators. The statute is silent with respect to a decision by a majority, but it does authorize action by a majority in compelling the attendance of witnesses (§ 7). In the absence of statutory requirement, the question as to the necessity of unanimity in the decision on the merits would be determined by the arbitration agreement, and it does not appear that under the agreement in this instance unanimity was needed. Nor does the record show that specific objection upon this point was taken in the District Court upon the motion for confirmation; and the rules of the New York Produce Exchange with respect to arbitrations under its Canal Grain Charter Party No. 1 (to which the petitioner's booking agreement was made subject) are not set forth. We think that there was no error in the ruling of the Circuit Court of Appeals upon this point.

The petitioner also insists that, under § 9, a judgment may be entered upon the award only if the parties have so agreed in their contract for arbitration and that the agreement here does not so provide. But the agreement for arbitration stipulated that the award should be 'final and binding.' The award was accordingly binding upon the Marine Transit Corporation both as respondent and as the owner and claimant of the tug, and the District Court entered its decree upon the award against that corporation under the authority expressly conferred by § 8.

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[3] See §§ 10 to 12.

The Circuit Court of Appeals also upheld the decree as against the stipulator, as its stipulation conformed to Admiralty Rule 8 of the Southern District of New York [4] and the decree was in accord with the stipulation and admiralty practice. *The Palmyra,* 12 Wheat. 1, 10; *The Wanata,* 95 U. S. 600, 611. We express no doubt as to the correctness of this conclusion, which the petitioner contests, but we have no occasion to deal with the question, as the stipulator has taken no steps to obtain a review of the decree in this Court.

We find no ground for disturbing the decree as unauthorized by the statute.

Second. The constitutional question raised by this application of the statute, is whether it is compatible with the maintenance of the judicial power of the United States as extended to cases of admiralty and maritime jurisdiction (Const. Art. III).

In *Red Cross Line* v. *Atlantic Fruit Co., supra* (at pp. 122, 123), this Court pointed out that in admiralty 'agreements to submit controversies to arbitration are valid,' and that 'reference of maritime controversies to arbitration has long been common practice.' 'An executory agreement,' said the court, 'may be made a rule of court' and the 'substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation.' The question, then, is one merely as to the power of the Congress to afford a remedy in admiralty to enforce such an obligation. It was because the question was one of remedy only, that this Court decided that a State, by virtue of the clause saving to suitors 'the right

[4] This rule is as follows: "Such stipulation shall contain the consent of the stipulators, that if the libellant or petitioner recover, the decree may be entered against them for an amount not exceeding the amount named in such stipulation and that thereupon execution may issue against their goods, chattels, lands, and tenements or other real estate."

of a common law remedy,' [5] had the power 'to confer upon its courts the authority to compel parties within its jurisdiction to specifically perform an agreement for arbitration, which is valid by the general maritime law, as well as by the law of the State,' and is contained in a maritime contract made within the State and there to be performed. *Red Cross Line* v. *Atlantic Fruit Co., supra,* at p. 124. The general power of the Congress to provide remedies in matters falling within the admiralty jurisdiction of the federal courts, and to regulate their procedure, is indisputable. The petitioner contends that the Congress could not confer upon courts of admiralty the authority to grant specific performance. But it is well settled that the Congress, in providing appropriate means to enforce obligations cognizable in admiralty, may draw upon other systems. Thus the Congress may authorize a trial by jury in admiralty, as it has done in relation to certain cases arising on the Great Lakes.[6] Courts of admiralty may be empowered to grant injunctions, as in proceedings for limitation of liability.[7] Similarly, there can be no question of the power of Congress to authorize specific performance when that is an appropriate remedy in a matter within the admiralty jurisdiction. As Chief Justice Taney said in *The Genesee Chief,* 12 How. 443, 460: "The Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction.' But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. . . . In ad-

[5] Judicial Code, § 24 (3); U. S. C., Tit. 28, § 41 (3).

[6] Act of February 26, 1845, c. 20, 5 Stat. 726; R. S. 566, U. S. C., Tit. 28, § 770; *The Genesee Chief,* 12 How. 443, 459, 460; *The Eagle,* 8 Wall. 15, 25.

[7] *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.,* 273 U. S. 207, 218.

miralty and maritime cases there is no such limitation as to the mode of proceeding, and Congress may therefore in cases of that description give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice."

In this instance a remedy is provided to fit the agreement. The Congress has authorized the court to direct the parties to proceed to arbitration in accordance with a valid stipulation of a maritime contract, and to enter a decree upon the award found to be regular and within the terms of the agreement. We think that the objection on constitutional grounds is without merit.

Decree affirmed.

UNITED STATES EX REL. POLYMERIS ET AL. *v.* TRUDELL, IMMIGRATION INSPECTOR.

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

No. 162. Argued December 9, 1931.—Decided January 4, 1932.

1. Under the Immigration Act of May 26, 1924, § 13 (a), (b), and the executive regulations pursuant thereto, an alien who was lawfully domiciled in this country but who went abroad for a temporary visit, cannot reënter unless he has either an immigration visa or a return permit. P. 280.
2. In habeas corpus to determine the right of an alien to enter the country, the burden of proof is upon the alien. P. 281.

49 F. (2d) 730, affirmed.

CERTIORARI, *post*, p. 601, to review a judgment reversing an order of the District Court discharging two aliens from the custody of immigration officers by a writ of habeas corpus.

Mr. Harold Van Riper for petitioners.

Mr. Claude R. Branch, with whom *Solicitor General Thacher, Assistant Attorney General Dodds,* and *Messrs. Frank M. Parrish* and *William H. Riley, Jr.,* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The relators, Aspasia Polymeris and her daughter Antigone, are Greek citizens who lawfully entered the United States in 1909 and lived for a number of years in New York City, which became and remains their domicil. In 1923, on account of the illness of Aspasia's husband, they went back to Greece with the intention, which the courts below found that they retained, of making only a temporary visit. The death of the husband and the necessity of settling his estate prolonged their stay until 1924. Beginning in that year they made several unsuccessful applications to the United States Consul General at Athens for documents that would permit them to return to New York. Finally, in 1929, they got authority to cross Canada, on a pretended trip from Greece to Japan, and, in 1930, presented themselves at St. Albans, Vermont, for admission to the United States. They were taken into custody by the immigration inspector and sought release by habeas corpus, on the ground that they were entitled to enter the country. It was held that they "were properly excluded under § 13 (a) of the Immigration Act of May 26, 1924, 43 Stat. 153, 161, since the Secretary of Labor did not admit them in his discretion, . . . and neither presented an unexpired valid immigration visa or an unexpired valid permit to reënter in accordance with the regulations promulgated under § 13 (b) of that Act." 49 F. (2d) 730. A contrary decision was reached in *Johnson* v. *Keating,* 17 F. (2d) 50. Therefore a writ of certiorari was granted by this Court.

The relators have no right to enter the United States unless it has been given to them by the United States.

The burden of proof is upon them to show that they have the right. Immigration Act of 1924, § 23, 43 Stat. 165; Code, Title 8, § 221. By § 13, and the regulations under it, as remarked by the court below, a returning alien can not enter unless he has either an immigration visa or a return permit. The relators must show not only that they ought to be admitted but that the United States, by the only voice authorized to express its will, has said so. Obviously it has not done so, and therefore the judgment must be affirmed.

Judgment affirmed.

LEWIS ET AL., TRUSTEES, *v.* REYNOLDS, COLLECTOR OF INTERNAL REVENUE.

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

No. 115. Argued December 8, 9, 1931.—Decided January 4, 1932.

In acting upon a claim for refund based upon the disallowance of a particular deduction, the Commissioner of Internal Revenue has authority to reaudit the return and to reject the claim on the basis of the disallowance of another deduction even though the statute of limitations prevents him from making an additional assessment for the year involved. P. 283.

48 F. (2d) 515, affirmed.

CERTIORARI, *post* p. 600, to review a decision affirming a judgment in favor of the Collector in an action for a refund of income taxes.

Mr. N. E. Corthell for petitioners.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher, Messrs. Whitney North Seymour* and *Sewall Key,* and *Miss Helen R. Carloss* were on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Petitioners sued the respondent Collector in the United States District Court for Wyoming, September 20, 1929, to recover $7,297.16 alleged to have been wrongfully exacted as income tax upon the estate of Cooper.

February 18, 1921, the administrator filed a return for the period January 1 to December 12, 1920, the day of final settlement. Among others, he reported deductions for attorney's fees, $20,750, and inheritance taxes paid to the State, $16,870. The amount of tax as indicated by the return was paid.

November 24, 1925, the Commissioner, having audited the return, disallowed all deductions except the one for attorney's fees and assessed a deficiency of $7,297.16. This sum was paid March 21, 1926; and on July 27, 1926, petitioners asked that it be refunded.

A letter from the Commissioner to petitioners, dated May 18, 1929, and introduced in evidence by them, stated that the deduction of $20,750 for attorney's fees had been improperly allowed. He also set out a revised computation wherein he deducted the state inheritance taxes. This showed liability greater than the total sums theretofore exacted. The Commissioner further said: "Since the correct computation results in an additional tax as indicated above which is barred from assessment by the statute of limitations your claim will be rejected on the next schedule to be approved by the commissioner."

The trial court upheld the Commissioner's action and its judgment was affirmed by the Circuit Court of Appeals.

Counsel for petitioners relies upon the five year statute of limitations (Rev. Act. 1926, § 277).[1] He maintains

[1] "Sec. 277. (a) Except as provided in § 278 [not here important]—. . . (3) The amount of income, excess-profits, and war-

that the Commissioner lacked authority to redetermine and reassess the tax after the statute had run.[2]

After referring to § 284, Revenue Act of 1926, 44 Stat. 66, and § 322, Revenue Act of 1928, 45 Stat. 861, the Circuit Court of Appeals said [48 F. (2d) 515, 516]—

"The above quoted provisions clearly limit refunds to overpayments. It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax. The action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him."

We agree with the conclusion reached by the courts below.

While the statutes authorizing refunds do not specifically empower the Commissioner to reaudit a return whenever repayment is claimed, authority therefor is necessarily implied. An overpayment must appear before refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.

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profits taxes imposed by . . . the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

[2] The opinion is printed here as amended by an order of February 15, 1932, to be published in the last part of this volume.

Bonwit Teller & Co. v. *United States*, 283 U. S. 258, says nothing in conflict with the view which we now approve.

Affirmed.

DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL. *v.* TERTE, JUDGE.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 130. Argued November 24, 1931.—Decided January 4, 1932.

1. A court of a State where a foreign railroad corporation is authorized to do business, owns and operates part of its lines, maintains an office, and has agents for the transaction of its general business, has jurisdiction of a suit against the company in damages for personal injuries under the Federal Employers' Liability Act, brought by a resident upon a cause of action which arose in another State when he was residing there. P. 287.
2. Jurisdiction in such case is not defeated by the fact that a second railroad company, over which the court is without jurisdiction, is named codefendant. *Id.*
3. A foreign railroad corporation which is not authorized to do business within the State, and does not own or operate any of its lines within the State, although it owns some property there and employs agents who solicit traffic, *held* not subject to the jurisdiction of a court of that State in a suit in damages for personal injuries under the Federal Employers' Liability Act, brought by a resident upon a cause of action which arose in another State when he was residing there, as otherwise an undue burden upon interstate commerce would result. *Id.*
4. The prohibition against burdening interstate commerce can not be evaded merely by attaching the property of the foreign railroad corporation within the State, nor may it be avoided by joining as codefendant in the suit a second railroad company over which the court has jurisdiction. The burden and expense which the carrier must incur in order to make defense in a State where the accident did not occur has no relation to the nature of the process used to bring it before the court. *Id.*
5. The fact that witnesses for the plaintiff reside within the State, thus enabling him to try his cause there with less inconvenience

than elsewhere, is not sufficient to justify the state court in retaining jurisdiction of the suit. P. 287.

Reversed.

CERTIORARI, *post,* p. 601, to review a judgment of the Supreme Court of Missouri denying a petition for a writ of prohibition to restrain a county circuit court from entertaining further jurisdiction of a suit in damages for personal injuries, under the Federal Employers' Liability Act, against two foreign railroad corporations.

Mr. Thomas Hackney, with whom *Mr. Cyrus Crane* was on the brief, for petitioners.

Mr. Clay C. Rogers for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

This writ of certiorari to the Supreme Court of Missouri brings up for review a judgment which denied a petition for prohibition without an accompanying opinion.

Following the local practice, the Denver and Rio Grande Western Railroad Company (Rio Grande) and the Atchison, Topeka and Santa Fe Railway Company (Santa Fe) presented their petition directly to the Supreme Court. After setting out the proceedings in an action against them pending in the Jackson County Circuit Court, it alleged that if the cause proceeded to trial an undue burden on interstate commerce would result; also the commerce clause of the Federal Constitution and the Fourteenth Amendment would be violated. It asked that the presiding Judge be restrained from entertaining further jurisdiction.

On August 26, 1930, Curtis, then residing in Missouri, brought the above mentioned action against both the Santa Fe and the Rio Grande under the Federal Em-

ployers' Liability Act. He sought damages for personal injuries said to have resulted from their joint negligence on December 26, 1929, while he was employed by them at an interlocking track and signal plant near Pueblo, Colorado.

A writ of attachment against the Rio Grande was served by garnishee process upon several railroad companies said to be indebted to it. Summonses for both defendants were served upon their agents.

Defendants, appearing specially, moved to quash the attachment and summonses and presented affidavits to support their motions. The plaintiff filed counter-affidavits. It appeared that properly to defend the cause would require attendance of witnesses from Colorado at large expense; also the attendance of some witnesses for the plaintiff who resided in Missouri. The trial court overruled the motions. Thereupon, the defendants petitioned the Supreme Court as above stated.

The Rio Grande, a Delaware corporation, operates lines which lie wholly within Colorado, Utah and New Mexico. It neither owns nor operates any line in Missouri; but it does own and use some property located there. It maintains one or more offices in the State and employs agents who solicit traffic. These agents engage in transactions incident to the procurement, delivery and record of such traffic. It is not licensed to do business in Missouri.

The Santa Fe, a Kansas corporation, owns and operates railroad lines in Missouri, Kansas, Colorado, and other States. It is licensed to do business in Missouri and has an office and agents in Jackson County. These agents transact the business ordinarily connected with the operation of a carrier by railroad.

After being injured at Pueblo, and before instituting his action against the railroad companies, Curtis removed to and became a bona fide resident and citizen of Missouri.

According to the doctrine approved in *Hoffman* v. *Foraker,* 274 U. S. 21, we think the Santa Fe was properly sued in Jackson County. The Supreme Court committed no error of which we can take notice by refusing to prohibit further prosecution of the action against that company. The mere fact that the Santa Fe was named a codefendant with the Rio Grande was not enough to defeat jurisdiction of the court over the former.

Under the rule approved in *Michigan Central R. Co.* v. *Mix,* 278 U. S. 492, the Rio Grande properly claimed exemption from suit in Jackson County. It was not necessary to join the two Railroad Companies in one action. Whatever liability exists is several. The prohibition against burdening interstate commerce cannot be avoided by the simple device of a joint action. Nor can this be evaded merely by attaching the property of the nonresident railroad corporation. Obviously, the burden and expense which the carrier must incur in order to make defense in a State where the accident did not occur has no relation to the nature of the process used to bring it before the court.

The alleged residence in Missouri of persons whose testimony plaintiff supposed would be necessary to prove his claim was not enough to justify retention of jurisdiction by the Circuit Court. While this circumstance might enable plaintiff to try his cause there with less inconvenience than elsewhere, it would not prevent imposition of a serious burden upon interstate commerce. And, we have held, it is the infliction of this burden that deprives the courts of jurisdiction over cases like this. *Davis* v. *Farmers Coöperative Co.,* 262 U. S. 312. Further, as a practical matter, courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the State and retain

or refuse jurisdiction according to the relative inconvenience of the parties.

The judgment of the Supreme Court must be reversed. The cause will be remanded there for further proceedings not inconsistent with this opinion.

Reversed.

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

ATLANTIC COAST LINE RAILROAD CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

No. 88. Argued December 7, 1931.—Decided January 4, 1932.

1. Acting under § 5 (2) of the Interstate Commerce Act, the Commission granted to petitioner carriers permission to lease a line connecting with their system, but in order to preserve existing and possible through routes via the leased line on other railroads, it granted the permission upon the conditions: that the lessor be maintained as a separate organization and its line constitute a separate operating unit; that existing routes of traffic, gateways of interchange, and neutrality in handling traffic be continued, so as to preserve equal service, routing and movement of competitive traffic to and from all connecting lines reached by the leased line; that the lessees permit carriers then connecting with the leased line, or which might thereafter connect with it, to participate, without discrimination, in through routes and joint rates on traffic moving over it as an intermediate road between regions designated in the order, and that, to this end, the leased line should be maintained as an open route equally available to all carriers connecting with it. *Held:*

(1) That the conditions applied in favor of a railroad whose line was extended, several years after the order was made, to the line of another carrier by which it was linked to the leased line. P. 293.

(2) That tariff provisions by which the lessee companies established exclusive through routes over the leased line violated the

conditions, and that an order for their cancellation made by the Commission under § 15 (7) was valid. P. 293 et seq.

2. The term "connecting lines" is not limited in meaning to railroads having direct connection, but is commonly used as referring to all of the lines making up a through route. P. 293.

3. The limitation imposed by § 15 (4) of the Interstate Commerce Act, prohibiting the Commission from requiring a carrier to establish, "without its consent," any through route which does not embrace substantially the entire length of its line between the termini of the route proposed, is designed to protect the existing long-haul routes of carriers, and applies only when the Commission is exercising the power conferred by paragraph 15 (3). It is not a limitation upon the power of the Commission to affix conditions when approving new combinations of carriers under § 5 (2). P. 294.

48 F. (2d) 239, affirmed.

APPEAL from a decree of the District Court of three judges dismissing a bill to set aside an order of the Interstate Commerce Commission.

Messrs. F. B. Grier and *Carl H. Davis,* with whom *Mr. M. G. McDonald* was on the brief, for appellants.

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

Mr. W. S. O'B. Robinson, Jr., with whom *Messrs. James M. Hull, Jr., George B. Barrett,* and *George B. Robinson, Jr.,* were on the brief, for the Piedmont & Northern Ry. Co. et al., appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit, under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220, was brought in the federal court for western South Carolina, to set aside an order of the Interstate Commerce Commission dated June 9, 1930. Restriction

in Routing in Connection with the Georgia & Florida Railroad, 165 I. C. C. 3. The plaintiffs are the Atlantic Coast Line Railroad, the Louisville & Nashville Railroad and the Charleston & Western Railroad. The defendants are the United States and, by intervention, the Commission, the Piedmont & Northern Railway and the Georgia & Florida Railroad. The order assailed was entered under § 15 (7) of the Interstate Commerce Act. It requires the cancellation of provisions in tariff schedules by which the plaintiffs seek to exclude the Georgia & Florida from participating as connecting carrier in through routes established over the Carolina, Clinchfield & Ohio Railway. The Commission held that the restrictive schedules violated the conditions under which that railroad had been leased to the Atlantic Coast Line and the Louisville & Nashville. Clinchfield Railway Lease, 90 I. C. C. 113. The District Court, three judges sitting, sustained the validity of the order and dismissed the bill. 48 F. (2d) 239. The case is here on direct appeal. We are of opinion that the decree should be affirmed.

The Clinchfield Railway extends in a southerly direction from Elkhorn City, Kentucky, to Spartanburg, South Carolina, a distance of 276.85 miles. The Atlantic Coast Line system lies to the east and south. To the west and south lies the Louisville & Nashville, of whose stock 51 per cent. is owned by the Coast Line. The Clinchfield is a link in many possible routes between points in the southeastern States and the north, in addition to those routes which are over the Atlantic Coast Line or the Louisville & Nashville. At Elkhorn City, the Clinchfield connects with the Chesapeake and Ohio Railway, whose system extends east, north and west. At Spartanburg, the Clinchfield connects with the Piedmont & Northern which extends in a southerly direction to Greenwood, South Carolina. And at Greenwood, the Piedmont & Northern connects with a recently built extension of the Georgia &

Florida, which now has 464 miles of line in the three southeastern States. The restrictive schedules excluded from the joint rates traffic over the Clinchfield if routed via the Georgia & Florida. Such traffic was thereby subjected to the applicable combination of higher local rates. The effect of this was to prevent not only the Georgia & Florida but also the Piedmont & Northern, the intermediate carrier, from participating in such business, with the result that the traffic would be secured for the Charleston & Western, which the Atlantic Coast Line controls through stock ownership.

In 1923 the Atlantic Coast Line and the Louisville & Nashville applied to the Commission for leave jointly to lease the Clinchfield. The extension of the Georgia & Florida to Greenwood was then in contemplation. The Piedmont & Northern and the Georgia & Florida opposed authorization of an unconditional lease, on the ground that if joint rates on traffic moving over the Clinchfield should be closed to them, they would be deprived of much traffic which might otherwise move over their lines or future extensions thereof. In order to preserve, among other things, the existing and possible through routes via the Clinchfield on railroads other than the Atlantic Coast Line and the Louisville & Nashville, the Commission, in authorizing the lease, made it subject to five conditions, which the lessees accepted.[1] Condition 1 requires the maintenance of a separate organization for the Clinchfield so that the road "shall con-

[1] The order of the Commission entered June 3, 1924, provided: "That the making of said lease and exercise of any of the rights conferred by this order shall in all future proceedings, judicial as well as administrative, to which the carriers above named or any of them may be parties, be deemed and taken as conclusive evidence of their acceptance of, and agreement to abide by, the conditions enumerated in said report, . . ." 90 I. C. C. at 139. Compare Control of Alabama & Vicksburg Railway, 111 I. C. C. 161, 182

stitute a separate operating unit." Condition 3 requires the continuance of existing routes and channels of trade, existing gateways for the interchange of traffic, and "the present neutrality of handling the traffic inbound and outbound" so as to permit equal service, routing, and movement of competitive traffic to and from all connecting lines reached by the Clinchfield.[2] Condition 4 requires the lessees to permit carriers then connecting with the line of the Clinchfield, or which may thereafter connect with it, to participate, without discrimination, in through routes and joint rates on traffic moving over the Clinchfield as an intermediate road between points at and beyond the Ohio River, on the one hand, and points in southeastern and Carolina territory, on the other; and that to this end the Clinchfield shall be maintained as an open route for traffic available to all carriers connecting with it.[3] The order of June 9, 1930, here

[2] "3. So far as lies within the power of the applicants, existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield shall be preserved, existing gateways for the interchange of traffic with such other carriers shall be maintained, and the present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued so as to permit equal opportunity for service and routing or movement of traffic which is competitive with traffic of the applicants, or either of them, to and from all connecting lines reached by the line of the Clinchfield companies, without discrimination in service against such competitive traffic."

[3] "4. The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, or via such gateways as may hereafter be established under authority of the commission by means of the connecting lines which the Louisville & Nashville Railroad Company proposes to build, equally available to such other carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the

assailed, cancelled the restrictive schedules on the ground that they violated Conditions 3 and 4. The plaintiffs deny that the restrictive schedules are inconsistent with Conditions 3 and 4; and claim that if the schedules are inconsistent with the conditions, it is the conditions which are void.

First. The plaintiffs contend that the restrictive schedules are consistent with the conditions because the Georgia & Florida is not a carrier "connecting with the Clinchfield." The argument is that the Georgia & Florida does not connect, since its own rails do not physically abut on the Clinchfield's rails—the connection being made over the Piedmont & Northern, an intermediate carrier. There is no warrant for limiting the meaning of "connecting lines" to those having a direct physical connection with the Clinchfield. The term is commonly used as referring to all the lines making up a through route.[4]

Second. The plaintiffs contend that the restrictive schedules are consistent with the conditions, because these assure equality of treatment only to connections existing at the time the order was entered authorizing the

Clinchfield and points at and beyond the Ohio River on the one hand and points in the southeastern and Carolina territory on the other, under divisions to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization, on the one hand, and by the other participating carrier or carriers on the other, and shall not discriminate as to rates, fares, and charges against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated."

[4] Compare cases under the Carmack Amendment. Act of January 29, 1906, c. 3591, § 7, 34 Stat. 584, 595; *Galveston, H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481, 489; *Galveston, H. & S. A. Ry. Co.* v. *Woodbury,* 254 U. S. 357, 358.

lease, and the Greenwood extension, by means of which the Georgia & Florida connects with the Piedmont & Northern, was not built until several years thereafter. But the open route guaranteed by the conditions is not so limited. Condition 4 prescribes that the lessees "shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, . . . equally available to such other carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River, on the one hand, and points in the Southeastern and Carolina territory, on the other."

Third. The plaintiffs contend that, as construed, Conditions 3 and 4 conflict with the provisions of § 15 (4) of the Act, which prohibits the Commission from requiring a carrier to establish "without its consent" any through route which does not embrace substantially the entire length of its line (including lines of controlled carriers) between the termini of the proposed route.[5] The argument is that the order short-hauls traffic which would otherwise pass over the Charleston & Western, and that this road is a part of the Atlantic Coast Line System. The Commission's order of June 3, 1924, which prescribed

[5] "(4) In establishing any . . . through route the commission shall not . . . require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established. . . ." Act of June 19, 1910, c. 309, § 12, 36 Stat. 539, 552, amended by Act of February 28, 1920, c. 91, § 418, 41 Stat. 456, 485.

the conditions did not require the lessees to abandon any protection given by § 15 (4) in respect to their then existing lines. It was not an order establishing a through route within the meaning of § 15 (3). In respect to the Clinchfield, which the carriers sought to acquire, the Commission gave them the option of either consenting to certain through routing over that road or abandoning their plan to lease the road. In effect, the Commission found that without such a condition the proposed lease was not in the public interest. With that condition it was. Compare *Chicago Junction Case,* 264 U. S. 258, 265. It was within the powers of the Commission to make such a condition.[6] Obviously the condition was not arbitrary. The provision was requested by the carriers interested; and it was required in order that competition, which the Commission deemed to be in the public interest, be preserved. Compare *Chesapeake & Ohio Ry. Co.* v. *United States,* 283 U. S. 35, 42. The limitation imposed by § 15 (4) of the Act upon the Commission's power under § 15 (3) to establish through routes is designed to protect the existing long-haul routes of carriers. Compare *United States* v. *Missouri Pacific R. Co.,* 278 U. S. 269, 277. It applies only when the Commission is exercising the power conferred by that paragraph. It is not a limitation upon the power of the Commission to approve new combinations of carriers.

Affirmed.

[6] The Commission has frequently attached similar conditions to orders authorizing acquisitions of control. See, *e. g.,* Chicago Junction Case, 71 I. C. C. 631, 639; Control of Alabama & Vicksburg Railway, 111 I. C. C. 161, 178, 179; Control of Columbia, Newberry & Laurens, 117 I. C. C. 219, 227; Control of Chicago Heights Terminal Transfer R. R. Co., 124 I. C. C. 753, 760; Acquisition of Control by Illinois Terminal Co., 138 I. C. C. 487, 498; Acquisition of Control by Wabash Ry. Co., 154 I. C. C. 155, 162, 163.

CHICAGO & EASTERN ILLINOIS RAILROAD CO. *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL.

CERTIORARI TO THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

No. 79. Argued December 1, 1931.—Decided January 4, 1932.

A railway employee, while occupied in oiling an electric motor which is used for hoisting coal into a chute, to be thence taken and used by locomotives principally employed in moving interstate freight, is not engaged in interstate transportation, or in work so closely related to it as to be practically a part of it; and therefore an injury suffered by him while so occupied is not within the Federal Employers' Liability Act. *Chicago, B. & Q. R. Co.* v. *Harrington,* 241 U. S. 177, and *Chicago & N. W. Ry. Co.* v. *Bolle, ante,* p. 74, followed. *Erie R. Co.* v. *Collins,* 253 U. S. 77, and *Erie R. Co.* v. *Szary, id.* 86, overruled.

Affirmed.

CERTIORARI, *post,* p. 599, to review a judgment affirming an award of compensation for personal injuries under a state workmen's compensation act. The Supreme Court of Illinois declined to review.

Mr. Edward W. Rawlins, with whom *Mr. Thomas P. Littlepage* was on the brief, for petitioner. They cited: *Erie R. Co.* v. *Collins,* 253 U. S. 77; *Erie R. Co.* v. *Collins,* 259 Fed. 172; *Erie R. Co.* v. *Szary,* 253 U. S. 86; *Southern Pacific Co.* v. *Industrial Accident Comm.,* 251 U. S. 259; *Rousch* v. *Baltimore & O. R. Co.,* 243 Fed. 712; *Horton* v. *Oregon W. R. & N. Co.,* 130 Pac. 897–901; *Sells* v. *Grand Trunk Ry. Co.,* 206 Ill. App. 45, 51; *Erie R. Co.* v. *Winfield,* 244 U. S. 170; *New York Central R. Co.* v. *Winfield,* 244 U. S. 147; *Toledo, St. L. & W. R. Co.* v. *Slavin,* 236 U. S. 454.

Mr. Samuel E. Hirsch, with whom *Messrs. Morris K. Levinson* and *K. L. Johnson* were on the brief, for respondents. They cited:

Shanks v. *Delaware, L. & W. R. Co.,* 239 U. S. 556; *Minneapolis & St. L. R. Co.* v. *Winters,* 242 U. S. 353; *Delaware, L. & W. R. Co.* v. *Yurkonis,* 238 U. S. 439; *Chicago, B. & Q. R. Co.* v. *Harrington,* 241 U. S. 177; *Kelly* v. *Pennsylvania R. Co.,* 238 Fed. 95; *Payne* v. *Industrial Commission,* 296 Ill. 223; *Goldsmith* v. *Payne,* 300 Ill. 119.

Mr. Justice Sutherland delivered the opinion of the Court.

Thomas, an employee of the railroad company, in attempting to oil an electric motor while it was running, was injured by having his hand caught in the gears. The railroad was engaged in both intrastate and interstate commerce. The motor furnished power for hoisting coal into a chute, to be taken therefrom by, and for the use of, locomotive engines principally employed in the movement of interstate freight. An action was brought before the Industrial Commission of Illinois to recover compensation for the injury under the provisions of the Workmen's Compensation Act of Illinois.

The railroad company contended, and an arbitrator, appointed by the commission, found, that the work in which Thomas was engaged was in interstate commerce, that the case, therefore, was not within the state act and the commission was without jurisdiction. The commission, on review, held otherwise and awarded compensation aggregating $2,184.64. The court below affirmed the award upon a writ of certiorari authorized by state statute. The state supreme court, in the exercise of its discretion, declined to review the judgment; and the case is

properly here on certiorari to the state circuit court. *American Ry. Express Co.* v. *Levee,* 263 U. S. 19, 20; *Western Union Tel. Co.* v. *Crovo,* 220 U. S. 364, 366.

The contention that Thomas was employed in interstate commerce at the time of the injury, rests upon the decisions of this court in *Erie R. Co.* v. *Collins,* 253 U. S. 77, and *Erie R. Co.* v. *Szary,* 253 U. S. 86. In the *Collins* case the employee, at the time of his injury, was operating a gasoline engine to pump water into a tank for the use of locomotives engaged in both interstate and intrastate commerce. In the *Szary* case the duty of the employee was to dry sand by the application of heat for the use of locomotives operating in both kinds of commerce; and he was so employed when injured. In each case this court held that the employee was engaged in interstate commerce at the time of the injury, within the terms of the Federal Employers' Liability Act.

The only difference between those cases and this one is that here the work of the employee related to coal, while in the *Collins* case it related to water, and in the *Szary* case, to sand. Obviously, the difference is not one of substance and if the *Collins* and *Szary* cases are followed a reversal of the judgment below would result.

But in *Chicago, B. & Q. R. Co.* v. *Harrington,* 241 U. S. 177, the injured employee was engaged in taking coal from storage tracks to bins or chutes for the use of locomotives used in the movement of both interstate and intrastate traffic; and this court held that the service was not in interstate commerce. After quoting the test for determining whether an employee is engaged in interstate commerce, laid down in *Shanks* v. *Delaware, L. & W. R. Co.,* 239 U. S. 556, 558, namely, "was the employé at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it," this court said (p. 180), "Manifestly, there

was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use."

We are unable to reconcile this decision with the rule deducible from the *Collins* and *Szary* cases, and it becomes our duty to determine which is authoritative. From a reading of the opinion in the *Collins* case, it is apparent that the test of the *Shanks* case was not followed (see p. 85), the words "interstate commerce" being inadvertently substituted for the words "interstate transportation" The *Szary* case is subject to the same criticism, since it simply followed the *Collins* case. Both cases are out of harmony with the general current of the decisions of this court since the *Shanks* case, *Chicago & North Western Ry. Co.* v. *Bolle, ante,* p. 74, and they are now definitely overruled. The *Harrington* case furnishes the correct rule, and, applying it, the judgment below must be

Affirmed.

BLOCKBURGER *v.* UNITED STATES.

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

No. 374. Argued November 24, 1931.—Decided January 4, 1932.

1. Two sales of morphine not in or from the original stamped package, the second having been initiated after the first was complete, *held* separate and distinct offenses under § 1 of the Narcotics Act, although buyer and seller were the same in both cases and but little time elapsed between the end of the one transaction and the beginning of the other. P. 301.
2. Section 1 of the Narcotics Act, forbidding sale except in or from the original stamped package, and § 2, forbidding sale not in pursuance of a written order of the person to whom the drug is sold, create two distinct offenses, and both are committed by a single

sale not in or from the original stamped package and without a written order. P. 303.

3. Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. P. 304.

4. The penal section of the Act, "any person who violates or fails to comply with any of the requirements of this act" shall be punished, etc., means that each offense is subject to the penalty prescribed. P. 305.

50 F. (2d) 795, affirmed.

CERTIORARI, *post*, p. 607, to review a judgment affirming a sentence under the Narcotics Act.

Mr. Harold J. Bandy was on the brief for petitioner.

Mr. Claude R. Branch, with whom *Solicitor General Thatcher, Assistant Attorney General Dodds,* and *Mr. Harry S. Ridgely* were on the brief, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The petitioner was charged with violating provisions of the Harrison Narcotic Act: c. 1, § 1, 38 Stat. 785, as amended by c. 18, § 1006, 40 Stat. 1057, 1131, (U. S. C., Title 26, § 692);[1] and c. 1, § 2, 38 Stat. 785, 786, as amended, (U. S. C., Title 26, § 696).[2] The indictment

[1] "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs [opium and other narcotics] except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; . . ."

[2] "It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs specified in section 691 of this title, except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue."

contained five counts. The jury returned a verdict against petitioner upon the second, third and fifth counts only. Each of these counts charged a sale of morphine hydrochloride to the same purchaser. The second count charged a sale on a specified day of ten grains of the drug not in or from the original stamped package; the third count charged a sale on the following day of eight grains of the drug not in or from the original stamped package; the fifth count charged the latter sale also as having been made not in pursuance of a written order of the purchaser as required by the statute. The court sentenced petitioner to five years imprisonment and a fine of $2,000 upon each count, the terms of imprisonment to run consecutively; and this judgment was affirmed on appeal. 50 F. (2d) 795.

The principal contentions here made by petitioner are as follows: (1) that, upon the facts, the two sales charged in the second and third counts as having been made to the same person, constitute a single offense; and (2) that the sale charged in the third count as having been made not from the original stamped package, and the same sale charged in the fifth count as having been made not in pursuance of a written order of the purchaser, constitute but one offense for which only a single penalty lawfully may be imposed.

One. The sales charged in the second and third counts, although made to the same person, were distinct and separate sales made at different times. It appears from the evidence that shortly after delivery of the drug which was the subject of the first sale, the purchaser paid for an additional quantity, which was delivered the next day. But the first sale had been consummated, and the payment for the additional drug, however closely following, was the initiation of a separate and distinct sale completed by its delivery.

The contention on behalf of petitioner is that these two sales, having been made to the same purchaser and

following each other with no substantial interval of time between the delivery of the drug in the first transaction and the payment for the second quantity sold, constitute a single continuing offense. The contention is unsound. The distinction between the transactions here involved and an offense continuous in its character, is well settled, as was pointed out by this court in the case of *In re Snow,* 120 U. S. 274. There it was held that the offense of cohabiting with more than one woman, created by the Act of March 22, 1882, c. 47, 22 Stat. 31, was a continuous offense, and was committed, in the sense of the statute, where there was a living or dwelling together as husband and wife. The court said (pp. 281, 286):

"It is, inherently, a continuous offence, having duration; and not an offense consisting of an isolated act.

. . . . . .

"A distinction is laid down in adjudged cases and in textwriters between an offence continuous in its character, like the one at bar, and a case where the statute is aimed at an offence that can be committed *uno ictu.*"

The Narcotic Act does not create the offense of engaging in the business of selling the forbidden drugs, but penalizes any sale made in the absence of either of the qualifying requirements set forth. Each of several successive sales constitutes a distinct offense, however closely they may follow each other. The distinction stated by Mr. Wharton is that "when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie." Wharton's Criminal Law, 11th ed., § 34. Or, as stated in note 3 to that section, "The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately . . . If the latter, there can be but one penalty."

In the present case, the first transaction, resulting in a sale, had come to an end. The next sale was not the result of the original impulse, but of a fresh one—that is to say, of a new bargain. The question is controlled, not by the *Snow* case, but by such cases as that of *Ebeling* v. *Morgan,* 237 U. S. 625. There the accused was convicted under several counts of a willful tearing, etc., of mail bags, with intent to rob. The court (p. 628) stated the question to be, "whether one who, in the same transaction, tears or cuts successively mail bags of the United States used in conveyance of the mails, with intent to rob or steal any such mail, is guilty of a single offense or of additional offenses because of each successive cutting with the criminal intent charged." Answering this question, the court, after quoting the statute, § 189, Criminal Code (U. S. C., Title 18, § 312), said (p. 629):

"These words plainly indicate that it was the intention of the lawmakers to protect each and every mail bag from felonious injury and mutilation. Whenever any one mail bag is thus torn, cut or injured, the offense is complete. Although the transaction of cutting the mail bags was in a sense continuous, the complete statutory offense was committed every time a mail bag was cut in the manner described, with the intent charged. The offense as to each separate bag was complete when that bag was cut, irrespective of any attack upon, or mutilation of, any other bag."

See also *In re Henry,* 123 U. S. 372, 374; *In re De Bara,* 179 U. S. 316, 320; *Badders* v. *United States,* 240 U. S. 391, 394; *Wilkes* v. *Dinsman,* 7 How. 89, 127; *United States* v. *Daugherty,* 269 U. S. 360; *Queen* v. *Scott,* 4 Best & S. (Q. B.) 368, 373.

Two. Section 1 of the Narcotic Act creates the offense of selling any of the forbidden drugs except in or from the original stamped package; and § 2 creates the offense of selling any of such drugs not in pursuance of a written

order of the person to whom the drug is sold. Thus, upon the face of the statute, two distinct offenses are created. Here there was but one sale, and the question is whether, both sections being violated by the same act, the accused committed two offenses or only one.

The statute is not aimed at sales of the forbidden drugs *qua* sales, a matter entirely beyond the authority of Congress, but at sales of such drugs in violation of the requirements set forth in §§ 1 and 2, enacted as aids to the enforcement of the stamp tax imposed by the act. See *Alston* v. *United States,* 274 U. S. 289, 294; *Nigro* v. *United States,* 276 U. S. 332, 341, 345, 351.

Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Gavieres* v. *United States,* 220 U. S. 338, 342, and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey* v. *Commonwealth,* 108 Mass. 433: "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." Compare *Albrecht* v. *United States,* 273 U. S. 1, 11–12, and cases there cited. Applying the test, we must conclude that here, although both sections were violated by the one sale, two offenses were committed.

The case of *Ballerini* v. *Aderholt,* 44 F. (2d) 352, is not in harmony with these views and is disapproved.

Three. It is not necessary to discuss the additional assignments of error in respect of cross-examination, admission of testimony, statements made by the district

attorney to the jury, claimed to be prejudicial, and instructions of the court. These matters were properly disposed of by the court below. Nor is there merit in the contention that the language of the penal section of the Narcotic Act, "any person who violates or fails to comply with any of the requirements of this act" shall be punished, etc., is to be construed as imposing a single punishment for a violation of the distinct requirements of §§ 1 and 2 when accomplished by one and the same sale. The plain meaning of the provision is that each offense is subject to the penalty prescribed; and if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction. Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment upon each count seems unduly severe; but there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment. In any event, the matter was one for that court, with whose judgment there is no warrant for interference on our part.

Judgment affirmed.

DENTON *v.* YAZOO & MISSISSIPPI VALLEY RAILROAD CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

No. 242. Argued December 11, 1931.—Decided January 4, 1932.

1. When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former. P. 308.
2. Railroad companies are required by statute to transport the mail "in the manner, under the conditions, and with the service prescribed by the Postmaster General," and one of his regulations

provides that they shall furnish the men necessary to handle the mails and to load them into the mail cars under the direction of a transfer clerk, a federal employee. *Held* that railroad companies are not liable for personal injuries resulting from the negligence of one of their employees while he was engaged in so loading mail, because his work at the time was work of the Government under control of a government agent. P. 309.

160 Miss. 850, 133 So. 656, affirmed.

CERTIORARI, *post*, p. 603, to review a judgment reversing a judgment recovered by the plaintiff in an action for personal injuries against two railroad companies.

Mr. John P. Bramhall, with whom *Mr. James E. McCabe* was on the brief, for petitioner.

They contended that the lent servant doctrine had no application, and quoted §§ 1286, par. 5; 1288, and 1293, par. 3, of the Postal Regulations of 1924 as serving to show that the work of the porter at the time of the injury was work of the railroads which they were required by statute to perform upon their own responsibility. They argued that the word "direction," as used in § 1293, par. 2, of those Regulations, could mean no more than a pointing out to the railroad porters of the disposition to be made of the various pouches of mail at railroad terminals and transfer points where the services of porters are required. Cases cited were: *Hinds* v. *Kellogg*, 13 N. Y. S. 922, 923; *Standard Oil Co.* v. *Anderson*, 212 U. S. 215, 226; *Driscoll* v. *Towle*, 181 Mass. 416.

Mr. H. D. Minor, with whom *Messrs. Charles N. Burch, R. V. Fletcher, A. S. Bozeman*, and *C. H. McKay* were on the brief, for respondents.

The porter was, while doing this work, the servant of the federal Government and not of the carrier, wherefore the doctrine of lent servant applies. *Yazoo & M. V. R. Co.* v. *Denton*, 133 So. 656; *Standard Oil Co.* v. *Anderson*, 212 U. S. 215; *Linstead* v. *Chesapeake & O. R. Co.*, 276

U. S. 28; *Harrell* v. *Atlas Co.*, 250 Fed. 83; *Burgess* v. *Standard Oil Co.*, 262 Fed. 767; *Isaacs* v. *Prince*, 133 Miss. 205; *Carr* v. *Burke*, 131 App. Div. (N. Y.) 361.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The petitioner, a United States railway postal clerk, sustained an injury due to the alleged negligence of one Hunter, a porter in the general service of the two railroad companies named as respondents. Hunter was hired and paid by the Illinois Central Railroad Company. At the time of the injury he was engaged in loading United States mail into a mail car, under the direction of a United States postal transfer clerk, and was not, as to that work, under the direction or control of either of the railroad companies.

The mail was being transported by the railroad companies under c. 261, § 5, 39 Stat. 412, 429, U. S. C., Title 39, § 541, which requires all railway common carriers to transport such mail "in the manner, under the conditions, and with the service prescribed by the Postmaster General." A regulation of the Postmaster General, adopted by authority of this statute, provides:

"Section 1293. . . . 2. Railroad companies shall furnish the men necessary to handle the mails, to load them into and receive them from the doors of railway post office cars, and to load and pile the mails in and unload them from storage and baggage cars, under the direction of the transfer clerk, or clerk in charge of the car, if one is on duty, except as provided in Section 1290. Mails intended for delivery to postal clerk shall never be placed in a postal car unless there is a clerk on duty to receive and care for them."

Petitioner brought an action in a Mississippi state court of first instance, against the railroad companies and

Hunter, to recover damages for the injury, joining the railroads upon the theory that, in performing the work of loading the mail, Hunter was their servant. A verdict against all of the defendants was returned by the jury, and a judgment thereon entered. The judgment, as to the railroad companies, was reversed by the state supreme court on the ground that what Hunter was doing at the time of his alleged negligent act, was not for them but for the United States. 160 Miss. 850; 133 So. 656.

Whether the railroad companies may be held liable for Hunter's act depends not upon the fact that he was their servant generally, but upon whether the work which he was doing at the time was their work or that of another, a question determined, usually at least, by ascertaining under whose authority and command the work was being done. When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former. This rule is elementary and finds support in a large number of decisions, a few only of which need be cited. In *Standard Oil Co.* v. *Anderson,* 212 U. S. 215, 220–225, this court said:

"The servant himself is, of course, liable for the consequences of his own carelessness. But when, as is so frequently the case, an attempt is made to impose upon the master the liability for those consequences, it sometimes becomes necessary to inquire who was the master at the very time of the negligent act or omission. One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation.

. . . . . .

"To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary coöperation, where the work furnished is part of a larger undertaking.

. . . . . .

"In many of the cases the power of substitution or discharge, the payment of wages and other circumstances bearing upon the relation are dwelt upon. They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control."

And see *Linstead* v. *Chesapeake & Ohio Ry. Co.,* 276 U. S. 28; *Harrell* v. *Atlas Portland Cement Co.,* 250 Fed. 83, 85; *Brady* v. *Chicago & G. W. Ry. Co.,* 114 Fed. 100, 107; *Wyllie* v. *Palmer,* 137 N. Y. 248, 257; 33 N. E. 381; *Higgins* v. *Western Union Telegraph Co.,* 156 N. Y. 75, 78; 50 N. E. 500; *Cotter* v. *Lindgren,* 106 Cal. 602, 607; 39 Pac. 950; *Rourke* v. *White Moss Colliery Co.,* L. R., 2 C. P. Div. (1876–1877) 205.

The statutory obligation imposed upon the railroad carriers is simply to transport mail offered for transportation by the United States. They are not required to handle, load or receive mail matter, but only to furnish the men necessary for those purposes. The men so furnished handle the mails and load them into, and receive them from, the railway post office cars, as the regulation prescribes, "under the direction of the transfer clerk, or clerk in charge of the car." The work they do is that of the government. It is said that "direction" means nothing more than the right to point out or indicate to the men fur-

nished the disposition to be made of the mail. The scope of the word, as it is here used, is not to be thus limited. The phrase, "under the direction of the transfer clerk," would be practically meaningless unless it comprehended the power to supervise and control the movement. Obviously, as the evidence shows, a direction by the transfer clerk carries with it the duty, on the part of the men directed, to obey, and has, and was intended to have, the force of a command. See *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, 34; *Kellyville Coal Co.* v. *Bruzas,* 223 Ill. 595, 600; 79 N. E. 309.

The *Anderson* case, *supra,* and *Driscoll* v. *Towle,* 181 Mass. 416; 63 N. E. 922, are relied upon by petitioner to sustain the verdict of the jury. In the *Anderson* case, a winchman in the general service of the Standard Oil Company was furnished by the company to a master stevedore under contract with it to load a ship with oil. The winchman, in operating the winch, depended upon signals to be given by an employee of the stevedore to determine the proper time for hoisting and lowering the cargo. The negligence charged was that a draft of cases had been lowered before receiving the signal. This court held upon the facts, in the light of the rule which we have just stated and discussed, that the power, the winch, and the winchman were those of the company, and that the company did not furnish *them,* but furnished the *work they did* to the stevedore; and that this work was done by the company as its own work, by its own instrumentalities and servant under its control. A judgment for Anderson against the company was affirmed.

In the *Driscoll* case the defendant was engaged in a general teaming business. Plaintiff was struck and injured by a horse or wagon driven by a servant of the defendant. This driver, for some time, had been carrying property for an electric light company under some

arrangement between that company and the defendant. He was told by an employee of the company, from time to time, what to do and where to go, and was sometimes directed to drive fast, in which event he did so. He selected his own route and had exclusive management of his horse. At the time of the accident he was going to get some supplies in pursuance of an order from the foreman of the company. It was held that there was evidence to go to the jury that the driver was the servant of the defendant. The court said that it fairly could be found that the contract between defendant and the company was an ordinary one by the defendant to do his regular business by his servants in the common way; that in such cases the one who employs the contractor controls the servant only in the sense that he indicates the work to be done; but that the person who receives such orders is not subject to the general orders of the one who gives them. "He does his own business in his own way, and the orders which he receives simply point out to him the work which he or his master has undertaken to do."

In each of these cases the facts plainly demonstrated that the work was that of the general master, and that in doing it, the servant had not passed under the direction and control of the person for whom the immediate work was being done, the latter being looked to not for commands, but for information. As already shown, the facts of the present case require a different conclusion.

Judgment affirmed.

FIRST NATIONAL BANK OF BOSTON, EXECUTOR, *v.* MAINE.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MAINE.

No. 171. Argued December 10, 1931.—Decided January 4, 1932.

1. Where a stockholder dies domiciled in a State other than that in which the corporation was created and has its property, the State of his domicile has power to tax the succession to the shares by will or inheritance, but the State of the corporation can not do so.
2. A resident of Massachusetts died there owning shares in a Maine corporation, most of the property of which was in Maine. A Massachusetts tax was assessed and paid on legacies and distributive shares made up largely of the proceeds of the stock. A like tax was assessed in Maine, from which the amount of the Massachusetts tax was deducted. *Held* that the tax by Maine was invalid under the due process clause of the Fourteenth Amendment. P. 326 *et seq.*
3. A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular State; and it is unreasonable, and incompatible with a sound construction of the due process clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of States. P. 327.
4. The considerations that justify application of the maxim *mobilia sequuntur personam* to death transfer taxes imposed in respect of bonds, certificates of indebtedness, notes, credits and bank deposits apply, with substantially the same force, in respect of shares of corporate stock. *Id.*
5. Ownership of shares by the stockholder and ownership of the capital by the corporation are not identical. The former is an individual interest giving the stockholder a right to a proportional part of the dividends and the effects of the corporation when dissolved, after payment of its debts. And this interest is an incorporeal property right which attaches to the person of the owner in the State of his domicile. P. 330.
6. The fact that the property of the corporation is situated in another State affords no ground for the imposition by that State of a death tax upon the transfer of the stock; nor does the further fact of incorporation under the laws of that State. *Id.*

7. Power of State of incorporation to tax stock transfers and issue of new certificates, distinguished. P. 330.
8. The question whether shares of stock as well as other intangibles may be so used in a State other than that of the owner's domicile as to give them a situs there for tax purposes analogous to the actual situs of tangible property, is not here presented. P. 331.

130 Me. 123; 154 Atl. 103, reversed.

APPEAL from a judgment sustaining a succession tax. An action in debt brought by the State to collect the tax was referred upon an agreed statement of facts to the Supreme Judicial Court.

Mr. Leonard A. Pierce, with whom *Messrs. Charles L. Hutchinson, Herbert J. Connell,* and *Marion H. Fisher* were on the brief, for appellant.

The exclusive situs of the shares, for inheritance tax purposes, was in Massachusetts. *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm.,* 282 U. S. 1.

There is no distinction between registration of bonds and recording transfers of stocks sufficient to warrant a tax for the latter. *Farmers Loan & Trust Co.* v. *Minnesota, supra.*

Shares are intangibles or choses in action, and as such are within the language and principle of the three cases cited. See *Union Refrigerator Co.* v. *Kentucky,* 199 U. S. 194, 206; *Hawley* v. *Malden,* 232 U. S. 1, 12; *Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 81; *Blodgett* v. *Silberman,* 277 U. S. 1, 9, 10, 18.

If the tax in this case is valid, shares of stock may be subjected to much more than double taxation. Shares of a transcontinental railway, for example, may be taxed by every State in which it was incorporated.

Maine has never attempted to fix the situs of stock in Maine corporations within that State, either for the purpose of a property tax or to provide for a succession tax.

The Maine statutes completely ignore the theory of situs, unlike the Maryland statute involved in *Corry* v. *Baltimore,* 196 U. S. 466. They deal with the clerical act of recording stock transfers, reserving no power to tax. By the decisions of the Maine court, the succession to personal property, wherever situated, is governed by the laws of the owner's domicile.

If the *Corry* case and those approving it are good law today and the reasoning of the *Farmers Loan Co.* case is still to be applied, it necessarily follows that shares in a corporation organized under the laws of a State having statutes similar to that of Maryland, have their situs for taxation purposes in the State of incorporation and have no tax situs in the State of the shareholder's domicile. Such a result is extremely undesirable and constitutes a step backward from the enlightened view of the latter case and the *Baldwin* and *Beidler* cases.

It seems to us that the logical, practical and consistent position is, that the *Farmers* case has established the principle that intangibles cannot longer be subject to more than one tax, and that the power of the State possessing the jurisdiction to tax is exclusive. We submit, that the doctrine of *mobilia sequuntur personam* should control the situs of corporate stock for succession and all other tax purposes, and that, under that rule, stock purchased by a nonresident *ipso facto* acquires immediately a tax situs in the State of his domicile; that the State of incorporation cannot by statute fix a different situs for stock owned by a nonresident, or reserve power to tax such stock beyond its jurisdiction; and that any statute which attempts to fix a different (and hence conflicting and double) tax situs or jurisdiction, is unconstitutional.

Thirty-eight States, including Maine, have impliedly adopted this principle by "reciprocal exemption" statutes, in which no distinction is made between stocks and bonds, and under which the right of the State of the share-

holder to impose succession taxes thereon is conceded, and its jurisdiction made exclusive.

If Maine has, and has exercised, the legal right to define the manner in which shares in one of its corporations shall pass upon the decease of a nonresident owner, then Maine has the incidental right to levy its tax upon the privilege which it has so conferred. Maine, however, has not attempted to control such succession. It admits that the stock in question passes by virtue of the law of Massachusetts. It makes no attempt whatever to control, limit, augment or subtract from any privilege granted by Massachusetts. It attempts merely to extract a toll for the exercise of a right which it does not pretend to confer, and it seeks to sustain the toll (imposed by it) upon a bare clerical act within its boundaries, which it says is necessary to " complete the devolution " of the stock in question. We contend the imposition of that toll under the circumstances is unconstitutional.

In *Susquehanna Power Co.* v. *Tax Comm.*, 283 U. S. 291, this Court pointed out that the Maryland court, construing a statute similar to that in the *Corry* case, found the assessment did not exceed the value of the tangible personal property of the corporation within the State, and was in lieu of any direct tax on that property and could well be sustained as an indirect tax. This is another feature distinguishing the Maryland statute from that of Maine.

In the *Frick* case, the question of the validity of the transfer taxes collected by the States where the corporations were organized, the stock of which was owned and held by Frick in Pennsylvania, was neither in issue nor was it discussed. The tax was paid by the executors without questioning the power of the States to impose the tax. The statement in the *Doughton* case, at p. 81, that the State in which a corporation is organized may provide, in creating it, for the taxation in that State of all its shares,

whether owned by residents or nonresidents, is also a dictum.

In *Hawley* v. *Malden,* 232 U. S. 1; *Hannis Distilling Co.* v. *Baltimore,* 216 U. S. 285; *Corry* v. *Baltimore,* 196 U. S. 466; and *Tappan* v. *Merchants Bank,* 19 Wall. 490, the tax in every instance was a property tax and not an inheritance tax.

The occurrence of a single transfer of property in more than one State is an impossibility.

Mr. Clement F. Robinson, Attorney General of Maine, with whom *Mr. Nathan W. Thompson* was on the brief, for appellee.

Aside from questions of double taxation, the incorporating State should and does have the power to tax the shares and to require an inheritance tax on their transfer, whether owned by residents or nonresidents. *Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 69; *Frick* v. *Pennsylvania,* 268 U. S. 473; *Baker* v. *Baker,* 242 U. S. 394; *Re Bronson,* 150 N. Y. 1; *Fisher* v. *Brucker,* 41 F. (2d) 774; *Industrial Trust Co.* v. *Tax Comm.,* 250 N. Y. S. 113; Equitable Trust Co. *v.* Tax Comm., 204 C. C. H. 11,490; *Benson* v. *Minnesota,* 236 N. W. 626.

Inheritance tax cases originated in, and are a corollary to, the well established doctrine that the State of the incorporation may tax the shares as property. *Corry* v. *Baltimore,* 196 U. S. 466.

This power to tax is an incident of the jurisdiction of the State over shareholders in its corporations. The ultimate basis is the fact that the State created, protects and sustains the corporation. On the fundamental economic and political theory that taxation and protection may well go hand in hand, Maine should therefore have the right to tax the shareholder. See *Jellnick* v. *Huron Co.,* 177 U. S. 1; *Tappan* v. *Merchants Bank,* 19 Wall. 490; *Glen* v. *Liggett,* 135 U. S. 533.

Stock in a Maine corporation cannot be validly transferred except on the books of the corporation; the corporation cannot sell out its assets over the objection of a minority stockholder; and dissolution proceedings must be brought in the equity courts of Maine. These provisions are obviously of much more moment than the mere registration of a bond; they amount to much more than the mere recording of a transfer of property. Furthermore, Maine is where this corporation has its property and does its business. There is no claim whatever that the certificates of stock themselves had a "business situs" there. But Maine is where the corporation "carries on," and to that extent the corporation may be said, in some degree at least, to have had a "business situs" in Maine.

The effect of a "business situs" has been specially referred to in *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; and *Beidler* v. *Tax Comm.,* 282 U. S. 1. Those cases indicate that, in a proper case, a State where a business has its situs may tax the transfer of a nonresident's ownership therein, in analogy to the property tax cases under the Louisiana law. *New Orleans* v. *Stempel,* 175 U. S. 309; *Bristol* v. *Washington County,* 177 U. S. 133; *State Board* v. *Comptoir,* 191 U. S. 388; *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395; *Liverpool Co.* v. *New Orleans,* 221 U. S. 346. Cf. *Hill* v. *Carter,* 47 F. (2d) 869.

Because of the distinction between debtor-creditor obligations and shares of stock, it is not necessary in this case to base the contention of the State on the theory of business situs.

In none of the three recent cases in this Court were corporate shares involved, except by way of the executor's conceding South Carolina's right to tax them in the *Beidler* case. These cases deal with bonds, certificates of indebt-

edness, notes, bank deposits,—in short, debtor-creditor obligations.

The difference between debtor-creditor obligations and corporate shares is more than a question of degree. By acquiring stock the shareholder enters into a definite status. He has a right to share in the management, profits and ultimate assets of his corporation; may consent or object to the closing up of the corporation and winding up of its affairs; and may participate in the distribution of its assets. If he wishes to vote his shares, he must come to the State of incorporation, in person or by proxy. He takes the stock impressed with the existing and subject to the future laws of that State regulating corporations.

If practicable, both the State of the incorporation and the State of the domicile should retain the right to an inheritance tax on this transfer. If, to avoid the evils of double taxation, the Court should rule out the right of Maine to tax this transfer, many cases sustaining not only this right but also the right of property taxation must be overruled. See *Ft. Smith Co.* v. *Arkansas,* 251 U. S. 532; *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325; *Swiss Oil Co.* v. *Shanks,* 273 U. S. 407; *Hellmich* v. *Hellman,* 276 U. S. 233; *Maxwell* v. *Bugbee,* 250 U. S. 525; *Paddell* v. *New York,* 211 U. S. 446; *Welch* v. *Boston,* 231 Mass. 155; *Hunt* v. *Perry,* 165 Mass. 287; *Rogers* v. *Hennepin Co.,* 240 U. S. 184; *Citizens Bank* v. *Durr,* 257 U. S. 99; *Rogers Estate,* 149 Mich. 305; *State* v. *Probate Court,* 145 Minn. 155. From these cases it will be seen that a certain amount of double taxation has always been approved by the courts.

As a matter of principle both States should have the right to tax, whether or not as a matter of public policy they exercise it.

The only reason for confining inheritance taxation of debtor-creditor obligations to the domicile is the double

taxation which otherwise occurs under complex modern conditions. But the right of a State to regulate and tax its own corporations is of such peculiar importance that it should not lightly be overturned merely for the sake of avoiding another evil.

Strictly speaking, double taxation is paying twice over for the same measure of protection. If the privilege of inheritance and transmission requires the protection of the laws of two jurisdictions both should exact a tax.

Unless both States may tax, there will be a complete escape from death duties in some estates of such size as to be within the scope of the state inheritance tax systems, though below the federal estate tax minimum. The nation as a whole will suffer. An exemption of corporate shares in the State of incorporation, where they can readily be located, will put a premium on the concealment of assets in order to escape taxation at the domicile.

The argument on policy and expediency should, of course, have no effect toward validating a tax fundamentally illegal, but may properly have force toward preserving an existing tax which is attacked because of its effect on the community.

The problem of taxing these shares at the death of their owner can properly be solved just as it was by the taxing authorities of the two States concerned, i. e., by the collecting of a tax in each jurisdiction, Maine's tax carrying a credit for the Massachusetts tax,—in short, split rather than double taxation.

Just how, as a matter of dollars and cents, the tax should be split, is, it seems to us, not for this Court to determine. In the absence of any showing of discrimination or confiscation this Court is not concerned with the proportions. So with the order in point of time of assessment. It may be that logically the tax in Maine comes first in order; the amount of the tax in Massachusetts comes next.

By leave of Court, briefs of *amici curiae* were filed as follows:

By *Mr. Seth T. Cole* on behalf of the Tax Commission of the State of New York; by *Messrs. Henry N. Benson,* Attorney General, and *John F. Bonner* and *William K. Montague,* Assistant Attorneys General, on behalf of the State of Minnesota; by *Messrs. John M. Perry, Samuel W. Fordyce, Thomas W. White, Henry J. Richardson,* and *C. P. Fordyce* on behalf of the executors of the will of James N. Jarvie; and by *Mr. Russell L. Bradford* on behalf of the City Bank Farmers Trust Co.

Mr. Justice Sutherland delivered the opinion of the Court.

The question presented for our determination by this appeal is whether the State of Maine has power, under the Fourteenth Amendment, to impose a tax upon a transfer by death of shares of stock in a Maine corporation, forming part of the estate of a decedent, who, at the time of his death, was domiciled in the Commonwealth of Massachusetts.

The facts which give rise to the question follow. In 1924, Edward H. Haskell died testate, a resident of Massachusetts. The greater part of his property consisted of shares of stock in the Great Northern Paper Company, a Maine corporation, having most of its property in that state. His will was probated in Massachusetts, where the stock, as a part of his estate, had been made liable to an inheritance tax of like character to the inheritance tax in force in Maine. The Massachusetts tax amounted to over $32,000 and was paid on legacies and distributive shares made up in greater part of the proceeds of the paper company stock. Ancillary administration was taken out in a Maine probate court, and an inheritance tax, amounting to over $62,000, was

assessed under the Maine statutes [1] on the property passing by the will. Upon this amount the tax paid to Massachusetts was allowed as a credit, and an action of debt was brought to recover the balance. Upon an agreed statement embodying the foregoing facts, the case was referred for final decision to the Supreme Judicial Court of the State of Maine, sitting as a law court. That court rendered judgment for the state, holding that the shares of stock were " within its jurisdiction and there subject to an inheritance tax even though the owner was a nonresident decedent, regardless of whether the certificates of stock were at the time of the death in the state of the domicile or in the taxing state;" and that the Fourteenth Amendment thereby was not infringed. 130 Me. 123; 154 Atl. 103.

Beginning with *Blackstone* v. *Miller,* 188 U. S. 189, decisions of this court rendered before *Farmers Loan Co.* v. *Minnesota,* 280 U. S. 204, it may be conceded, would preclude a successful challenge to the judgment of the state court. In the first named case it was held that a deposit in a New York trust company to the credit of Blackstone, who died domiciled in Illinois, was subject

[1] Sec. 1, c. 69, R. S. Maine, 1916, provides:

"All property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will, by the intestate laws of this state, . . . shall be subject to an inheritance tax for the use of the state as hereinafter provided. . . ."

Sec. 25 of the same chapter in substance provides that in case of transfers of stock owned by a nonresident decedent in a Maine corporation, the tax shall be paid to the Attorney General at the time of the transfer.

Sec. 37, c. 51, R. S. Maine, 1916, provides:

" No transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation or a new certificate is issued to the person to whom it has been so transferred."

to a transfer tax imposed by New York, notwithstanding the fact that the whole succession, including the deposit, had been similarly taxed in Illinois. That decision was overruled by the *Farmers Loan Company* case, and with it, of course, all intermediate decisions so far as they were based on *Blackstone* v. *Miller*.

A review of these decisions would serve no useful purpose. While in some of them a restatement of the doctrine of *Blackstone* v. *Miller* was unnecessary to a determination of the points presented for consideration, and in others the facts might be distinguished from those of the present case; nevertheless, the authority of the *Blackstone* case was accepted by all. *Frick* v. *Pennsylvania*, 268 U. S. 473, was one of the latest to approve that case and give countenance to the general doctrine that intangible property (unlike tangible property) might be subjected to a death transfer tax in more than one state; but this and all other instances of such approval, whether express or tacit, with the overthrow of the foundation upon which they rested, have ceased to have other than historic interest.

It was by the *Frick* case, however, that the rule became definitely fixed that, as to tangible personal property, the power to tax is exclusively in the state where the property has an actual *situs;* and this, as will be seen later, has an important bearing on the present case. Mr. Frick, domiciled in Pennsylvania, died testate owning tangible personal property having an actual *situs* in New York and Massachusetts. His will was probated in Pennsylvania, and a transfer tax was imposed under a Pennsylvania statute which provided for such a tax on all property of a resident decedent, whether within or without the state. Ancillary letters were granted in New York and Massachusetts. We decided, pp. 488–492, that the Pennsylvania tax, in so far as it was imposed upon the transfer of tangible personalty having an actual *situs* in other states, was in contravention of the due process clause of the Fourteenth Amendment. Upon a review of former decisions, it was held (1) that the exaction of a tax beyond

the power of the state to impose was a taking of property in violation of the due process clause; (2) that while the tax laws of a state may reach every object which is under its jurisdiction, they cannot be given extraterritorial operation; and (3) that as respects tangible personal property having an actual *situs* in a particular state, the power to subject it to state taxation rests exclusively in that state, regardless of the owner's domicile.

The tax there under consideration was not a property tax, but one laid on the transfer of property on the death of the owner, and as to that the court said (p. 492):

"But to impose either tax the State must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion and in contravention of due process of law."

See also *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 204; *Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 69, 80.

The decision of this court in the *Farmers Loan Company* case was foreshadowed by its decision in *Safe Deposit & T. Co.* v. *Virginia,* 280 U. S. 83. There it was held that intangibles, such as stocks and bonds, in the hands of the legal holder of the title in the state of his residence, may not be taxed at the domicile of the equitable owner in another state; and in respect of taxation of the same securities by two states we said (p. 94):

"It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two States at the same instant and because of this to uphold a double and oppressive assessment."

A little later at the same term, the *Farmers Loan Company* case was decided. 280 U. S. 204. The facts are recited at page 208. Henry R. Taylor, domiciled in New York, died testate leaving negotiable bonds and certificates of indebtedness issued by the State of Minnesota and two of her municipalities. Some of them were regis-

tered; none were connected with business carried on by or for the decedent in Minnesota. His will was probated and his estate administered in New York, and a tax exacted by that state on the testamentary transfer. Minnesota assessed an inheritance tax upon the same transfer, which was upheld by her supreme court. This court, applying the maxim *mobilia sequuntur personam,* held that the *situs* for taxation was in New York, and that the tax was there properly imposed. The contention on behalf of the state was that the obligations were debts of Minnesota and her municipal corporations, subject to her control; that her laws gave them validity, protected them and provided means for enforcing payment; and that, accordingly, they had a *situs* for taxation also in that state.

This court agreed that *Blackstone* v. *Miller* and certain approving opinions lent support to the view that ordinarily choses in action might be subjected to taxation both at the domicile of the debtor and that of the creditor, and that two states might tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the Fourteenth Amendment. But it was said that the tendency of that view was to disturb good relations among the states; that the practical effect of it had been bad; and that a preponderance of the states had endeavored to avoid the evil by resort to reciprocal exemption laws. Upon these and other considerations, which we shall not stop to particularize, the case was overruled as no longer constituting a correct exposition of existing law. The view that two states have power to tax the same transfer on different and inconsistent principles was distinctly rejected; and the general reasons which support the rule that tangibles and their testamentary transfer may be taxed only by the state where they are found were held to be sufficient to inhibit the taxation by two states of intangibles with a

taxable *situs* imposed by due application of the *mobilia* maxim.

After saying that choses in action, no less than tangible personalty, demand protection against multiple taxation, the court, at p. 212, concluded:

"Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

Notwithstanding the registration of certain of the bonds, and notwithstanding the contention that Minnesota protects the debt, compels its payment, and permits its transfer, we concluded that the testamentary transfer was properly taxable in New York, but not also in Minnesota.

This case was followed by *Baldwin* v. *Missouri,* 281 U. S. 586. There the testator, domiciled in Illinois at the time of her death, had credits for cash deposited in banks located in Missouri, and certain bonds of the United States and promissory notes—all physically within that state. Some of the notes, executed by residents of Missouri, were secured on lands in that state. Applying the principles of the *Farmers Loan Company* case, we held that the *situs* of these credits, bonds and notes was at the domicile of the testator, and there passed from the dead to the living; that they were not within Missouri for taxation purposes; and that the transfer was not subject to the power of that state.

Beidler v. *South Carolina Tax Comm.*, 282 U. S. 1, presented still another phase of the subject. There it appeared that a resident of Illinois died in that state. At the time of his death, a South Carolina corporation was indebted to him in a large sum upon an open, unsecured account entered upon the books of the corporation kept in South Carolina. Again applying the principles of the *Farmers Loan Company* case, we held that the transfer by death of this debt was taxable only by the state of the domicile.

It long has been settled law that real property cannot be taxed, or made the basis of an inheritance tax, except by the state in which it is located. More recently it became settled that the same rule applies with respect to tangible personal property. And it now is established by the three cases last cited that certain specific kinds of intangibles, namely, bonds, notes and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state, and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment.

The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it. In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time. In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self-contradiction. Due regard for the processes of correct thinking compels the

conclusion that a determination fixing the local *situs* of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local *situs* in another state for the purpose of transferring the same thing there. The contrary conclusion as to intangible property has led to nothing but confusion and injustice by bringing about the anomalous and grossly unfair result that one kind of personal property cannot, for the purpose of imposing a transfer tax, be within the jurisdiction of more than one state at the same time, while another kind, quite as much within the protecting reach of the Fourteenth Amendment, may be, at the same moment, within the taxable jurisdiction of as many as four states, and by each subjected to a tax upon its transfer by death, an event which takes place, and in the nature of things can take place, in one of the states only.

A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states.

It is true, there are such differences between bonds and stocks as might justify their being placed in separate categories for some purposes. But, plainly, they may not be so placed for the purpose of subjecting a transfer by death of the former to a tax by one state only, and a similar transfer of the latter to a tax by two or more states. Both are intangibles and both generally have been recognized as resting in contract, or, technically, as " choses in action." *Hawley* v. *Malden,* 232 U. S. 1, 12; *Blodgett* v. *Silberman,* 277 U. S. 1, 14. The reciprocal inheritance statutes now in force in a preponderating number of the

states of the Union make no distinction between the various classes of intangible personal property. The New York statute, for example, under that term includes "deposits in banks, mortgages, debts, receivables, *shares of stock,* bonds, notes, credits, evidences of an interest in property, evidences of debt and choses in action generally." Genl. L. N. Y., 1930, c. 710, § 1. This impressive recognition of the substantial identity of the enumerated intangibles, for purposes of death taxation, is entitled to weight.

A distinction between bonds and stocks for the essentially practical purposes of taxation is more fanciful than real. Certainly, for such purposes, the differences are not greater than the differences between tangible and intangible property, or between bonds and credits. When things so dissimilar as bonds and household furniture may not be subjected to contrary rules in respect of the number of states which may tax them, there is a manifest incongruity in declaring that bonds and stocks, possessing, for the most part, the same or like characteristics, may be subjected to contrary rules in that regard.

We conclude that shares of stock, like the other intangibles, constitutionally can be subjected to a death transfer tax by one state only.

The question remains: In which state, among two or more claiming the power to impose the tax, does the taxable event occur? In the case of tangible personalty, the solution is simple: the transfer, that is, the taxable event, occurs in that state where the property has an actual *situs,* and it is taxable there and not elsewhere. In the case of intangibles, the problem is not so readily solved, since intangibles ordinarily have no actual *situs.* But it must be solved unless gross discrimination between the two classes of property is to be sanctioned; and this court has solved it in respect of the intangibles heretofore dealt with by applying the maxim *mobilia sequuntur personam.*

Farmers Loan Co. v. *Minnesota, supra,* at pp. 211–212; *Baldwin* v. *Missouri, supra; Beidler* v. *South Carolina Tax Comm., supra.*

This ancient maxim had its origin when personal property consisted, in the main, of articles appertaining to the person of the owner, such as gold, silver, jewels and apparel, and, less immediately, animals and products of the farm and shop. Such property was usually under the direct supervision of the owner and was often carried about by him on his journeys. Under these circumstances, the maxim furnished the natural and reasonable rule. In modern times, due to the vast increase in the extent and variety of tangible personal property not immediately connected with the person of the owner, the rule has gradually yielded to the law of the place where the property is kept and used. *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18, 22; *Eidman* v. *Martinez,* 184 U. S. 578, 581; *Union Transit Co.* v. *Kentucky, supra,* 206. But in respect of intangible property, the rule is still convenient and useful, if not always necessary; and it has been adhered to as peculiarly applicable to that class of property. *Blodgett* v. *Silberman, supra,* 9–10; *Farmers Loan Co.* v. *Minnesota, supra,* 211; *Union Transit Co.* v. *Kentucky, supra,* 206.

The considerations which justify the application of the fiction embodied in the maxim to death transfer taxes imposed in respect of bonds, certificates of indebtedness, notes, credits and bank deposits, apply, with substantially the same force, in respect of corporate shares of stock. And since death duties rest upon the power of the state imposing them to control the privilege of succession, the reasons which sanction the selection of the domiciliary state in the various cases first named, sanction the same selection in the case last named. In each case, there is wanting, on the part of a state other than that of the domicile, any real taxable relationship to the event which is the subject of the tax. Ownership of shares by

the stockholder and ownership of the capital by the corporation are not identical. The former is an individual interest giving the stockholder a right to a proportional part of the dividends and the effects of the corporation when dissolved, after payment of its debts. *The Delaware Railroad Tax,* 18 Wall. 206, 229–230; *Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 69, 81; *Eisner* v. *Macomber,* 252 U. S. 189, 213–214. And this interest is an incorporeal property right which attaches to the person of the owner in the state of his domicile. The fact that the property of the corporation is situated in another state affords no ground for the imposition, by that state, of a death tax upon the transfer of the stock. *Rhode Island Trust Co.* v. *Doughton, supra.* And we are unable to find in the further fact of incorporation under the laws of such state, adequate reason for a different conclusion.

Undoubtedly, the state of incorporation may tax the transfer of the stock of a nonresident decedent, and the issue of a new certificate to take the place of the old, under the power generally to impose taxes of that character. But, plainly, such a tax is not a death duty which flows from the power to control the succession; it is a stock transfer tax which flows from the power of the state to control and condition the operations of the corporation which it creates. A formal transfer of the stock upon the books of the corporation, and the issue of new certificates, bear a relation to the succession differing little, if at all, in substantial effect from that borne by the registration of the state bonds, involved in the *Farmers Loan Company* case, or the necessity of invoking the law of Missouri in respect of notes secured on Missouri lands, involved in the *Baldwin* case. Practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to in-

tangibles to the state of the domicile; and these considerations are greatly fortified by the fact that a large majority of the states have adopted that rule by their reciprocal inheritance tax statutes. In some states, indeed, the rule has been declared independently of such reciprocal statutes. The requirements of due process of law accord with this view.

We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a *situs* analogous to the actual *situs* of tangible personal property. See *Farmers Loan Company* case, *supra,* at p. 213. That question heretofore has been reserved, and it still is reserved to be disposed of when, if ever, it properly shall be presented for our consideration.

We hold that the exaction of the tax here assailed was not within the power of the state under the Fourteenth Amendment; and, accordingly, the judgment below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

MR. JUSTICE STONE, dissenting.

Recognizing that responsibility must rest primarily on those who undertake to blaze a new path in the law, to say how far it shall go, and notwithstanding the decisions of this Court in *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83; *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm.,* 282 U. S. 1, I am not persuaded that either logic, expediency, or generalizations about the undesirability of double taxation justify our adding, to the cases recently overruled, the long list of those which, without a dissenting voice, have supported taxation like the present. No decision of this Court requires that result. See *Baldwin* v. *Missouri, supra,* p. 596.

Such want of logic as there may be in taxing the transfer of stock of a nonresident at the home of the corporation results from ascribing a *situs* to the shareholder's intangible interests which, because of their very want of physical characteristics, can have no *situs,* and again in saying that the rights, powers, and privileges incident to stock ownership and transfer which are actually enjoyed in two taxing jurisdictions, have *situs* in one and not in the other. *Situs* of an intangible, for taxing purposes, as the decisions of this Court, including the present one, abundantly demonstrate, is not a dominating reality, but a convenient fiction which may be judicially employed or discarded, according to the result desired.

The decedent, if we disregard the fiction and its attendant maxims, acquired rights and privileges with respect to a corporation created by Maine and under its control. The nature and extent of his interest are defined by the laws of Maine, and his power to secure the complete transfer of it is dependent upon them. These characteristics of corporate shares, distinguishing them in several respects from unsecured obligations to pay money, have long been explicitly recognized by this Court as the source of state power to tax nonresident stockholders and as sufficient ground for its exercise. See *Frick* v. *Pennsylvania,* 268 U. S. 473, 497; *Baker* v. *Baker, Eccles & Co.,* 242 U. S. 394, 401; *Hawley* v. *Malden,* 232 U. S. 1, 12; *Rhode Island Hospital Trust Co.* v. *Doughton,* 270 U. S. 69, 81. See also *Corry* v. *Baltimore,* 196 U. S. 466. Compare *Citizens National Bank* v. *Durr,* 257 U. S. 99; *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325. This Court has recently said, in *Frick* v. *Pennsylvania, supra* [p. 497]:

"The decedent owned many stocks in corporations of States, other than Pennsylvania, which subjected their transfer on death to a tax and prescribed means of enforcement which practically gave those States the status

of lienors in possession. As those States had created the corporations issuing the stocks, they had power to impose the tax and to enforce it by such means, irrespective of the decedent's domicile and the actual situs of the stock certificates. Pennsylvania's jurisdiction over the stocks necessarily was subordinate to that power. Therefore to bring them into the administration in that State it was essential that the tax be paid. . . . We think it plain that such value as the stocks had in excess of the tax is all that could be regarded as within the range of Pennsylvania's taxing power."

The withdrawal from appellee of authority to impose the present tax, in terms which would sweep away all power to impose any form of tax with respect to the shares of a domestic corporation if owned by nonresidents, would seem to be a far greater departure from sound and accepted principles, and one having far more serious consequences, than would the disregard of wholly artificial notions of the *situs* of intangibles.

The present tax is not double in the sense that it is added to that imposed by Massachusetts, since the Maine statute directs that the latter be deducted from the former. But, as the stockholder could secure complete protection and effect a complete transfer of his interest only by invoking the laws of both states, I am aware of no principle of constitutional interpretation which would enable us to say that taxation by both states, reaching the same economic interest with respect to which he has sought and secured the benefits of the laws of both, is so arbitrary or oppressive as to merit condemnation as a denial of due process of law. Only by recourse to a form of words—saying that there is no taxable subject within the state, by reason of the fictitious attribution to the intangible interest of the stockholder of a location elsewhere,—is it possible to stigmatize the tax as arbitrary.

Affirmance of this judgment involves no declaration that the tax may be imposed by three or more states instead of two, and, under the decisions of this Court, there is no ground for supposing that it could be. See *Rhode Island Trust Co.* v. *Doughton,* 270 U. S. 69. Even if it be assumed that some protection from multiple taxation, which the Constitution has failed to provide, is desirable, and that this Court is free to supply it, that result would seem more likely to be attained, without injustice to the states, by familiar types of reciprocal state legislation, than by stretching the due process clause to cover this case. See 28 Columbia L. Rev. 806; 43 Harvard L. Rev. 641. We can have no assurance that resort to the Fourteenth Amendment, as the ill-adapted instrument of such a reform, will not create more difficulties and injustices than it will remove. See 30 Columbia L. Rev. 405–406.

The present denial to Maine of power to tax transfers of shares of a nonresident stockholder in its own corporation, in the face of the now accepted doctrine that a transfer of his chattels located there and equally under its control, *Frick* v. *Pennsylvania, supra,* and that his rights as *cestui que trust* in a trust of property within the state, *Safe Deposit & Trust Co.* v. *Virginia, supra,* may be taxed there and not elsewhere, makes no such harmonious addition to a logical pattern of state taxing power as would warrant overturning an established system of taxation. The capital objection to it is that the due process clause is made the basis for withholding from a state the power to tax interests subject to its control and benefited by its laws; such control and benefit are together the ultimate and indubitable justification of all taxation.

I think the judgment should be affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur in this opinion.

HODGE DRIVE-IT-YOURSELF CO. ET AL. *v.* CINCINNATI ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 63. Argued November 30, 1931.—Decided January 4, 1932.

An ordinance requiring that persons engaged in the business of letting out automobiles to be driven by and for the use of those who hire them shall pay license fees on the vehicles and deposit insurance policies or bonds for the protection of persons and property against negligent operation of the vehicles by their lessees, *sustained* in view of the state power over public highways, and in the absence of any showing that the regulation was arbitrarily burdensome or based on arbitrary or capricious classifications. P. 337.
123 Oh. St. 284, affirmed.

APPEAL from a judgment sustaining a city ordinance in a suit to enjoin its enforcement.

Mr. Julius R. Samuels for appellants.

Messrs. John D. Ellis, City Solicitor of Cincinnati, and *Jacob Hauptman,* Assistant Solicitor, were on the brief for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The appellants sued the city, its mayor and other officers in the court of common pleas of Hamilton county to enjoin the enforcement of ordinance No. 50–1929 on the ground of repugnancy to the due process and equal protection clauses of the Fourteenth Amendment. After a trial at which evidence was taken, that court found the provisions invalid and granted permanent injunction. The court of appeals tried the case *de novo* and sustained the ordinance; its judgment was affirmed in the highest court of the State. 123 Ohio St. 284; 175 N. E. 196.

The ordinance[1] classifies "driverless automobiles for hire" as public vehicles, imposes license fees for their use upon the streets and requires persons engaged in the business of leasing such automobiles to deposit with the city treasurer insurance policies or bonds in specified sums for the protection of persons injured or whose property may be damaged as a result of lessees' negligent operation, maintenance or use of such vehicles.

Each appellant owns automobiles and is carrying on the business of leasing them, for compensation based on mileage, to be driven by the lessees on the city streets and elsewhere. Many insurance companies which formerly carried the risks specified in the ordinance decline to issue such policies; but some are offering rates, at the option of the insured, of $232.50 per vehicle per year or ten per cent. of the gross earnings, which on the average amount to approximately $1,800 per year.

Appellants maintain that the measure constitutes an unreasonable interference with a purely private business and is not one for the regulation of the use of streets; that it attempts to convert appellants into public utilities and impose upon them liability without fault, and that it is discriminatory and oppressive.

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[1] "Sec. 65–1 b. The term 'public vehicles' shall apply to all vehicles furnishing individual service as a business in the transportation of persons, which are hereby classified as (1) public vehicles which seek their business, or a part thereof, on the public streets or quasi-public places, to wit: 'taxicabs,' and (2) public vehicles which use the public streets for the purpose of transporting passengers for hire, but which do not seek their business thereon, or in quasi-public places, to wit: 'autosforhire,' 'driverless autosforhire' and 'funeral cars.'

"Sec. 65–1 e. The term 'driverless autosforhire' shall include any public vehicle which is rented or hired out to a person other than the owner, and operated by the person renting or hiring the same for his own use and not for the purpose of transporting persons for compensation."

Unquestionably, appellants contemplate that those hiring their cars will operate them upon the streets. In fact such use of the streets is essential to appellants' business. It is a special and extraordinary use materially differing from operation of automobiles or trucks by owners or their chauffeurs in the usual way for private ends. The running of automobiles necessarily is attended by danger to persons and property in the vicinity; and, when they are negligently driven upon city streets, the peril is great. The court below found that the operation of automobiles by such hirers is extra-hazardous to the public. The State has power for the safety of the public to regulate the use of its public highways. *Hendrick* v. *Maryland,* 235 U. S. 610, 622. *Kane* v. *New Jersey,* 242 U. S. 160, 167. *Sprout* v. *South Bend,* 277 U. S. 163, 168. It may prohibit or condition as it deems proper the use of city streets as a place for the carrying on of private business. This Court has sustained a state law requiring reasonable security for the protection of persons in respect of injuries and losses caused by the negligent operation of motor vehicles engaged in carrying persons for hire. *Packard* v. *Banton,* 264 U. S. 140, 144. Cf. *Hess* v. *Pawloski,* 274 U. S. 352, 356. Such measures, so far as concerns constitutional validity, are not distinguishable from the ordinance under consideration. *San Antonio* v. *Besteiro* (Tex. Civ. App.) 209 S. W. 472. *Welch* v. *Hartnett,* 127 Misc. 221; 215 N. Y. S. 540.

This ordinance is not an interference with or regulation of a business that has no relation to matters of public concern; it rests upon the power of the city to prescribe the terms upon which it will permit the use of its streets to carry on business for gain. It does not attempt to impose any burden or duty that is peculiar to public utilities. Our decisions in *Michigan Commission* v. *Duke,* 266 U. S. 570, and *Frost* v. *Railroad Comm.,* 271 U. S. 583, do not

apply here. Nor does the ordinance attempt to make hirers the agents or employees of the owners or to make the latter liable for the negligence of the former. It merely requires the giving of security that lessees shall "respond in damage for their own tortious acts." 123 O. S. 284; 175 N. E. 196. There is no showing that the conditions imposed are arbitrarily burdensome or that the measure in any way operates to deprive appellants of property without due process of law.

There is nothing on the face of the ordinance or in the evidence or findings below to warrant the conclusion that the classification, § 65-1 b, is capricious, arbitrary or so lacking in foundation as to contravene the equal protection clause. *Truax* v. *Corrigan,* 257 U. S. 312, 333. *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490, 493. *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 400. The record fails to show that the enforcement of the ordinance does or will substantially discriminate against the business of appellants. The claim of repugnancy to the equality clause cannot be supported by mere speculation or conjecture.

Judgment affirmed.

SOUTHERN RAILWAY CO. *v.* KENTUCKY.*

APPEALS FROM THE COURT OF APPEALS OF KENTUCKY.

No. 300. Argued December 4, 7, 1931.—Decided January 4, 1932.

1. The former decision of this Court (274 U. S. 76) respecting taxes on additional intangible values attributed to part of the Kentucky mileage of appellant's interstate railway system, and holding such valuations to be so excessive and arbitrary as in reality to include property outside of the State and result in violation of the due

* Together with No. 301, *Mellon, Director General of Railroads,* v. *Kentucky.*

process clause of the Fourteenth Amendment, was addressed to the particular application of the taxing statute then under consideration; it did not preclude a retrial of the case upon an amended petition of the State claiming the same amounts of tax but including in the re-computation additional and more lucrative Kentucky mileage of the system. P. 341.

2. On this appeal it is not shown that, when attributed to the entire Kentucky mileage of the railway system, the additional values are so excessive and arbitrary as to amount to inclusion of property outside of the State. *Id.*

3. A railway company is not relieved by any federal legislation from the obligation to pay state taxes for years during which its system was in possession and control of the Director General under the Federal Control Act, together with penalties imposed by the state law for its failure to make reports of its property when required. The State may secure payment of such taxes and penalties by a judgment lien on the railroad properties. P. 342.

238 Ky. 638, affirmed.

APPEALS from a judgment which affirmed a recovery by the State in proceedings against the Railway Company and the Director General of Railroads to collect taxes and penalties.

Messrs. Edward P. Humphrey and *Charles W. Milner,* with whom *Messrs. L. E. Jeffries* and *S. R. Prince* were on the brief, for appellants.

Mr. Charles N. Hobson argued the cause and *Messrs. J. W. Cammack,* Attorney General of Kentucky, *Clifford E. Smith,* and *J. P. Hobson* were on the brief, for appellees.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This case involves franchise taxes imposed by Kentucky in respect of railroad lines in that State that are a part of the system of appellant, the Southern Railway Company, a Virginia corporation, and here referred to as the Southern system. A judgment of the circuit court of

Woodford county affirmed in the highest court of the State, 204 Ky. 388; 264 S. W. 850, determined that there remained unpaid franchise taxes to be assessed on values of intangible elements amounting to $1,730,090.02 for 1918 and $3,028,592.62 for 1919. These additional values were attributed solely to 127.63 miles of railroad in that State belonging to a Kentucky corporation, the Southern Railway Company in Kentucky. The lines of the Cincinnati, New Orleans and Texas Pacific Railway Company had been held to form a part of the system, but that company paid taxes in Kentucky upon its tangible property and also franchise taxes calculated on the basis of its own net earnings. The Commonwealth originally made no claim against appellants for any taxes in respect of that company's lines. This court, 274 U. S. 76, reversed the judgment of the state court on the ground that the additional values attributed to such 127.63 miles were so excessive and arbitrary as in reality to include property outside Kentucky and that the enforcement by that State of franchise taxes based thereon would violate the due process clause of the Fourteenth Amendment.

After receiving our opinion and mandate, the court of appeals of Kentucky remanded the case to the circuit court; and there the Commonwealth amended its petition so as to claim, in addition to its earlier demands, franchise taxes in respect of the Kentucky mileage of the Cincinnati, New Orleans and Texas Pacific. The facts were stipulated. Appellants maintained below that the proceedings were in conflict with our mandate and that to enforce the taxes claimed would be to tax property outside the Commonwealth. The court adjudged the Commonwealth entitled to recover as to the Kentucky mileage of both companies on the basis of the same values that in the former judgment had been assigned to the line of the Southern Railway Company in Kentucky alone. The court of appeals affirmed. 238

Ky. 638; 38 S. W. (2d) 696. This appeal is under 28 U. S. C., § 344 (a).

Our former decision merely held that the particular application of the state statute then under consideration was repugnant to the due process clause. The judgment now before us is based on a different claim. The remanding of the case by the court of appeals and the filing of an amended petition in the circuit court by the Commonwealth and the trial thereon were not inconsistent with the mandate of this court. *Mutual Life Ins. Co.* v. *Hill,* 193 U. S. 551, 553. *Wolff Packing Co.* v. *Industrial Court,* 267 U. S. 552, 562.

The additional values adjudged are based on average net earnings per mile of the system in the year preceding that for which the franchise taxes are imposed. As shown in our former opinion, net earnings of the 127.63 miles of the Southern Railway in Kentucky were very small for 1917 and there was a large deficit in 1918. But the net earnings per mile of the Cincinnati, New Orleans and Texas Pacific, having 197.5 miles in Kentucky, for both years were high when compared with the average of the system. The values on which the last mentioned company separately paid franchise taxes were excluded.

The Kentucky mileage used in the calculations included certain trackage rights and also the Kentucky lines of the Mobile & Ohio, the Cumberland Railroad and the Cumberland Railway. The court of appeals held that the lines of these three companies were not a part of the system. 193 Ky. 474, 481; 237 S. W. 11. But the Commonwealth shows that, taking both years together, the additional values so arrived at are much less than if the computation had been correctly made. The error operates to the advantage of appellants. They have not shown, and but faintly claim, that when attributed to the entire system mileage in Kentucky, the additional values are so excessive or arbitrary as to

amount to the inclusion of property outside the State. On this record, it cannot be said that the enforcement of franchise taxes on the basis of values established by the judgment would deprive appellants of their property in violation of the due process clause of the Fourteenth Amendment.

The judgment requires that, in addition to the taxes levied for the two years, there shall be paid a penalty of twenty per cent. on the taxes based on the omitted assessment, "which shall be collected and accounted for as other taxes." § 4241. Seventy-five per cent. of the amount so added is for the compensation of officers prosecuting the action. The appellant company maintains that it is not liable for the taxes or the penalty because during 1918 and 1919 the system was in the possession and control of the Director General. And the latter says that the enforcement of the penalty against him would violate the Acts of Congress under which the railroads were taken and operated.

Neither contention can be sustained.

The opinion below shows that the property was not assessed when it should have been because of the failure of the company to report as required. It was not relieved of that duty by any federal law. On the contrary the Act of March 21, 1918, 40 Stat. 451, after requiring every agreement for compensation to the carriers to provide that all taxes during the period of federal control other than certain war taxes should be paid out of operating revenues, § 1, declared that nothing in the Act should be construed to amend, repeal, impair or affect the existing laws or powers of the States in relation to taxation. § 15. Whatever may be the rights of the company as between it and the Director General, its obligations under state tax laws remain unaffected by federal enactments.

Referring to the enforcement of the judgment, the court of appeals said (238 Ky., p. 661; 38 S. W. (2d), p. 706):

"The State cannot compel the government of the United States to pay the taxes or the penalty, but it has a lien on the property, which should have been assessed, to secure payment of the taxes," and declared that the penalty is not one where the element of punishment predominates. Our decisions in *Missouri Pacific R. Co.* v. *Ault,* 256 U. S. 554, and *Norfolk-Southern R. Co.* v. *Owens,* 256 U. S. 565, cited by appellants do not apply here. The judgment, as construed by the court of appeals, is a lien upon the railroad properties in respect of which the franchise taxes are collected but does not require payment of the taxes or penalty by the Director General or the United States.

Affirmed.

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

AMERICAN HIDE & LEATHER CO. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 62. Argued November 25, 1931.—Decided January 4, 1932.

1. A corporation which, under the Revenue Act of 1918, § 212 (b), should have returned its income in 1918–1920 for its fiscal years ending June 30, in accordance with its books of account, mistakenly made returns and payments for the calendar years. Throughout the taxable periods, the total payments always exceeded the total taxes due, computed, as the statute required, on the basis of the taxpayer's fiscal years. The right to recover the excess turned on whether or not it was paid for a period bringing it within the applicable period of limitation. *Held:*

(1) The object of the payment in each instance is defined by the intention of the taxpayer, to be ascertained from all relevant facts, including his return. P. 347.

(2) Inasmuch as the return and payment for 1918 disclose an intention to pay the tax on all income received during that calendar

year, the amount paid in excess of the tax accrued for the six months ended June 30 is not to be treated as an overpayment of that tax but as a payment on the tax for the first six months of the next fiscal year, which form the last half of the calendar year. P. 348.

(3) In like manner, the amount by which the sum of the overpayment thus applied to the first half of the fiscal year ended June 30, 1919, and the payment intended for the calendar year 1919 exceeded the tax accrued for that fiscal year, should be treated as a payment in advance for the fiscal year ending June 30, 1920. P. 348.

(4) There is no basis for the contention that the taxes paid for each calendar year should be divided and one-half applied to the tax due for the first six months and one-half for the tax accruing in the last six months of the year. Revenue Act, 1918, §§ 226, 252 considered. P. 350.

2. In Revenue Act of 1926, § 284 (h), providing that allowance of a claim for refund in respect of a tax for the taxable year 1920 shall not be barred "if such claim is filed before the expiration of five years after the date the return was due," the date intended is the statutory due date for return for the taxable year for which the payment was made; and where the payment was under a return mistakenly made for the calendar instead of the taxpayer's fiscal year, the time runs from the date when return for the fiscal year was due. P. 348.

71 Ct. Cls. 114; 48 F. (2d) 430, reversed.

CERTIORARI, *post*, p. 599, to review a judgment denying a claim for refund of money paid for income taxes.

Messrs. George E. Hamilton and *William E. Hayes* for petitioner.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher* and *Messrs. George H. Foster, Bradley B. Gilman*, and *Erwin N. Griswold* were on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on certiorari, to review a judgment of the Court of Claims, denying recovery of an overpayment of income taxes because barred by the statute of limita-

tions. 71 Ct. Cls. 114; 48 F. (2d) 430, 434. Claim for refund was filed September 15, 1925, and the questions presented are whether the court below correctly held that the admitted overpayment was of the tax due and payable for petitioner's fiscal year ending June 30, 1918, so that the bar of the statute had fallen at the time of the claim for refund, or was of taxes on income for the fiscal period ending June 30, 1920, and, if the latter, whether recovery was barred by the statute of limitations.

Petitioner filed income tax returns for the calendar years 1918, 1919, and 1920, although in each of those years it had kept its books on the basis of a fiscal year ending June 30th. By § 212 (b) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1064, returns were required to be made on the basis of the fiscal year, as shown by the taxpayer's books of account, and under the applicable section and regulation petitioner was required to file a return for the six months ending June 30, 1918, and for the years ending on June 30, 1919 and 1920. § 226, 40 Stat. 1057, 1075; Treasury Regulations 45, art. 431. Pursuant to its returns for the calendar years in question, petitioner paid taxes as follows:

For the calendar year		
1918		$1,246,271.24
1919		1,113,509.41
1920		None
		$2,359,780.65
Refunds of the taxes paid were made in the following amounts, to which interest was added:		
May 17, 1928	$217,194.58	
Aug. 17, 1928	94,835.16	
		312,029.74
Net payments of taxes for the calendar years 1918, 1919, 1920		$2,047,750.91

The correct tax for the period in question as computed by the Commissioner on the basis of amended returns for petitioner's fiscal years:		
For the 6 months ending June 30, 1918..	$708,068.47	
For the fiscal year ending June 30, 1919.	896,314.83	
For the fiscal year ending June 30, 1920.	None	
		$1,604,383.30
Total overpayment for the period in question..		$443,367.61

The Government contends that as the only return petitioner was authorized by the statute to make for the year 1918 was for the six months, January 1st to June 30th, petitioner's return for the calendar year can be given effect only as a return for that six months, and payments of the tax as returned must be deemed, as the Court of Claims held, to be on account of the tax due for the six months, with a consequent overpayment for that period in the sum of $538,202.77. Of this overpayment, $94,835.16 has been refunded, and, as petitioner concedes, recovery of the $443,367.61 balance is barred by the statute of limitations if it be treated as an overpayment attributable to that period.

The petitioner insists that the amount paid as tax for each of the calendar years 1918 and 1919, should be divided and one-half applied to payment of the tax due for the fiscal period ending June 30th and one-half to payment of the tax due for the following fiscal year, the first six months of which were the last six months of the calendar year for which the tax was paid. This would result in an underpayment for the six months ending June 30, 1918, of $84,932.85, collection of which is barred by the statute; in an overpayment for the year ending June 30, 1919, of $66,380.91, reclaim of which is also barred by the statute; and in an overpayment for the year ending June 30, 1920, of $556,754.70, for which claim for refund was filed September 15, 1925, and for recovery of which the present suit was brought.

We think that neither the Government nor the petitioner has chosen the correct method of restating the account. At the outset it is to be observed that, throughout the taxable periods in question, the total payments made by the taxpayer always exceeded the total taxes due, computed, as the statute required, on the basis of the taxpayer's fiscal years; and the right to recover the excess payment turns on whether it was paid for a period bringing it within or without the applicable period of limitation. The periods for which the several payments by petitioner were made are not necessarily the same as petitioner's fiscal years, for which the statute required returns. The object of the payment is in each instance defined by the intention of the taxpayer, to be ascertained from all the relevant facts and circumstances. To determine petitioner's intention, we may look at the returns which it filed, even though they mistakenly embraced a period which did not coincide with the fiscal period for which a return was prescribed.

The return made for the calendar year 1918, and the payments of tax made in accordance with it, disclose unmistakably petitioner's intention to pay the tax on all income received during the calendar year 1918. Of the total income thus received, only that of the first six months was, under the statute, taxable in that year. Hence, the payment of taxes on the income for the entire year resulted in an overpayment of the tax accrued in the first six months in the sum of $538,202.77. But this is not, as the Government contends, to be regarded as an overpayment only of tax due for the first six months of 1918. True, the taxpayer was required to make a return and pay taxes for that six months, and was not authorized to make any other return, but it did in fact make a return of its income and pay taxes for the entire calendar year and thus evidenced its intention to include in the return, and pay taxes upon, income accruing in the last, as well as

the first, six months of the calendar year. Thus, when the taxpayer had completed its payments of taxes for the entire year, they were enough to pay in full the tax due and payable for the six months ending June 30, 1918, and in addition to pay the sum of $538,202.77 on account of the tax on income accrued in the remaining six months of the year for which the payment was made. But as those six months were embraced in the fiscal period ending June 30, 1919, which for purposes of assessing and paying the tax the statute treats as a unit, the overpayment must necessarily be treated as a payment on account of the tax accruing for that period.

For the calendar year 1919 the same considerations govern. The overpayment last referred to, applicable on account of taxes due for the fiscal year ending June 30, 1919, was not sufficient to pay the entire tax, aggregating $896,314.83, which the Commissioner assessed for that period. But the payments for the calendar year 1919, when added to this overpayment, exceeded the tax assessed for the fiscal year ending in June by a sum amounting, after deduction of refunds since made, to $443,367.61. As in the case of the tax paid for 1918, that paid by petitioner for 1919 was not for the fiscal, but for the calendar year. Consequently, the payment in excess of the tax due and payable for the period ending June 30, 1919, was in fact and in law a payment in advance on account of the tax upon income for the ensuing taxable period, the fiscal year ending June 30, 1920. As upon recomputation of the tax none was found due for that fiscal year, this payment in advance became an overpayment, when the tax for that period was assessable, which the petitioner is entitled to recover unless barred by the statute of limitations.

Section 284 (b) (1) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 66, provides that no refund shall be made after four years from the time the tax is paid unless within that period a claim for refund is filed by the taxpayer.

But by § 284 (h) it is provided that that section shall not "bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920, if such claim is filed before the expiration of five years after the date the return was due." As the petitioner's tax payments for the entire period under consideration were completed in December, 1920, its claim for refund, filed September 15, 1925, was not within the four year period, and its right to recover is barred unless September 15, 1925, the date the claim was filed, was before the expiration of "five years after the date the return was due," as provided by paragraph (h). The claim was in time only if, as petitioner contends, the return was due September 15, 1920, which is the date fixed by § 227 of the 1918 Act for filing petitioner's return for the fiscal year ending June 30th. See *Burnet* v. *Willingham Loan & Trust Co.*, 282 U. S. 437.

On its face, § 284 (h), which specifically refers to a claim for a refund "of a tax for the taxable year . . . 1920," and bars it if not filed within five years after the return was due, would seem to refer to the time fixed by the statute for return of income for the taxable year for which the tax was paid, which, in this case, was September 15, 1920. But the Government, notwithstanding its argument that the return for petitioner's fiscal year is the only one referred to or authorized by § 212 of the 1918 Act, insists that the words "date the return was due" in § 284 (h) of the 1926 Act refer to the return which the taxpayer in fact filed for the calendar year 1919, which, under the applicable section, § 227 of the 1918 Act, was due on March 15, 1920. In support of this contention it points to the language of § 252 of the 1918 Act, in which the quoted words first occurred. In that section they were preceded by a provision requiring credit or refund "if, upon examination of any return," an overpayment appeared. From this it is argued that the proviso in the same section that refund should not be allowed unless claim was made within five years from the "date the

return was due," refers to the due date of the return actually filed and not the due date of the return required by the statute.

But it is to be noted that the reference, in § 252 of the 1918 Act, to an examination of the return, which was continued in § 252 of the 1921 Act, c. 136, 42 Stat. 227, 268, was dropped from the corresponding § 281 of the Act of 1924 and the applicable § 284 of the Act of 1926. Both of these sections provide for refund or credit of any overpayment of the tax, and specific reference to the taxable year 1920 was inserted in the proviso that the section should not bar claims for overpayment of "a tax for the taxable year 1919 or 1920" if "filed before expiration of five years after the date the return was due." Whatever the meaning of "return" as used in the earlier sections, we think it reasonably clear that the omission by the later ones of all reference to the return actually filed and the insertion of a reference to the taxable year, in juxtaposition to the phrase "five years after the date the return was due," evidenced an intention that the date from which the statute is to run should be the due date of the return required by the statute for the taxable year.

There is no basis for the contention of petitioner that the taxes paid for each calendar year should be divided and one-half applied to tax due for the first six months and one-half for tax accruing in the last six months of the year.[1] We think neither the circumstances nor the applicable statute permits such an allocation. Section 226 of the 1918 Act authorizes the calculation of the tax for that

[1] Such a prorating of tax payments in order to allocate taxes, erroneously paid for a calendar year, to the portions of the two fiscal years which make up the calendar year was allowed by the Board of Tax Appeals in Paso Robles Mercantile Co. *v.* Commissioner, 12 B. T. A. 750; aff'd 33 F. (2d) 653. Certiorari was denied, 280 U. S. 595, upon a petition which did not present for review the method of allocation thus adopted.

part of a fiscal year falling between the beginning of the calendar year and the end of the fiscal year by the apportionment of gross income and deductions for the fiscal year, *pro rata* to the taxable fiscal period, in order to arrive at net income for the latter. See Appeal of Weed, 2 B. T. A. 84. But the section does not authorize a like apportionment of the tax paid for the calendar year, and none was made by the returns which petitioner filed. The tax paid was for the income of the entire year and was obviously intended to be applied to the payment of any tax due or payable in that year, which would include all the tax accruing for the fiscal period ending June 30th. Under § 252 of the Revenue Act of 1918, petitioner could not at any time have claimed a refund of any overpayment of tax except such amount as was "in excess of that properly due" for the first six months, and since the excess, as already indicated, was, in each year, paid on account of the calendar year, a part of which fell within the fiscal period following June 30th, a correct statement of the account requires the overpayment to be credited to that rather than the preceding fiscal period.

It follows that recovery should be allowed of the amount of the overpayment not already refunded, which, as stated, is $443,367.61, with interest computed in accordance with the applicable statutes, and that the judgment should be reversed and the cause remanded for further proceedings in accordance with this opinion.

The amounts of the tax computed by the Commissioner and the amount of the overpayment as stated in this opinion are those shown by the findings of the Court of Claims, but the mandate of this Court will be without prejudice to any restatement of the amount of overpayment based on a recomputation of the tax.*

Reversed.

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* The opinion is printed here as amended by an order of January 25, 1932, which added the paragraph to which this note is appended. See *post*, p. 598.

MATSON NAVIGATION CO. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 137. Argued December 9, 1931.—Decided January 4, 1932.

1. Section 154 of the Judicial Code, which forbids prosecution in the Court of Claims of any claim for which suit is "pending in any other court . . . against any person who, at the time when the cause of action . . . arose, was, in respect thereto, acting . . . under the authority of the United States," is inapplicable where the other suit is against the United States, and not against its agent. P. 355.
2. Where the words of a statute are plain, they may not be added to or altered, in construction, to effect a purpose not apparent on its face or from its legislative history. P. 356.
3. Under the Suits in Admiralty Act, §§ 1 and 2, jurisdiction of maritime causes of action against the United States, arising out of the operation of merchant vessels for it, is vested exclusively in the district courts. *Id.*
4. After vessels had been requisitioned by the Shipping Board under the Act of June 15, 1917, the Board and the owner entered into a charter contract, providing that the vessels should remain in the service of the United States, to be employed as it might determine, but that the owner should operate them, furnish crew and equipment, and pay for provisions, wages, etc. The United States agreed to pay the owner for certain expenses of maintenance and operation, and ship hire at a rate established by the Board for vessels of like description, with liberty in the owner to terminate the charter if the rate should be less than a specified minimum. It agreed also to reimburse the owner for any proper increases in wages over a specified standard. *Held:*

   (1) That the making of the contract worked an abandonment of the requisition and a release of the owner's right to just compensation under the Act of 1917; and that a cause of action of the owner based on the contract provision for recovery of increased wage payments could not be entertained by the Court of Claims, under Jud. Code § 145, as a claim for just compensation. P. 357.

   (2) That the contract was maritime and the cause of action within the admiralty jurisdiction. P. 358.
5. A claimant in the Court of Claims has the burden of alleging and proving a cause of action within its jurisdiction. P. 359.

6. As the present suit is against the United States upon a maritime cause of action growing out of the operation of ships for the Government, the Court of Claims is without jurisdiction if the vessels in question were operated as merchant vessels; and as the petition does not allege that they were otherwise operated, it fails to state a cause of action within the jurisdiction of that court. P. 359.
7. Want of jurisdiction of the subject matter may be considered, and appropriate judgment given, at any stage of the proceedings, either here or below. *Id.*
8. Section 2 of the Merchant Marine Act of June 5, 1920, which repealed the Emergency Shipping Fund Provisions of the Act of June 15, 1917, and imposed upon the Shipping Board the duty of carrying out contracts and making settlements, but preserved to every suitor "the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the acts hereby repealed," did not purport to enlarge existing remedies or establish a new procedure for the enforcement of maritime obligations which, like the present, are embraced within the Suits in Admiralty Act. P. 359.

72 Ct. Cls. 210, affirmed.

CERTIORARI, *post*, p. 600, to review a judgment dismissing a claim for want of jurisdiction.

Mr. Gregory A. Harrison, with whom *Messrs. Herman Phleger, Maurice E. Harrison,* and *William G. Feely* were on the brief, for petitioner.

Mr. Claude R. Branch, with whom *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. H. Brian Holland* were on the brief, for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on certiorari, to review a judgment of the Court of Claims dismissing the petition for want of jurisdiction. 72 Ct. Cls. 210.

The suit was brought upon a petition which alleged facts as follows: On October 15, 1917, the United States Shipping Board, under the Urgent Deficiencies Appropri-

ation Act of June 15, 1917, c. 29, 40 Stat. 182, 183, and an Executive Order promulgated by the President on July 11, 1917, requisitioned for use by the United States seven merchant vessels then owned and operated by petitioner. On December 29, 1917, the Government, acting through the Shipping Board, entered into a contract for the operation of each ship by petitioner under a "requisition charter," the form of which was attached. It was agreed that petitioner "in consideration of the compensation provided [by the requisition charter] and the other obligations assumed by the United States . . . accepts this Requisition Charter in full satisfaction of any and all claims he has or may have against the United States arising out of the Requisition, and accepts the compensation herein provided for as the just compensation required by law . . . ."

The attached form contained numerous clauses dealing with matters commonly covered by time charters. It provided that the vessel should remain in the service of the United States, to be employed as it might determine, but that petitioner should operate the vessel, furnish crew and equipment, and pay for provisions, wages, shipping fees, and supplies. The United States agreed to pay to petitioner, in addition to certain enumerated expenses of maintenance and operation of the vessel, ship hire at the monthly rate established by the Shipping Board for vessels of like description, but with provision for terminating the charter by petitioner if the rate should be less than a specified minimum. By the tenth clause of the charter, with which we are chiefly concerned, the Government agreed to reimburse petitioner "for any proper increases in wages and bonuses over the standard prevailing 1 August, 1917, for master, officers, and crew. . . ."

Acting under the charters, petitioner from time to time credited the Government on its books with sums received on its account, and charged it with items due petitioner,

including payments of increased wages and bonuses. On October 18, 1926, petitioner entered into a second agreement with the Government, accepting a specified amount in full satisfaction of all its demands except one for the sum of $49,373.11, claimed under Clause Tenth, for the recovery of which the present suit was brought.

The Court of Claims made a special finding that the petitioner, after the petition was filed, had brought separate suits against the United States in the District Court of the United States for Northern California, to recover the amounts alleged to have been paid by it as increased wages and bonuses, and granted the Government's motion to dismiss on the sole ground that the pendency of the suits in the District Court deprived it of jurisdiction to proceed with the cause by virtue of § 154 of the Judicial Code, c. 231, 36 Stat. 1087, 1138. This section forbids prosecution in the Court of Claims of any claim for which suit is "pending in any other court . . . against any person who, at the time when the cause of action . . . arose, was, in respect thereto, acting . . . under the authority of the United States."

Petitioner insists that the jurisdiction of the Court of Claims is unaffected by the suits pending in the District Court, since § 154 denies jurisdiction to the Court of Claims only when an agent of the United States is sued simultaneously in another court; here, the United States is the defendant. The Government does not press the contention upheld by the Court of Claims, that its jurisdiction was ousted by the pendency of the petitioner's suits in the District Court. Although they were not within the language of the section, they were nevertheless regarded as within its assumed purpose to prevent the prosecution at the same time of two suits against the Government for the same cause of action. But the declared purpose of the section (originally enacted as § 8 of the Act of June 25, 1868, 15 Stat. 77, c. 71) was only

to require an election between a suit in the Court of Claims and one brought in another court against an agent of the Government, in which the judgment would not be *res adjudicata* in the suit pending in the Court of Claims (Statement of Senator Edmunds, Chairman of the Judiciary Committee, in reporting the bill to the Senate, Cong. Globe, 40th Cong., 2nd Sess., 1868, p. 2769). See *Sage* v. *United States,* 250 U. S. 33, 37; and compare *Southern Pacific R. Co.* v. *United States,* 168 U. S. 1, 48, 49, holding otherwise as to a judgment obtained in a suit brought against the United States in a District Court. As the words of the section are plain, we are not at liberty to add to or alter them to effect a purpose which does not appear on its face or from its legislative history. *Corona Coal Co.* v. *United States,* 263 U. S. 537, 540.

In supporting the judgment of dismissal below, the Government relies on the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525, 526, 527, 528, by which, it is contended, jurisdiction over the asserted cause of action is vested exclusively in courts of admiralty. Section 1 of the Suits in Admiralty Act forbids the arrest or seizure of vessels owned or operated by or for the United States. Section 2 provides that where a proceeding in admiralty could be maintained, if at the time of the commencement of the action such vessel were privately owned or operated, "a libel in personam may be brought against the United States . . . provided that such vessel is employed as a merchant vessel . . .," and that "such suits shall be brought in the district court of the United States . . ."

Under these sections, jurisdiction of maritime causes of action against the United States, arising out of the operation of merchant vessels for it, is vested exclusively in the district courts. *Johnson* v. *U. S. Shipping Board Emergency Fleet Corporation,* 280 U. S. 320; *U. S. Shipping Board Emergency Fleet Corporation* v. *Rosenberg*

Bros. & Co., 276 U. S. 202. The language of § 2 is general, embracing suits on maritime causes of action by owners, as well as by third persons injured by the operation for the Government of merchant vessels. See *Eastern Transportation Co.* v. *United States,* 272 U. S. 675, 689 *et seq.*

Petitioner argues that the Suits in Admiralty Act is not applicable, because the cause of action here alleged is non-maritime in character; it contends that the so-called requisition charter is not a time charter, but a mere agreement for just compensation for the requisitioned ships, which may be recovered in the Court of Claims. But we think the cause of action is maritime, arising out of the express contract for the operation of vessels for the United States, and is not shown to be within the jurisdiction of the court below.

It is true that under § 145 of the Judicial Code, c. 231, 36 Stat. 1087, 1136, the Court of Claims has jurisdiction of claims for just compensation for property requisitioned by the United States, but such is not the cause of action alleged. Subdivision (e) of the Emergency Shipping Fund provisions of the Urgent Deficiencies Appropriation Act of June 15, 1917, authorized the requisition of the title or possession of ships "for use or operation by the United States." It required just compensation for requisitioned ships to be fixed by the President, and provided, in case the amount was unsatisfactory to the person entitled to compensation, that 75% of it should be paid and that suit might be brought against the United States to recover such further amount as, with that already paid, would make up just compensation.

But upon seizure of the petitioner's vessels, this procedure was abandoned. By the agreement with the Shipping Board, the requisition charter was substituted for petitioner's right to receive just compensation under the Constitution and the statute. The substituted contract

conferred new and different rights upon petitioner and subjected it to new obligations, not flowing from the requisition. The requisition of the ships imposed no duty on petitioner to operate them or to pay expenses of operation and maintenance after their seizure. That duty and petitioner's right to compensation for the performance of it and its right to be reimbursed for increased costs of operation, one of which is the subject of the present suit, arose from the contract alone. Such compensation and reimbursement are not included in just compensation for the requisition, even though waiver of the constitutional right was part consideration for the obligation to pay for the operation of the ships. The stipulated monthly payments to petitioner for ship hire were not measured by the just compensation which petitioner would otherwise have been entitled to receive and might, in fact, be either more or less. The effect of the agreement was to release petitioner's rights, growing out of the requisition, and to define the rights of the parties with respect to the use of petitioner's ships and the compensation for them, as effectively and completely and with the same consequences as though no requisition had ever been made.

We need not examine the requisition charter with meticulous care to see whether it is in all respects identical with the usual charter party, which, as petitioner concedes, is maritime. *Morewood* v. *Enequist,* 23 How. 491. It is enough that the right asserted is upon express contract with the shipowner for its operation of the ship for the Government, and stipulates compensation both for use of the ship and for service rendered and expense incurred in its operation and maintenance, all of which undertakings are characteristically within the admiralty jurisdiction. Compare *New Jersey Steam Navigation Co.* v. *Merchants' Bank,* 6 How. 344, 392; *The Thomas Jefferson,* 10 Wheat. 428, 429; *The Eddy,* 5 Wall. 481, 494; *The General Smith,* 4 Wheat. 438; *James Shewan & Sons* v.

United States, 266 U. S. 108; *The Arlyn Nelson,* 243 Fed. 415; 3 Benedict, Admiralty (5th ed.) 82–96.

Petitioner also asserts that the present cause of action is not maintainable under the Suits in Admiralty Act because it does not appear that it arose out of the operation of the ships as merchant vessels. The Government argues that it is inferable from certain allegations in the petition, read in the light of the requisition charter, that the vessels were so used; but we do not stop to consider the argument. The burden rested upon petitioner to allege and prove a cause of action within the jurisdiction of the Court of Claims. *Johnson* v. *United States,* 160 U. S. 546, 552–553; *Merritt* v. *United States,* 267 U. S. 338; *Contzen* v. *United States,* 179 U. S. 191, 192. As the suit is against the United States upon a maritime cause of action growing out of the operation of ships for the Government, the Court of Claims is without jurisdiction if the vessels in question were operated as merchant vessels, and as the petition does not allege that they were otherwise operated, it fails to state a cause of action within the jurisdiction of the Court of Claims. As the want of jurisdiction is of the subject matter, it may be considered, and appropriate judgment given, at any stage of the proceedings, either here or below. *Hilton* v. *Dickinson,* 108 U. S. 165, 168; *Gainesville* v. *Brown-Crummer Co.,* 277 U. S. 54, 59. See *Grace* v. *American Central Ins. Co.,* 109 U. S. 278, 283–284; *Börs* v. *Preston,* 111 U. S. 252, 255.

Section 2 of the Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 989, did not, as petitioner contends, restore to the Court of Claims the jurisdiction previously withdrawn from it by the Suits in Admiralty Act. It repealed the Emergency Shipping Fund provisions of the Act of June 15, 1917, and imposed upon the Shipping Board the duty of carrying out all contracts lawfully entered into under the repealed Act, and of settling " all matters aris-

ing out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President." It preserved to every suitor "the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the acts hereby repealed." Assuming, without deciding, that the present claim is one which the Board was authorized to settle, we think it clear that the Act did not purport to enlarge existing remedies or establish a new procedure for the enforcement of maritime obligations which, like the present, are embraced within the Suits in Admiralty Act.

We have considered, but find it unnecessary to discuss, other less substantial grounds advanced for denying the applicability of the Suits in Admiralty Act. The judgment will be affirmed, but without prejudice to an application by the petitioner to the court below, if so advised, for leave to amend the petition.

Affirmed.

TRANSIT COMMISSION ET AL. *v.* UNITED STATES ET AL.

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

No. 498. Argued November 24, 25, 1931.—Decided January 4, 1932.

1. In ascertaining the public convenience and necessity with respect to the abandonment of a branch line by a railroad company engaged in intrastate and interstate commerce, the Interstate Commerce Commission must weigh the benefit to accrue to interstate commerce against the injury to intrastate commerce. P. 367.
2. Where the State has ordered the removal of grade crossings on a branch line which the company seeks to abandon, the Commission may properly take into consideration the magnitude of the required outlay as compared with the value of the branch, and the resulting effect on the company's revenue. P. 368.

3. Under § 1 (18) of the Interstate Commerce Act, as amended by the Transportation Act, 1920, the Commission has power to authorize the abandonment of an unprofitable branch line by a railroad company engaged in interstate commerce, although its lines lie wholly within the State of its incorporation, and although the bulk of its traffic is intrastate and its business as a whole is prosperous, upon finding that continued operation of the branch would result in a serious and increasing depletion of revenue, due to competition by municipal rapid transit lines and their probable extension, which would entail an unreasonable burden on interstate commerce, and that the losses would be aggravated by expenditures for the removal of grade crossings as required by the state commission. The exercise of such power is not an unconstitutional invasion of the State's sovereignty. P. 368.
4. Evidence examined and held to support an order of the Commission authorizing the abandonment of a branch line. Pp. 369, 370.

Affirmed.

APPEAL from a decree of the district court of three judges denying a preliminary injunction and dismissing the bills in suits against the United States and the Railroad Company to enjoin the latter from abandoning a branch line and to set aside an order of the Interstate Commerce Commission permitting the abandonment. The suits were brought by the Transit Commission and its members and by the State of New York. They were consolidated. The Commission and the Company intervened. See 162 I. C. C. 363; 166 *id.* 371; 175 *id.* 163.

Mr. George H. Stover, with whom *Messrs. John J. Bennett, Jr., Edward M. Deegan,* and *Charles Dickerman Williams* were on the brief, for appellants.

In this case, the Interstate Commerce Commission authorized abandonment, not to stop the drain of operating losses which could be checked in no other way, but to avoid the added capital charges which would be incurred by complying with a grade crossing elimination order, the propriety and validity of which is unquestioned.

The State has a constitutional right to require the elimination of dangerous grade crossings, regardless of the effect on interstate commerce; and the Interstate Commerce Commission cannot destroy or impair this right or prevent or hamper its exercise by authorizing abandonment of the line, because a valid elimination order has been made. *Erie R. Co.* v. *Pub. Util. Commrs.*, 254 U. S. 394; *Railroad Comm.* v. *Southern Pac. Co.*, 264 U. S. 331; *Lehigh Valley R. Co.* v. *Commissioners*, 278 U. S. 24; *Atchison, T. & S. F. Ry. Co.* v. *Railroad Comm.*, 283 U. S. 380, 391; *Missouri, K. & T. Ry. Co.* v. *Harris*, 234 U. S. 412, 418–419; *Missouri Pac. R. Co.* v. *Norwood*, 283 U. S. 249, 256; *Interstate Commerce Comm.* v. *Los Angeles*, 280 U. S. 52, 53.

An attempt to authorize the Commission to deprive the State of that right, without providing for a judicial review on both the law and the facts, would constitute a denial of due process of law. *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U. S. 287. In *Colorado* v. *United States*, 271 U. S. 153, this grade crossing issue was not presented.

The existence and practically all the rights of the carriers were derived from the States; and these rights, in New York at least, were granted on certain conditions, among which was the condition that the roads would operate *in toto* or abandon *in toto*. *People* v. *Albany & V. R. Co.*, 24 N. Y. 261, 269; *Paige* v. *Schenectady R. Co.*, 178 N. Y. 102, 114.

The Commission is without power to authorize abandonment, except in a case where such course is necessary to protect interstate commerce from undue or unreasonable burdens; and must arrive at its determination by balancing the demonstrated prejudice to interstate commerce against the injury to the community; and can authorize abandonment only where such prejudice outweighs the injury to the community. *Wichita R. Co.* v. *Public Utilities Comm.*, 260 U. S. 48, 59; *Colorado* v. *United States*, 271 U. S. 153.

The evidence shows that the continuance of the Whitestone branch will not prejudice, burden, obstruct or interfere with interstate commerce in any way, and will not lessen the ability of the Company properly to serve interstate commerce or prevent it from performing its federal duty.

The evidence shows that the abandonment of the branch would cause serious injury to the property of the communities.

The Commission could not ignore the present injury to the community, on the theory that this would ultimately be corrected in the future, by the rapid transit line which the abandonment of the branch would compel the city to build.

There is no evidence that the city will extend its rapid transit system into the area, unless the branch is abandoned.

No amount of buses would ever serve as a substitute for the Whitestone branch; and there is no evidence to support the suggestion that they would.

Congress did not intend, nor does the Constitution permit, that an incidental and dependent interstate traffic should be used to provide color for federal interference with a self-contained and highly remunerative local traffic.

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

The constitutional and statutory authority of the Commission to enter the order is sustained by *Colorado* v. *United States,* 271 U. S. 153. In that case the Court pointed out that the sole statutory test prescribed is that abandonment be consistent with public necessity and convenience; that this test requires a balancing of the na-

tional interest not to have an interstate carrier burdened with excessive expenditures for the operation of a local line against the injury which abandonment will cause to the community affected; and that in this balancing the fact of demonstrated prejudice to interstate commerce is relevant and may be controlling, but is not requisite to the issuance of a certificate of abandonment.

The evidence amply sustains the findings of the Commission that service on the Whitestone branch results in large operating losses; that, due to declining passenger traffic, these losses have been and will be progressive; that the branch can not successfully compete with transportation by buses and trolleys connecting with the city rapid-transit line; that the branch will eventually be supplanted by these instrumentalities; and that, if the branch is not abandoned, the railroad will be required to incur a capital obligation of $2,000,000, representing its share of the cost of removing grade crossings on the branch. In finding that public convenience and necessity permit abandonment, the Commission considered all relevant factors, including the so-called "prosperity" of the railroad.

Mr. Alfred A. Gardner, with whom *Mr. Joseph F. Keany* was on the brief, for the Long Island Railroad Co., appellee.

Mr. Justice Roberts delivered the opinion of the Court.

This appeal involves the validity of a certificate of public convenience and necessity of the Interstate Commerce Commission, permitting the abandonment by Long Island Railroad Company of a portion of its Whitestone branch. Separate bills were filed by appellants to enjoin action by the railroad and to adjudge the certificate void. They were consolidated and heard by a specially constituted

district court.[1] The parties having stipulated that they had offered all the proofs they desired to present, the court refused an interlocutory injunction, and dismissed the bills.

The Long Island Railroad Company, chartered under the laws of New York, whose lines lie wholly within that state, transports passengers and freight in interstate commerce by the use of steam and electricity. Its Whitestone branch extends a distance of 4.7 miles from the Port Washington branch to the Flushing River, and thence to Whitestone Landing. The bulk of its passenger traffic is intrastate, and only a slight amount interstate; but it carries a considerable volume of freight, seventy-five per cent. of which is interstate. In these respects the branch is representative of conditions throughout the system. There are five passenger stations on the branch line,—Flushing, which is much the largest, and four others beyond.

In January, 1928, the city of New York opened a rapid transit line connecting Flushing with Manhattan. There ensued a thirty-three per cent. decrease in the passenger revenue of the Whitestone branch; and its operating deficit of some $18,000 for 1927 increased to over $125,000 in 1928. There was a further decrease of over twenty-six per cent. in passenger revenue in the first five months of 1929.

On June 2, 1926, the Transit Commission, pursuant to a program of grade crossing abolition, ordered the elimination of four in and near Flushing. There are twelve such crossings on the entire branch, removal of all of which was in contemplation, and it was estimated that to remove them would cost about $4,000,000, the company's share being $2,000,000, which it could borrow from the state at from four to five per cent. interest. The elimination of

[1] Pursuant to U. S. C., Tit. 28, § 47.

the crossings would save $37,000 per year now spent for guarding them. On December 31, 1928, the total value of land and improvements on the portion of the branch sought to be abandoned was approximately $933,000.

The company did not appeal from the order, as it might have done, but formally offered to quit-claim to the city of New York that portion of the branch which is involved in this proceeding. The city did not accept the proffer. The effective date of the grade separation order was postponed to December 31, 1928, and upon the Transit Commission's refusal further to extend the time for compliance, the company, on January 10, 1929, filed with the Interstate Commerce Commission its application under § 1 (18) of the Interstate Commerce Act, as amended by the Transportation Act of 1920,[2] for a certificate permitting the abandonment of the 4.1 miles of the branch extending from west of Flushing River to the terminus at Whitestone Landing. After interventions by the Transit Commission, the city of New York, and others, the matter was heard by an examiner, whose proposed report was the subject of argument before Division 4 of the Commission. It found in favor of the application, and ordered that a certificate issue.[3]

During the hearing the company proposed that it would substitute truck service for the freight traffic to be affected by the abandonment, and would, if a franchise were granted it by the city of New York, inaugurate a passenger bus service to the towns on the branch, which would connect them with its station at Flushing and with the terminus of the city's rapid transit line to Manhattan.

A reargument was granted before the full Commission, which affirmed[4] the report of Division 4. Since, however, the interveners expressed some doubt as to the com-

[2] U. S. C., Tit. 49, § 1 (18).

[3] 162 I. C. C. 363.

[4] 166 I. C. C. 671.

pany's making satisfactory arrangements for bus service, the Commission indefinitely suspended the order, to afford opportunity for negotiating the proposed bus franchise. The company promptly applied to the proper authorities, agreeing to take a grant terminable at short notice and on terms favorable both to the city and to the traveling public. No response was made to its offer and no action was taken on its application. After waiting five months, it applied to the Commission to take final action, setting forth the neglect of the city to act in the matter. Thereupon the Commission ordered that its certificate should take effect 120 days from June 17, 1931.[5]

By their bills the state of New York and the Transit Commission challenge the power of the Interstate Commerce Commission to issue a certificate of public convenience and necessity in such a case as is here presented, and assert that if it has such power, the proofs do not warrant its action.

First. It is claimed that the certificate has as its sole basis the order of the State Transit Commission for the removal of grade crossings; that the latter was valid and within the state's Constitutional right, regardless of its effect on interstate commerce, and that the Interstate Commerce Commission cannot destroy or impair this right, or hamper its exercise, by authorizing an abandonment of the railroad's line. We think this assertion is based upon a misconception of the Commission's action. In ascertaining the public convenience and necessity the Commission was bound to weigh the benefit to accrue to interstate commerce by the abandonment against the resultant prejudice and injury to intrastate commerce. *Colorado* v. *United States,* 271 U. S. 153, 168. The finding was that continued operation would result in a serious and increasing depletion of revenue, due to the competi-

[5] 175 I. C. C. 163.

tion by the city's rapid transit lines and their probable extension, which would entail an unreasonable burden on interstate commerce. It was found that the expenditure for removal of grade crossings would, in the circumstances, be a waste of the company's funds, and that the requirement of the State Transit Commission removed all doubt of the propriety of abandonment of the branch. The magnitude of the required outlay as compared with the value of the whole property, and the resulting effect on the company's revenue, were facts properly taken into account in passing on the application. Compare *Oregon R. & N. Co.* v. *Fairchild,* 224 U. S. 510, 529; *Lehigh Valley R. Co.* v. *Board of Commissioners,* 278 U. S. 24, 34; *New Orleans Public Service* v. *New Orleans,* 281 U. S. 682, 687.

In reaching these conclusions the Commission considered the needs of the communities served, and gave due regard to them. It was shown that the city authorities had refused to take over the line, when the company offered to convey it, on the ground that the territory could be adequately served by bus transportation. Moreover, the company could not maintain satisfactory schedules on the branch, because of congestion in the tunnels under the East River, and without better schedules could not hope to increase use of this line. It was in evidence that the company's offer to establish an adequate bus system had not been accepted by the city authorities. There was other proof, which need not be detailed, as to the intrastate traffic needs. All these matters were given due consideration by the Commission in reaching its ultimate conclusion. It followed the course outlined in *Colorado* v. *United States, supra;* and the claim that its action was beyond its authority and without warrant of law cannot be sustained. That decision requires a holding that appellant's assertion of unconstitutional invasion of the State's sovereignty is without merit. We need not elaborate what was there said on the subject (271 U. S. 165).

Second. Appellants insist that the Commission's findings and conclusions, assuming that its order was within its powers, lack support in the evidence. They say the proofs show the continued operation of the branch will not prejudice, burden, obstruct, or interfere with interstate commerce, or lessen the ability of the carrier to serve that commerce, and since it is shown that the abandonment will cause prejudice to several communities, the certificate should not have been granted. There is no contradiction of the fact that the branch is operating at a serious loss, as shown by the carrier's accounts offered in evidence, and that this will continue and increase from year to year and be aggravated by expenditures for the removal of grade crossings. Appellants criticize the allocation of certain rentals and overheads by the company, and point to evidence produced by them indicating that the operating losses are in fact much less than those claimed by the carrier. The Commission, however, concluded that the railroad's figures came nearer representing the true situation than those offered by the interveners. The latter further assert that the intrastate passenger traffic of the railroad constitutes by far the greater and more profitable portion of its business; that the interstate traffic represents only about sixteen per cent. of its gross revenue and is unprofitable; that the system as a whole has large net earnings and is a successful enterprise; and that the Commission was in error in considering incidental and dependent interstate traffic as an excuse for federal interference with a highly remunerative local traffic. They seek thus to distinguish the present case from *Colorado* v. *United States, supra,* and assert that the Commission ignored the test there approved and acted upon the erroneous theory that proof that the continuance of the Whitestone branch would constitute a burden on interstate commerce was unnecessary.

We do not so read the Commission's report. That body professed to follow the decision in the *Colorado* case and

we think that it did so. The Court there held that, in the issuance of a certificate of public convenience and necessity, the Commission need not determine with mathematical exactness the extent of the burden imposed upon interstate commerce by the operation of a branch line; that such burden might involve various elements, and that if upon the whole proof the conclusion was warranted that continued operation would in fact unreasonably burden the interstate commerce of the carrier, the Commission was justified in authorizing abandonment. There, as here, the system lay wholly within the state and was prosperous, and no claim was made that immediate abandonment of the local branch was necessary to enable the carrier to earn a reasonable return on its investment. Here, as in the *Colorado* case, the Commission had regard for the needs of intrastate as well as interstate commerce. The evidence was ample to give a comprehensive view of the entire situation, and due weight was accorded all of the proofs in the light of the conflicting requirements. The contention that the Commission went upon the theory that it might authorize abandonment in disregard of the evidence is not supported by the record. The judgment must be

Affirmed.

ARIZONA GROCERY CO. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL.

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

No. 98. Argued December 8, 1931.—Decided January 4, 1932.

1. Where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous

order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceedings to be a reasonable rate. Pp. 383–390.

2. When the Commission by its authority under the Transportation Act declares a specific rate to be the reasonable and lawful rate for the future, it exercises a legislative function and its pronouncement has the force of a statute. This is well established as to the fixing of specific rates by state commissions, and in this respect there is no difference between authority delegated by a state legislature and that conferred by Congress. P. 386.
3. When the Commission fixes a maximum rate, or maximum and minimum rates, the carrier is not obliged at its peril to see that the rates it maintains within the limits so authorized are reasonable. Pp. 386, 387.
4. In declaring a maximum rate the Commission exercises a delegated power legislative in character, and may act only within the scope of the delegation; its authority is to fix a maximum reasonable rate, and it is precluded by the statute from fixing one which is unreasonable. P. 387.
5. When the carrier establishes a rate within the limits of the Commission's order, that rate becomes a lawful—that is, a reasonable—rate. *Id.*
6. The prescription of a maximum rate, or maximum and minimum rates, is as legislative in quality as the fixing of an exact rate. P. 388.
7. The action of the Commission in fixing rates for the future is subject to the same tests as to its validity as would be an act of Congress intended to accomplish the same purpose. *Id.*
8. Where the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed. P. 389.

49 F. (2d) 563, affirmed.

CERTIORARI, *post*, p. 600, to review a judgment reversing a judgment in favor of a shipper in a suit to enforce an order of the Interstate Commerce Commission awarding reparations.

Messrs. Frank L. Snell, Jr., and *R. C. Fulbright,* with whom *Mr. Samuel White* was on the brief, for petitioner.

The Interstate Commerce Act confers jurisdiction upon the Commission to award reparation against rates which were charged under an order prescribing a maximum rate if the rate charged was in fact unreasonable.

Section 15 (1) provides that the Commission may prescribe four types of rates: (1) just and reasonable; (2) maximum; (3) minimum; and (4) maximum and minimum.

A maximum rate is not necessarily a just and reasonable rate. The fact that the Commission prescribed a maximum rate does not relieve the carrier of the duty to file and publish a reasonable rate. That duty is a continuing one which must be complied with by the carriers; otherwise the Act will be violated and the shipper entitled to damages because of such violation. *News Syndicate Co.* v. *New York Cent. R. Co.,* 275 U. S. 179, 187.

Section 16 (1) gives the Commission the right, as a judicial body, to act retroactively and award reparation whenever damages arise, as provided in §§ 8 and 9. Section 15 (2) gives it the power to set aside a previous order.

It is fundamental in this case that a carrier is entitled only to a just and reasonable rate and not permitted to charge more. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426; *Dayton-Goose Creek R. Co.* v. *United States,* 263 U. S. 456; *Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.,* 245 U. S. 531.

The shipper is compelled to pay the duly filed and published tariff whether such tariff is Commission-made or railroad-made; and if it is unreasonable he must seek recovery before the Commission, acting as a judicial body. To hold that the shipper would be foreclosed in such a proceeding because of the prior finding and order of the Commission acting as a legislative body, would amount

to depriving him of his property without due process of law, if in fact the rate charged was unreasonable.

The right to a reasonable rate is a vested property right of the shipper. *Missouri, K. & T. R. Co.* v. *Interstate Commerce Comm.,* 164 Fed. 645; *McLean Lumber Co.* v. *United States,* 237 Fed. 460, 466.

The Commission, acting in a judicial capacity, has a right to determine, in view of the facts then before it, whether the rate in question was in fact just and reasonable and in compliance with the Act. The fact that the rate had been previously prescribed as a maximum rate by the Commission, acting in a legislative capacity, can not be conclusive in such a judicial proceeding. *Baltimore & O. R. Co.* v. *United States,* 279 U. S. 781.

The only method provided by the Act for a shipper to attack an unjust and unreasonable rate is to file a complaint before the Commission in accordance with §§ 9 and 13. The fact that the Act took from the shipper the right to a proceeding in court does not mean that the shipper forfeited his lawful rights to a just and reasonable rate. Only the remedy and method of procedure were changed.

Allowance of reparation to plaintiff does not violate the Fifth Amendment. There can be no vested right in a rate fixed by the Commission for the future. *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 568; *Interstate Commerce Comm.* v. *Louisville & N. R. Co.,* 73 Fed. 409, 428. Distinguishing *Blodgett* v. *Holden,* 275 U. S. 142; *Fletcher* v. *Peck,* 6 Cranch 87. The carrier acquires no vested right in any income in excess of a reasonable return on its investment. *Dayton-Goose Creek R. Co.* v. *United States,* 263 U. S. 456.

Decisions of state courts relied upon by the court below do not support the conclusions reached. See *Eagle Cotton Oil Co.* v. *Southern Ry. Co.,* 51 F. (2d) 443; *Mathieson Alkali Works* v. *Norfolk & W. Ry. Co.,* 147 Va. 426; *Young Heading Co.* v. *Payne,* 127 Miss. 48.

These state courts clearly point out the distinction between the Interstate Commerce Act, in which the Commission is given broad and comprehensive powers including the right to prescribe a maximum rate, and the state acts, in which commissions are given limited and restricted powers and the right to fix only the exact rate. *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*, 46 F. (2d) 1006. See especially s. c., 51 F. (2d) 443.

The decision conflicts with the principles of interpretation and application of the Interstate Commerce Act previously laid down by this Court. *Reagan* v. *Farmers L. & T. Co.*, 154 U. S. 362, 367; *Mitchell Coal & C. Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 259; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 442; *Smith* v. *Townsend*, 148 U. S. 490; *Interstate Commerce Comm.* v. *Baltimore & O. R. Co.*, 145 U. S. 265; *Chicago & A. R. Co.* v. *Kirby*, 225 U. S. 155.

Mr. Burton Mason, with whom *Messrs. L. H. Chalmers, Thomas G. Nairn, E. W. Camp, R. S. Outlaw*, and *J. E. Lyons* were on the brief, for respondents.

The rates assessed, and the charges collected, upon petitioner's shipments, were conclusively established as just and reasonable, and in conformity with the requirements of the Act and of the Commission's valid findings and valid continuing order. The Commission's findings and order in the First Case were continuously in effect without modification throughout the period of movement of petitioner's shipments, and were fully and literally complied with by the respondents.

In the very nature of things, the voluntary publication of rates less than the reasonable maximum fixed by the Commission must have resulted in rates just as properly to be termed "Commission-made," as the exact rate named in the Commission's findings and order. It is conceded that the order fixed only a reasonable maximum

rate, and not the exact or only rate thereafter to be charged. Admittedly, the carriers did exactly as they were directed. Since the greater includes the less, it follows that the resulting rates were just as completely within the terms of the Commission's order, and thus just as much "Commission-made," as if the 96½ cent rate and no other had been published. *Eagle Cotton Oil Co.* v. *Southern Ry. Co.,* 51 F. (2d) 443, is not in point upon the issue here discussed, and does not sustain the Commission's position at all.

The findings and order in the First Case, whereby the rate to be observed in future was determined, were made by the Commission in the exercise of its quasi-legislative power. *Prentis* v. *Atlantic Coast Line R. Co.,* 211 U. S. 210; *Knoxville* v. *Knoxville Water Co.,* 212 U. S. 1, 8; *Louisville & N. R. Co.* v. *Garrett,* 231 U. S. 298, 305; *Baer Bros.* v. *Denver & R. G. R. Co.,* 233 U. S. 479, 486; *Great Northern R. Co.* v. *Merchants Elevator Co.,* 259 U. S. 285, 291.

The primary issue presented to, and necessarily decided by, the Commission in the First Case, was whether the rate then in effect was reasonable. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 232 U. S. 199, 221.

The Commission has no power to prescribe a maximum rate which is other than just and reasonable. *Southern Pac. Co.* v. *Interstate Commerce Comm.,* 219 U. S. 433, 443, 444; *Interstate Commerce Comm.* v. *United States,* 224 U. S. 474; *Interstate Commerce Comm.* v. *Diffenbaugh,* 222 U. S. 42, 47; *United States* v. *New York Cent. R. Co.,* 263 U. S. 603, 610; *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, 668; *Brimstone R. & C. Co. v. United States,* 276 U. S. 104, 109; *Akron, C. & Y. Ry. Co.* v. *United States,* 22 F. (2d) 199, 203; *Anchor Coal Co.* v. *United States,* 25 F. (2d) 462. See McVeagh, Transportation Act of 1920, pp. 356–358; Congressional Record, Vol. 58, pp. 8309–8318.

Orders of the Commission precisely similar in every essential respect to the order in the First Case have been held by this Court and the inferior federal courts to be orders prescribing reasonable rates. *Chicago, R. I. & P. Ry. Co.* v. *United States,* 274 U. S. 29, affirming 6 F. (2d) 888; Houston Cotton Exchange *v.* A. & A. R. R. Corp., 87 I. C. C. 392; 93 I. C. C. 268; *Montrose Oil Rfg. Co.* v. *St. Louis-San Francisco Ry. Co.,* 25 F. (2d) 750, affirmed, 25 F. (2d) 755; *Mellon* v. *World Publishing Co.,* 20 F. (2d) 613; s. c., 53 I. C. C. 491.

Having been validly made, and in full force and effect at the time petitioner's shipments moved, the findings and order in the First Case constituted a conclusive determination that the rates established and charged in compliance therewith were just and reasonable. *Interstate Commerce Comm.* v. *Union Pac. R. Co.,* 222 U. S. 541, 547, 548; *Western Paper Co.* v. *United States,* 271 U. S. 268, 271; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 234 U. S. 294, 311; *Virginian R. Co.* v. *United States,* 272 U. S. 658, 665; *Keogh* v. *Chicago & N. W. Ry. Co.,* 260 U. S. 156.

The Interstate Commerce Act does not confer jurisdiction upon the Commission to award reparation for the charging of rates maintained and applied in conformity with the Commission's valid outstanding findings and valid continuing formal order. The Act confers upon the Commission jurisdiction to award reparation (damages) only for violations of the Act by carriers. *News Syndicate Co.* v. *New York Cent. R. Co.,* 275 U. S. 179, 187; New Pittsburgh Coal Co. v. H. V. Ry. Co., 26 I. C. C. 121, 126; Pitwood v. N. P. Ry. Co., 51 I. C. C. 535.

The Commission's determination of the reasonableness of a particular rate, if validly made, is absolutely conclusive. By the terms of the statute it fixes the rate "to be thereafter observed" as long as its order is effective. Certainly if the carrier has no option to advance a rate, except

by approval of the Commission, it should not be required, as an affirmative obligation imposed by § 1 of the Act, voluntarily to reduce a rate below a standard set by the Commission " to be thereafter observed."

Phillips v. *Grand Trunk W. Ry. Co.*, 236 U. S. 662, 665; *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 258, make it quite clear that findings of the Commission as to the reasonableness of a particular rate, when properly made as the foundation for awards of reparation, are conclusive and binding, not merely upon the shippers and carriers directly involved in the proceeding, but upon all shippers and carriers who may be affected by the ruling. But if such conclusive effect is given to rulings of the Commission as relating to past rates, equally its rulings as to rates to be observed for the future should be regarded as constituting the conclusive measure of the rights of the shippers, as long as those rulings continue in effect. The carrier's obedience to a conclusive and continuing order prescribing the maximum reasonable rate thereafter to be charged, necessarily results in the maintenance and application of rates which, as measured by the only final standard which the law of the land recognizes, are just and reasonable. There can be no violation of the Act, under such circumstances; and consequently, there is nothing to which the Commission's jurisdiction to award reparation may attach. Cf. *Atlantic Coast Line R. Co.* v. *Powe*, 283 U. S. 401; *United States* v. *New River Co.*, 265 U. S. 533, 541.

All the reported court decisions declare and sustain the proposition that a regulatory tribunal, exercising functions similar to those of the Interstate Commerce Commission, cannot award reparation for the charging of rates which such tribunal has itself prescribed or approved. There is no reported decision holding to the contrary. *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156; *Southern Pac. Co.* v. *Interstate Commerce Comm.*, 219 U. S. 433, 452;

Winsor Coal Co. v. *C. & A. R. Co.*, 52 Fed. 719; *El Paso & S. W. R. Co.* v. *A. C. C.*, 51 F. (2d) 573; *Northern Pac. Ry. Co.* v. *Dept. of Pub. Wks.*, 136 Wash. 389; *Missouri, K. & T. Ry. Co.* v. *Railroad Comm.*, 3 S. W. (2d) 489; s. c. 13 S. W. (2d) 680; *Mathieson Alkali Works* v. *Norfolk & W. Ry. Co.*, 147 Va. 426; *Miller Coal Co.* v. *Louisville & N. R. Co.*, 207 Ala. 252; *Young Co.* v. *Payne*, 127 Miss. 48; *Texas & Pac. Ry. Co.* v. *Railroad Comm.*, 137 La. 1059; *Bonfils* v. *Public Utilities Comm.*, 67 Colo. 563. Distinguishing cases referred to by petitioner and the Commission.

If the Act were so construed as to confer upon the Commission power to award reparation under the circumstances here presented, it would, to that extent, contravene the due process clause of the Fifth Amendment.

The Commission, in awarding reparation, exercises quasi-judicial power, as an agency of the judicial arm, and not of the Congress. In so doing, it is bound by its prior legislative determinations and must act with reference only to the law and the facts as they existed at the time the asserted right to damages arose. *Baer Bros.* v. *Denver & R. G. R. Co.*, 233 U. S. 479; *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291; *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 430; *Prentis* v. *Atlantic Coast Line R. Co.*, 211 U. S. 210.

The due process clause prohibits any action on the part of the Commission the effect of which would be to divest respondents of property theretofore properly acquired in direct conformity with the Commission's own prior valid legislative pronouncement. *Fletcher* v. *Peck*, 6 Cranch 87; *Forbes Boat Line* v. *Commissioners*, 258 U. S. 338; *Blodgett* v. *Holden*, 275 U. S. 142; *Untermyer* v. *Anderson*, 276 U. S. 440; *Calder* v. *Bull*, 3 Dall. 385, 388, 391; *Murray's Lessee* v. *Land Co.*, 18 How. 272, 276, 277; *Hurtado* v. *California*, 110 U. S. 516, 535, 536; *Twining* v. *New Jersey*, 211 U. S. 78, 101, 102.

Messrs. Daniel W. Knowlton and *H. L. Underwood,* by special leave of Court, filed a brief on behalf of the Interstate Commerce Commission, as *amicus curiae.*

Section 1 (4) requires carriers subject to the Act to "establish . . . just and reasonable rates, fares, and charges," and § 1 (5) declares that "all charges made for any service rendered . . . in the transportation of . . . property . . . shall be just and reasonable," and that "every unjust and unreasonable charge for such service . . . is prohibited and declared to be unlawful." There is a continuing duty upon carriers to observe these mandates and the prescription of maximum rates by the Commission does not absolve them from that obligation or authorize the continuance of a charge which by reason of changed conditions has become unreasonable and unjust. *Baer Bros. Co.* v. *Denver & R. G. R. Co.,* 233 U. S. 479. Such an order is not *res judicata. Tagg Bros.* v. *United States,* 280 U. S. 420, 445.

The basis upon which reparation is awarded is that a carrier has been guilty of a violation of the Act by exaction of an unreasonable rate—a tort. *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.,* 269 U. S. 217, 234; *Lewis-Simas-Jones Co.* v. *Southern Pac. Co.,* 283 U. S. 654, 660. If the Commission finds the rate exacted unreasonable, it matters not that the rate at some prior time was held to be reasonable by the Commission.

A contrary conclusion would deny to shippers the right to a reasonable rate during all the time the question of reasonableness is being litigated before the Commission, as well as prior thereto, although the Commission finds that the rate had become and was unreasonable during the entire period covered by the award.

In the present case, there are the added considerations that the finding of the Commission as a result of which reparation was awarded, was made upon a comprehensive record, as distinguished from a partial one, on which the

prior maximum rates had been authorized, and that the rates here involved were repeatedly under fire of the shippers.

The action of the Commission in awarding reparation was consistent with that in other cases.

Subsequent reduction of the rates by the voluntary action of the carriers warrants a conclusion that such reduced rates were not prescribed by the Commission. *Brimstone R. & C. Co.* v. *United States,* 276 U. S. 104, 122; *Eagle Cotton Oil Co.* v. *Southern Ry. Co.,* 51 F. (2d) 443.

When the language of § 1 (4) and (5) is contrasted with that of § 15 (1), it will be seen that there is no duty imposed upon the Commission such as that imposed upon the carriers. The provisions of § 15 (1) are that the Commission may, upon its own motion, and must, upon complaint, inquire into the reasonableness of rates and prescribe reasonable rates when deemed proper. That falls far short of making it the duty of the Commission to see that rates are kept currently reasonable. But § 1 (4) and (5), as we have seen, does impose that duty upon the carriers. There are good reasons for this.

We think there is no difference, with respect to reparation, between a rate established by the carrier and one established by order of the Commission. The Act makes none. The sole question is whether, for the period for which reparation is sought, the rate exacted was unreasonable, that is, has there been a violation of the Act? Reparation is allowed for the collection by a common carrier of exorbitant charges, which constitutes a tort. *Lewis-Simas-Jones Co.* v. *Southern Pac. Co.,* 283 U. S. 654. The wrong for which the statute renders the carrier liable is the exacting of payment pursuant to an unlawful rate. *Louisville & N. R. Co.* v. *Sloss-Sheffield Co.,* 269 U. S. 217, 240.

While in fixing a rate for the future the Commission exercises a legislative function, *Prentis* v. *Atlantic Coast*

Line, 211 U. S. 210, 226, yet strictly speaking the rate for the future has no relevancy to the reparation claim, since the award of reparation is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper arising from a violation of the Act by the carrier. But testimony showing the unreasonableness of a past rate may also furnish information on which to fix a reasonable future rate, and both subjects can be, and often are, disposed of by the same order. *Baer Bros. Co.* v. *Denver & R. G. R. Co.,* 233 U. S. 479, 486.

If the requirements of § 1 (5) are kept in mind, there can be no inconsistency in awarding reparation for the exaction of a "Commission-made" rate, which is in effect the legal rate until changed, but not necessarily the lawful rate, if subsequently it becomes in fact unreasonable.

Messrs. John E. Benton and *Clyde S. Bailey,* by special leave of Court, filed briefs on behalf of the National Association of Railroad and Utilities Commissioners and the Arizona Corporation Commission, as *amici curiae.*

Mr. Justice Roberts delivered the opinion of the Court.

This case turns upon the power of the Interstate Commerce Commission to award reparations with respect to shipments which moved under rates approved or prescribed by it.

The respondent carriers maintained a rate of $1.045 per hundred pounds for shipment of sugar from California points to Phoenix, Arizona. On complaint of petitioner and others, the Commission, after hearing, on June 22, 1921, found that the rate attacked had been, then was, and for the future would be, unreasonable to the extent that it exceeded 96.5 cents,[1] and ordered the establishment

[1] 62 I. C. C. 412,

of a rate not exceeding that figure. September 17, 1921, the carriers promulgated a rate of 96 cents, which they later voluntarily reduced to 86.5 cents. November 3, 1922, certain of the complainants in the earlier proceeding, other than petitioner, filed a new petition attacking the current rate. While this case was pending, the carriers, on January 10, 1924, again made a voluntary reduction to 84 cents. February 25, 1925, the Commission filed a report prescribing for the future a maximum reasonable rate of 71 cents, to that extent modifying its earlier order.[2] Reparation was found to be due shippers under the old rate, but none was awarded. February 8, 1927, the second case was reopened for further consideration, but the 71 cent rate was not disturbed. In a later proceeding, with which petitioner's and other claims for reparation were consolidated, the Commission found that the rates to Phoenix from and after July 1, 1922, had been unreasonable to the extent they had exceeded 73 cents from Northern California and 71 cents from Southern California; prescribed rates for the future from those origins to Phoenix and other Arizona destinations, and awarded petitioner and other shippers reparation in the amounts by which the rates paid (86.5 and 84 cents) exceeded those (73 and 71 cents) found to have been the reasonable rates during the period since July 1, 1922.[3]

The date of the first shipment made by petitioner on which reparation was awarded was February 21, 1923, and of the last February 5, 1925, so that all were made between the effective dates of the first and second orders above mentioned.

The respondents objected that they should not be required to pay reparations on shipments which moved under rates approved or prescribed by the Commission as reasonable. To this that body replied, "We reserve the right, upon a more comprehensive record, to modify our

[2] 95 I. C. C. 244. [3] 140 I. C. C. 171.

previous findings, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period. If we are within our authority in finding that a lower rate would have been reasonable, then it must follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable, and are entitled to reparation. . . ."

The carriers having failed to pay the amount awarded, the petitioner sued therefor in the District Court, and recovered judgment. The Circuit Court of Appeals reversed, and entered judgment for respondents.[4] This Court granted certiorari. Whether, as the petitioner argues, the Commission correctly construed its authority, is to be determined by examination of the legislation defining its powers.

The exaction of unreasonable rates by a public carrier was forbidden by the common law. *Interstate Commerce Comm.* v. *Baltimore & Ohio R. Co.*, 145 U. S. 263, 275. The public policy which underlay this rule could, however, be vindicated only in an action brought by him who paid the excessive charge, to recover damages thus sustained. Rates, fares, and charges were fixed by the carrier, which took its chances that in an action by the shipper these might be adjudged unreasonable and reparation be awarded.

But we are here specially concerned with the Interstate Commerce Act of 1887 [5] and with some of the changes or

[4] 49 F. (2d) 563. [5] Act of February 4, 1887, 24 Stat. 379.

supplements adopted since its original enactment. That Act did not take from the carriers their power to initiate rates—that is, the power in the first instance to fix rates, or to increase or to reduce them. *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 564; *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Comm.,* 162 U. S. 184, 197. In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the *legal* rates, that is, those which must be charged to all shippers alike.[6] Any deviation from the published rate was declared a criminal offense, and also a civil wrong giving rise to an action for damages by the injured shipper.[7] Although the Act thus created a legal rate, it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard.[8] In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. Under § 6 the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation.

The Act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate.[9] If the finding on this question was against the carrier, reparation

[6] *Id.,* § 6. *Kansas City Southern Ry. Co.* v. *Carl,* 227 U. S. 639, 653; *Pennsylvania R. Co.* v. *International Coal Co.,* 230 U. S. 184, 197; *Louisville & N. R. Co.* v. *Maxwell,* 237 U. S. 94, 97; *Dayton C. & I. Co.* v. *Cincinnati, N. O. & T. P. Ry. Co.,* 239 U. S. 446, 450.

[7] *Id.,* §§ 8, 9, 10.

[8] *Id.,* § 1.

[9] *Id.,* § 13. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 443; *Robinson* v. *Baltimore & O. R. Co.,* 222 U. S. 506; *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 562, and cases cited.

was to be awarded the shipper, and only the enforcement of the award was relegated to the courts. In passing upon the issue of fact the function of the Commission was judicial in character;[10] its action affected only the past, so far as any remedy of the shipper was concerned, and adjudged for the present merely that the rate was then unreasonable; no authority was granted to prescribe rates to be charged in the future. Indeed, after a finding that an existing rate was unreasonable, the carrier might put into effect a new and slightly different rate and compel the shipper to resort to a new proceeding to have this declared unreasonable.[11] Since the carrier had complete liberty of action in making the rate, it necessarily followed that upon a finding of unreasonableness, an award of reparation should be measured by the excess paid, subject only to statutory limitations of time.

Under the Act of 1887 the Commission was without power either to prescribe a given rate thereafter to be charged (*Interstate Commerce Comm.* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479), or to set a maximum rate for the future (*Cincinnati, N. O. & T. P. Ry. Co.* v. *Interstate Commerce Comm., supra,* p. 196), for the reason that so to do would be to exercise a legislative function not delegated to that body by the statute.[12]

The Hepburn Act[13] and the Transportation Act[14] evince an enlarged and different policy on the part of

[10] *Interstate Commerce Comm.* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 499–500; *Baer Bros. Co.* v. *Denver & R. G. R. Co.*, 233 U. S. 479, 486.

[11] See *Baer Bros. Co.* v. *Denver & R. G. R. Co., supra,* p. 487.

[12] Compare *Prentis* v. *Atlantic C. L. Co.*, 211 U. S. 210, 226; *Louisville & N. R. Co.* v. *Garrett,* 231 U. S. 298, 301; *Terminal Railroad Assn.* v. *United States,* 266 U. S. 17, 30; *Assigned Car Cases,* 274 U. S. 564, 582.

[13] § 4, 34 Stat. 589.

[14] §§ 418–421, 41 Stat. 484–488.

Congress. The first granted the Commission power to fix the maximum reasonable rate; the second extended its authority to the prescription of a named rate, or the maximum or minimum reasonable rate, or the maximum and minimum limits within which the carriers' published rate must come. When under this mandate the Commission declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the legislature, and its pronouncement has the force of a statute.[15] This Court has repeatedly so held with respect to the fixing of specific rates by state commissions;[16] and in this respect there is no difference between authority delegated by state legislation and that conferred by Congressional action.

But it is suggested that the mere setting of limits by Commission order leaves the carrier free to name any rate within those limits, and, as at common law, it must at its peril publish a reasonable rate within the bound-

[15] As a statute fixing or limiting rates to be charged by one whose business is affected by a public interest may be declared void for violation of the due process and equal protection clauses (*Dow* v. *Beidelman*, 125 U. S. 680; *Chicago & G. T. Ry. Co.* v. *Wellman*, 143 U. S. 339; *Budd* v. *New York*, 143 U. S. 517; *Covington Turnpike Co.* v. *Sandford*, 164 U .S. 578), an order made by a commission created by statute is subject to the like action of the courts (*Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Minnesota Rate Cases*, 230 U. S. 352, 433–434). There is, however, in the case of a commission order, the additional element, that the courts will examine the question whether the administrative agency of the legislature has exceeded its statutory powers (*Skinner & Eddy Corp.* v. *United States*, 249 U. S. at p. 562, and cases cited) or has based its order upon a finding without evidence or upon evidence which clearly fails to support it (*Northern Pacific Ry. Co.* v. *Dept. of Public Works*, 268 U. S. 39).

[16] *Chicago, M. & St. P. Ry. Co.* v. *Minnesota*, 134 U. S. 418; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 394; *Home Tel. & Tel. Co.* v. *Los Angeles*, 211 U. S. 265, 271; *Louisville & N. R. Co.* v. *Garrett*, 231 U. S. 298, 306; and compare the cases cited in note 12.

aries set by the order; that as it has the initiative it must take the burden, notwithstanding the Commission's order, of maintaining the rate at a reasonable level, and will be answerable in damages if it fails so to do. This argument overlooks the fact that in declaring a maximum rate the Commission is exercising a delegated power legislative in character; [17] that it may act only within the scope of the delegation; that its authority is to fix a maximum or minimum *reasonable* rate; for it is precluded by the statute from fixing one which is unreasonable, which by the statute is declared unlawful. If it were avowedly to attempt to set an unreasonably high maximum its order would be a nullity.

The report and order of 1921 involved in the present case declared in terms that 96.5 cents was, and for the future would be, a reasonable rate. There can be no question that when the carriers, pursuant to that finding, published a rate of 96 cents, the legal rate thus established, to which they and the shipper were bound to conform, became by virtue of the Commission's order also a lawful—that is, a reasonable—rate.

Specific rates prescribed for the future take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers, and themselves become the legal rates. As to such rates there is therefore no difference between the legal or published tariff rate and the lawful rate. The carrier cannot change a rate so prescribed and take its chances of an adjudication that the substituted rate will be found reasonable. It is bound to conform to the order of the Commission. If that body sets too low a rate, the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future. It cannot have reparation from the shippers for a rate collected under the order upon the ground that it was unreasonably

[17] *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331, 335.

low. This is true because the Commission, in naming the rate, speaks in its quasi-legislative capacity. The prescription of a maximum rate, or maximum and minimum rates, is as legislative in quality as the fixing of a specified rate.

In *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331, 335, it was said, " The order of the Commission prohibiting the company from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribed maximum rates for the service. It was, therefore, a legislative order. . . . "

If by act of Congress maximum rates were declared lawful for certain classes of service, neither carrier nor shipper could thereafter draw into question in the courts the conduct of the other if it conformed to the legislative mandate, save by an attack on the constitutionality of the statute. By the amendatory legislation Congress has delegated to the Commission as its administrative arm its undoubted power to declare, within constitutional limits, what are lawful rates for the service to be performed by the carriers. The action of the Commission in fixing such rates for the future is subject to the same tests as to its validity as would be an act of Congress intended to accomplish the same purpose.

As has been pointed out, the system now administered by the Commission is dual in nature. As respects a rate made by the carrier, its adjudication finds the facts and may involve a liability to pay reparation. The Commission may, and often does, in the same proceeding, and in a single report and order, exercise its additional authority by fixing rates or rate limits for the future. But the fact that this function is combined with that of passing upon the rates theretofore and then in effect does not alter the character of the action.[18]

[18] *Interstate Commerce Comm.* v. *Cincinnati, N. O. & T. P. Ry. Co.,* 167 U. S. 479, 499; *Baer Bros. Co.* v. *Denver & R. G. R. Co.,* 233 U. S. 479.

As respects its future conduct the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate; and if the order merely sets limits it is entitled to protection if it fixes a rate which falls within them. Where, as in this case, the Commission has made an order having a dual aspect, it may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed.

The Commission in its report confuses legal concepts in stating that the doctrine of *res judicata* does not affect its action in a case like this one. It is unnecessary to determine whether an adjudication with respect to reasonableness of rates theretofore charged is binding in another proceeding, for that question is not here presented. The rule of estoppel by judgment obviously applies only to bodies exercising judicial functions; it is manifestly inapplicable to legislative action. The Commission's error arose from a failure to recognize that when it prescribed a maximum reasonable rate for the future, it was performing a legislative function, and that when it was sitting to award reparation, it was sitting for a purpose judicial in its nature. In the second capacity, while not bound by the rule of *res judicata,* it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself.

The argument is pressed that this conclusion will work serious inconvenience in the administration of the Act; will require the Commission constantly to reëxamine the fairness of rates prescribed, and will put an unbearable

burden upon that body. If this is so, it results from the new policy declared by the Congress, which, in effect, vests in the Commission the power to legislate in specific cases as to the future conduct of the carrier. But it is also to be observed that so long as the Act continues in its present form, the great mass of rates will be carrier-made rates, as to which the Commission need take no action except of its own volition or upon complaint, and may in such case award reparation by reason of the charges made to shippers under the theretofore existing rate.

Where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate.

The judgment is

Affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS think that the judgment should be reversed for the reasons stated by Judge Hutcheson in the concurring opinion in *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*, 51 F. (2d) 443, 445.

DUNN *v.* UNITED STATES.

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

No. 393. Argued November 24, 1931.—Decided January 11, 1932.

1. Where no question was raised in the courts below with respect to the sufficiency of an indictment, and no such question is presented here, its sufficiency will be assumed. P. 392.

2. Upon an indictment in three counts charging (1) maintenance of a common nuisance by keeping intoxicating liquor for sale at a specified place, (2) unlawful possession, and (3) unlawful sale, a defendant was found guilty on the first and was acquitted on the second and third. The evidence was the same on each count. It was contended that the evidence on the nuisance count was insufficient and that the verdict was inconsistent. *Held:*

(1) The evidence on the nuisance count was sufficient to warrant a verdict of guilty. P. 392.

(2) Consistency in the verdict was not required. P. 393.

(3) The verdict may not be upset by speculation or inquiry into whether it was the result of compromise or mistake on the part of the jury. P. 394.

3. Where offenses are separately charged in the counts of a single indictment, though the evidence is the same in support of each, an acquittal on one may not be pleaded as *res judicata* of the other. P. 393.

50 F. (2d) 779, affirmed.

CERTIORARI, *post,* p. 607, to review a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court upon a verdict of guilty under the National Prohibition Act. See *Borum* v. *U. S., post,* p. 596.

Mr. Roger O'Donnell argued the cause, and *Mr. Raymond T. Coughlin* filed a brief, for petitioner.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist* and *Messrs. Mahlon D. Kiefer, John J. Byrne,* and *Francis H. Horan* were on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The petitioner was indicted in three counts, first, for maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor, second, for unlawful possession of intoxicating liquor, and third, for the unlawful sale of such liquor. The jury acquitted him on the

second and third counts, and found him guilty on the first. No question was raised in the courts below with respect to the sufficiency of the indictment on the first count, and no such question has been presented here. The case was tried upon the assumption that the indictment was good as to that count, and, in the opinion of the majority, we should make the same assumption.

The defendant says that the evidence did not warrant a conviction; and that the verdict on the second and third counts is inconsistent with that upon the first, and that for this reason also he is entitled to be discharged. The evidence was the same for all the counts. The defendant owned the establishment where the alleged sale took place. It consisted of a front room where fishing tackle, sporting goods, cigars and soft drinks were sold, and a larger room in the rear with pool tables and a bar. Two prohibition agents and two unknown men walked in and ordered from the defendant three glasses of whiskey and one of beer and were served without further conversation. A little later two more drinks were called for and furnished. The whiskey was served in ordinary whiskey glasses from underneath the bar and the money paid for it, twenty-five cents a glass, was put into a cash register behind the bar. The testimony, if believed, showed a regular course of business, which manifestly was continuous, *Fisher* v. *United States,* 32 F. (2d) 602, 604, and warranted a verdict of guilty on the nuisance count. The defendant gave evidence that he was elsewhere at the time of the alleged sale and did not make it. He contends that the verdict is inconsistent, since it negatives possession and affirms the nuisance, the proof of the commission of both alleged offenses consisting of identical evidence. The Government says that even though the jury seems to have believed that the defendant was elsewhere at the time of the alleged sale and did not make it, the verdict

is not necessarily inconsistent, for some third person, with defendant's knowledge, may have been doing business on the premises, and if so they were a nuisance, and the defendant was guilty although he neither possessed nor sold intoxicating liquors upon them; that whereas the Government's witnesses may have been mistaken in saying that the defendant sold, they may have been right to the extent that someone did, and if that be true the defendant's knowledge could be inferred, this being his place of business and he being habitually present there. It is further argued that it may be inferred that he received the money coming from the sale, and that he knowingly abetted the seller in the acts that created the nuisance on the premises that the defendant controlled.

Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. *Latham* v. *The Queen,* 5 Best & Smith 635, 642, 643. *Selvester* v. *United States,* 170 U. S. 262. If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold. As was said in *Steckler* v. *United States,* 7 F. (2d) 59, 60:

" The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity."

Compare *Horning* v. *District of Columbia,* 254 U. S. 135.

That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters.

Judgment affirmed.

MR. JUSTICE BUTLER, dissenting.

The indictment contains three counts and accuses petitioner of violations of the liquor laws. The first is under § 33 and the other two are under § 12 of Title 27, U. S. Code, being, respectively, §§ 21 and 3 of Title II of the National Prohibition Act, 41 Stat. 308, 314. The pertinent words are:

"§ 33. Any . . . building . . . or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this chapter [title], and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor . . ."

"§ 12. No person shall . . . sell . . . or possess any intoxicating liquor except as authorized in this chapter [title] . . ."

The first count cites § 33 and charges that petitioner on the fourth of July, 1930 (the evidence shows that June 26 was meant) "at a place known as No. 301–2d Street, in the City of Eureka . . . did . . . maintain a common nuisance, in then and there knowingly and willfully committing a prohibited and unlawful act of keeping for sale at said place certain intoxicating liquor . . . to wit: five drinks of whiskey and one drink of beer . . ." The second cites § 12 and charges that he then and there committed a prohibited and unlawful act of "possession of the said certain intoxicating liquor." The third cites § 12 and charges that on June 26, 1930, he did then and

there knowingly and willfully commit a prohibited and unlawful act of "sale of certain intoxicating liquor . . . to wit: five drinks of whiskey and one drink of beer."

The nuisance charged is specifically limited to the "keeping for sale" of the six drinks mentioned. The unlawful possession count is limited to the same drinks. The unlawful sale alleged is limited to six drinks. The evidence showed that the same liquor constituted the sole basis of each count.

At the trial it was shown that petitioner owned and carried on business in the place described; that there was a front room where sporting goods, cigars and soft drinks were sold and a back room in which defendant had a bar, pool and card tables and all kinds of soft drinks. The bar was used to wait on customers in that room. There were some one-ounce whiskey glasses which petitioner testified were used to serve bitters.

Two federal prohibition agents testified that about 7:30 o'clock in the afternoon of June 26, 1930, they and two unknown men, whom they referred to as "pick-ups," entered the rear room and found petitioner behind the bar; that one of the agents bought from petitioner "three whiskeys and one beer" and paid him a dollar which he rang up on the cash register; that the other agent bought from him two more drinks of whiskey and that all such liquor was consumed on the premises by the agents and their companions. No other sale was shown. No arrest, search or seizure was then made or attempted. *Marron* v. *United States,* 275 U. S. 192. Eight days later federal officers having a warrant for arrest accompanied by one of the prohibition agents raided the place and arrested petitioner. There was no evidence that any liquor was found. Petitioner testified and introduced other evidence to show that he was absent from Eureka and not in the place until some time between 8:00 and 8:30 o'clock that evening.

The trial court charged:

"The element of nuisance is the keeping of intoxicating liquor for sale. If you find from the evidence that the defendant had in his possession any liquor . . . for the purpose of such sale, then you must find the defendant guilty. . . .

"If you find from the evidence that the defendant unlawfully possessed intoxicating liquor, of course it will be your duty to find him guilty of that charge; . . .

"Of course, if . . . you believe that he is guilty . . . of having sold liquor at his said place of business, it will be your duty to find him guilty of that charge. . . .

"When an indictment charges a defendant with crime, it is not necessary for the Government to prove that the act was committed by the defendant personally, but it is sufficient for the Government to prove that the act was committed by an agent of the defendant and committed in the course of the agency and in furtherance of it. . . .

"I instruct you . . . that it is the law that 'Whoever directly commits any act constituting an offense defined in any law of the United States or aids or abets or procures its commission is a principal.' [apparently referring to 18 U. S. C., § 550] . . .

"The defendant has introduced evidence tending to show that he was not present at the time and place of the commission of the crime charged in this indictment. . . . If the evidence of an alibi in connection with all the other evidence raises a reasonable doubt of the presence of the defendant at the time and place of the crime he should be acquitted."

The jury acquitted petitioner on the possession and sales counts and convicted him on the nuisance count.

The court by the first quoted instruction, in harmony with the pleadings, authorized the conviction of petitioner upon the finding of the possession for sale of the

six drinks without more. The familiar rules that the principal may be held for acts of his agent and that one who aids or procures the commission of crime is a principal applied equally to all the accusations and were not limited to the first count. The charge that if petitioner was absent he must be acquitted also applied on all counts. There is no ground to hold that the jury, notwithstanding petitioner's absence from the place when the prohibition agents were there, found him guilty of nuisance and that because of that absence it found him not guilty of the very act alleged to constitute the nuisance. The jury must have rejected his alibi. And, if petitioner through another kept for sale the liquor as charged in the first count, he necessarily acted through the same agent as to the identical possession alleged in the second.

The definition of nuisance in § 33 manifestly requires continuity of maintenance, that is, a practice or course of business. Inherently it is a continuous offense having duration. Cf. *In re Snow,* 120 U. S. 274, 281. *Blockburger* v. *United States, ante,* p. 299. This is confirmed by § 34, which authorizes temporary and permanent injunctions for the abatement of such nuisances. But to hold that unlawful possession or a single sale, without more, constitutes a nuisance as defined "would be to render meaningless the other provisions of the law in which the Congress has denounced these specific acts, and provided punishment for their violation." *Barker* v. *United States,* 289 Fed. 249, 250. A single sale, if attended by circumstances warranting the inference that the defendant is engaged in a practice of which the sale is but an instance, may be sufficient to establish the offense. But mere possession for sale in a building of a half-dozen drinks does not measure up to the standard. *Lewinsohn* v. *United States,* 278 Fed. 421, 425. *Reynolds* v. *United States,* 282 Fed. 256, 258. *Singer* v. *United States,* 288 Fed. 695, 696.

Miller v. *United States,* 300 Fed. 529, 537. *United States* v. *Ward,* 6 F. (2d) 182. *Schechter* v. *United States,* 7 F. (2d) 881. *Fisher* v. *United States,* 32 F. (2d) 602, 604.

The facts alleged in the first count are not sufficient to constitute nuisance. They amount only to a charge of unlawful possession. The count contains nothing as to the character of the place. No practice or course of business maintained or intended is alleged. The facts set forth are not distinguishable from those alleged as constituting the unlawful possession charged in the second count. It is of no legal significance that the pleader cited § 33 in the first count and § 12 in the others and referred to the offense as "nuisance" and failed to characterize or name those charged in the others. *Williams* v. *United States,* 168 U. S. 382, 389. *Hammer* v. *United States,* 271 U. S. 620, 625. *People* v. *Aro,* 6 Cal. 207. *State* v. *Murray,* 41 Iowa 580.

By finding petitioner not guilty under the second and third counts the jury conclusively established that the evidence was not sufficient to prove the unlawful possession or sale there alleged. Since the first count charged nothing more than unlawful possession, this amounted to contradictory findings on the same fact. But even if that count charged a nuisance, the unlawful keeping of that liquor for sale was essential to the offense, in fact the corpus delicti, and the verdict of guilty necessarily included a finding of the very possession that was conclusively negatived by the verdict under the second count. If the finding of guilt on the first count were not contradicted by another finding contained in the same verdict, or if it stood alone, a judgment would properly be entered thereon convicting petitioner of the unlawful possession. 18 U. S. C., § 565. *Samlin* v. *United States,* 278 Fed. 170. *Sparf and Hansen* v. *United States,* 156 U. S. 51, 62. *Wallace* v. *United States,* 162 U. S. 466, 476.

This is not a failure of the jury to pass on all the counts submitted to them as in *Selvester* v. *United States,* 170 U. S. 262, and *Latham* v. *The Queen,* 5 B. & S. 635, cited in the opinion here. In this case the jury responded to all the issues, but the findings cannot be reconciled. Possession was alleged in the second count and negatived by the jury. Nothing remains to support the opposite finding under the first count. The repugnancy is such that if the first is accepted the second must be rejected. I am of opinion that this record plainly requires an express and unqualified decision that these findings conflict and are completely repugnant.

What is the legal effect of such conflict in the verdict?

Where the jury's action reflects mere inconsistency in the consideration of the evidence, which results in apparently illogical or unreasonable conclusions, courts will disregard differences and give effect to the verdict.[1]

In civil cases where there is conflict between a special and general verdict the former will prevail. *Lemke* v. *Chicago, M. & St. P. R. Co.,* 39 Wis. 449. If here the first count stated facts which taken with the specified possession of six drinks would be sufficient to constitute nui-

[1] *Dimmick* v. *United States,* 121 Fed. 638, 642. *Boone* v. *United States,* 257 Fed. 963, 968. *American Socialist Society* v. *United States,* 266 Fed. 212, 214. *Bullock* v. *United States,* 289 Fed 29, 32. *Carrignan* v. *United States,* 290 Fed. 189, 190. *Lee Choy* v. *United States,* 293 Fed. 582, 584. *Dallas* v. *United States,* 4 F. (2d) 201, 202. *Hesse* v. *United States,* 28 F. (2d) 770. *United States* v. *Anderson,* 31 F. (2d) 436. *Pankratz Lumber Co.* v. *United States,* 50 F. (2d) 174. *Thompson* v. *State,* 177 Ark. 1, 10; 5 S. W. (2d) 355. *People* v. *Edwards,* 72 Cal. App. 102, 117; 236 Pac. 944. *Holt* v. *People* (Colo.), 1 Pac. (2d) 921, 922. *Rokvic* v. *State,* 194 Ind. 450; 143 N. E. 357. *State* v. *Brizendine,* 114 Kan. 699, 703; 220 Pac. 174. *Lanasa* v. *State,* 109 Md. 602, 609; 71 Atl. 1058. *State* v. *Daly,* 77 Mont. 387, 391; 250 Pac. 976. *Weinecke* v. *State,* 34 Neb. 14, 23; 51 N. W. 307. *People* v. *Haupt,* 247 N. Y. 369, 371; 160 N. E. 643. *State* v. *Brown,* 198 N. C. 41; 150 S. E. 635.

sance, the finding of not guilty on the possession count would be in principle and effect a special finding negativing that element of the offense charged. Cf. *People* v. *Piper,* 50 Mich. 390; 15 N. W. 523. In a civil case, if the inconsistency is between findings in a special verdict in respect of a controlling fact no judgment can be entered. As said by Chief Justice Ryan: "The verdict on a material point finds for each party, and against each party; being, in effect, equivalent to disagreement of the jury. The answer assumes to cut a single and indivisible truth in two. . . . No judgment can rest on such a verdict, and no court should receive it." *Carroll* v. *Bohan,* 43 Wis. 218, 220. *Hawes* v. *Chicago & N. W. R. Co.,* 41 Wis. 44, 51. *Davis* v. *Farmington,* 42 Wis. 425, 431. *German Ins. Co.* v. *Smelker,* 38 Kan. 285; 16 Pac. 735. Under the common law a jury may give a special verdict in a criminal case. 2 Hawkins P. C., 8th ed., c. 47, § 3. 4 Blackstone, pp. 360–361. *Commonwealth* v. *Call,* 21 Pick. 509, 514. *Commonwealth* v. *Eichelberger,* 119 Pa. St. 254, 263; 13 Atl. 422. *State* v. *Bray,* 89 N. C. 480. *People* v. *Piper, supra.* No judgment may be entered upon an uncertain special verdict. *People* v. *Olcott,* 2 Johns. 301, 311.

In criminal cases no form of verdict will be good which creates a repugnancy or absurdity in the conviction. 2 Bishop, New Criminal Procedure, 2d ed., § 1015a (5).

Where one by different counts is accused of two crimes which by reason of their nature cannot be committed by the same person, a verdict of guilty on both counts will be held so inconsistent with itself and so uncertain in law that no judgment can be entered thereon. Such verdicts are so meaningless as to be without force. *Regina* v. *Evans,* 7 Cox C. C. 151, 157. *Rosenthal* v. *United States,* 276 Fed. 714. *Commonwealth* v. *Haskins,* 128 Mass. 60. *Tobin* v. *People,* 104 Ill. 565. And see *Commonwealth* v. *Lowrey,* 158 Mass. 18, 20; 32 N. E. 940.

In *Regina* v. *Evans, supra,* one count accused the prisoner of stealing sheep. Another count charged him with having received them on the same day. There was a verdict amounting to a finding of guilty on each count. The Court of Queen's Bench held it inconsistent. The chief justice announcing the judgment said (p. 157): "This record must therefore be dealt with as if there had been a special verdict, on which the court should find matter which would not justify either an acquittal or conviction. The practice in such a case has been to award a *venire de novo.* The cases in Lord Raymond's reports, and the later cases, sanction such a course, and we cannot see any good grounds for distinguishing an uncertain general verdict, such as this, from an uncertain special verdict."

In *Rosenthal* v. *United States, supra,* three were indicted under the Act of February 13, 1913, 37 Stat. 670. One count accused them of having bought and received property that had been stolen from a car, then being a shipment in interstate commerce, knowing it to have been so stolen. The second count charged that at the same time and place they had that property in their possession under like circumstances and with like knowledge.

On the first count the jury found all not guilty. On the other count all were acquitted but one and he was found guilty. The evidence showed that the property had been stolen and disclosed only one transaction between the thieves and the defendant who was found guilty. The court said (p. 715): "By its verdict upon the first count of the indictment the jury found that the plaintiff in error neither bought nor received the cigarettes from them [the thieves] with knowledge of the theft, and by its verdict upon the second count that the plaintiff in error was at the same time and place in possession of the property with such guilty knowledge. The two findings were thus wholly inconsistent and conflicting. For this reason we feel obliged to reverse the judgment and remand the case for a new trial."

Upon the indictment of several for an offense that could not be committed without the participation of two or more of them a verdict of guilty against one and of not guilty for the others is deemed wholly repugnant and invalid. 1 Chitty, Criminal Law, 5th Am. ed., p. 640. On indictment of riot against three a verdict finding less than that number guilty is void; for more than two must riot. *Harison* v. *Errington,* Popham (2d ed.) 202. *Rex* v. *Heaps,* 2 Salk. 593. *The King* v. *Sudbury,* 12 Mod. 262. *Rex* v. *Scott,* 3 Burr. 1262, 1264. And on a charge of conspiracy against two, a verdict convicting only one is void. *United States* v. *Hamilton,* 26 Fed. Cas., pp. 90, 91; No. 15,288. *Feder* v. *United States,* 257 Fed. 694, 696. *People* v. *Olcott, supra,* 310–311. *Queen* v. *Manning,* 12 Q. B. D. 241, 245. *Queen* v. *Thompson,* 16 A. & E. 832, 844 *et seq.* And on the trial together of persons accused as principal and accessory, acquittal of the former renders a verdict against the latter bad because entirely inconsistent with the innocence of the person charged as the principal offender. 2 Coke's Inst. 184. Foster, p. 360. 1 Hale P. C. (1st. Am. ed.), p. 625. 2 Hawkins P. C., c. 29, § 47. *United States* v. *Crane,* 4 McLean 317, 319; Fed. Cas. No. 14,888. *Commonwealth* v. *Andrews,* 3 Mass. 126, 131.

One accused in different counts of an indictment of the same crime, there being no difference in the means alleged to have been employed, may not be adjudged guilty on a verdict of conviction on one count and of acquittal on the other. *Speiller* v. *United States,* 31 F. (2d) 682, 684. *State* v. *Akers,* 278 Mo. 368, 370; 213 S. W. 424. *State* v. *Headrick,* 179 Mo. 300, 307; 78 S. W. 630. Cf. *Commonwealth* v. *Edds,* 14 Gray 406, 410. *United States* v. *Malone,* 9 Fed. 897, 900.

Where there is a verdict of not guilty on one count and a verdict of guilt on another and the former necessarily determines that the evidence failed to establish a fact

which is an essential ingredient of the offense charged in the other count, then in determining whether the evidence was sufficient to sustain the finding of guilt the court must exclude from consideration the fact so found in favor of the accused. And so in every such case the question of law for the court always is whether, outside the fact eliminated by the verdict of not guilty, the evidence was sufficient to warrant the conviction. *Hohenadel Brewing Co.* v. *United States,* 295 Fed. 489. *Peru* v. *United States,* 4 F. (2d) 881. *Murphy* v. *United States,* 18 F. (2d) 509. *Boyle* v. *United States,* 22 F. (2d) 547. *Kuck* v. *State,* 149 Ga. 191, 193; 99 S. E. 622. And see *Baldini* v. *United States,* 286 Fed. 133.

Under an indictment by one count accusing eight persons of conspiracy to maintain a nuisance and alleging as an overt act the maintenance of that nuisance, and by another charging that they did knowingly maintain such nuisance, a verdict acquitting them of the conspiracy (i. e., the agreement to maintain) and convicting them of having knowingly maintained the identical nuisance specified in the conspiracy charge will not support a judgment of guilt. This for the reason that, by the verdict that all knowingly maintained the nuisance, the jury necessarily found that there was an agreement among them to maintain the nuisance. The court said: "It is unthinkable that eight men should for a period of time have knowingly maintained and operated the place where intoxicating liquor was sold and kept for sale, without some kind of an agreement among themselves." *Boyle* v. *United States, supra,* 548.

A brewing company indicted for violation of the National Prohibition Act was accused by the first count of unlawful manufacture at divers times between dates more than a year apart. By the five counts following it was accused of unlawful sales at different times; and, by the sev-

enth count it was accused of nuisance during that period in that it maintained a place where liquor was manufactured, kept and bartered. The jury found defendant not guilty under the first six counts, and guilty of nuisance under the seventh. The court held the facts alleged in the counts on which defendant was acquitted were to be deemed as non-existent and excluded from consideration in determining whether there was evidence to sustain the nuisance charged. Finding no evidence outside the facts so negatived, the court held conviction could not be sustained. *Hohenadel Brewing Co.* v. *United States, supra.*

The Government cites *Carrignan* v. *United States,* 290 Fed. 189; *Marshallo* v. *United States,* 298 Fed. 74; *Steckler* v. *United States,* 7 F. (2d) 59; and *Gozner* v. *United States,* 9 F. (2d) 603. And see *Seiden* v. *United States,* 16 F. (2d) 197.

In the *Carrignan* case defendant was accused in two counts of violation of liquor laws; the first count charged unlawful sale and the second maintenance of a nuisance. The opinion does not disclose details alleged. The jury acquitted on the sale charge and convicted of nuisance. The court distinguished the *Rosenthal* case, *supra,* and said (p. 190): "In the present case, plaintiff in error could have been convicted and sentenced upon both counts of the indictment. He could have been found guilty of either offense without having been guilty of the other." And it supported that statement by reference to the evidence. It is to be inferred from the opinion that the allegations in the nuisance count were not, as they are here, limited to the liquor bought by the government agent. No repugnancy as a matter of law was found or dealt with in the opinion, and there is nothing in recognition or support of the principle here contended for by the Government.

In the *Marshallo* case the indictment was in two counts for violation of liquor laws; the first was for nuisance and

the second for unlawful possession. The opinion does not show details alleged. Marshallo was shown to be owner and proprietor of the place. Government employees testified: The place was a soft drink parlor having a lunch bar and back room. Two witnesses went into the back room and ordered three drinks. Marshallo was behind the bar, bottles of liquor were passed from the cellar through a hole in the floor, three drinks were handed to the waiter, payment was made and rung up on a cash register. Immediate examination of the cellar disclosed a large quantity of liquor kept there. The jury found Marshallo guilty of nuisance, not guilty of possession. He insisted that the verdict of guilt of nuisance could not stand, because inconsistent with the acquittal of possession. The court held there was ample evidence of nuisance and sustained the verdict, citing the *Carrignan* case. The opinion does not suggest that, outside the possession so specifically found not proved, there was not ample evidence to establish defendant guilty of nuisance. The opinion shows no such conflict or repugnancy that if one finding were true the other necessarily must be false.

In the *Steckler* case—which the opinion of this court cites—a druggist with a permit to possess liquor for sale under prescribed regulations was indicted for violation of liquor laws in four counts; the first charged nuisance—the maintenance of a place where liquor was kept for sale in violation of the Act—the second unlawful possession, the third an unlawful sale on April 8, the fourth another unlawful sale on that day. The jury found him guilty of unlawful possession and acquitted him on the other counts. The court held *Marshallo* v. *United States* controlling and—it need not be considered whether justifiably—dealt with the case as if there were an irreconcilable conflict. It said (p. 60): "No doubt it has generally been assumed that, if a verdict was rationally inconsistent, the conviction ought not to stand, and probably that was

the common law, though it is hard to find a case squarely so holding." It concluded that the acquittal on the nuisance and sales counts was an "assumption of power which they [the jury] had no right to exercise but to which they were disposed through lenity," and so sustained the conviction.

In the *Gozner* case, the indictment charged violation of the liquor laws; the first count charged unlawful possession, the second unlawful possession of property for use in the manufacture of intoxicating liquor, the third manufacture and the fourth the maintenance of a nuisance. Gozner was acquitted on the first three and convicted of nuisance. The court held the findings of not guilty on the three counts did not have the force of res adjudicata precluding conviction on the other count. But it was not held or suggested that, excluding the facts necessarily found not proved under the first three counts, there was not evidence to warrant conviction of defendant for the maintenance of the nuisance. The reasoning of the court does not apply in this case. One of the judges in a dissenting opinion insisted that there was a legal inconsistency between the findings of not guilty in favor of Gozner on the three counts and his conviction on the fourth and maintained that, outside the facts necessarily negatived by the acquittals, there was no evidence to convict of nuisance.

I am of opinion that the authorities establish as well-settled: (1) that when, upon an indictment charging the same offense in different counts, the jury acquits as to one and convicts on the other, defendant is entitled to a new trial; and (2) that when different crimes are charged in separate counts and the jury acquits as to one and convicts on the other, the conviction will be sustained unless, excluding the facts which the jury in reaching its verdict of

acquittal necessarily found not proved, it must be held as a matter of law that there is not sufficient evidence to warrant the verdict of guilty; and, where the evidence outside the facts so conclusively negatived by the acquittal on one count is not sufficient to sustain guilt on the other count, defendant is entitled to a new trial.

The rule first stated is applicable here. Excluding the possession negatived by the finding under the second count, there is nothing of substance left in the first count; for its specifications were limited to the keeping for sale of the identical drinks alleged in the second count to have been unlawfully possessed. Moreover, even if it be thought that nuisance was sufficiently alleged in the first count, the unlawful possession of the six drinks was an essential ingredient of the offense alleged. The evidence having been found insufficient to establish such possession, it cannot be held adequate to warrant conviction under the first count. The finding of not guilty is a final determination that possession, the gravamen of both counts, was not proved.

The law does not permit investigations into the deliberations of juries for ascertainment as a matter of fact upon what considerations verdicts are reached; the soundness of that rule has never been questioned. There are stronger reasons against speculating whether, or assuming that, the jury through tenderness of disposition, mercy or forbearance acquitted while knowing that its duty was to convict the accused. Conflict between the findings may not be explained. The inference that the jury, seeking rightly to discharge its duty, made a mistake, is to be preferred over the suggestion that it found for defendant upon an assumption of power it might not lawfully exert.

I am of opinion that the verdict does not support the judgment.

BALTIMORE & PHILA. STEAMBOAT CO. ET AL. *v.* NORTON, DEPUTY COMMISSIONER, ET AL.

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

No. 185. Argued December 11, 1931.—Decided January 11, 1932.

1. Laws such as the Longshoremen's and Harbor Workers' Act, of March 4, 1927, which operate to relieve employees and their dependents of part of the burden resulting from injuries and deaths in employment, and to distribute it to the industries and mediately to those served by them, are in the public interest and should be construed liberally in furtherance of their purpose and, if possible, so as to avoid incongruous results. P. 414.
2. It is clear, when the related parts of § 8 of the Act are considered together, that Congress intended to distinguish between temporary total disability (b), permanent partial disability due to the total loss of the use of a member (c) (1), and permanent partial disability due to the partial loss of such use (c) (18) (19), and that its purpose was to require payments on account of the loss of earning capacity resulting from each. P. 415.
3. The language of (22) when taken in context and construed in harmony with the purpose of the Act, means that the full rate shall be allowed for the duration of the "healing time" and that the proportionate rate shall apply to the rest of the established compensation period. *Id.*
4. A longshoreman, while working on a vessel in navigable waters of the United States, suffered an injury to his arm resulting in his temporary total disability for 34 weeks, and permanent partial disability amounting to 40% of the use of the arm. *Held:*

   (1) That the full period for compensation is 314 weeks, made up by adding to the period of 312 weeks specified in paragraphs (c) (1) (18) the two weeks by which the temporary total disability exceeded the period of 32 weeks ("healing time") fixed in the schedule of paragraph (22).

   (2) The full rate of 66⅔% of the average weekly wages should be allowed for 32 weeks only, on account of the temporary permanent disability, and the proportionate rate (40% of the full rate) should be allowed for 282 weeks (the remainder of the full compensation period) on account of the permanent partial disability.

48 F. (2d) 57, modified and affirmed.

CERTIORARI, *post*, p. 602, to review a judgment affirming the dismissal of a suit to set aside an award of compensation under the Longshoremen's & Harbor Workers' Compensation Act. For the opinion of the District Court see 40 F. (2d) 530.

Messrs. Ira A. Campbell and *Edwin A. Swingle,* with whom *Messrs. Cletus Keating, Vernon S. Jones,* and *Raymond Parmer* were on the brief, for petitioners.

Solicitor General Thacher and *Messrs. Claude R. Branch, J. Frank Staley, C. M. Hester,* and *Wm. H. Riley, Jr.,* filed a memorandum on behalf of respondent Norton, disclaiming any interest in the case on the part of the Government.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This is a suit in equity brought by petitioners in the District Court for the Eastern District of Pennsylvania to set aside as not in accordance with law an order of the deputy commissioner awarding compensation to Gube under the Longshoremen's and Harbor Workers' Act of March 4, 1927, 44 Stat. 1427, 33 U. S. C., § 900 *et seq.* The District Court dismissed the cause, 40 F. (2d) 530, and the Circuit Court of Appeals affirmed. 48 F. (2d) 57.

February 17, 1928, Gube, while engaged in work for the steamboat company as a longshoreman upon a vessel in the navigable waters of the United States, suffered an injury to his left arm. He filed with the deputy commissioner a claim against the employer and insurer for compensation in accordance with the Act. The deputy commissioner found that claimant's average weekly wage amounted to $36.06; that as a result of the injury he suffered total disability for 34 weeks following and permanent partial impairment, amounting to 40 per cent. of the use of his arm, and awarded compensation at the weekly rate of $24.04 for 146 weeks, amounting in all to $3,509.84.

Petitioners maintain that the award should be the full rate for 40 per cent. of 314, being 125.6 weeks, and that the amount allowed below is excessive by 20.4 weeks or $490.42. We are called on to determine, on the basis of the facts found, what amount the Act requires the employer to pay claimant. No other question is presented.

The pertinent provisions follow:

"Sec. 8. Compensation for disability shall be paid to the employee as follows: . . .

"(a) In case of total disability adjudged to be permanent 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. . . .

"(b) In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

"(c) In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, and shall be paid to the employee as follows:

"(1) Arm lost, three hundred and twelve weeks' compensation. . . .

"(18) Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

"(19) Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member. . . .

"(22) In case of temporary total disability and permanent partial disability, both resulting from the same injury, if the temporary total disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation period provided in subdivision (c) of this section: Arm, thirty-two weeks; . . .

"In any case resulting in loss or partial loss of use of arm . . . where the temporary total disability does not extend beyond the periods above mentioned for such injury, compensation shall be limited to the schedule contained in subdivision (c). . . ."

The award is based on a construction of the section in substance as follows: Subdivision (b) allows compensation for temporary total disability during its continuance at the rate of two-thirds of the average weekly wage. Subdivision (c) allows for permanent partial loss of use of an arm compensation for 314 weeks at a rate that is the same proportion of two-thirds of the weekly wage as such partial disability is of the total use. (1), (18), (19), (22). Temporary total disability and permanent partial disability resulted from the same injury. The former continued 34 weeks, being two weeks in excess of the healing period allowed by c (22). The computation was: $\$36.06 \times \frac{2}{3} = \$24.04 \times 34 = \$817.36$ for temporary total disability of claimant. $312 + 2 = 314 - 34 = 280 \times \$24.04 \times .40 = \$2,692.48$ for permanent partial disability of his arm.

The allowance for temporary total disability was for its duration, 34 weeks. That is not authorized. The period of allowance is definitely limited to 32 weeks, and the statute expressly authorizes enlargement of the specified compensation period, 312 weeks, by the excess of actual temporary total disability over the time limited for healing, and so here the added two weeks take the proportionate rate. (c) (1) (22).

The deputy commissioner did not apply the proportionate rate, $9.616, to the 280 weeks remaining but added to the 34 weeks 40 per cent. of 280 (being 112) and applied the full rate for 146 weeks. The total of the payments is the same in either case. The computation employed shortens the statutory period and correspondingly increases the weekly payments. Petitioners raise no question as to that feature of the award, and therefore

we need not consider whether it is consonant with the Act.

In support of their computation, petitioners call attention to the second paragraph of (c) (22), that in any case resulting in the loss or partial loss of the use of an arm, or other specified member, where the temporary total disability does not extend beyond the periods for which payments are required, compensation shall be limited to the schedule, (1) to (13), contained in subdivision (c). And they contend that if claimant had not been totally disabled for more than 32 weeks he would not have been entitled to any allowance at the full rate on account of the temporary total disability but only to the proportionate rate for the entire period, or, according to the method of computation adopted, the full rate for the proportionate number of weeks. And they argue that it is inconsistent to hold that, merely because total disability continued two weeks in excess of the prescribed healing period, claimant was entitled to an allowance at the full rate for the period of total disability.

Petitioners' construction would produce incongruous results in many cases. Indeed a decision cited by them, *Texas Employers' Ins. Assn.* v. *Sheppeard,* 32 F. (2d) 300, concretely illustrates such a result. On that basis, whenever the temporary total disability of an arm continued during the full time allowed for healing and the subsequent permanent partial loss of its use was not more than ten per cent., the injured employee would receive less than if he had suffered only the temporary total disability. Thus petitioners' construction would deny any allowance for the permanent injury. If in this case claimant's permanent partial loss of use of his arm had not been more than ten per cent., petitioners' calculation would give him compensation for only 31.4 weeks whereas without any permanent disability he would be paid for 32 weeks. Similar inconsistencies would arise where an injury of any

member listed in the schedule contained in subdivision (c) resulted in temporary total disability followed by relatively small permanent partial loss of its use. It may not reasonably be assumed that Congress intended to require payment of more compensation for a lesser disability than for a greater one including the lesser. Nothing less than compelling language would justify such a construction of the Act.

Petitioners also cite *Marhoffer* v. *Marhoffer,* 220 N. Y. 543; 116 N. E. 379, reversing 175 App. Div. 52; 161 N. Y. S. 527. That case arose under the state workmen's compensation law. Claimant suffered an injury to his hand including lacerations of his thumb and index and loss of the middle finger. The statute limited the temporary total to 12 and the permanent partial disability allowance to 30 weeks. It required the payment of the full rate of two-thirds of the weekly wage on account of the total disability and the same rate during the compensation period established for the loss of a finger. The commission found total disability continued ten weeks and, as the statute provided, excluded the first two and allowed the full rate for eight weeks; it also allowed the full rate for the permanent partial disability for 30 weeks, to commence at the expiration of the eight weeks period, and so the full rate was allowed for 38 weeks. The appellate division sustained the award but that judgment was reversed. The Court of Appeals held it error to make consecutive allowances, first for the temporary total disability and second on account of the loss of the finger for the full period, and directed that the claim for the first be dismissed. Obviously the loss of the finger together with the other lacerations caused temporary total disability. That period was attributable to the injury as a whole and not exclusively to the lacerations. And while the total disability continued it necessarily included the impairment of use that was permanently to remain. That case is not

in point. There the controversy concerned the period for which payments were required to be made. Here the question is not whether the healing period shall be added to that allowed on account of partial permanent disability, but it is whether the full rate shall be allowed for the period of total disability up to the specified limit of 32 weeks.

The measure before us, like recent similar legislation in many States, requires employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work, whether with or without fault attributable to employers. Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. They are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results. *Jamison* v. *Encarnacion,* 281 U. S. 635, 640.

Section 8 establishes the rule that the full rate shall apply during continuance of total disability whether permanent or temporary, (a) and (b), and during the specified compensation period for partial permanent disability due to loss of a listed member, (c) (1) to (13) inclusive, and it specifically provides: "Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member." The provisions of (c) (22) have no bearing on the question whether the full rate or a proportionate one shall be allowed. They relate to the periods during which payments are to be made when temporary total disability and permanent partial disability result from the same injury, and establish the rule that, if temporary total disability continues for more than the prescribed healing period, the excess shall be added to the total compensation period

specified in the schedule in subdivision (c), and that if actual duration of the temporary total disability does not exceed such healing time then the applicable period specified in such schedule shall not be increased.

It is clear, when the related parts of § 8 are considered together, that Congress intended to distinguish between temporary total disability (b), permanent partial disability due to the total loss of the use of a member (c) (1), and permanent partial disability due to the partial loss of such use (c) (18) (19), and that its purpose was to require payments on account of the loss of earning capacity resulting from each. The language of (22) on which petitioners rely, when taken in context and construed in harmony with the purpose of the Act, means that the full rate shall be allowed for the duration of the healing time and that the proportionate rate shall apply to the balance of the established compensation period.

The decree will be modified so as to allow the full rate of $24.04 for only 32 weeks and proportionate compensation of 40 per cent. for 282 weeks.

Modified and affirmed as modified.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. *v.* BEZUE.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 263. Argued January 7, 1932.—Decided January 25, 1932.

1. A case is not within the Federal Employers' Liability Act unless the employee at the time of his injury was engaged in interstate transportation or in work so closely related thereto as to be practically a part of it. *Shanks* v. *Delaware, L. & W. R. Co.*, 239 U. S. 556; *Chicago & E. I. R. Co.* v. *Industrial Comm., ante*, p. 296. P. 420.
2. Whether repair work on a locomotive comes within this definition must be determined, not by reference to the kind of plant in which it was done, nor by the kind of labor usually performed by the

employee, but by whether the locomotive at the time of the accident was in service in interstate transportation, or had been taken out of it. P. 420.

3. The fact that the facilities of the yards where the employee was at work at the time of the injury were used largely for servicing and repairing locomotives engaged in interstate commerce, and that he was engaged in a "plant service," is not sufficient to bring him within the Act. Pp. 419, 420.
4. A practice of the railroad company to send its locomotives to another shop for so-called out-of-service repairs and to use the shop in which the injury occurred for monthly boiler washings and incidental repairs can not overcome facts showing that the locomotive in question was out of service at the time of the injury. Pp. 420, 421.
5. The employee, when injured, was engaged in a terminal plant, moving a pair of main driving wheels from a shop where they had been repaired to a roundhouse where they were to be replaced under a locomotive. The locomotive was one used for interstate transportation, which for nine days had been undergoing repairs in connection with a boiler wash and was inert and partly dismantled. *Held* not within the Act.

256 N. Y. 427, reversed.

CERTIORARI, *post*, p. 604, to review a judgment of the Supreme Court of New York, entered on remittitur from the Court of Appeals, which affirmed a judgment of the Appellate Division, in an action in damages for personal injuries under the Federal Employers' Liability Act.

Mr. Edward R. Brumley, with whom *Mr. John M. Gibbons* was on the brief, for petitioner.

Mr. Thomas J. O'Neill, with whom *Mr. Charles D. Lewis* was on the brief, for respondent.

Respondent at the time of his injury was an essential employee in an interstate transportation service plant, and then and at all times was engaged in servicing and maintaining interstate locomotives. Therefore his work was an essential part of interstate transportation. *Shanks* v. *Delaware, L. & W. R. Co.*, 239 U. S. 556; *Chicago &*

N. W. Ry. Co. v. *Bolle,* 284 U. S. 74; *New York Cent. R. Co.* v. *Marcone,* 281 U. S. 345; *Illonardo* v. *Erie R. Co.,* 103 N. J. L. 4; *Salvo* v. *New York Cent. R. Co.,* 216 App. Div. 592; *Erie R. Co.* v. *Collins,* 253 U. S. 77; *St. Louis R. Co.* v. *Seale,* 229 U. S. 156; *Erie R. Co.* v. *Winfield,* 244 U. S. 170; *Knowles* v. *New York, N. H. & H. R. Co.,* 223 N. Y. 513.

At the time of his injury he was working on an interstate transportation instrumentality not withdrawn from service, and therefore the Federal Act applies. *Lusk* v. *Bandy,* 76 Okla. 108; *Industrial Comm.* v. *Davis,* 259 U. S. 188; *Oglesby* v. *St. Louis, S. F. R. Co.,* 318 Mo. 79; 277 U. S. 587; *Minneapolis & St. L. R. Co.* v. *Winters,* 242 U. S. 353; *Davis* v. *Akins,* 109 Kan. 474; certiorari denied, 257 U. S. 658.

Mr. Justice Roberts delivered the opinion of the Court.

The respondent was injured while in the employ of petitioner, an interstate carrier. He brought suit under the Federal Employers' Liability Act in the Supreme Court of New York and recovered a judgment which was affirmed by the Appellate Division and the Court of Appeals.[1] Petitioner urges that at the time of respondent's injury his work was not in interstate commerce within the intendment of the statute.

At Maybrook, New York, the westerly terminus of a branch of the railroad, petitioner maintains a roundhouse, a machine shop, a carpenter shop, and a so-called hoist building containing four tracks with two pits, a hoist of large capacity for raising engines, a lathe for repairing driving wheels, apparatus for electric welding, tool room, and electrical shop. These facilities are used largely for

[1] 232 N. Y. App. Div. 840, 248 N. Y. S. 926; 256 N. Y. 427, 176 N. E. 828.

servicing and repairing locomotives engaged in interstate transportation. The respondent had been employed at this terminal for about a year, at first as an engine wiper; later, and at the time of the accident, as a member of a general unskilled labor gang. His principal work was the operation of an electric truck with which he transported materials from one portion of the plant to another. By means of this truck, and sometimes without it, he was accustomed to assist in various minor repairs to locomotives brought into the terminal, such as lifting driving rods, pumps, journal boxes, draw bars, assisting in greasing, or greasing, engines, and other work of a similar nature. On the morning of September 2, 1929, he was not using the truck, but pursuant to an order of the foreman of the gang joined other workmen in removing a pair of main driving wheels from a lathe in the hoist building and rolling them along the tracks in the yard to an engine pit where they were to be installed in a locomotive which had arrived at the terminal August 23, and had been set aside for the customary boiler-wash given all engines every thirty days. Preparatory to the boiler-wash an inspection was made and orders were issued for certain work, which included the removal of the main driving wheels and shifting them to the hoist shop so that the journal might be turned, the transfer of several parts to the machine shop, the separation of the jacket from the fire-box, the replacement of some four hundred seventeen leaking bolts, the renewal of bushings, and other items requiring skilled labor. The fire was dumped, the main driving wheels and other portions needing attention were removed, and the engine was left inert and incapable of locomotion.

The boiler-wash and repairs consumed twelve days. On the ninth day, the turning of the journal on the main drivers having been completed, the respondent, on orders of his foreman, joined others of the unskilled labor gang

in removing the main driving wheels from the lathe in the hoist shop, placing them upon a track, and pushing them by hand to the turntable, which was then connected with another track onto which the men pushed the wheels preparatory to moving them to a pit in the roundhouse where they could be placed under the locomotive. During this work respondent was injured, as has been found, by the negligence of the foreman in removing a block from under the wheels.

The state court held that the terminal facilities in which respondent worked constitute a part of the railroad's system necessary to the operation of the road and to the conduct of interstate commerce; that the fact that some work is there done on locomotives engaged in intrastate commerce does not deprive the establishment of its character as an essential instrumentality of interstate commerce; that the respondent was engaged in a "plant service," and worked indiscriminately upon engines engaged in interstate and intrastate commerce. The conclusion was that the nature and purpose of the plant warranted characterization of all respondent's work, of whatever nature, as in interstate commerce.

The test thus applied is broader than our decisions justify. All work performed in railroad employment may, in a sense, be said to be necessary to the operation of the road. The business could not be conducted without repair shop employees, clerks, janitors, mechanics, and those who operate all manner of appliances not directly or intimately concerned with interstate transportation as such, or with facilities actually used therein. But we have held that the mere fact of employment does not bring such employees within the Act. *Delaware, L. & W. R. Co.* v. *Yurkonis,* 238 U. S. 439; *Chicago, B. & Q. R. Co.* v. *Harrington,* 241 U. S. 177; *Illinois Central R. Co.* v. *Cousins,* 241 U. S. 641; *New York Central R. Co.* v. *White,* 243 U. S. 188, 192; *Industrial Accident Comm.* v.

Davis, 259 U. S. 182, 187; *Chicago & N. W. Ry. Co.* v. *Bolle, ante,* p. 74.

The criterion of applicability of the statute is the employee's occupation at the time of his injury in interstate transportation or work so closely related thereto as to be practically a part of it. *Shanks* v. *Delaware, L. & W. R. Co.,* 239 U. S. 556, 558; *Chicago & E. I. R. Co.* v. *Industrial Comm., ante,* p. 296. Under the circumstances of this case, whether respondent is within the Act must be decided not by reference to the kind of plant in which he worked, or the character of labor he usually performed, but by determining whether the locomotive in question was, at the time of the accident, in use in interstate transportation or had been taken out of it. The length of the period during which the locomotive was withdrawn from service and the extent of the repairs bring the case within the principle announced in *Industrial Accident Comm.* v. *Davis, supra,* and *Minneapolis & St. Louis R. Co.* v. *Winters,* 242 U. S. 353, stamp the engine as no longer an instrumentality of or intimately connected with interstate activity, and distinguish such cases as *New York Cent. R. Co.* v. *Marcone,* 281 U. S. 345, where the injured employee was oiling a locomotive which had shortly before entered the roundhouse after completing an interstate run.

Respondent endeavors to support the claim that here the instrumentality had not been taken out of interstate commerce, by reference to the practice of petitioner, which is that work, sometimes greater and often less in amount than in this case, is done at Maybrook in connection with the monthly boiler-wash; whereas after a locomotive has run thirty-five thousand miles, or eighteen months, it is marked for out-of-service repairs and is sent to petitioner's general repair shop at Readville, Massachusetts. The argument is that the railroad company thus recognizes that such work as is done at Maybrook in conjunction with boiler-washing is incidental and does not take the engine out of service.

We do not think this custom warrants a disregard of the proved facts, and the adoption of an artificial classification of the locomotive as one in service at the time of respondent's injury. The judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

BLACKMER *v.* UNITED STATES.

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

Nos. 200 and 201. Argued January 5, 6, 1932.—Decided February 15, 1932.

1. A citizen of the United States residing in a foreign country continues to owe allegiance to the United States and is bound by its laws made applicable to his situation. P. 436.
2. The power to require the return of absent citizens in the public interest is inherent in sovereignty; and what in England was the sovereign prerogative in this respect, pertains, under our constitutional system, to the national authority, exercisable by Congress, to prescribe the duties of the citizens of the United States. P. 437.
3. One of the duties of such absent citizens to the United States is that of attending its courts to give testimony when properly summoned; and Congress may provide for the performance of this duty and prescribe penalties for disobedience. P. 438.
4. Questions of authority in such cases are not questions of international law, but of municipal law. P. 437.
5. The Act of July 3, 1926, provides that when the testimony of a citizen of the United States residing in a foreign country is needed by the Government in a criminal case, the court in which the case is pending may issue a subpœna to be served upon him personally by an American consul with a tender of money to cover his necessary expenses of travel to and from, and attendance upon, the court; that if he refuse or neglect to appear as directed by the subpœna, the same court, upon proof of service and default, may issue its order directing him to appear before it at a designated time to show cause why he should not be adjudged guilty of con-

tempt and be punished; that this order may direct that property of the witness in the United States be seized and held to satisfy any judgment that may be rendered in the contempt proceeding; that after such seizure the order to show cause and for sequestration shall be served on the witness personally by such consul and shall be published in some newspaper of general circulation in the district where the court sits; and that on the return day of the order, or later, proof shall be taken, and if the charge of recusancy shall be sustained, the court shall adjudge the witness guilty of contempt and impose upon him a fine not exceeding $100,000, which, with the costs, may be satisfied by sale of the property levied upon, to be conducted upon notice and in the manner provided for sales upon execution. In contempt proceedings for failure to obey subpœnas, *held:*

(1) The absent witness is bound with notice of the statute. P. 438.

(2) The method provided by the Act for acquiring judicial jurisdiction to render a personal judgment includes due notice and opportunity to be heard and satisfies the due process clause of the Fifth Amendment. Pp. 438, 439.

(3) Service of the subpœna in a foreign country invades no right of the foreign government, and the citizen has no standing to invoke such supposed right. P. 439.

(4) The function of a consul in serving the subpœna and the order to show cause, is merely that of an agent of the Government for conveying actual notice to one of its citizens; it need not be sanctioned by a treaty. Pp. 439, 440.

(5) In criminal contempt proceedings, due process does not require that the respondent be present at the hearing and adjudication if he was duly notified and had adequate opportunity to appear and be heard. P. 440.

(6) The contempt proceeding being valid, the provisional remedy of seizing and applying property to secure payment of the penalty is also constitutional. P. 441.

(7) The fact that enforcement of the penalty may depend on seizure of property does not imply unconstitutional discrimination between those contumacious absentee witnesses who have property in this country and those who have not. *Id.*

(8) A provisional or final levy on property, as provided in the statute, to satisfy liability of the owner, is not an unreasonable search and seizure. *Id.*

(9) The question whether the statute grants the right to subpœna foreign residents in criminal cases to the Government only, and thereby violates the provision of the Sixth Amendment guaranteeing accused persons compulsory process for witnesses, will not be considered at the instance of a recalcitrant witness. P. 442.

(10) Where the subpœna served was issued at the request of the Government upon a statement as to the materiality and importance of the expected testimony sufficient to give the court jurisdiction to issue it, it binds the witness unless set aside upon proper petition, and the question whether the showing was otherwise sufficient can not be raised in defense against proceedings to punish his disobedience as contempt. *Id.*

(11) It is not necessary that the subpœna issued under the statute show on its face that it was so issued. *Id.*

(12) Where a witness has been served with subpœna, under the statute, and has defaulted, service of an order directing him to show cause, at a time and place stated, why he should not be adjudged guilty of contempt, and providing for seizure of his property to be held to satisfy any judgment that may be rendered against him in the proceeding, affords notice sufficient to inform him of the character of the charge and of the hearing at which he will have opportunity to present his defense. P. 443.

(13) Where two subpœnas are issued for appearances at different times, a seizure of property in connection with the first is not vacated by the seizure of the same property in connection with the second. *Id.*

(14) A witness subpœnaed to attend on a day named, and not to depart the court without leave of the court or the district attorney, can not excuse his refusal to come upon the ground that the trial did not begin on the day specified in the writ but on a later day to which the case was continued. *Id.*

60 App. D. C. 141; 49 F. (2d) 523, affirmed.

CERTIORARI * to review decrees sustaining fines imposed on the petitioner Blackmer as punishment for contemptuous disobedience of two subpœnas in a criminal case. The judgments provided that the fines be satisfied out of property seized after the subpœnas were served.

* See table of cases reported in this volume.

Messrs. George Gordon Battle and *Karl C. Schuyler,* with whom *Messrs. Eugene D. Millikin, Frederick DeC. Faust,* and *Charles F. Wilson* were on the brief, for petitioner.

The laws of Congress cannot outreach the Constitution, *Hodgson* v. *Bowerbank,* 5 Cranch 303; *Downes* v. *Bidwell,* 182 U. S. 244; *Dorr* v. *United States,* 195 U. S. 138. This nation is an equal sovereignty, which, in the absence of treaty, can not exercise power extraterritorially. *The Exchange* v. *McFaddon,* 7 Cranch 116; Cooley's Const. Lim., 8th ed., vol. 1, pp. 3, 4.

The prohibition against extraterritorial exercise of judicial power applies to the States of the United States, whether the attempt be against a citizen of the State or an absent nonresident. *McDonald* v. *Mabee,* 243 U. S. 90; *Cooper* v. *Reynolds,* 10 Wall. 308, reaffirmed in *Pennoyer* v. *Neff,* 95 U. S. 714; *Galpin* v. *Page,* 18 Wall. 350; *Minder* v. *Georgia,* 183 U. S. 559; *Harkness* v. *Hyde,* 98 U. S. 476; *Wilson* v. *Seligman,* 144 U. S. 41; *Bischoff* v. *Wethered,* 9 Wall. 812; *Roller* v. *Holly,* 176 U. S. 398; *Freeman* v. *Alderson,* 119 U. S. 185; *Overby* v. *Gordon,* 177 U. S. 214; *Brown* v. *Fletcher's Estate,* 210 U. S. 82; *Michigan Trust Co.* v. *Ferry,* 228 U. S. 346; *Baker* v. *Baker,* 242 U. S. 394.

The prohibition applies to our federal courts in favor of absent citizens of the United States, whether abroad or absent from a particular district. *Toland* v. *Sprague,* 12 Pet. 300; *Picquet* v. *Swan,* 5 Mason 35; *Robertson* v. *Labor Board,* 268 U. S. 619. It is applied by this nation to other nations attempting, in the absence of treaty, to exercise judicial power here over their own citizens. *Glass* v. *The Betsey,* 3 Dall. 6. It applies to the Government as well as to private suitors. *Robertson* v. *Labor Board,* 268 U. S. 619, 623.

Jurisdiction *in personam* is " acquired " either by voluntary appearance or by service on the person within the territorial jurisdiction of the court. [Citing many cases.] It follows that the extraterritorial service is invalid and violates due process. *Pennoyer* v. *Neff,* 95 U. S. 714. The subpœna being invalid, the court was without jurisdiction and the order punishing for contempt was void. *Ex parte Fiske,* 113 U. S. 713. See also *United States* v. *Shipp,* 203 U. S. 563; *Ex parte Rowland,* 104 U. S. 604; *In re Sawyer,* 124 U. S. 200.

Allegiance as a doctrine to destroy territorial limits on the exercise of power, was repudiated by this Court. *McDonald* v. *Mabee,* 243 U. S. 90. Cf. *Michigan Trust Co.* v. *Ferry,* 228 U. S. 346; *Ex parte Indiana Transportation Co.,* 244 U. S. 456. *United States* v. *Bowman,* 260 U. S. 94; *United States* v. *Bennett,* 232 U. S. 299, and *Cook* v. *Tait,* 265 U. S. 47, dealt with laws that did not pretend to authorize the exercise of extraterritorial power by our Government.

The ancient power of the English Crown to recall subjects is not important here, for the reason that, at and before the time of the first Judiciary Act, under American common law, jurisdiction *in personam* could be acquired only by appearance or by service at a place where the serving officer had authority to execute a summons. *Robertson* v. *Labor Board,* 268 U. S. 619. The right to recall is an executive or legislative function; it has never been claimed as a judicial right, and hence Congress could not confer it upon the federal judiciary. The Crown procedure in the ancient English cases,—indeed, the procedure in the case at bar,—savors of outlawry. The English common law doctrine of outlawry, and that of the continental systems as to " civil death," violate the fundamental rights of the citizen. *Hovey* v. *Elliott,* 167 U. S. 409, 444.

Congress has no power to authorize United States consuls to serve subpœnas and orders to show cause. *In re Ross,* 140 U. S. 453, 462; *Dainese* v. *Hale,* 91 U. S. 13.

Under international law consuls have no power except that conferred by treaty. A nation can not send its officers into other countries even to "round up" absent citizens for return to war service. *Crapo* v. *Kelly,* 16 Wall. 610.

The Act does not provide a valid method of acquiring judicial jurisdiction to render personal judgment against defendant and judgment against his property. Jurisdiction to punish is sought to be acquired by *quasi in rem* procedure. The action is in fact *in personam.* The charge is "recusancy"; the issue, therefore, is whether defendant is guilty or not guilty of "recusancy"; the trial is exclusively confined to that issue; the judgment is guilty or not guilty of contempt, with fine, if guilty, to be satisfied, if not paid, out of defendant's attached property. It is a personal criminal offense—criminal contempt of court. *Michaelson* v. *United States,* 262 U. S. 42, 66, 67. There is no charge, issue, trial or judgment as to "offending property." It is not until after the trial has been completed, and until after the personal judgment has been decreed, that the fine is ordered satisfied out of the attached property.

Quasi in rem methods of acquiring jurisdiction *in personam* violate due process. *Pennoyer* v. *Neff,* 95 U. S. 714. No part of the judgment resulting from *quasi in rem* procedure may stand as an unsatisfied judgment *in personam* against defendant.

In federal courts attachment is but an incident to a suit, and unless the court acquires jurisdiction over the person of the defendant by appearance or service of process within the court's territorial jurisdiction, the attachment must fall. *Toland* v. *Sprague,* 12 Pet. 300, 329;

Picquet v. *Swan,* 5 Mason 35; *Big Vein Coal Co.* v. *Read,* 229 U. S. 31; *Laborde* v. *Ubarri,* 214 U. S. 173.

If there is no jurisdiction to render the personal judgment of guilty of contempt, it follows that there is no jurisdiction to sequester or sell the property, for those steps are entirely dependent upon the right to proceed to judgment on the issue of " recusancy."

The Act does not require actual, or any other, notice to defendant of the offense, or of the Government's claim against his property; hence it violates due process.

The search and seizure of property authorized by the Act is unreasonable and in violation of the Fourth Amendment.

The provisions for hearing and judgment in the entire absence of the accused and without his consent, violate due process.

Criminal contempt of court is a criminal offense. *Ex parte Grossman,* 267 U. S. 87; *Michaelson* v. *United States,* 266 U. S. 42, 66–67. At some stage, the court must have jurisdiction *in personam. Ex parte Terry,* 128 U. S. 289.

But the Act authorizes punitive procedure against defendants who were beyond the jurisdiction of the United States when the alleged offense was committed; who were not subsequently attached, or served with summons, within the United States; who have never appeared in the court room; who have never pleaded to the charge, nor consented to proceedings in their absence; who have never received notice of an offense.

By excluding defendants in criminal prosecutions from the right to extraterritorial subpœnas, the Act violates the Sixth Amendment.

The Act is arbitrary, capricious and unreasonable. It makes the ownership of " non-offending " property a condition precedent to judgment of guilt of crime. It can

have no purpose, aside from its special motive, other than to secure testimony which the poor may have to give as well as the rich. But it does not apply to rich and poor alike.

The attachment is made despite the fact that under the Act the property can not be "offending"; it is made prior to trial and therefore prior to the time when the fine can possibly be estimated, unless we assume that the court may act on hearsay, or on preconceived notions, or on *ex parte* advice.

In view of the presumption of innocence, the possibility of proved innocence, of highly mitigatory defense, of guilt without mitigation, there can not possibly be a reasonable relationship between the authorized unlimited attachment and the result of the trial.

The procedure against petitioner violates due process under the Fifth Amendment in each of the following respects: (a) The subpœnas, not having issued upon proper showing, were invalid, and therefore all subsequent proceedings were invalid; (b) the omission from the subpœnas (not otherwise supplied) of notice that they issued under the Act, deprived them of compulsory effect, and, therefore, deprived the court below of jurisdiction to punish failure to obey; (c) petitioner did not receive notice of any offense or of facts constituting the Government's claim against his property; (d) levy and seizure of petitioner's property in the first case was abandoned by the Government, and, therefore, jurisdiction of his person and property was abandoned, and all proceedings in that case subsequent to issuance of the order to show cause are null; (e) petitioner was not subpœnaed to attend the trial court on April 9, 1928, and hence all proceedings in the second case arising out of his failure to appear on that date are null.

Mr. Atlee Pomerene, with whom *Messrs. Leo A. Rover,* United States Attorney for the District of Columbia, and *Frank Harrison* were on the brief, for the United States.

Every citizen owes the duty of allegiance to the United States. *Carlisle* v. *United States,* 16 Wall. 147; *Minor* v. *Happersett,* 21 Wall. 162; *Luria* v. *United States,* 231 U. S. 9; Miller, Const., pp. 294, 295.

The United States has extraterritorial jurisdiction over its citizens. *Rose* v. *Himely,* 4 Cranch 241; *The Apollon,* 9 Wheat. 362; *The Resolution,* 2 Dall. 1; Willoughby, Const., pp. 247, 248, §§ 120, 121; Moore, Int. L. Dig., vol. II, pp. 255, 256; Hyde, Int. Law, vol. I, p. 424; Columbia L. Rev., vol. 27, p. 204; *Cook* v. *Tait,* 265 U. S. 47; *United States* v. *Bennett,* 232 U. S. 299; *United States* v. *Bowman,* 260 U. S. 94.

Independent nations generally have the right to recall their citizens. The United States is not less favored. *Everard's Breweries* v. *Day,* 265 U. S. 545, 558–559; *McGrain* v. *Daugherty,* 273 U. S. 135.

The recall of a citizen to bear arms is appropriate to carrying into execution the power of the Congress to raise and support armies. Likewise, the recall of a citizen for the purpose of giving testimony in a case pending in court, is appropriate to the power of the Congress to constitute tribunals inferior to the Supreme Court.

The power to recall citizens was recognized by the framers of our Constitution as inhering in the legislative branch. Jefferson's draft for Va. Const., quoted by McReynolds, J., (diss.) in *Myers* v. *United States,* 272 U. S. 52, at p. 235; Federalist, No. xlviii.

Congress can delegate this power to the judiciary. *Field* v. *Clark,* 143 U. S. 649, 694; *Ex parte Bakelite Corp.,* 279 U. S. 438; *In re Chapman,* 166 U. S. 661.

The duty of allegiance is a sufficient basis for jurisdiction *in personam*. *Lauria* v. *United States,* 231 U. S. 9; *United States* v. *Knight,* 291 Fed. 129, 131, affirmed, 299 Fed. 571; *Thompson* v. *Thompson,* 226 U. S. 551, 562; Beale, Conflict of Laws, in proposed final draft No. 1, Am. L. Inst., § 82; 27 Harv. L. Rev., pp. 464 to 466; 41 *id.,* p. 1067; 30 Mich. L. Rev, pp. 137 to 142, and many other cases and text books.

The notice of recall necessary to due process as a prerequisite to punishment for disobedience may be served abroad. *Bartue and Duchess of Suffolk,* 2 Dyer's Rep. 176b; 73 Eng. Rep. 388; *Knowles* v. *Luce,* Moore 109; 72 Eng. Rep. 473; *Perez* v. *Fernandez,* 220 U. S. 224; *Mellen* v. *Malleable Iron Wks.,* 131 U. S. 352; *Luria* v. *United States,* 231 U. S. 9; *Douglas* v. *Forrest,* 4 Bing. 686; *Cowan* v. *Braidwood,* 9 Dow. P. C. 26, 33–7; *General Steam Nav. Co.* v. *Guillou,* 11 M. & W. 877, 894. Distinguishing *McDonald* v. *Mabee,* 243 U. S. 90.

Substituted service by leaving summons at last place of abode is sufficient for a judgment *in personam* against an absent citizen. *McDonald* v. *Mabee,* 243 U. S. 90; s. c., 107 Tex. 139, 173, 174; *Langdon* v. *Doud,* 88 Mass. 423, 435; *Henderson* v. *Staniford,* 105 Mass. 504, 505; *Nichols* v. *Vaughan,* 217 Mass. 548; *Hess* v. *Pawloski,* 274 U. S. 352, 355; *Wuchter* v. *Pizzutti,* 276 U. S. 13; *Gilbert* v. *Burnstine,* 255 N. Y. 348. Citizenship supports jurisdiction *in personam* upon extraterritorial personal service only. *In re Hendrickson,* 167 N. W. Rep. 172; *De La Montanya* v. *De La Montanya,* 44 Pac. 345; *Raher* v. *Raher,* 150 Iowa 511; 35 L. R. A. (N. S.) 297.

Nonresident cases affecting aliens cited by appellant are not in point.

If the necessary statutory authority has been given to the court, and to the executive or administrative officers who are to carry out its orders, witnesses may be

subpœnaed from anywhere if they rest under the obligation to obey the laws.

The act of serving a subpœna is a ministerial act of giving notice and not an exercise of "jurisdiction." It is the issuance and not the service that is the exercise of jurisdiction, except in so far as the service is necessary to due process, and hence to the jurisdiction of the court to render a valid judgment, and not in the international law sense. But when the duty pre-exists, the process, no matter what its form may be, is a mere notice.

We admit that the issuance of the subpœna by the court is an assertion of power. The order issuing the subpœna is a judicial act in conformity with the Walsh Act. A process is deemed issued when ordered by the court and ready for service. *McIntosh* v. *Standard Oil Co.,* 236 N. W. 152; *Society* v. *Whitcomb,* 2 N. H. 227; *Smith* v. *Nicholson,* 5 N. D. 426. The service of the subpœna is simply notice that the power has been exercised. The giving of notice thereof by the consul to a citizen abroad does not offend international law.

Service by a consul is valid even if no treaty deals with the subject. If the United States has the power and right to send a messenger to France to deliver the subpœna without a treaty with France, then there is nothing within or without the scope of international law that requires a treaty before the United States can use one of its consuls for that service.

Even if the manner of serving the subpœna were contrary to international law or French law, the Walsh Act would not be unconstitutional.

The Walsh Act does not limit enforcement to *quasi in rem* procedure and these cases at bar were not entirely *quasi in rem.*

"Criminal" contempt proceedings are *sui generis* and not, strictly, criminal prosecutions. Due process therein

is satisfied under the Walsh Act. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; s. c. 33 App. D. C. 516; *Re Gompers*, 40 App. D. C. 293; *Gompers* v. *United States*, 233 U. S. 604; *Ex parte Hudgings*, 249 U. S. 378; *Myers* v. *United States*, 264 U. S. 95; *United States* v. *Zucker*, 161 U. S. 475; *Michaelson* v. *United States*, 266 U. S. 42; *Ex parte Grossman*, 267 U. S. 87; *Cooke* v. *United States*, 267 U. S. 517; *In re Savin*, 131 U. S. 267; *Schwartz* v. *United States*, 217 Fed. 866; *Armstrong* v. *United States*, 18 F. (2d) 371, and other cases. The " essential nature " of punishment for contempt is penal, not criminal.

Congress may authorize federal courts to use *quasi in rem* procedure to acquire jurisdiction.

Service by publication in actions *quasi in rem* is sufficient for due process. *Central Loan & Tr. Co.* v. *Campbell Co.*, 173 U. S. 84; *Security Savings Bank* v. *California*, 263 U. S. 282; *Missouri* v. *North*, 271 U. S. 40, and citing many other cases.

Service of the " order to show cause " is sufficient notice of the offense to afford due process.

No unreasonable search and seizure is authorized by the Act.

Holding the hearing and pronouncing judgment in the absence of petitioner did not violate due process.

The Act does not violate the right of an accused to compulsory process for obtaining witnesses. The petitioner is not entitled to raise the point.

The Sixth Amendment does not require that the accused in the criminal prosecution have equal compulsory process with the process available to the Government. *United States* v. *Reid*, 12 How. 361. There are a number of respects in which a person accused of crime has a less right to compulsory process than that accorded to the Government. The accused in the criminal case has substantially equal process.

The Walsh Act is not arbitrary, capricious, or unreasonable, and does not deny due process.

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

The petitioner, Harry M. Blackmer, a citizen of the United States resident in Paris, France, was adjudged guilty of contempt of the Supreme Court of the District of Columbia for failure to respond to subpœnas served upon him in France and requiring him to appear as a witness on behalf of the United States at a criminal trial in that court. Two subpœnas were issued, for appearances at different times, and there was a separate proceeding with respect to each. The two cases were heard together, and a fine of $30,000 with costs was imposed in each case, to be satisfied out of the property of the petitioner which had been seized by order of the court. The decrees were affirmed by the Court of Appeals of the District, 49 F. (2d) 523, and this Court granted writs of certiorari.

The subpœnas were issued and served, and the proceedings to punish for contempt were taken, under the provisions of the Act of July 3, 1926, c. 762, 44 Stat. 835, U. S. C., Tit. 28, §§ 711–718.[1] The statute provides that

[1] The Act is as follows: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever letters rogatory shall issue out of any court of the United States, either with or without interrogatories addressed to any court of any foreign country, to take the testimony of any witness, being a citizen of the United States or domiciled therein, and such witness, having been personally notified by it according to the practice of such court, to appear and testify pursuant to such letters rogatory and such witness shall neglect to appear, or having appeared shall decline, refuse, or neglect to answer to any question which may be propounded to him by or under the authority of such court, to which he would be required to make answer were he being examined before

whenever the attendance at the trial of a criminal action of a witness abroad, who is "a citizen of the United States or domiciled therein," is desired by the Attorney General, or any assistant or district attorney acting under him, the judge of the court in which the action is pending may order a subpœna to issue, to be addressed to a consul of the United States and to be served by him personally

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the court issuing such letters, the court out of which said letters issued may upon proper showing order that a subpœna issue addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

"Sec. 2. Whenever the attendance at the trial of any criminal action of a witness, being a citizen of the United States or domiciled therein, who is beyond the jurisdiction of the United States, is desired by the Attorney General or any assistant or district attorney acting under him, the judge of the court before which such action is pending, or who is to sit in the trial of the same, may, upon proper showing, order that a subpœna issue, addressed to any consul of the United States within any country in which such witness may be, commanding such witness to appear before the said court at a time and place therein designated.

"Sec. 3. It shall be the duty of any consul of the United States within any country in which such witness may be at the request of the clerk of the court issuing any subpœna under this Act or at the request of the officer causing such subpœna to be issued, to serve the same personally upon such witness and also to serve any orders to show cause, rules, judgments, or decrees when requested by the court or United States marshal, and to make a return thereof to the court out of which the same issued, first tendering to the witness the amount of his necessary expenses in traveling to and from the place at which the court sits and his attendance thereon, which amount shall be determined by the judge on issuing the order for the subpœna and supplied to the consul making the service.

"Sec. 4. If the witness so served shall neglect or refuse to appear as in such subpœna directed, the court out of which it was issued shall, upon proof being made of the service and default, issue an order directing the witness to appear before the court at a time in such order designated to show cause why he should not be adjudged guilty of contempt and be punished accordingly.

upon the witness with a tender of travelling expenses. §§ 2, 3. Upon proof of such service and of the failure of the witness to appear, the court may make an order requiring the witness to show cause why he should not be punished for contempt, and upon the issue of such an order the court may direct that property belonging to the witness and within the United States may be seized and held to satisfy any judgment which may be rendered

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"Sec. 5. Upon issuing such order the court may, upon the giving of security for any damages which the recusing witness may have suffered, should the charge be dismissed (except that no security shall be required of the United States), direct as a part of such order that the property of the recusing witness, at any place within the United States, or so much thereof in value as the court may direct shall be levied upon and seized by the marshal of said court in the manner provided by law or the rule of the court for a levy or seizure under execution, to be held to satisfy any judgment that may be rendered against such witness in the proceeding so instituted.

"Sec. 6. The marshal, having made such levy, shall thereupon forward to the consul of any country where the recusing witness may be a copy of the order to show cause why such witness should not be adjudged guilty of contempt with the request that said consul make service of the same personally upon the recusing witness, and shall cause to be published such order to show cause and for the sequestration of the property of such witness, in some newspaper of general circulation in the district within which the court issuing such order sits, once each week for six consecutive weeks.

"Sec. 7. On the return day of such order or any later day to which the hearing may by the court be continued, proof shall be taken; and if the charge of recusancy against the witness shall be sustained, the court shall adjudge him guilty of contempt and, notwithstanding any limitation upon the power of the court generally to punish for contempt, impose upon him a fine not exceeding $100,000 and direct that the amount thereof, with the costs of the proceeding, be satisfied, unless paid, by a sale of the property of the witness so seized or levied upon, such sale to be conducted upon the notice required and in the manner provided for sales upon execution.

"Sec. 8. Any judgment rendered pursuant to this Act upon service by publication only may be opened for answer within the time and in the manner provided in section 57 of the Judicial Code,"

against him in the proceeding. §§ 4, 5. Provision is made for personal service of the order upon the witness and also for its publication in a newspaper of general circulation in the district where the court is sitting. § 6. If, upon the hearing, the charge is sustained, the court may adjudge the witness guilty of contempt and impose upon him a fine not exceeding $100,000, to be satisfied by a sale of the property seized. § 7. This statute and the proceedings against the petitioner are assailed as being repugnant to the Constitution of the United States.

First. The principal objections to the statute are that it violates the due process clause of the Fifth Amendment. These contentions are (1) that the "Congress has no power to authorize United States consuls to serve process except as permitted by treaty"; (2) that the Act does not provide "a valid method of acquiring judicial jurisdiction to render personal judgment against defendant and judgment against his property"; (3) that the Act "does not require actual or any other notice to defendant of the offense or of the Government's claim against his property"; (4) that the provisions "for hearing and judgment in the entire absence of the accused and without his consent" are invalid; and (5) that the Act is "arbitrary, capricious and unreasonable."

While it appears that the petitioner removed his residence to France in the year 1924, it is undisputed that he was, and continued to be, a citizen of the United States. He continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country. Thus, although resident abroad, the petitioner remained subject to the taxing power of the United States. *Cook* v. *Tait,* 265 U. S. 47, 54, 56. For disobedience to its laws through conduct abroad he was subject to punishment in the courts of the United States. *United States* v. *Bow-*

man, 260 U. S. 94, 102. With respect to such an exercise of authority, there is no question of international law,[2] but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government.[3] While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power. *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 357; *United States* v. *Bowman, supra; Robertson* v. *Labor Board,* 268 U. S. 619, 622. Nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal. Compare *Bartue and the Duchess of Suffolk's Case,* 2 Dyer's Rep. 176b, 73 Eng. Rep. 388; *Knowles* v. *Luce,* Moore 109, 72 Eng. Rep. 473.[4] What in England was the prerogative of the sov-

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[2] "The law of Nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy." Oppenheim, International Law, 4th ed., vol. I, § 145, p. 281; Story, Conflict of Laws, 8th ed., § 540, p. 755; Moore's International Law Digest, vol. II, pp. 255, 256; Hyde, International Law, vol. I, § 240, p. 424; Borchard, Diplomatic Protection of Citizens Abroad, § 13, pp. 21, 22.

[3] Compare *The Nereide,* 9 Cranch 388, 422, 423; *Rose* v. *Himely,* 4 Cranch 241, 279; *The Apollon,* 9 Wheat. 362, 370; *Schibsby* v. *Westenholz,* L. R. 6 Q. B. 155, 161. Illustrations of acts of the Congress applicable to citizens abroad are the provisions found in the chapter of the Criminal Code relating to "Offenses against Operations of Government" (U. S. C., Tit. 18, c. 4; *United States* v. *Bowman,* 260 U. S. 94, 98–102) and the provisions relating to criminal correspondence with foreign governments, Act of January 30, 1799, 1 Stat. 613, U. S. C., Tit. 18, § 5.

[4] See, also, Hyde, *op. cit.,* vol. 1, § 381, pp. 668, 669.

ereign in this respect, pertains under our constitutional system to the national authority which may be exercised by the Congress by virtue of the legislative power to prescribe the duties of the citizens of the United States. It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned. *Blair* v. *United States,* 250 U. S. 273, 281. And the Congress may provide for the performance of this duty and prescribe penalties for disobedience.

In the present instance, the question concerns only the method of enforcing the obligation.[5] The jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction *in personam,* as he is personally bound to take notice of the laws that are applicable to him and to obey them. *United States* v. *Bowman, supra.* But, for the exercise of judicial jurisdiction *in personam,* there must be due process, which requires appropriate notice of the judicial action and an opportunity to be heard. For this notice and opportunity the statute provides. The authority to require the absent citizen to return and testify necessarily implies the authority to give him notice of the requirement. As his attendance is needed in court, it is appropriate that the Congress should authorize the court to direct the notice to be given and that it should be in the customary form of a subpœna. Obviously, the requirement would be nugatory, if provision could not be made for its communication to the witness in the foreign coun-

[5] The instant case does not present the questions which arise in cases where obligations inherent in allegiance are not involved. See *Pennoyer* v. *Neff,* 95 U. S. 714; *Galpin* v. *Page,* 18 Wall. 350, 369; *Harkness* v. *Hyde,* 98 U. S. 476, 478; *Riverside & Dan River Cotton Mills* v. *Menefee,* 237 U. S. 189, 193; *McDonald* v. *Mabee,* 243 U. S. 90, 92; *Wuchter* v. *Pizzutti,* 276 U. S. 13.

try. The efficacy of an attempt to provide constructive service in this country would rest upon the presumption that the notice would be given in a manner calculated to reach the witness abroad. *McDonald* v. *Mabee,* 243 U. S. 90, 92. The question of the validity of the provision for actual service of the subpœna in a foreign country is one that arises solely between the Government of the United States and the citizen. The mere giving of such a notice to the citizen in the foreign country of the requirement of his government that he shall return is in no sense an invasion of any right of the foreign government; and the citizen has no standing to invoke any such supposed right. While consular privileges in foreign countries are the appropriate subjects of treaties,[6] it does not follow that every act of a consul, as, *e. g.,* in communicating with citizens of his own country, must be predicated upon a specific provision of a treaty. The intercourse of friendly nations, permitting travel and residence of the citizens of each in the territory of the other, presupposes and facilitates such communications. In selecting the consul for the service of the subpœna, the Congress merely prescribed a method deemed to assure the desired result but in no sense essential. The consul was not directed to perform any function involving consular privileges or depending upon any treaty relating to them, but simply to act as any designated person might act for the Government in conveying to the citizen the actual notice of the requirement of his attendance. The point raised by the petitioner with respect to the provision for the service of the subpœna abroad is without merit.

As the Congress could define the obligation, it could prescribe a penalty to enforce it. And as the default lay in disobedience to an authorized direction of the court, it

[6] Cf. *Dainese* v. *Hale,* 91 U. S. 13, 15, 16; *In re Ross,* 140 U. S. 453, 462, 463. See, also, U. S. C., Tit. 22, §§ 71 *et seq.;* Hyde, *op. cit.,* § 488, pp. 828–832.

constituted a contempt of court and the Congress could provide for procedure appropriate in contempt cases. The provision of the statute for punishment for contempt is applicable only "upon proof being made of the service and default." § 4. That proof affords a proper basis for the proceeding, and provision is made for personal service upon the witness of the order to show cause why he should not be adjudged guilty. For the same reasons as those which sustain the service of the subpœna abroad, it was competent to provide for the service of the order in like manner. It is only after a hearing pursuant to the order to show cause, and upon proof sustaining the charge, that the court can impose the penalty. The petitioner urges that the statute does not require notice of the offense, but the order to show cause is to be issued after the witness has failed to obey the subpœna demanding his attendance and the order is to be made by the court before which he was required to appear. This is sufficient to apprise the witness of the nature of the proceeding and he has full opportunity to be heard. The further contention is made that, as the offense is a criminal one, it is a violation of due process to hold the hearing, and to proceed to judgment, in the absence of the defendant. The argument misconstrues the nature of the proceeding. "While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not 'criminal prosecutions' within the Sixth Amendment or common understanding." *Myers* v. *United States,* 264 U. S. 95, 104, 105. See, also, *Bessette* v. *Conkey Co.,* 194 U. S. 324, 336, 337; *Michaelson* v. *United States,* 266 U. S. 42, 65, 66; *Ex parte Grossman,* 267 U. S. 87, 117, 118. The requirement of due process in such a case is satisfied by suitable notice and adequate opportunity to appear and to be heard. Cf. *Cooke* v. *United States,* 267 U. S. 517, 537.

The authorization of the seizure of the property belonging to the defaulting witness and within the United States, upon the issue of the order to show cause why he should not be punished for contempt (§ 5), affords a provisional remedy, the propriety of which rests upon the validity of the contempt proceeding. As the witness is liable to punishment by fine if, upon the hearing, he is found guilty of contempt, no reason appears why his property may not be seized to provide security for the payment of the penalty. The proceeding conforms to familiar practice where absence or other circumstance makes a provisional remedy appropriate. See *Cooper* v. *Reynolds,* 10 Wall. 308, 318. The order that is to be served upon the witness contains the direction for the seizure. The property is to be held pending the hearing and is to be applied to the satisfaction of the fine if imposed and unless it is paid. Given the obligation of the witness to respond to the subpœna, the showing of his default after service, and the validity of the provision for a fine in case default is not excused, there is no basis for objection to the seizure upon constitutional grounds. The argument that the statute creates an unreasonable classification is untenable. The disobedience of the defaulting witness to a lawful requirement of the court, and not the fact that he owns property, is the ground of his liability. He is not the subject of unconstitutional discrimination simply because he has property which may be appropriated to the satisfaction of a lawful claim.

Second. What has already been said also disposes of the contention that the statute provides for an unreasonable search and seizure in violation of the Fourth Amendment. It authorizes a levy upon property of the witness at any place within the United States in the manner provided by law or rule of court for levy or seizure under execution. A levy in such a manner, either provisionally

or finally, to satisfy the liability of the owner is not within the constitutional prohibition.

The petitioner raises the further and distinct point that the statute limits the availability of the subpœna to the Government, and that "by excluding defendants in criminal prosecutions" from the right to such a subpœna it violates the provision of the Sixth Amendment that the accused shall have "compulsory process for obtaining witnesses in his favor." We need not consider whether the statute requires the construction for which the petitioner contends, as in any event the petitioner, a recalcitrant witness, is not entitled to raise the question. *Nelson* v. *United States,* 201 U. S. 92, 115; *Southern Railway Co.* v. *King,* 217 U. S. 524, 534; *Jeffrey Manufacturing Co.* v. *Blagg,* 235 U. S. 571, 576; *Blair* v. *United States, supra,* at p. 282.

Third. The statute being valid, the question remains as to the procedure in its application against the petitioner. He insists that the showing for the issue of the subpœnas requiring him to attend was inadequate. But the "proper showing" required was for the purpose of satisfying the court that the subpœna should issue. The petitions, in the instant cases, were presented to the judge of the court by the official representatives of the Government and their statement as to the materiality and importance of the testimony expected from the witness was unquestionably sufficient to give the court jurisdiction to issue the subpœnas, and, unless they were vacated upon proper application, the petitioner was bound to obey. Nor was it necessary that the subpœnas should "identify" themselves with the statute under which they were issued. The petitioner as a citizen of the United States was chargeable with knowledge of the law under which his attendance as a witness could be required. It was sufficient that the subpœnas required his attendance to testify on behalf of the United States at the time and place stated.

Equally unavailing is the objection that after the petitioner had refused to appear in response to the subpœnas, the orders to show cause why he should not be punished for contempt did not specify the offense. As the statute prescribed, he had been served with the subpœnas, and had defaulted, and he had also been served with the order which directed him to show cause why he should not be adjudged guilty of contempt and provided for the seizure of his property to be held to satisfy any judgment that might be rendered against him in the proceeding. The notice which he thus received was sufficient to inform him of the character of the charge against him and of the hearing at which he would have opportunity to present his defense. The petitioner also insists that the seizure which was made in case No. 200 was abandoned by virtue of the seizure of the same property under the order issued in No. 201. But the second levy was not antagonistic to the first. The proceedings were consistent.

In No. 201, the contention is made that the petitioner was subpœnaed to attend on April 2, 1928, and that the case in which his testimony was desired was not tried until April 9, 1928. There is no suggestion that the petitioner appeared on April 2, 1928, in compliance with the subpœna, and the record shows that the case in which he was subpœnaed was continued by the court until the later date. The subpœna contained the usual provision that the witness was "not to depart the court without leave of the court or district attorney." Cf. Rev. Stat., § 877; U. S. C., Tit. 28, § 655. It was the duty of the petitioner to respond to the subpœna and to remain in attendance until excused by the court or by the Government's representatives.

Decrees affirmed.

Mr. Justice Roberts took no part in the consideration and decision of this case.

HENKEL, ADMINISTRATRIX, *v.* CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO.

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

No. 387. Argued January 21, 1932.—Decided February 15, 1932.

1. Inasmuch as the Act of April 26, 1926, prescribes fully the amounts payable to witnesses, additional amounts paid as compensation, or fees, to expert witnesses can not be allowed or taxed as costs in a federal court, though permitted by the statutes and procedure of the State where the case is tried. P. 445.
2. The Rules-of-Decision Act is inapplicable. P. 446.

RESPONSE to a question certified by the court below arising upon an appeal from a judgment under the Federal Employers' Liability Act.

Mr. Everett Sanders argued the cause, and *Mr. Frederick M. Miner* filed a brief, for Henkel, Administratrix.

Mr. William T. Faricy, with whom *Mr. R. N. Van Doren* was on the brief, for the Chicago, St. P., M. & O. Ry. Co.

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

This action was brought in the Federal District Court for the District of Minnesota under the Federal Employers' Liability Act to recover damages for the death of the plaintiff's intestate. Upon obtaining a verdict, the plaintiff asked for an order allowing fees for expert witnesses who had testified at the trial. The application was made under the following provision of the Minnesota statutes (Mason's Minn. Stat. 1927, § 7009):

"Expert Witnesses.—The judge of any court of record, before whom any witness is summoned or sworn and

examined as an expert in any profession or calling, may, in his discretion, allow such fees or compensation as in his judgment may be just and reasonable."

Under this statute it appears to be the practice of the state courts of Minnesota to allow reasonable fees of expert witnesses, which are included in the taxable costs and become part of the judgment. The allowance is in the discretion of the trial court. *Farmer* v. *Stillwater Water Co.,* 86 Minn. 59; 90 N. W. 10; *Melander* v. *County of Freeborn,* 170 Minn. 378, 381; 212 N. W. 590, 591.

The District Court denied the application for want of power under the federal statutes. The Circuit Court of Appeals, having the judgment before it on appeal, has certified to this Court the following question:

" Has a United States District Court power and authority to allow expert witness fees, and to include the same as part of the taxable costs in a law case, said United States District Court being for and sitting in a State the Courts of which are by a state statute authorized, in their discretion, to allow expert witness fees, and the practice and usage in said state courts being to make such allowances and to include the same in the taxable costs, but there being no such usage and practice in said United States District Court? "

The Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, contained references to costs, but no fee bill. By the Process Act of September 29, 1789, c. 21, 1 Stat. 93, it was provided that the " rates of fees . . . in the circuit and district courts, in suits at common law," should be the same as were " used or allowed " in state courts. This was a temporary act (*id.,* 123, 191) but, under it and later legislation of a similar sort, the federal system was put in operation. It thus became " the practical usage of the Courts of the United States to conform to the State laws as to costs, when no express provision has been made and

is in force by any act of Congress in relation to any particular item, or when no general rule of court exists on this subject." Mr. Justice Woodbury in *Hathaway* v. *Roach,* 2 Woodb. and M. 63, 67; Mr. Justice Nelson in "Costs in Civil Cases," 1 Blatchf. 652; *The Baltimore,* 8 Wall. 377, 390–392; *Ex parte Peterson,* 253 U. S. 300, 316. But when the Congress has prescribed the amount to be allowed as costs, its enactment controls. *The Baltimore, supra.*

Specific provision as to the amounts payable and taxable as witness fees was made by the Congress as early as the Act of February 28, 1799, c. 19, § 6, 1 Stat. 624, 626. See, also, Act of February 26, 1853, c. 80, § 3, 10 Stat. 161, 167; Rev. Stat. § 848. The statute now applicable is the Act of April 26, 1926, c. 183, 44 Stat. 323. U. S. C. Tit. 28, §§ 600a to 600d.[1] Under these provisions, additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed as costs in cases in the federal courts. *The William Branfoot,* 52 Fed. 390, 395; *In re Carolina Cooperage Co.,* 96 Fed. 604, 605; *Bone* v. *Walsh Construction Co.,* 235 Fed. 901, 903, 904; *Cheatham Electric Co.* v. *Transit Development Co.,* 261 Fed. 792, 796.

The appellant, seeking the application of the statute of Minnesota, invokes the rule that "the laws of the sev-

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[1] Sections 600a and 600c are as follows:

"600a. *Per diem; mileage.* That . . . witnesses (other than witnesses who are salaried employees of the Government, and detained witnesses) in the United States courts, . . . who attend, . . . shall be entitled to a per diem for each day of actual attendance and for each day necessarily occupied in traveling to attend court, . . . and return home, and, in addition, mileage as provided in sections 600b to 600d of this title.

. . . . . .

"600c. *Amount of per diem and mileage for witnesses; subsistence.* Witnesses attending in such courts, . . . shall receive for each day's attendance and for the time necessarily occupied in going to and

eral States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States in cases where they apply." U. S. C., Tit. 28, § 725. But this provision, by its terms, is inapplicable, as the Congress has definitely prescribed its own requirement with respect to the fees of witnesses. The Congress has dealt with the subject comprehensively and has made no exception of the fees of expert witnesses. Its legislation must be deemed controlling and excludes the application in the federal courts of any different state practice. *United States* v. *Sanborn,* 135 U. S. 271, 282, 283; *Northern Pacific Ry. Co.* v. *Washington,* 222 U. S. 370; *Second Employers' Liability Cases,* 223 U. S. 1, 55; *Missouri Pacific R. Co.* v. *Porter,* 273 U. S. 341, 346; *Lindgren* v. *United States,* 281 U. S. 38, 45.

In *Ex parte Peterson, supra,* the question related to the fees of an auditor appointed by the court, and as the court had power to appoint him, and there was no statute or rule of court on the subject, the court had authority to allow the expense in the items taxable as costs. *Id.,* pp. 314, 317. The case of *People of Sioux County* v. *National Surety Co.,* 276 U. S. 238, was an action upon a surety bond. A Nebraska statute provided that in specified classes of cases, including that before the court,

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returning from the same $2, and 5 cents per mile for going from his or her place of residence to the place of trial or hearing and 5 cents per mile for returning; *And provided further,* That witnesses (other than witnesses who are salaried employees of the Government and detained witnesses) in the United States courts, . . . who attend court . . . at points so far removed from their respective residences as to prohibit return thereto from day to day, shall, when this fact is certified to in the order of the court . . . for payment, be entitled, in addition to the compensation provided by existing law, as modified by sections 600a to 600d of this title, to a per diem of $3 for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to attend court and return home."

the plaintiff on obtaining judgment should be allowed a reasonable sum as an attorney's fee. The requirement was mandatory. This court held that in such a case the attorney's fee was recoverable in the federal court, but was careful to point out that the amount was "not costs in the ordinary sense" and hence was "not within the field of costs legislation" covered by the federal statutes. In this view, the fact that the amount could not be taxed as costs in the federal courts did not preclude the recovery. "Since the right exists," said the Court, "the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment." *Id.*, p. 244.

The present case is simply one of the amount to be allowed as witness fees, to be included in the taxable costs, and the federal statute governs.

The question certified is answered

"*No.*"

LEMAN, ADMINISTRATOR, ET AL. *v.* KRENTLER-ARNOLD HINGE LAST CO.

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

No. 332. Argued January 13, 14, 1932.—Decided February 15, 1932.

1. One who sues in a federal court of equity to enjoin infringement of his patent, thereby submits himself to the jurisdiction of that court with respect to all the issues in the case, including those pertaining to a counterclaim praying that he be restrained from infringing the like patent of the defendant. P. 451.
2. A decree of the District Court perpetually enjoining a party from infringing a patent binds him personally and continuously throughout the United States; and his disobedience of the prohibition is a contempt even though committed outside of the district of the court. *Id.*
3. A court which has permanently enjoined a party from infringing a patent, retains jurisdiction to enforce obedience through civil contempt proceedings. P. 452.

4. The civil contempt proceeding is part of the main cause. *Id.*
5. Service of process for the purpose of bringing the respondent within the jurisdiction of the court is therefore unnecessary in the contempt proceeding; actual notice of that proceeding suffices, as where the respondent appeared for the purpose of objecting to the jurisdiction upon the ground that he had not been brought in by process, and upon the overruling of the objection, contested his liability. P. 454.
6. While the distinction is clear between damages to a patent-owner, in the sense of actual pecuniary loss resulting from infringement, and the profits made by the infringer, the profits are within the concept of compensatory relief and are allowed in equity as an equitable measure of compensation. P. 455.
7. The profits resulting from an infringement of a patent committed in violation of an injunction are recoverable by the injured party in a civil proceeding for contempt. P. 457.

50 F. (2d) 699, 707, reversed.
District Court affirmed.

CERTIORARI * to review a decree reversing a decree entered against the present respondent by the District Court in a contempt proceeding for violation of an injunction against infringement of a patent. The court below sustained the jurisdiction but held that profits and certain expenses were not allowable in this proceeding by way of compensation. See also, 13 F. (2d) 796; 24 *id.* 423.

Mr. Ellis Spear, Jr., for petitioners.

Mr. Robert Cushman, with whom *Mr. Otto F. Barthel* was on the brief, for respondent.

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

This is a contempt proceeding against the respondent, Krentler-Arnold Hinge Last Company, for violation of a permanent injunction granted in an infringement suit.

In that suit, which was brought by the respondent, a Michigan corporation, in the Federal District Court for

* See table of cases reported in this volume.

the District of Massachusetts, the bill of complaint for the infringement of the respondent's patents was dismissed and the counterclaim of the present petitioners for the infringement of their patent (Peterson patent No. 1,195,-266, for hinged lasts for shoes) was sustained. 300 Fed. 834. The decree, as modified, was affirmed by the Circuit Court of Appeals. 13 F. (2d) 796. The decree perpetually enjoined the respondent from making, using or selling lasts containing the invention covered by designated claims of the petitioners' patent and "any substantial or material part thereof, or any substantial equivalent or colorable imitation thereof." Final decree, after accounting, was entered on March 1, 1928. 24 F. (2d) 423. Thereafter the respondent placed upon the market a "sliding link" hinge which was claimed to be a new invention. The petitioners then (June 4, 1929) brought the present proceeding for contempt in the court which had entered the decree.

The order to show cause, with the supporting affidavits, was served upon the respondent by the delivery of copies to its attorney of record in the infringement suit and by the mailing of copies to the respondent at its office in Michigan. On June 10, 1929, the attorney of record for the respondent in the infringement suit filed with the clerk of the court a withdrawal of appearance. The respondent then appeared specially in the contempt proceeding and moved to dismiss the petition "for lack of jurisdiction over the respondent." In support of the motion, affidavits were presented to the effect that the authority of the attorney of record in the infringement suit was terminated on the entry of the final decree, and that the respondent had no office or place of business in Massachusetts and had not manufactured, sold or used within that State the device of which the petitioners complained. The motion was denied. Upon hearing, the District Court held the respondent to be guilty of "civil contempt"

for deliberate violation of the injunction and ordered a reference to a master to take an account of the profits made by the respondent through such violation and to ascertain the petitioners' costs and expenses in the contempt proceeding. On the master's report, the District Court entered a decree for the recovery by the petitioners of $39,576.26 as profits, together with counsel fees, expenses and interest, making a total of $49,292.89. On appeal, the Circuit Court of Appeals deemed it to be clear that the respondent's new device answered in every respect the claims of the petitioners' patent and that "the question of infringement is not doubtful or even merely colorable, but certain." The Circuit Court of Appeals sustained the jurisdiction of the District Court but held that profits could not be recovered. Certain expenses were also disallowed, and the decree of the District Court, with respect to the amount of the recovery, was vacated. 50 F. (2d) 699; on rehearing, *id.*, 707. This Court granted a writ of certiorari.

First. The question of jurisdiction turns upon the nature and effect of the decree in the infringement suit and the relation to that suit of the contempt proceeding. When the respondent brought the suit in the Federal District Court for the District of Massachusetts, it submitted itself to the jurisdiction of the court with respect to all the issues embraced in the suit, including those pertaining to the counterclaim of the defendants, petitioners here. Equity Rule 30. See Langdell's Eq. Pleading, c. 5, § 119; *Frank L. Young Co.* v. *McNeal-Edwards Co.*, 283 U. S. 398, 400. The decree upon the counterclaim bound the respondent personally. It was a decree which operated continuously and perpetually upon the respondent in relation to the prohibited conduct. The decree was binding upon the respondent, not simply within the District of Massachusetts, but throughout the United States. *Macaulay* v. *White Sewing Machine Co.*, 9 Fed. 698; *Kessler* v.

Eldred, 206 U. S. 285, 288; *Rubber Tire Co.* v. *Goodyear Co.*, 232 U. S. 413, 417; *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S. 294, 298, 299; *Louisville & Nashville R. Co.* v. *Western Union Telegraph Co.*, 250 U. S. 363, 368; *Toledo Co.* v. *Computing Co.*, 261 U. S. 399, 426. The respondent could not escape the decree by removing from, or staying without, the District of Massachusetts. Wherever it might conduct its affairs, it would carry with it the prohibition. Disobedience constituted contempt of the court which rendered the decree, and was none the less contempt because the act was committed outside the district, as the contempt lay in the fact, not in the place, of the disobedience to the requirement.

In view of the nature and effect of the decree in the infringement suit, it cannot be said that the suit was terminated in the sense that the court had no further relation to the party subject to its permanent injunction. The terms of the injunction continued the relation. The question is not one of an attempted rehearing of the merits of the controversy which was determined by the final decree, or of the modification of that decree, after the expiration of the term in which an application for that purpose could properly be made. Equity Rule 69; *Roemer* v. *Simon*, 91 U. S. 149; *Brooks* v. *Railway Co.*, 101 U. S. 443; *Bronson* v. *Schulten*, 104 U. S. 410, 415. This proceeding was for the enforcement of the decree, and not to review or alter it. It was heard and determined as a proceeding for civil, not criminal, contempt. 50 F. (2d) at p. 701. The question of the relation of such a proceeding to the main suit was fully considered in the case of *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, and it was determined that the proceeding was not to be regarded as an independent one, but as a part of the original cause. The court said: "Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main cause." *Id.*, at

pp. 444, 445. The distinction was made in this respect between such proceedings and those at law for criminal contempt which "are between the public and the defendant, and are not a part of the original cause." In the *Gompers* case, the contempt proceeding had been instituted after the entry of the final decree awarding the permanent injunction and pending an appeal from that decree. *Id.*, pp. 421, 422. This Court held that the proceeding had been improperly treated as one for criminal contempt, and, as there had been a complete settlement of all matters involved in the equity suit, the contempt proceeding was necessarily ended. The conclusion of the Court was thus stated (*id.*, pp. 451, 452): "When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled—of course without prejudice to the power and right of the court to punish for contempt by proper proceedings. *Worden* v. *Searls*, 121 U. S. 27. If this had been a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court, with the public on one side and the defendants on the other, it could not, in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation. But, as we have shown, this was a proceeding in equity for civil contempt where the only remedial relief possible was a fine payable to the complainant. The company prayed 'for such relief as the nature of its case may require,' and when the main cause was terminated by a termination of all differences between the parties, the complainant did not require and was not entitled to any compensation or relief of any other character. The present proceeding necessarily ended with the settlement of the main cause of which it is a part." See *Michaelson* v. *United States*, 266 U. S. 42, 64, 65; *Oriel* v. *Russell*, 278 U. S. 358, 363.

As the proceeding for civil contempt for violation of the injunction should be treated as a part of the main cause, it follows that service of process for the purpose of bringing the respondent within the jurisdiction of the District Court of Massachusetts was not necessary. The respondent was already subject to the jurisdiction of the court for the purposes of all proceedings that were part of the equity suit and could not escape it, so as successfully to defy the injunction, by absenting itself from the district. In *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 633, this Court said that it had decided "many times" that when a bill is filed in the federal court to enjoin a judgment of that court, it was "not to be considered as an original bill, but as a continuation of the proceeding at law; so much so that the court will proceed in the injunction suit without actual service of subpœna on the defendant, and though he be a citizen of another State, if he were a party to the judgment at law." See *Dunn* v. *Clarke*, 8 Pet. 1, 3; *Krippendorf* v. *Hyde*, 110 U. S. 276, 285; *Carey* v. *Houston & Texas Ry. Co.*, 161 U. S. 115, 128; *Merriam Co.* v. *Saalfield*, 241 U. S. 22, 30, 31. For similar reasons, after a final decree a party cannot defeat the jurisdiction of the appellate tribunal by removing from the jurisdiction, as the proceedings on appeal are part of the cause. *Nations* v. *Johnson*, 24 How. 195, 203, 204. As this Court said in *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346, 353, where "there is service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute." And so, with respect to the application of Article IV, § 1, of the Constitution, "if a judicial proceeding is begun with jurisdiction over the person of the party concerned it is

within the power of a State to bind him by every subsequent order in the cause." *Id.*

In this view, nothing more was required in the present case than appropriate notice of the contempt proceeding, and that notice the respondent received. We do not need to consider the effect of the service of the order to show cause with supporting affidavits upon the attorney who still appeared of record as the attorney for the respondent in the equity suit, but whose authority was alleged to have been terminated, or any question of the sufficiency of constructive notice, as the respondent had actual notice. While the respondent appeared specially for the purpose of objecting to the jurisdiction of the court, this objection was not upon the ground that the respondent did not have notice, which manifestly it did have, but that it had not been brought into the proceeding by service of process in that proceeding, which in view of its relation to the cause was unnecessary. Its objection on that ground being overruled, the respondent contested its liability.

We are of the opinion that the District Court had jurisdiction of the contempt proceeding and of the respondent.

Second. The Circuit Court of Appeals refused recovery of profits upon the ground that in a proceeding for civil contempt the relief should be based upon the "pecuniary injury or damage" which the act of disobedience caused the complaining party, including such reasonable expenses as were incurred in the bringing of the proceeding. There is no question here that the respondent had made profits through the infringing sales in violation of the injunction, and the amount of the profits was ascertained, but the appellate court held that the petitioners were limited to the damages caused by such sales and that no damages had been shown. We think that the court erred in imposing this limitation. The fact that a proceeding for civil contempt is for the purpose of compensating

the injured party, and not, as in criminal contempt, to redress the public wrong, does not require so narrow a view of what should be embraced in an adequate remedial award.

While the distinction is clear between damages, in the sense of actual pecuniary loss, and profits, the latter may none the less be included in the concept of compensatory relief. In a suit in equity against an infringer, profits are recoverable not by way of punishment but to insure full compensation to the party injured. As this Court said in *Mowry* v. *Whitney,* 14 Wall. 620, 653: "The profits which are recoverable against an infringer of a patent are in fact a compensation for the injury the patentee has sustained from the invasion of his right." The court of equity in such cases applies familiar principle in "converting the infringer into a trustee for the patentee as regards the profits thus made." *Packet Co.* v. *Sickles,* 19 Wall. 611, 617. This is not to say that there is an actual fiduciary relation which would give the right to an accounting for profits regardless of the existence of a basic claim to equitable relief. *Root* v. *Railway Co.,* 105 U. S. 189, 214, 215. Referring to the case last cited, this Court succinctly stated the controlling principle in its opinion in *Tilghman* v. *Proctor,* 125 U. S. 136, 148, as follows: "But, as has been recently declared by this court, upon an elaborate review of the cases in this country and in England, it is more strictly accurate to say, that a court of equity, which has acquired, upon some equitable ground, jurisdiction of a suit for the infringement of a patent, will not send the plaintiff to a court of law to recover damages, but will administer full relief, by awarding, as an equivalent or a substitute for legal damages, a compensation computed and measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property for his own advantage." Profits are thus allowed "as an equitable measure of com-

pensation." *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 259. See, also, *Dowagiac Manufacturing Co.* v. *Minnesota Plow Co.,* 235 U. S. 641, 647. In view of the principles governing the broader relief obtainable in equity, as contrasted with those applicable in courts of law, it is apparent that there is no necessary exclusion of profits from the idea of compensation in a remedial proceeding.

The respondent insists that this contempt proceeding is not a suit in equity, but, as we have seen, the proceeding is a part of the main cause in equity and is for the enforcement of the decree, and there is no reason why in such a proceeding equitable principles should not control the measure of relief to be accorded to the injured party. It is also urged that an award of profits involves a discovery and accounting from a party charged with a penal liability. This argument is also based on a misconception of the nature of the proceeding, which is not penal but remedial, and the remedy should be complete. Accordingly it has been repeatedly assumed that, in a proceeding for civil contempt for disobedience to an injunction granted in an infringement suit, the profits derived from the violation of the injunction are recoverable. *Worden* v. *Searls,* 121 U. S. 14, 25; *Matter of Christensen Engineering Co.,* 194 U. S. 458, 460; *Gordon* v. *Turco-Halvah Co.,* 247 Fed. 487, 490, 492; *McKee Glass Co.* v. *H. C. Fry Glass Co.,* 248 Fed. 125, 127.

We are of the opinion that the District Court properly allowed the profits in question, and, in this respect, the decree of the Circuit Court of Appeals modifying the decree of the District Court is reversed and that of the District Court affirmed.

C. C. A. reversed.
D. C. affirmed.

MR. JUSTICE MCREYNOLDS is of the opinion that the proceedings should have been dismissed for lack of jurisdiction over the respondent.

ATCHISON, TOPEKA & SANTA FE RY. CO. *v.* SAXON, ANCILLARY ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 291. Argued January 8, 1932.—Decided February 15, 1932.

1. In order to sustain a claim under the Federal Employers' Liability Act, the plaintiff must in some adequate way establish negligence of the carrier and causal connection between the negligence and the injury. P. 459.
2. Circumstances in this case *held* insufficient to prove that the falling of a brakeman under a train was caused by stumbling in a depression in a pathway skirting the track, upon which he was seen running.

36 S. W. (2d) 686; 38 *id.* 775, reversed.

CERTIORARI * to review a judgment sustaining a recovery under the Federal Employers' Liability Act.

Mr. A. H. Culwell, with whom *Messrs. E. E. McInnis* and *Wm. H. Burges* were on the brief, for petitioner.

Mr. Winbourn Pearce for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

While employed as head brakeman by petitioner Railway Company and engaged in interstate commerce, J. W. Moore sustained fatal injuries at a New Mexico station. His personal representative obtained a judgment for damages, under the Federal Employers' Liability Act, in a Texas court.

The Court of Civil Appeals at El Paso reversed this, holding that the evidence failed to show the accident resulted from the carrier's negligence. The Supreme Court granted a writ of error, reversed the Court of Civil

* See table of cases reported in this volume.

Appeals and affirmed the original judgment. It concluded that, viewing all the evidence, there was enough to show negligence and causal connection between this and the death.

The matter is here by certiorari. The Railway sets up a claim under the federal statute which it has not heretofore had opportunity to submit for adjudication to any federal tribunal. The cause is one of a peculiar class where we have frequently been obliged to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted.

Examination of the record convinces us that the Court of Civil Appeals reached the proper conclusion. We can find no evidence from which it may be properly concluded that Moore's tragic death was the result of negligence by the Railway Company. As often pointed out, one who claims under the Federal Act must in some adequate way establish negligence and causal connection between this and the injury. *New York Central R. Co.* v. *Ambrose,* 280 U. S. 486; *Atchison, Topeka & Santa Fe Ry.* v. *Toops,* 281 U. S. 351, 354.

In the language of the Supreme Court the respondent "recovered in the trial court on the theory that the deceased, while in the discharge of his duties as a brakeman, was running along by the side of the track of the Railway Company and while doing so with the purpose and intent of boarding one of the cars in the train, he stepped in or upon some soft area or hole in his pathway, and was thereby caused to fall and be run over and killed."

Nobody saw the accident; no one can say with fair certainty how it occurred. Consistently with the facts disclosed, it might have happened in one of several ways and without causal negligence by the petitioner. When last seen the deceased was running westwardly by the side of the train, then moving in that direction. Across

the pathway commonly used by trainmen, there was a slight depression—estimated to be four or five, or possibly six or eight, feet long and three feet wide—filled with small rock screenings. It was softer than other portions of the way—yielded to the foot. Eight or ten feet west of this witnesses found blood upon the rail.

Two hours after the accident a fourteen year old boy discovered the mark of a shoe in the screenings. He said it "was deeper than the footprint that I made, it looked as though somebody that was heavy or running had stepped in it. The front part of the foot was deepest." There is no evidence—nothing but conjecture—to show that the deceased made this impression; and, even if he did, we cannot assume that by stepping there he was made to stumble and fall under the moving train.

What occasioned this distressing accident can only be surmised. It was necessary to show causal negligence in order to establish the respondent's right to recover. The evidence fails to meet this requirement.

The judgment below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MISSOURI PACIFIC RAILROAD CO. *v.* DAVID, ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 365. Argued January 20, 1932.—Decided February 15, 1932.

1. In actions under the Federal Employers' Liability Act, assumption of risk is a defense. P. 462.
2. A railway company employed an experienced guard to help protect its freight trains against anticipated depredations by murderous gangs of robbers. He was fully armed and fully apprised of the danger. It also employed a member of one of the gangs to give the company advance information of projected robberies. In a

raid by the gang, of which the accomplice knew beforehand, and at which he was present, but of which he did not warn the company, the guard was killed. *Held* that the guard, even if he knew of the company's arrangement with the accomplice, assumed the risk that warning would not be given. P. 463.

328 Mo. 437; 41 S. W. (2d) 179, reversed.

CERTIORARI * to review a judgment affirming a recovery in an action under the Federal Employers' Liability Act.

Mr. Leslie A. Welch, with whom *Messrs. Edward J. White* and *Thomas Hackney* were on the brief, for petitioner.

Mr. C. A. Randolph, with whom *Mr. Horace Guffin* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

While employed by petitioner, Railroad Company, and charged with the duty of protecting its trains against robbers, James Lee David was murdered in the night of May 17th, 1923. His administratrix sued for damages under the Federal Employers' Liability Act in the Circuit Court, Jackson County, Missouri, and obtained a favorable verdict. Judgment thereon was affirmed by the Supreme Court. The cause is here upon writ of certiorari.

Often during the months prior to April, 1923, the petitioner suffered losses through depredations by organized bands of robbers upon freight trains in and near Kansas City, Missouri. It determined to make special efforts to frustrate further attacks by the culprits and, if possible, cause their apprehension. To this end, on April 1st, 1923, it employed David to act as a "train rider" or guard for its cars. He had had experience in similar undertakings.

* See table of cases reported in this volume.

Also, he was carefully advised concerning the probable danger. He was told that the robbers were desperate men who "would shoot him just as quick as they saw him." He carried a pistol and sawed-off shotgun "for the purpose of defending himself and the company's property." When asked "Whether you will fight these fellows or not?" he replied "I will fight them until I die."

Subsequent to David's employment, in order to strengthen its efforts towards frustration and to secure arrests, petitioner employed McCarthy, known to be associated with one of the criminal bands, who agreed, when possible, to furnish advance information of intended depredations, aid in locating stolen goods, etc. "His instructions were that he was to get us word [through the telephone] before the robbery was committed, if he could, if not, to give us information as soon as he could after the robbery had been committed."

The theory upon which respondent recovered below is that, while acting for petitioner, McCarthy knew of a plan to rob the train to which David was assigned on May 17th, and in violation of his duty negligently failed to notify his superior officer,—that because of such negligence, David received no notice of the plan, although he had the right to rely upon being supplied with such information in order to prepare to cope with the brigands on equal terms. As a consequence, he failed to take the necessary precautions and exposed himself to being shot.

The established rule is that in proceedings under the Federal Employers' Liability Act assumption of the risk is an adequate defense. *Seaboard Air Line Ry* v. *Horton,* 233 U. S. 492; *Boldt* v. *Pennsylvania R. Co.,* 245 U. S. 441, 445; *Chesapeake & Ohio Ry. Co.* v. *Nixon,* 271 U. S. 218; *St. Louis-San Francisco Ry. Co.* v. *Mills,* 271 U. S. 344; *Atlantic Coast Line R. Co.* v. *Southwell,* 275 U. S. 64; *Toledo, St. Louis & Western R. Co.* v. *Allen,* 276 U. S. 165.

Under the circumstances disclosed by the record, clearly, we think, David assumed the risk of the default which, it is said, resulted in his death. He understood the nature of his employment and the incident dangers. He well knew that he was subjecting himself to murderous attacks by desperadoes. There was no promise to give him special warning or protection. Even if he had knowledge of McCarthy's employment (and this is far from certain), he must have appreciated the utter unreliability of the man and the probable inability of the master to obtain timely information through such a medium. He could not properly expect to be protected against criminals, whom he was employed to fight, through treachery by one of their associates. The common employer, notwithstanding efforts to obtain warning, actually knew nothing of the criminal plan. If we accept respondent's view of the facts, David assumed the risk of the negligent action of which complaint is now made.

We need not consider any other point advanced in behalf of the petitioner.

The judgment of the court below must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

Reversed.

CENTRAL PACIFIC RAILWAY CO. ET AL. *v.* ALAMEDA COUNTY ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 258. Argued January 7, 1932. Decided February 15, 1932.

1. There is a presumption that a highway, once established, continues to exist; and he who would make good a later title upon the ground that, through deviations in places from the original route, there was such an abandonment as to substitute for the old road a different one, dependent for its legality upon other and independent facts and conditions, has the burden of sustaining that proposition. P. 467.

2. Even in the case of highways sought to be established by prescription, where the user must be confined to a definite line, slight deviations are not regarded as material. P. 467.
3. Section 8 of the Act of July 26, 1866, granting rights of way for the construction of highways over the public lands, was, so far as the then existing roads are concerned, a voluntary recognition and confirmation of preëxisting rights brought into being with the acquiescence and encouragement of the general Government. Pp. 468–472.
4. The grant of a right of way over the public lands made to the Central Pacific Railroad by the Acts of July 1, 1862, and July 2, 1864, *held* subject to the easement of a highway in California established in 1859 under the state law and in use before and when the railway was laid out and constructed, and continuously since. *Id.*
5. Judicial notice taken:

   (1) Of the fact that where roads have been originally formed by the passage of wagons over the natural soil, the line of travel is subject to occasional deviations owing to changes brought about by storms, temporary obstructions, and other causes. P. 467.

   (2) Of the facts that, long before the Act of July 26, 1866, highways in large numbers had been laid out by local, state, and territorial authorities, upon and across the public lands, and that this practice had been so long continued and the number of roads thus created had been so great, as to compel the conclusion that they were established and used with the knowledge and acquiescence of the national Government. P. 472.

212 Cal. 348; 299 Pac. 75, affirmed.

CERTIORARI * to review a decree dismissing a bill brought by the petitioners to quiet their title to lands within the right of way of the railway company which were traversed by a public highway.

Mr. C. F. R. Ogilby, with whom *Messrs. Frank Thunen* and *Guy V. Shoup* were on the brief, for petitioners.

Mr. Earl Warren, District Attorney of Alameda County, with whom *Mr. T. P. Wittschen* was on the brief, for respondents.

* See table of cases reported in this volume.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioners brought this suit against respondents in a state superior court to quiet their title to certain lands lying within Alameda County, California. The bill alleges that the lands described constitute parts of the right of way granted by the acts of Congress approved July 1, 1862, and July 2, 1864 (c. 120, 12 Stat. 489; c. 216, 13 Stat. 356), to the Central Pacific Railroad Company, predecessor in interest of the Central Pacific Railway Company, and leased to the Southern Pacific Company; that the County of Alameda and the other defendants, without the permission or consent, and against the will, of petitioners, and without right or legal authority, had been and were then using the lands for highway or road purposes and thereby wrongfully excluding petitioners therefrom. To this bill respondents filed an answer and cross-complaint, denying some of the allegations of the bill, admitting others, and alleging affirmatively that the County of Alameda was the owner of the described lands, and was in possession and entitled to the possession thereof.

The trial court found that three of the described parcels, held in fee by the Central Pacific Railway Company, were subject to an easement in favor of the county to maintain an existing right of way for highway purposes. A decree, entered accordingly, was affirmed by the state supreme court. 299 Pac. 75.

An abridged statement of facts found by the trial court and set forth at length in the opinion of the state supreme court follows.

A public highway between Niles and Sunol, through and along the bottom of Niles Canyon, was laid out and declared by the county in 1859, and ever since has been maintained. During that time it has served as one of the main arteries of travel between the bay regions of

southern Alameda County and the Livermore Valley. In establishing the highway, the county acted by authority of, and in compliance with, the requirements of state statutes then in force. That portion of the canyon containing the segments of the highway here in question is narrow, deep, and rugged, and through it runs the Alameda Creek. Steep cliffs make it impracticable to maintain a highway through the canyon except along the bottom thereof. In pursuance of the act of Congress of 1862, *supra,* granting a right of way four hundred feet wide across the public lands to the Central Pacific Railroad Company, the company designated as part of its right of way the route through Niles Canyon, which right of way, on account of the narrowness of the canyon, embraced part of the land occupied by the highway. A single track railroad was completed in 1868, over which trains have since been operated, but thereby the free use of the highway never has been interfered with.

About the years 1910–1911, owing to the effect of flood waters, a part of the highway was moved from one side of the creek to the other and beyond the railroad right of way, the discontinued portions being formally abandoned. When this suit was begun, the highway was within the right of way for stretches of about one-half a mile at the westerly end of the canyon, about one mile and a half at the easterly end, and for a short distance between the two. The physical conditions of the canyon are such as to render the use of the lands over these stretches for highway purposes a practical necessity. In reconstituting the highway in 1910–1911, the line of the then existing road was substantially followed, except for the abandoned portions.

The trial court found that " the said highway did not exist throughout in its present location hereinabove particularly described prior to March 27, 1911, but that these parts of the old road No. 247 [the road of 1859] not ex-

pressly abandoned by the Board of Supervisors on said date and now included within the limits of County road No. 4974 [the road of 1910–1911], are a part of the present traveled road." The testimony of witnesses in respect of the identity of these parts of the new and the old roads is meager and leaves much to be desired in the way of certainty, as, owing to the great lapse of time, well might be expected. But that a road through the canyon was laid out and established in 1859, under and in accordance with the state law, and was thereafter used by the public, is not open to serious controversy, although the point is urged that the present road departs from the line of that first established. The original road was formed by the passage of wagons, etc., over the natural soil, and we know, as a matter of ordinary observation, that in such cases the line of travel is subject to occasional deviations owing to changes brought about by storms, temporary obstructions, and other causes. But, so far as the specific parcels of land here in dispute are concerned, we find nothing in the record to compel the conclusion that any departure from the line of the original highway was of such extent as to destroy the identity of the road as originally laid out and used. Even in the case of highways sought to be established by prescription, where the user must be confined to a definite line, slight deviations are not regarded as material. *Nelson* v. *Jenkins,* 42 Neb. 133, 137; 60 N. W. 311; *Burleigh County* v. *Rhud,* 23 N. D. 362, 364; 136 N. W. 1082; *Moon* v. *Lollar,* 203 Ala. 672; 85 So. 6; *Gentleman* v. *Soule,* 32 Ill. 271, 278; *Bannister* v. *O'Connor,* 113 Iowa 541, 543; 85 N. W. 767.

Here the question is not whether there had been such deviations from the original line of travel as to negative the claim that a road had been brought into existence by prescription, but whether there had been such substantial departures from portions of the line of the road established in 1859 as to constitute an abandonment of those

portions of that road, and the substitution, *pro tanto,* of a new one so removed in location as to cause it to depend for its legality not upon the original establishment but upon independent facts and considerations. The burden of sustaining the affirmative of this proposition plainly rests upon the party who asserts it, since proof of the establishment of a road raises a presumption of its continuance. That is to say, the respondents having shown the establishment by the county of a road through Niles Canyon in 1859, the continuing identity of that road must be presumed until overcome by proof to the contrary, the burden of which rests upon the petitioners. *Barnes* v. *Robertson,* 156 Iowa 730, 733; 137 N. W. 1018; *Beckwith* v. *Whalen,* 65 N. Y. 322, 332; *Eklon* v. *Chelsea,* 223 Mass. 213, 216; 111 N. E. 866; *Taeger* v. *Riepe,* 90 Iowa 484, 487; 57 N. W. 1125; *Oyster Bay* v. *Stehli,* 169 App. Div. (N. Y.) 257, 262; 154 N. Y. S. 849. This is in accordance with the general principle that a condition once shown to exist is presumed to continue. In the light of this presumption, and the absence of evidence clearly contravening it, we cannot say that the findings below are wholly without support. The conclusion follows that the portions of the highway now in question, prior to the grant of the railroad right of way of 1862, formed part of a legally constituted public road, which, since its establishment in 1859, has been in continuous use. In this view, the decree below must be affirmed upon principles settled by this court in respect of cognate cases.

By the Act of July 26, 1866, c. 262, 14 Stat. 251–253, Congress dealt with the acquisition of a variety of rights upon the public domain. By §§ 1–7, mineral lands, whether surveyed or unsurveyed, are opened to exploration and occupation, subject to regulations prescribed by law, and to the local customs and rules of miners in the several districts. Section 8, the one with which we are

here concerned, provides "That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." By § 9, it is provided that rights to the use of water for mining, agricultural, or other purposes, which have vested and accrued and are recognized and acknowledged by local customs, laws, etc., shall be maintained and protected; "and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed."

In *Broder* v. *Water Co.*, 101 U. S. 274, this court had § 9 under consideration. It there appeared that the water company owned a canal for conducting and distributing water for mining, agricultural, and other uses. The canal was completed in 1853, and thereafter was in constant operation, and uniformly acknowledged and recognized by the local customs, laws, and decisions of the courts of California. Until the passage of the act of 1862, *supra,* the land through which the canal ran was the public property of the United States. A portion of it was included in the grant of lands made by that act to the railroad company from which Broder derived his title to a tract traversed by the canal. He brought suit against the water company to have the canal declared a nuisance and abated, and to recover damages. This court held that, notwithstanding the fact that Broder's title antedated the Act of 1866, that title, nevertheless, was subject to the right of way for the canal. Upon that matter it was said [p. 276]:

"It is the established doctrine of this court that rights of . . . persons who had constructed canals and ditches . . . are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary *recognition of a pre-existing right of*

possession, constituting a valid claim to its continued use, than the establishment of a new one."

The court then, referring to the clause in § 4 of the Act of July 2, 1864, *supra,* reserving from defeat or impairment by the general terms of the grant of 1862, " any pre-emption, homestead, swampland, *or other lawful claim,*" said that all such reservations were to be construed in the light of the general principle that Congress, in making the donations, could not be supposed to do so " at the expense of pre-existing rights, which, though imperfect, were still meritorious, and had just claims to legislative protection."

Leavenworth, L. & G. R. Co. v. *United States,* 92 U. S. 733, involved a grant to the State of Kansas of lands to aid in the construction of specified railroads; and the question was whether the grant included lands dedicated to, and occupied by, the Osage Indians. The grant was subject to a proviso reserving to the United States all lands theretofore reserved for the purpose of aiding in any object of internal improvement or for any other purpose whatsoever. It was held that this proviso had the effect of excluding the Indian lands from the operation of the grant. The court, at p. 746, said:

" It would be strange, indeed, if, by such an act, Congress meant to give away property which a just and wise policy had devoted to other purposes. That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the government, and saved from a possible grant, is a proposition which will command universal assent."

And the court added:

" What ought to be done, has been done. The proviso was not necessary to do it; but it serves to fix more definitely what is granted by what is excepted."

Likewise, this court has recognized that the appropriation of mineral lands upon the public domain in accordance with the local customs of miners, prior to Congressional legislation, was assented to by the silent acquiescence of the government, and was entitled to protection. See *Atchison* v. *Peterson,* 20 Wall. 507, 512; *Sparrow* v. *Strong,* 3 Wall. 97, 104; *Jennison* v. *Kirk,* 98 U. S. 453, 458; *Northern Pacific R. Co.* v. *Sanders,* 166 U. S. 620, 634.

In *Jennison* v. *Kirk, supra,* at page 459, referring to the Act of 1866, this court quoted approvingly the statement of the author of the act, that "It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached."

As far back as 1855, the Supreme Court of California, in an opinion which received the approval of this court in *Atchison v. Peterson, supra,* said:

"In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown either by the United States or the state governments, and with the exception of certain state regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some

which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res judicata.* Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development." *Irwin* v. *Phillips,* 5 Cal. 140, 146.

Finally, in *Cramer* v. *United States,* 261 U. S. 219, 229, it was held that public lands in the actual occupancy of individual Indians since before 1859, were excepted from the railroad grant of lands made by the Act of July 25, 1866, c. 242, 14 Stat. 239. This holding was based upon the well understood governmental policy of encouraging the Indian to forego his wandering habits and adopt those of civilized life; and it was said that to hold that by so doing he acquired no possessory rights to the lands occupied, to which the government would accord protection, would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation. "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy. *Broder* v. *Water Co.,* 101 U. S. 274, 276, furnishes an analogy."

The present case is controlled by the same general principles. We cannot close our eyes to the fact that long before the Act of 1866, highways in large number had been laid out by local, state and territorial authority, upon and across the public lands. The practice of doing so had been so long continued, and the number of roads thus created was so great, that it is impossible to con-

clude otherwise than that they were established and used with the full knowledge and acquiescence of the national government. These roads, in the fullest sense of the words, were necessary aids to the development and disposition of the public lands. Compare *Flint & P. M. Ry. Co.* v. *Gordon,* 41 Mich. 420, 428–429; 2 N. W. 648; *Red Bluff* v. *Walbridge,* 15 Cal. App. 770, 778–9; 116 Pac. 77. They facilitated communication between settlements already made, and encouraged the making of new ones; increased the demand for additional lands, and enhanced their value. Governmental concurrence in and assent to the establishment of these roads are so apparent, and their maintenance so clearly in furtherance of the general policies of the United States, that the moral obligation to protect them against destruction or impairment as a result of subsequent grants follows as a rational consequence. The section of the Act of 1866 granting rights of way for the construction of highways, no less than that which grants the right of way for ditches and canals, was, so far as then existing roads are concerned, a voluntary recognition and confirmation of preëxisting rights, brought into being with the acquiescence and encouragement of the general government.

It follows that the laying out by authority of the state law of the road here in question created rights of continuing user to which the government must be deemed to have assented. Within the principle of the decisions of this court heretofore cited, they were such rights as the government in good conscience was bound to protect against impairment from subsequent grants. The reasons for so holding are too cogent to be denied. When, under that grant, the railroad company designated its right of way and built its line, it must be held to have done so with knowledge of the existence of the highway and subject to its continued maintenance and use.

Decree affirmed.

UNITED STATES NAVIGATION CO., INC., *v.* CUNARD STEAMSHIP CO., LTD., ET AL.

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

No. 296. Argued January 8, 11, 1932.—Decided February 15, 1932.

1. The relation of the Shipping Act to carriers by water is substantially the same as the relation of the Interstate Commerce Act to carriers by land; and owing to the close parallelism between the two, the construction of the Interstate Commerce Act, settled when the Shipping Act was passed, must be applied to the latter, unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the terms of the Act relating thereto, requiring a different conclusion. P. 480.
2. Questions essentially of fact, and those involving the exercise of administrative discretion, which are within the jurisdiction of the Shipping Board, are primarily within its exclusive jurisdiction, and private remedies must, in general, be sought from the Board before the jurisdiction of the courts can be invoked. P. 481.
3. A steamship company, by its bill for an injunction under the Sherman and Clayton Acts, alleged that certain of its competitors were in a combination and conspiracy to exclude it from the business of carrying general cargo between the United States and certain foreign countries and to monopolize such business themselves. The means alleged included: coercion of shippers by exaction of much higher rates from those who did than from those who did not agree to use the defendants' lines exclusively; giving rebates; spreading false rumors that the plaintiff was about to discontinue its service; use of defendants' combined economic bargaining power to coerce shippers who were also producers of commodities used in large quantities by the defendants, to enter into joint exclusive contracts with them; and threats to blacklist forwarders, and refuse to pay them joint brokerage fees, unless they discontinued making, or advising shippers to make, shipments in plaintiff's ships. *Held:*

   (1) The case is remediable under the Shipping Act, since the allegations either constitute direct and basic charges of violations of that Act (§§ 14, 14a, 16 and 17), or are so interrelated with such charges as to be in effect a component part of them. P. 483.

(2) The Shipping Act, to this extent, supersedes the antitrust laws. P. 485.

(3) The matter is within the exclusive preliminary jurisdiction of the Shipping Board. *Id.*

4. Section 15 of the Shipping Act requires that agreements between carriers "in any manner providing for an exclusive, preferential, or coöperative working arrangement," shall be filed immediately with the Board; and thereupon, the Board is authorized to disapprove, cancel or modify any such agreement, "whether or not previously approved by it," which it finds to be unjustly discriminatory or unfair as between carriers, shippers, etc., "or to operate to the detriment of the commerce of the United States, or to be in violation of this Act." *Held:*

(1) That failure to file such an agreement with the Board will not afford ground for an injunction under § 16 of the Clayton Act at the suit of a private party. P. 486.

(2) In case of such failure, § 22 of the Shipping Act authorizes the Board to afford relief upon complaint or upon its own motion; and its orders are then, under § 31, for the first time, open to a judicial proceeding to enforce, suspend or set them aside in accordance, generally, with the rules and limitations announced by this Court in respect of like orders made by the Interstate Commerce Commission. *Id.*

(3) Even though an agreement, as described in a bill for an injunction, be such that it could not legally be approved, the Board has primary original jurisdiction to consider the case upon a full hearing and with regard to the peculiar nature of ocean traffic, and to "disapprove, cancel or modify" the agreement that it finds was made. P. 487.

(4) A decision by the Board adjudging an agreement unlawful under the Shipping Act after full hearing, will not justify the courts in entertaining a bill for an injunction with respect to another agreement between other parties, although, as described by the bill, it be similar to the agreement that the Board held unlawful. P. 488.

50 F. (2d) 83, affirmed.

CERTIORARI * to review a decree affirming the dismissal of a bill to enjoin alleged violations of the Sherman and Clayton Acts. 39 F. (2d) 204.

* See table of cases reported in this volume.

Mr. Mark W. Maclay, with whom *Mr. John Tilney Carpenter* was on the brief, for petitioner.

The Shipping Act expressly confines the powers of the Board to the provisions of the Act itself and confers no general jurisdiction over monopolies and restraints in respect of ocean carriers.

The only reference to monopolies and restraints is in § 15, relieving approved agreements from the operation of the antitrust laws,—an exemption which does not apply to the subject-matter of this suit.

The exception in § 16 of the Clayton Act, denying injunctive relief against land carriers in respect of matters subject to the jurisdiction of the Interstate Commerce Commission, should not be extended by implication to ocean carriage.

The circumstance that the facts alleged were, or may have been, also violations of the Shipping Act, is not a sufficient reason for depriving the petitioner of its legal or equitable remedies under the antitrust laws, or for confining it to proceedings before the Shipping Board under the Shipping Act.

Relief has been given under the Sherman Act, at common law, and in admiralty, in cases where the facts included violations of the Shipping Act. *Buyer* v. *Guillan,* 271 Fed. 65; *European Commercial Co.* v. *International Mercantile Co.,* 1923 A. M. C. 211; *New Orleans Box Co.* v. *Luckenbach S. S. Co.,* No. 19,745, Dist. Ct., U. S., E. Dist. La., Nov. 7, 1930; *American Pitch Co.* v. *Dixie S. S. Co.,* No. 20,871, Dist. Ct. U. S., E. Dist. La., December 24, 1931; *Burgess Bros. Co.* v. *Stewart,* 114 Misc. (N. Y.) 673; *Prince Line* v. *American Exports Co.,* 45 F. (2d) 242.

The mere existence of a remedy at the hands of the Interstate Commerce Commission has not been considered a bar to relief under the Sherman Act, other remedial statutes, or on common law principles. *United States* v.

Pacific & Arctic Co., 228 U. S. 87; *United States* v. *Union Pacific R. Co.*, 226 U. S. 61; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290; *Meeker* v. *Lehigh Valley R. Co.*, 183 Fed. 548. Distinguishing *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156.

The requirement of prior resort to the administrative body depends upon the kind of function to be exercised, or upon the nature of the question and of the inquiry needed to solve it. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. The character of the party plaintiff, whether private or governmental, is irrelevant. Cf. *United States* v. *Pacific & Arctic Co.*, 228 U. S. 87.

If the Shipping Act repealed or made inapplicable the remedial provisions of the Sherman and Clayton Acts, then the situation from the point of view of remedy becomes what it was before either of those Acts was passed; and at that stage a private party could obtain an injunction against a group of ocean carriers giving preferential treatment in consideration of exclusive patronage. *Menacho* v. *Ward*, 27 Fed. 529.

Notwithstanding the jurisdiction of the Interstate Commerce Commission, the courts have repeatedly held that state and federal common law and statutory provisions apply to and will be enforced by the courts against illegal practices, at the instance of private parties. *Pennsylvania R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 134; *Louisville & N. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70; *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285; *Pennsylvania R. Co.* v. *Sonman Coal Co.*, 242 U. S. 120; *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184; *China Fire Ins. Co.* v. *Davis*, 50 F. (2d) 389.

The court has jurisdiction without preliminary resort to the regulatory body in the absence of a question of an administrative nature or of complex facts calling for ex-

perience in technical matters. *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426; *Great Northern Ry. Co.* v. *Merchants Elevator Co.,* 259 U. S. 285; *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.,* 270 U. S. 266.

The questions in this case are not of an administrative character and their adjudication does not require reference either to any standard of factual reasonableness or to any standard of the welfare of the industry. Cf. *Menacho* v. *Ward,* 25 Fed. 529; *United States* v. *Pacific & Arctic Co.,* 228 U. S. 87; *United States* v. *Great Lakes Towing Co.,* 208 Fed. 733; *Thomsen* v. *Cayser,* 243 U. S. 66. Eden Mining Co. *v.* Bluefields Fruit & S. S. Co., 1 U. S. S. B. 41.

The agreements and understandings complained of could not legally be approved by the Shipping Board.

Refusal to carry at a given rate except in consideration of exclusive patronage has already been held unlawful by the Board.

The acts complained of are unlawful by the express terms of the Shipping Act itself.

Mr. Roscoe H. Hupper, with whom *Mr. Charles C. Burlingham* was on the brief, for respondents.

Mr. Justice Sutherland delivered the opinion of the Court.

The United States Navigation Company is a corporation operating ships in foreign commerce. It brought this suit in the federal district court for the southern district of New York to enjoin respondents from continuing an alleged combination and conspiracy in violation of the Sherman Antitrust Act, c. 647, 26 Stat. 209, Title 15, U. S. C., §§ 1–7, and of the Clayton Act, c. 323, 38 Stat. 730, Title 15, U. S. C., §§ 12–27. The district court granted a motion to dismiss the amended bill on the ground, principally, that the matters complained of were

within the exclusive jurisdiction of the United States Shipping Board, under the Shipping Act of 1916, c. 451, 39 Stat. 728, Title 46, U. S. C., §§ 801–842, as amended by the Merchant Marine Act of 1920, c. 250, 41 Stat. 988. 39 F. (2d) 204. The circuit court of appeals affirmed. 50 F. (2d) 83.

For present purposes, the substance of the pertinent allegations of the bill may be stated as follows: The petitioner, during the time mentioned in the bill, operated steamships for the carriage of general cargo between the port of New York and specified foreign ports. The respondents are corporations also engaged in foreign commerce between the United States and specified foreign countries, carrying ninety-five per cent. of the general cargo trade from North Atlantic ports in the United States to the ports of Great Britain and Ireland. These corporations and the petitioner are the only lines maintaining general cargo services in that trade. Respondents have entered into and are engaged in a combination and conspiracy to restrain the foreign trade and commerce of the United States in respect of the carriage of general cargo from the United States to the foreign ports named, with the object and purpose of driving the petitioner and all others not parties to the combination out of, and of monopolizing, such trade and commerce. The conspiracy involves the establishment of a general tariff rate and a lower contract rate, the latter to be made available only to shippers who agree to confine their shipments to the lines of respondents. The differentials thus created between the two rates are not predicated upon volume of traffic or frequency or regularity of shipment, but are purely arbitrary and wholly disproportionate to any difference in service rendered, the sole consideration being their effect as a coercive measure. The tariff rate in numerous instances is as much as one hundred per cent. higher than the contract rate. The disproportionately

wide spread of these differentials is wholly arbitrary and unreasonable. The respondents have put into effect what is called a scheme of joint exclusive patronage contracts, by which shippers are required to agree to ship exclusively by their lines, and to refrain from offering any shipments to petitioner. Unless they so agree, the shippers are forced to pay the far higher general tariff rates. This plan is resorted to for the purpose of coercing shippers to deal exclusively with respondents and refrain from shipping by the vessels of petitioner, and thus exclude it entirely from the carrying trade between the United States and Great Britain.

Other means to accomplish the same end are alleged, such as, giving rebates; spreading false rumors and falsely stating that petitioner is about to discontinue its service; making use of their combined economic bargaining power to coerce various shippers, who are also producers of commodities used in large quantities by respondents, to enter into joint exclusive contracts with them; and threatening to blacklist forwarders and refuse to pay them joint brokerage fees unless they discontinue making, or advising shippers to make, shipments in petitioner's ships. Certain overt acts are alleged as being in furtherance of the combination, conspiracy, and attempt to monopolize. A more detailed analysis of the amended bill, is embodied in the statement of the case which precedes the opinion of the court below.

It may be conceded that, looking alone to the Sherman Antitrust Act, the bill states a cause of action under §§ 1 and 2 of that act, and, consequently, furnishes ground for an injunction under § 16 of the Clayton Act, unless the Shipping Act stands in the way; and this was the view of both courts below.

The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to

interstate common carriers by land. When the Shipping Act was passed, the Interstate Commerce Act had been in force in its original form or in amended forms for more than a generation. Its provisions had been applied to a great variety of situations, and had been judicially construed in a large number and variety of cases. The rule had become settled, that questions essentially of fact and those involving the exercise of administrative discretion, which were within the jurisdiction of the Interstate Commerce Commission, were primarily within its exclusive jurisdiction, and, with certain exceptions not applicable here, that a remedy must be sought from the commission before the jurisdiction of the courts could be invoked. In this situation the Shipping Act was passed. In its general scope and purpose, as well as in its terms, that act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect. It follows that the settled construction in respect of the earlier act must be applied to the later one, unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the terms of the act relating thereto, requiring a different conclusion.

The decisions of this court which deal with the subject under the Interstate Commerce Act are fully reviewed by the court below in an able and carefully drawn opinion. It is enough for us here to refer to a few illustrative cases. In *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291, the general rule and an exception to it are considered. The immediate question there at issue concerned merely the legal construction of an interstate tariff, no question of fact, either as an aid to the construction, or in any other respect, and no question of administrative discretion, being involved. It was held that the issue was within the jurisdiction of the courts without preliminary

resort to the commission. But the distinction between that case and one where preliminary resort to the commission is necessary was definitely stated. Such resort, it was said, must be had where a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, and also where it is necessary, in the construction of a tariff, to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction. In all such cases the uniformity which it is the purpose of the Commerce Act to secure could not be obtained without a preliminary determination by the commission. Preliminary resort to the commission "is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

In *Board* v. *Great Northern Ry. Co.*, 281 U. S. 412, an interlocutory injunction had been granted by a federal district court of three judges in a suit assailing intrastate railroad rates as working undue and unreasonable discrimination against interstate commerce. The order granting the injunction was reversed on the ground that the district court was without power to entertain the suit in advance of a determination of the question by the Interstate Commerce Commission.

"The inquiry," we said (pp. 421–422), "would necessarily relate to technical and intricate matters of fact,

and the solution of the question would demand the exercise of sound administrative discretion. The accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision. Only through the action of such a body could there be secured the uniformity of ruling upon which appropriate protection from unreasonable exactions and unjust discriminations must depend."

So the rule has been applied where recovery was sought by a shipper for unreasonable and excessive freight rates not found to be unreasonable by the commission, *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426; where the question was as to the reasonableness of the carrier's practice in distributing cars, *Midland Valley R. Co.* v. *Barkley,* 276 U. S. 482; where the reasonableness of a particular practice of routing was involved, *Northern Pacific Ry. Co.* v. *Solum,* 247 U. S. 477, 483; where the continuance of service on an industrial track was assailed as unduly discriminatory, *Western & Atlantic R. Co.* v. *Public Service Comm.,* 267 U. S. 493, 497; and where an action was brought under § 7 of the Antitrust Act, based upon an alleged conspiracy among carriers to fix rates, *Keogh* v. *Chicago & N. W. Ry. Co.,* 260 U. S. 156. In the case last cited it was pointed out (p. 163) that if a shipper were permitted to recover under the Antitrust Act, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. "Uniform treatment would not result, even if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief."

That the Shipping Act covers the dominant facts alleged in the present case as constituting a violation of the Antitrust Act is clear. Section 14 prohibits retaliation by a common carrier by water against any shipper by resort

to discriminating or unfair methods because the shipper has patronized another carrier; and § 14a confers power upon the board to determine the question. The latter section also confers similar power on the board in respect of any combination, agreement or understanding involving transportation of passengers or property between foreign ports, deferred rebates, or any other unfair practice designated in § 14. Section 16 makes it unlawful for any such carrier, alone or in conjunction with another, to give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic, or to subject any such person, locality or traffic to undue or unreasonable prejudice or disadvantage in any respect, or to allow any person to obtain transportation for property at less than the regular rates by any unjust or unfair device or means. Section 17 prohibits any charge or rate unjustly discriminatory between shippers or ports, etc., and gives the board authority to alter the same to the extent necessary to correct the discrimination or prejudice, and to order the carrier to discontinue. Section 22 authorizes any person to file with the board a complaint, setting forth any violation of the act by a common carrier by water, and asking reparation for the injury. Copy of the complaint is to be furnished to the carrier, who is required to satisfy the complaint or answer it in writing. If not satisfied, the board is authorized to investigate the case and make such order as it deems proper, and the board may direct payment of full reparation for the injury caused by such violation. The board is also authorized, upon its own motion, except as to orders for the payment of money, to investigate any violation of the act. We need not pursue the analysis further. These and other provisions of the Shipping Act clearly exhibit the close parallelism between that act and its prototype, the Interstate Commerce Act, and the applicability to both of like principles of construction and administration.

The act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. Compare *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238; *United States* v. *Hamburgh-American S. S. Line,* 216 Fed. 971.

A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws. Compare *Keogh* v. *Chicago & N. W. Ry. Co., supra,* at p. 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, are demonstrative of this conclusion. Indeed, if there be a difference, the conclusion as to the first named act rests upon stronger ground, since the decisions of this court compelling a preliminary resort to the commission

were made in the face of a clause in § 22 of the Interstate Commerce Act, that nothing therein contained should in any way abridge or alter existing common law or statutory remedies, but that the provisions of the act were in addition to such remedies (*Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 256); a clause that finds no counterpart in the Shipping Act.

There is nothing in § 15 of the Shipping Act which militates against the foregoing views. That section requires that agreements between carriers, or others subject to the act, in respect of a number of enumerated matters, or "in any manner providing for an exclusive, preferential, or coöperative working arrangement," shall be filed immediately with the board; and that the term "agreement" shall include understandings, conferences, and other arrangements. Thereupon, the board is authorized to disapprove, cancel or modify any such agreement, "whether or not previously approved by it," which it finds to be unjustly discriminatory or unfair as between carriers, shippers, etc., "or to operate to the detriment of the commerce of the United States, or to be in violation of this Act." But a failure to file such an agreement with the board will not afford ground for an injunction under § 16 of the Clayton Act at the suit of private parties—whatever, in that event, may be the rights of the government—since the maintenance of such a suit, being predicated upon a violation of the antitrust laws, depends upon the right to seek a remedy under those laws, a right which, as we have seen, does not here exist. If there be a failure to file an agreement as required by § 15, the board, as in the case of other violations of the act, is fully authorized by § 22, *supra*, to afford relief upon complaint or upon its own motion. Its orders, in that respect, as in other respects, are then, under § 31, for the first time, open to a judicial proceeding to enforce, suspend or set them aside in accordance, generally, with the rules and limita-

tions announced by this court in respect of like orders made by the Interstate Commerce Commission.

It is said that the agreement referred to in the bill of complaint cannot legally be approved. But this is by no means clear. In the first place, while the allegations of the bill must be taken as true upon the motion to dismiss, they still are subject to challenge by pleading and proof if the motion be denied. We cannot assume that, in a proceeding before the board in which the whole case would be open, similar allegations will not be denied or met by countervailing affirmative averments. In any event, it reasonably cannot be thought that Congress intended to strip the board of its primary original jurisdiction to consider such an agreement and "disapprove, cancel, or modify" it, because of a failure of the contracting parties to file it as § 15 requires. A contention to that effect is clearly out of harmony with the fundamental purposes of the act and specifically with the provision of § 22 authorizing the board to investigate *any* violation of the act upon complaint or upon its own motion and make such order as it deems proper. And whatever may be the form of the agreement, and whether it be lawful or unlawful upon its face, Congress undoubtedly intended that the board should possess the authority primarily to hear and adjudge the matter. For the courts to take jurisdiction in advance of such hearing and determination would be to usurp that authority. Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications.

Petitioner contends that the Shipping Board has already determined that an agreement similar to the one here involved is unlawful under the Shipping Act, Eden Mining Co. *v.* Bluefields Fruit & S. S. Co., 1 U. S. S. B. 41,

and, therefore, that the courts may take jurisdiction of the case without further preliminary resort to the board. In support of this contention we are referred to *Mitchell Coal Co.* v. *Pennsylvania R. Co., supra,* (see p. 257), and *National Pole Co.* v. *Chicago & N. W. Ry. Co.,* 211 Fed. 65, 72. Without stopping to consider the general principle thus invoked, it is enough to say that the *Eden* case did not involve this agreement or these parties, and it was decided after a full hearing upon issue joined. Here we have only the allegations of the bill before us. If there be a formal written agreement, it is not set out; and it is pleaded, apparently, only according to the pleader's conception of its legal effect. There is at present no answer, and the question before us arises upon a motion to dismiss, which admits the facts, so far as they are well pleaded, only for the sake of the argument. What might be disclosed by an answer and upon a hearing, we do not know and are not permitted to conjecture. It may be, for aught that now appears, that in an original proceeding before the board, the allegations upon which petitioner relies may not be sustained, or may be so qualified as to render the *Eden* decision entirely inapplicable. Whatever might be the rule to be applied under other circumstances, we are of opinion that in the state of the present record the ordinary primary jurisdiction of the board has not been superseded by its decision in the *Eden* case. To hold otherwise would be to create the doubtful, and perhaps dangerous, precedent that a decision of the board in respect of one agreement definitely establishes that the rule of that decision must, without more, be applied to all other agreements alleged to be of a similar character, although it may turn out upon investigation that the allegations are not warranted, or the facts and circumstances of and surrounding the transaction are so wholly different as to afford ground for a different result.

Decree affirmed.

BERGHOLM ET AL. *v.* PEORIA LIFE INS. CO.

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

No. 297. Argued January 18, 1932.—Decided February 15, 1932.

1. Contracts of life insurance, like other contracts, must be construed according to the terms that the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense. P. 492.
2. A condition in a policy of life insurance that the policy shall cease if the stipulated premium shall not be paid on or before the day fixed is of the very essence and substance of the contract. *Id.*
3. Clauses in a policy by which the company undertook to pay the premiums if the insured were totally and permanently disabled, but only upon receipt by it of proof of such disability and only the premiums becoming due after such receipt, *held* unambiguous and not to be construed, to save the policy from a lapse, as an agreement to pay premiums accruing after the disability occurred but before the company received proof of it. P. 491.

50 F. (2d) 67, affirmed.

CERTIORARI * to review a judgment reversing a recovery in an action upon a life insurance policy.

Mr. E. L. Klett, with whom *Mr. Tom Connally* was on the brief, for petitioners.

Mr. J. I. Kilpatrick, with whom *Mr. J. B. Wolfenbarger* was on the brief, for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action brought to recover the sum of $5,000 life insurance and specified disability benefits upon a policy issued by the respondent to Carl Oscar Bergholm on March 13, 1926. Judgment upon a verdict for peti-

* See table of cases reported in this volume.

tioners in the trial court was reversed by the court of appeals. 50 F. (2d) 67. We granted certiorari because of a supposed conflict with *Minnesota Mut. Life Ins. Co.* v. *Marshall,* 29 F. (2d) 977.

Beginning with February 27, 1927, premiums were to be paid quarterly, with a grace period of one month from any due date, during which period the policy was to continue in full force. In case of total and permanent disablement there was a provision for payment of a monthly income for life of one per cent. of the amount of the principal sum. The policy expressly provided that "if any premium is not paid on the date when due, this policy shall cease and determine, except as hereinafter provided." The "income disability" clause, which follows this language, provides:

"Upon receipt by the Company of satisfactory proof that the Insured is totally and permanently disabled as hereinafter defined the Company will

"1. Pay for the Insured all premiums becoming due hereon after the receipt of such proof and during the continuance of the total and permanent disability of the Insured and will also

"2. Pay to the Insured a Monthly Income for life of 1% of this Policy; The first payment of such income to be paid immediately upon receipt of such proof . . . .

"3. . . . To entitle the Insured to the above Total and Permanent Disability Benefits this policy at the time of making claim for such benefits must be in full force and all premiums becoming due prior to the time of making claim must have been duly paid . . ."

The insured died on April 18, 1929. Judgment was sought for disability benefits from December 1, 1927, to April 1, 1929, at the rate of $50 per month, with interest. The last premium paid was due on May 27, 1927. The next, allowing a month's period of grace, should have been paid not later than September 27, 1927. Neither that nor

any subsequent premium was ever paid. Long prior to the death of the insured, the policy, therefore, had lapsed, unless saved by the terms of the disability clause above quoted. There is evidence in the record from which it reasonably may be found that the insured was totally and permanently disabled from a time before the premiums first became in arrears, and that this condition continued until his death; but no proof thereof was furnished to the company.

The petitioners, nevertheless, contend that this is enough to bring into effect the promise of the company to pay the premiums which became due after the disability began. In support of this contention, *Minnesota Mut. Life Ins. Co.* v. *Marshall, supra,* is cited. The pertinent provisions of the policy there, however, differ from those found in the policy here under consideration. There the policy provided that if the insured, while the policy is in force and before default in payment of premiums, " shall become totally and permanently disabled . . . and shall furnish satisfactory proof thereof, the Company will waive the payment of premiums thereafter becoming due," and that " upon the receipt of due proof of total and permanent disabilities . . . the Company will waive the payment of all premiums thereafter becoming due." The court held that the waiver took effect at the time of the disability, and did not depend upon the time when proof thereof was furnished.

We do not need to controvert this construction of the words quoted, or question the soundness of the view of the court that the existence of the disability before the premium became in arrears, standing alone, was enough to create the waiver. In that view, the obligation to furnish proof was no part of the condition precedent to the waiver; but such proof might be furnished within a reasonable time thereafter. Here the obligation of the company does not rest upon the existence of the disability;

but it is the receipt by the company of *proof* of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums *becoming due after the receipt of such proof*. The provision to that effect is wholly free from the ambiguity which the court thought existed in the Marshall policy. Compare *Brams* v. *New York Life Ins. Co.*, 299 Pa. 11, 14; 148 Atl. 855. It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted. *Mutual Life Ins. Co.* v. *Hurni Co.*, 263 U. S. 167, 174; *Stipcich* v. *Insurance Co.*, 277 U. S. 311, 322. This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings.

Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense. *Imperial Fire Ins. Co.* v. *Coos County*, 151 U. S. 452, 462–463. As long ago pointed out by this court, the condition in a policy of life insurance that the policy shall cease if the stipulated premium shall not be paid on or before the day fixed is of the very essence and substance of the contract, against which even a court of equity cannot grant relief. *Klein* v. *Insurance Co.*, 104 U. S. 88, 91; *New York Life Ins. Co.* v. *Statham*, 93 U. S. 24, 30–31; *Pilot Life Ins. Co.* v. *Owen*, 31 F. (2d) 862, 866. And to discharge the insured from the legal consequences of a failure to comply with an explicitly stipulated requirement of the policy, constituting a condition precedent to the granting of such relief by the insurer, would be to vary the plain terms of a contract in utter disregard of long-settled principles.

Judgment affirmed.

SINGLETON ET AL. *v.* CHEEK ET AL.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 403. Argued January 22, 1932.—Decided February 15, 1932.

1. Under § 303 of the World War Veterans Act of 1924, as amended by the Act of March 4, 1925, when the insured and the beneficiary designated in a certificate of war risk insurance die successively, intestate, the commuted amount of the installments not accrued when the beneficiary died is to be paid to the estate of the insured for distribution to his heirs. The heirs are to be determined in accordance with the laws of the State where the insured resided, and as of the time of his death, and are not limited to the class of beneficiaries designated in the Acts of Congress prior to the amendment. P. 496.
2. The retroactive provision of the amendment making it effective as of October 6, 1917, was within the power of Congress. *White* v. *United States*, 270 U. S. 175. P. 497.

152 Okla. 229, reversed.

CERTIORARI * to review a judgment determining the distribution, in administration proceedings, of a fund derived from war risk insurance.

Mr. A. G. C. Bierer, Jr., with whom *Mr. A. G. C. Bierer* was on the brief, for petitioners.

No appearance for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Lee Ray Jackson, a soldier in the United States army, received a certificate of insurance on his life, issued by the United States through the Bureau of War Risk Insurance on September 5, 1918. His wife, Mary Lucinda Jackson, was named as beneficiary. He died intestate March 21, 1921, a resident of Craig County, Oklahoma, leaving him surviving his wife and a son named James Lee Roy Jack-

* See table of cases reported in this volume.

son, a minor child about seven months old. In March, 1922, the child died, of course intestate; and in March, 1923, the widow died intestate, in the meantime having married Charley Singleton, one of the petitioners. No part of the insurance due under the certificate was paid during the lifetime of the insured or beneficiary; but the sum accrued between March 31, 1921, and March 30, 1923, has since been paid to the administrator of the estate of Mary Lucinda Jackson, who, at the time of her death, was Mary Lucinda Singleton. The amount of insurance due to the insured on account of permanent disability has been paid to the administrator de bonis non of the estate of Lee Ray Jackson. The remaining installments of the life insurance were commuted and the sum thereof, fixed by the War Risk Bureau, was also paid to the administrator last named. Such payments of the disability insurance and the sum of the commuted installments were authorized by the Veterans' Bureau and the administrator directed to distribute the amounts in accordance with the intestacy laws of the state of the insured's last legal residence, an award in favor of the administrator in each case having previously been made. The respondents, Edith Cheek, née Jackson, and Jewel Braziel, née Jackson, are sisters, and Emmett Jackson is a brother, of Lee Ray Jackson. Neither his father nor his mother survived him. George Davis and Maggie Davis are the parents of Mary Lucinda Singleton, but neither they nor Charley Singleton are blood kin to the insured.

During her lifetime Mary Lucinda Jackson administered the estate of Lee Ray Jackson, and upon her final report the court having probate jurisdiction found that she was entitled to all of the estate of the deceased Lee Ray Jackson, one-half in her own right, and the other one-half in the right of the minor child above named. A decree of heirship to that effect was duly entered.

In the administration following the death of Mary Lucinda Singleton and the infant son of Lee Ray Jackson, the same court determined that petitioners were entitled to the disability insurance which accrued before the death of the insured, but that respondents were entitled to the commuted value of the insurance falling due after the death of the beneficiary, holding that the commuted balance of such insurance was payable to the estate of the insured, but vested in the heirs next surviving within the permitted class of beneficiaries designated by the War Risk Insurance Act of 1917, c. 105, Art. 4, § 402, 40 Stat. 398, 409, as amended by the World War Veterans' Acts of 1919, c. 16, § 13, 41 Stat. 371, 375, and of 1924, c. 320, §§ 300, 303, 43 Stat. 607, 624, 625. The case was appealed to a state district court, where a different judgment was rendered. From that judgment an appeal was taken to the Supreme Court of Oklahoma, where it was twice heard. That court first sustained the petitioners' contention. Subsequently, upon rehearing, it held in favor of the respondents in respect of the commuted installments accruing after the death of the beneficiary, and in favor of petitioners as to those accruing before her death, following a decision of the Supreme Court of Kentucky in *Sutton's Executor* v. *Barr's Administrator*, 219 Ky. 543; 293 S. W. 1075, in which that court had decided that the heirs of the insured in being at the time of the death of the beneficiary took the property, and not those who were heirs at the time of the death of the insured.[1] 7 P. (2d) 140.

By the first Oklahoma decision the doctrine of the Kentucky case, just cited, was expressly disapproved; and, following the view of a number of other state decisions to the contrary, it was held that the decree of the county

[1] But see *Mefford* v. *Mefford*, 231 Ky. 127; 21 S. W. (2d) 151, and *Mason's Adm'r* v. *Mason's Guardian*, 239 Ky. 208, 39 S. W. (2d) 211, 213–214, which seem to overrule *Sutton's Executor* v. *Barr's Administrator*.

court in the original administration of the Jackson estate fixed the parties entitled to inherit all his estate, "whether the assets were then in the hands of the administrator, or later came into the possession of an administrator de bonis non"; and that when the widow died these assets became assets of her estate, to be distributed among her heirs. By the second Oklahoma decision this was reversed, upon the authority of the very case which had been distinctly rejected in the first decision.

We are of opinion that the first decision was right, and the second wrong. Undoubtedly, by § 15 of the War Risk Insurance Amending Act of 1919,[2] war risk insurance, after the death of the designated beneficiary, became payable to such person or persons within the permitted class of beneficiaries (enumerated in § 402, Act of 1917, as amended by § 13, Act of 1919) as would, under the laws of the state of the residence of the insured, be entitled to his personal property in case of intestacy. The second decision of the state supreme court, therefore, would have been entirely correct if no change had been made in the statute. But a radical change had been effected prior to the award of insurance made by the Veterans' Bureau on August 18, 1925. The Act of March 4, 1925, c. 553, 43 Stat. 1302, 1310, amended § 303 of the World War Veterans' Act of 1924 (which had in turn amended and modified the preceding acts), to read as follows:

[2] "Sec. 15. That if any person to whom such yearly renewable term insurance has been awarded dies, or his rights are otherwise terminated after the death of the insured, but before all of the two hundred and forty monthly installments have been paid, then the monthly installments payable and applicable shall be payable to such person or persons *within the permitted class of beneficiaries* as would, under the laws of the State of residence of the insured, be entitled to his personal property in case of intestacy; and if the permitted class of beneficiaries be exhausted before all of the two hundred and forty monthly installments have been paid, then there shall be paid to the estate of the last surviving person within the permitted class the remaining unpaid monthly installments."

"If no person within the permitted class be designated as beneficiary for yearly renewable term insurance by the insured either in his lifetime or by his last will and testament or if the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all of the two hundred and forty installments or all such as are payable and applicable, there shall be paid *to the estate of the insured* the present value of the monthly installments thereafter payable, said value to be computed as of date of last payment made under any existing award."

The amendment, in express terms, was made retroactive so as to take effect as of October 6, 1917, a provision undoubtedly within the power of Congress, for the reasons stated by this court in *White* v. *United States,* 270 U. S. 175.

By that amendment, the rule, which, upon the happening of the contingencies named in the prior acts, limited the benefit of the unpaid installments to persons within the designated class of permittees, was abandoned, and "the estate of the insured" was wholly substituted as the payee. All installments, whether accruing before the death of the insured or after the death of the beneficiary named in the certificate of insurance, as a result, became assets of the estate of the insured as of the instant of his death, to be distributed to the heirs of the insured in accordance with the intestacy laws of the state of his residence, such heirs to be determined as of the date of his death, and not as of the date of the death of the beneficiary. The state courts, with almost entire unanimity, have reached the same conclusion.[3]

Judgment reversed.

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[3] Cases in accord with the text: *In re Young's Estate,* 1 Pac. (2d) 523, 525; *Garland* v. *Anderson,* 88 Colo. 341, 346, *et seq.;* 296 Pac. 1023; *Condon* v. *Mallan,* 58 App. D. C. 371, 372; 30 F. (2d) 995, 996; *Tolbert* v. *Tolbert,* 41 Ga. App. 737; 154 S. E. 655; *In re Estate of Pivonka,* 202 Iowa 855, 858; 211 N. W. 246; *Robbins, Petitioner,*

MILLER, COLLECTOR OF INTERNAL REVENUE, *v.* STANDARD NUT MARGARINE COMPANY OF FLORIDA.*

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

No. 251. Argued January 6, 1932.—Decided February 15, 1932.

1. A suit to restrain collection of an excise imposed under the Oleomargarine Act is a suit to restrain collection of a tax, within the meaning of R. S. § 3224, and not a suit to collect a penalty. P. 506.

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126 Me. 555; 140 Atl. 366; *Woodworth* v. *Tepper,* 152 Md. 332, 334; 136 Atl. 536; *In re Dempster's Estate,* 247 Mich. 459, 462–464; 226 N. W. 243; *Williams* v. *Eason,* 148 Miss. 446, 454–455; 114 So. 338; *Matter of Storum,* 220 App. Div. (N. Y.) 472, 476; 221 N. Y. S. 771; *Trust Co.* v. *Brinkley,* 196 N. C. 40, 44; 144 S. E. 530; *In re Estate of Pruden,* 199 N. C. 256; 154 S. E. 7; *Re Root,* 58 N. D. 422, 428; 226 N. W. 598; *Palmer* v. *Mitchell,* 117 Oh. St. 87, 93; 158 N. E. 187; *Ogilvie's Estate,* 291 Pa. 326, 331–334; 139 Atl. 826; *National Union Bank* v. *McNeal,* 148 S. C. 30, 37; 145 S. E. 549; *Whaley* v. *Jones,* 152 S. C. 328, 333 *et seq.;* 149 S. E. 841; *Moss* v. *Moss,* 158 S. C. 243, 246; 155 S. E. 597; *Wade* v. *Madding,* 161 Tenn. 88, 93 *et seq.;* 28 S. W. (2d) 642; *Elben* v. *Jordan,* 161 Tenn. 509, 515; 33 S. W. (2d) 65; *Battaglia* v. *Battaglia,* 290 S. W. (Tex. Civ. App.) 296, 298; *Turner* v. *Thomas,* 30 S. W. (2d) (Tex. Civ. App.) 558; *In re Hogan's Estate,* 297 Pac. 1007, 1008; *Price* v. *McConnell,* 153 Va. 567, 572; 149 S. E. 515; *Stacy* v. *Culbertson,* 160 S. E. 50, 51; *Estate of Singer,* 192 Wis. 524, 527; 213 N. W. 479.

Cases either directly or apparently to the contrary: *Sutton's Executor* v. *Barr's Administrator,* 219 Ky. 543; 293 S. W. 1075; *Sizemore* v. *Sizemore's Guardian,* 222 Ky. 713; 2 S. W. (2d) 395; (the later Kentucky cases of *Mefford* v. *Mefford,* 231 Ky. 127; 21 S. W. (2d) 151, and *Mason's Administrator* v. *Mason's Guardian,* 239 Ky. 208; 39 S. W. (2d) 211, 213–214, apparently disagree with the earlier view); *In re Estate of Hallbom,* 179 Minn. 402; 229 N. W. 344; *Tax Commission* v. *Rife,* 119 Oh. St. 83; 162 N. E. 390; *Fisher's Estate,* 302 Pa. 516; 153 Atl. 736; *In re Cross' Estate,* 152 Wash. 459; 278 Pac. 414.

* Together with No. 252, *Rose, Collector of Internal Revenue,* v. *Standard Nut Margarine Company of Florida.*

2. Tax laws are to be interpreted liberally in favor of taxpayers; words defining things to be taxed may not be extended beyond their clear import; doubts must be resolved against the Government and in favor of the taxpayer. P. 508.
3. R. S. § 3224 is declaratory of the equitable rule that a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality; and it should be construed as nearly as may be in harmony with that rule and the reasons upon which it rests. P. 509.
4. The section is general and should not be construed as abrogating, by implication, the other equitable principle which permits suit to restrain collection where not only is the exaction illegal but there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence. *Id.*
5. The Oleomargarine Tax Act, before the Amendment of July 10, 1930, did not apply to substances resembling butter but containing no animal fat. P. 506.

   The product in question was made exclusively of cocoanut and peanut oils, salt, water and harmless coloring matter, and was sold for cooking, baking and seasoning.
6. Plaintiff made and sold a product not taxable under the Oleomargarine Act, in reliance upon determinations by courts and the Commissioner of Internal Revenue interpreting the Act as inapplicable in like cases and upon assurance from the Bureau that its product would not be taxed. Later the Commissioner changed his ruling, and while not attempting to collect from other makers of like products who had obtained injunctions in which he had acquiesced and which had become final, directed that the tax be enforced against plaintiff's entire product from the beginning. This would have destroyed the business, ruined the plaintiff financially and inflicted loss without remedy at law. *Held* that the Commissioner's action was not only based upon an erroneous construction of the statute, but was arbitrary and capricious, and that a suit could be maintained in the circumstances, to enjoin the collection. Pp. 508, 510.

42 F. (2d) 79, 85, affirmed.

CERTIORARI * to review affirmances of two decrees permanently enjoining collectors from collecting taxes imposed under the Oleomargarine Tax Law prior to the 1930 Amendment.

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* See table of cases reported in this volume.

Mr. Whitney North Seymour, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, A. H. Conner, Clarence M. Charest,* and *Harrison F. McConnell* were on the brief, for petitioners.

Under § 3224 R. S., the exclusive remedy is by suit to recover the tax after payment. *State Railroad Tax Cases,* 92 U. S. 575, 613; *Snyder* v. *Marks,* 109 U. S. 189, 192, 193; *Dodge* v. *Osborn,* 240 U. S. 118; *Graham* v. *du Pont,* 262 U. S. 234; *Phillips* v. *Commissioner,* 283 U. S. 589, 595–596. Cf. *Smallwood* v. *Gallardo,* 275 U. S. 56. *Cheatham* v. *United States,* 92 U. S. 85, 89.

Section 3224 was applied in: *Moore* v. *Miller,* 5 App. D. C. 413, appeal dismissed, 163 U. S. 696; *Nichols* v. *Gaston,* 281 Fed. 67; *Page* v. *Polk,* 281 Fed. 74; *Hernandez* v. *McGhee,* 294 Fed. 460; *Bashara* v. *Hopkins,* 295 Fed. 319, certiorari denied, 265 U. S. 584; *Cadwalader* v. *Sturgess,* 297 Fed. 73, certiorari denied, 265 U. S. 584; *Seaman* v. *Bowers,* 297 Fed. 371, affirmed on other grounds, 273 U. S. 346; *Sigman* v. *Reinecke,* 297 Fed. 1005, certiorari denied, 264 U. S. 597; *Reinecke* v. *Peacock,* 3 F. (2d) 583, certiorari denied, 268 U. S. 699, appeal dismissed, 271 U. S. 643; *McDowell* v. *Heiner,* 15 F. (2d) 1015, affirming 9 F. (2d) 120, certiorari denied, 273 U. S. 759; *Reinecke* v. *Jennings & Co.,* 16 F. (2d) 927, certiorari denied, 274 U. S. 753; *Ralston* v. *Heiner,* 24 F. (2d) 416, certiorari denied, 277 U. S. 608; *Ellay Co.* v. *Bowers,* 25 F. (2d) 637, certiorari denied, 277 U. S. 606; *Wright & Taylor* v. *Lucas,* 45 F. (2d) 75, affirmed, 282 U. S. 409; *Keogh* v. *Neely,* 50 F. (2d) 685, appeal dismissed and certiorari denied (reported elsewhere in this volume); *Pullan* v. *Kinsinger,* 2 Abb. 94; *Kissinger* v. *Bean,* Fed. Cas. No. 7,853; *Kensett* v. *Stivers.* 10 Fed. 517; *Schulenberg-Boeckeler Lumber Co.* v. *Hayward,* 20 Fed. 422; *Straus* v. *Abrast Realty Co.,* 200 Fed. 327; *Gouge* v. *Hart,* 250 Fed. 802, dismissed for want of jurisdiction, 251 U. S.

542; *Markle* v. *Kirkendall,* 267 Fed. 498; *Union Fisherman's Co-op. Co.* v. *Huntley,* 285 Fed. 671; *Black* v. *Rafferty,* 287 Fed. 937; *Witherbee* v. *Durey,* 296 Fed. 576; *Waldron* v. *Poe,* 1 F. (2d) 932; *Seaman* v. *Guaranty Trust Co.,* 1 F. (2d) 391; *Seattle* v. *Poe,* 4 F. (2d) 276; *Staley* v. *Hopkins,* 9 F. (2d) 976; *Israelite House of David* v. *Holden,* 14 F. (2d) 701; *Thornhill Wagon Co.* v. *Noel,* 17 F. (2d) 407; *Erie Taxi Co.* v. *Gnichtel,* 17 F. (2d) 661; *French Mortgage & Bond Co.* v. *Woodworth,* 38 F. (2d) 841; *Stafford Mills* v. *White,* 41 F. (2d) 58.

In the following cases § 3224 was not applied, for various reasons: In *Frayser* v. *Russell,* Fed. Cas. No. 5,067, the Collector was exceeding his jurisdiction. Cf. *Nichols* v. *Gaston,* 281 Fed. 67. In *Lafayette Worsted Co.* v. *Page,* 6 F. (2d) 399, the Commissioner had no jurisdiction to distrain while an appeal was pending before the Board of Tax Appeals; *contra: Joseph Garneau Co.* v. *Bowers,* 8 F. (2d) 378. Cf. *Emaus Silk Co.* v. *McCaughn,* 6 F. (2d) 660; *Oak Worsted Mills* v. *McCaughn,* 6 F. (2d) 662. In *Trinacia Real Estate Co.* v. *Clarke,* 34 F. (2d) 325, the action of the Collector was obviously arbitrary. In *Long* v. *Rasmussen,* 281 Fed. 236, the complainant was a stranger to the tax. In *Mertz* v. *Mellon,* 6 Am. Fed. Tax Rep., p. 7166, the liability had been extinguished by § 1106 (a), Rev. Act of 1926; appeal dismissed as premature, 30 F. (2d) 311. *Acklin* v. *Peoples Savings Assn.,* 293 Fed. 392, may be classed with the special group of stockholder cases.

The decision below is the first to hold that vegetable oils were not included among the ingredients named in § 2 of the taxing statute. The earlier cases turned upon the question whether the particular product under consideration was made "in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter." *Higgins Mfg. Co.* v. *Page,* 297 Fed. 644; *Higgins Mfg. Co.* v. *Page,* 20 F. (2d) 948; Baltimore

Butterine Co. *v.* Mellon, 1 Prentice-Hall Fed. Tax Ser., 1927, p. 1872.

Each product must be judged on its own content, form, and other attributes; and one unfavorable decision could not bind the petitioner so as to justify a restraint against the performance of his duties in connection with other products.

As the Commissioner construed the Oleomargarine Act as applying to mixtures or compounds of vegetable oils, and as there was a basis for his conclusion that the respondent's product was made in imitation or semblance of butter, it is obvious that his action in assessing the tax was not arbitrary or capricious.

If there is any exception to the application of § 3224 of the Revised Statutes, this case is not within it. *Hill* v. *Wallace,* 259 U. S. 44.

Messrs. George N. Murdock and *E. M. McIlvaine,* with whom *Messrs. A. Y. Milam* and *Robert R. Milam* were on the brief, for respondent.

Mr. Justice Butler delivered the opinion of the Court.

No. 251.

Respondent, a manufacturer of "Southern Nut Product," brought this suit in the Southern District of Florida to restrain petitioner from collecting from respondent, or from dealers selling its product, any tax purporting to be levied under the Oleomargarine Act of August 2, 1886, 24 Stat. 209, as amended by the Act of May 9, 1902, 32 Stat. 194. Petitioner answered, denying the essential allegations of the complaint. Respondent applied for a temporary injunction, the court found that it would suffer irreparable injury unless petitioner were restrained pending the final disposition of the case, and granted the application. At the trial respondent introduced oral and

documentary evidence together with specimens of the product sought to be taxed. The court found that the material allegations of the complaint were established by the evidence and granted permanent injunction. The record states in condensed form the substance of the testimony but does not contain the documents which were made exhibits and introduced in evidence. The Circuit Court of Appeals found, and it appears from the testimony brought up, that omitted exhibits constitute a material part of the evidence received and that the record is consistent with the trial court's conclusion in respect of the facts; it held R. S., § 3224, does not apply and affirmed the decree. 49 F. (2d) 79, 82, 85.

That section declares (26 U. S. C., § 154): "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This suit was commenced December 26, 1929. The complaint, the evidence contained in the record, and documents of which judicial notice may be taken, show the following facts:

In April, 1928, respondent commenced, and thereafter carried on, at Jacksonville, Florida, the manufacture and sale of Southern Nut Product. It contained no animal fat but was made exclusively of cocoanut oil, peanut oil, salt, water and harmless coloring matter; it was sold in one pound cartons for cooking, baking and seasoning. Respondent built up a valuable business in the sale of the product to dealers in Florida and other States.

In January, 1922, the Commissioner of Internal Revenue issued to the Higgins Manufacturing Company a permit to manufacture and sell "Nut-Z-All" without paying the oleomargarine tax thereon. He revoked the permit in December of the same year and purported to assess such a tax upon some of that product. The company, having paid it under protest to the collector in Rhode Island, brought an action against him in the

United States district court for that State to recover the amount so exacted. After hearing evidence, including the testimony of chemists in the Bureau of Internal Revenue called in behalf of the collector, the court in April, 1924, found that the product was not made in imitation or semblance of butter, was not intended to be sold as or for butter, and was not oleomargarine or taxable as such. 297 Fed. 644. Thereupon the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated the court's decision as Treasury Decision 3590, thus informing all concerned that the product was not subject to the tax.

In August, 1924, the deputy commissioner, in answer to an inquiry made by the Institute of Margarine Manufacturers as to the taxability of "Nut-Z-All," sent a letter stating: "The court having held the product to be not taxable as oleomargarine, the fact that retailers advertise and sell it as butter, or as a substitute for butter, would not render them or the manufacturers liable under the internal revenue law."

April 1, 1927, the Commissioner, contrary to the court's decree, Treasury Decision 3590 and his deputy's response to the Institute's inquiry, promulgated Treasury Decision 4006, which declared products similar to "Nut-Z-All" taxable as oleomargarine if colored to look like butter. Then the Higgins Manufacturing Company brought suit in the federal court for Rhode Island to restrain the collector from enforcing the tax on its product. The court, upon the allegations of the complaint admitted by motion to dismiss, found that the facts there alleged in respect of taxability were identical with those shown in the earlier case; that the collector was threatening to enforce the tax which had been adjudged illegal; that if the tax should be collected plaintiff's business would be ruined, and, July 18, 1927, granted temporary injunction,

20 F. (2d) 948, which was made permanent in December following.

In July, 1927, the Baltimore Butterine Company brought suit in the Supreme Court of the District of Columbia to enjoin the Commissioner and his deputy from enforcing the tax as declared in Treasury Decision 4006, against its product "Nu-ine," which was identical in content and appearance with "Nut-Z-All" made by the Higgins Manufacturing Company, and Southern Nut Product made by respondent in this case. The court held the product not taxable and granted a permanent injunction.

No appeal was taken in any of the cases above mentioned. And the petitioner, by letter, answering an inquiry made by respondent, advised respondent that its product would not be taxable as oleomargarine.

Relying on the decision in *Higgins Mfg. Co.* v. *Page*, 297 Fed. 644, Treasury Decision 3590, the deputy commissioner's letter to the Institute and the injunctions above referred to, respondent believed the product which it proposed to manufacture and sell would not be taxable as oleomargarine, and, upon receipt of petitioner's letter, commenced manufacture and sale of the product.

In 1928, pursuant to instructions sent him by the deputy commissioner stating that respondent's product was held taxable as colored oleomargarine, the petitioner demanded and threatened to collect a tax of ten cents a pound upon respondent's product. But petitioner made no effort to collect the tax on "Nut-Z-All" which at the time of the trial was being sold in Florida. Excluding the tax from cost, respondent's net profit was approximately three cents per pound. The enforcement of the Oleomargarine Act against respondent would impose a tax that respondent would be unable to pay, would subject it to heavy penalties and the forfeiture of its plant together

with the materials and manufactured product on hand, and would destroy its business.

The complaint asserts that the exaction of ten cents per pound, while in the guise of a tax, is really a penalty imposed to eliminate competition with butter, and is therefore in excess of the power granted to the Congress by the Constitution. But, having regard to *McCray* v. *United States,* 195 U. S. 27, 59, we treat the imposition laid by the Act upon oleomargarine as a valid excise tax. The rule that § 3224 does not extend to suits brought to restrain collection of penalties (*Lipke* v. *Lederer,* 259 U. S. 557, 562; *Regal Drug Corp.* v. *Wardell,* 260 U. S. 386) does not apply.

Petitioner does not here assign as error the finding below that respondent's product was not oleomargarine. He seeks reversal upon the grounds that the statute forbids injunction against the collection of the tax even if erroneously assessed; that this assessment was made by the Commissioner under color of his office and was not arbitrary or capricious, and that, if there is any exception to the application of § 3224, this case is not within it.

We are of opinion that, as held below and here claimed by respondent, the product in question was not taxable as oleomargarine defined by § 2 of the Act of 1886. It is as follows:

"That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine', namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil annotto, and other coloring matter,

intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

That definition remained in force until July 10, 1931. It was amended by the Act of July 10, 1930, 46 Stat. 1022, effective twelve months later, the material parts of which are printed in the margin.* The hyphen in the phrase "vegetable-oil" was eliminated and a comma was inserted between those words and "annotto." Words added are shown in italics and words deleted are within brackets.

When the Act of 1886 was passed various imitations of and substitutes for butter, the principal ingredients of which were the fats of cattle and swine, were being manufactured and sold in large quantities. Products such as respondent's, which contain no animal fat, were unknown and were not made in substantial quantities until much later. There is nothing in the Act, or that has been brought to our attention, to suggest that Congress anticipated the development of the art later to occur. Annotto had long been used to color butter and cheese and was then being used to make oleomargarine resemble butter. It is a coloring material found in association with the oil content of the covering of certain tree seeds.

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*"Sec. 2. That for the purposes of this Act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, *fish oil or fish fat,* vegetable oil, annatto, and other coloring matter, intestinal fat, and offal fat;—*if* (1) made in imitation or semblance of butter or [when so made] (2) calculated or intended to be sold as butter or for butter, *or* (*3*) *churned, emulsified, or mixed in cream, milk, water, or other liquid, and containing moisture in excess of 1 per centum or common salt. . . .*"

When prepared for sale and use the colorant is contained in a stiff oily mass that was then well-known in the market. The words "vegetable-oil annotto" appropriately describe that substance. The hyphen between "vegetable" and "oil" and the absence of any punctuation mark following them signify that the words so compounded qualify "annotto" and indicate that such coloring material was meant. And that construction is strongly supported by the use in the same connection of the words "and other coloring matter."

Regulations promulgated under the Act omit the hyphen and add a comma thus making the phrase to read "vegetable oil, annotto." The Commissioner's determination that respondent's product is oleomargarine necessarily was based on that version. It is elementary that tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import. Doubts must be resolved against the Government and in favor of taxpayers. *United States* v. *Merriam,* 263 U. S. 179, 188. *Bowers* v. *N. Y. & Albany Co.,* 273 U. S. 346, 350. The legislative history and passage of the amendatory Act of 1930 show that the Commissioner as well as the Congress found that an enlargement of the definition was necessary in order to cover products such as respondent's. The language used in the original Act was not sufficiently clear and definite to include products containing no animal fat. The Commissioner's rendition of the governing phrase was without warrant. His determination that respondent's product was oleomargarine and taxable under the Act was erroneous and, in view of his earlier interpretations and the court decisions which had become final, must be held arbitrary and capricious. It was without force. *Interstate Commerce Commission* v. *Louisville & N. R. Co.,* 227 U. S. 88, 91. *Kwock Jan Fat* v. *White,* 253 U. S. 454, 457, 464. *United States* v. *Mann,* 2 Brock. 9, 11.

Independently of, and in cases arising prior to, the enactment of the provision (Act of March 2, 1867, 14 Stat. 475) which became R. S., § 3224, this court in harmony with the rule generally followed in courts of equity held that a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality. The principal reason is that, as courts are without authority to apportion or equalize taxes or to make assessments, such suits would enable those liable for taxes in some amount to delay payment or possibly to escape their lawful burden and so to interfere with and thwart the collection of revenues for the support of the government. And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector. *Dows* v. *Chicago,* 11 Wall. 108. *Hannewinkle* v. *Georgetown,* 15 Wall. 547. *State Railroad Tax Cases,* 92 U. S. 575, 614. Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reasons upon which it rests. *Cumberland Telephone & Telegraph Co.* v. *Kelly,* 160 Fed. 316, 321. *Baker* v. *Baker,* 13 Cal. 87, 95. *Bradley* v. *People,* 8 Colo. 599, 604; 9 Pac. 783; 2 Sutherland, 2d Lewis ed., § 454. The section does not refer specifically to the rule applicable to cases involving exceptional circumstances. The general words employed are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutary and well established rule. This court has given effect to § 3224 in a number of cases. *Snyder* v. *Marks,* 109 U. S. 189, 191. *Dodge* v. *Osborn,* 240 U. S. 118, 121. *Dodge* v. *Brady,* 240 U. S. 122. It has never held the rule to be absolute, but has repeatedly indi-

cated that extraordinary and exceptional circumstances render its provisions inapplicable. *Hill* v. *Wallace,* 259 U. S. 44, 62. *Dodge* v. *Osborn, supra,* 12. *Dodge* v. *Brady, supra.* Cf. *Graham* v. *du Pont,* 262 U. S. 234, 257. *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1.

This is not a case in which the injunction is sought upon the mere ground of illegality because of error in the amount of the tax. The article is not covered by the Act. A valid oleomargarine tax could by no legal possibility have been assessed against respondent, and therefore the reasons underlying § 3224 apply, if at all, with little force. *LeRoy* v. *East Saginaw Ry. Co.,* 18 Mich. 233, 238–239. *Kissinger* v. *Bean,* Fed. Cas. 7853. Respondent commenced business after the product it proposed to make had repeatedly been determined by the Commissioner and adjudged in courts not to be oleomargarine or taxable under the Act, and upon the assurance from the Bureau that its product would not be taxed. For more than a year and a half respondent sold its product relying upon the aforesaid rulings that it was not subject to tax. If required to pay the tax its loss would be seven cents per pound. Before the Commissioner's latest ruling respondent had made and sold so much that the tax would have amounted to more than it could pay. Petitioner acquiesced in the injunctions granted in Rhode Island and the District of Columbia and did not assess any tax upon identical products contemporaneously being made by complainants in such suits, and directed enforcement against respondent's entire product. Such discrimination conflicts with the principle underlying the constitutional provision directing that excises laid by Congress shall be uniform throughout the United States. It requires no elaboration of the facts found to show that the enforcement of the Act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no rem-

edy at law. It is clear that, by reason of the special and extraordinary facts and circumstances, § 3224 does not apply. The lower courts rightly held respondent entitled to the injunction.

No. 252.

This case was decided in the Circuit Court of Appeals at the same time as No. 251, 49 F. (2d) 85, presents the same question, and is governed by the foregoing opinion.

Decrees affirmed.

MR. JUSTICE STONE, dissenting.

In my opinion, R. S. § 3224, which says that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," cannot rightly be construed as permitting the present suit, whose sole purpose is to enjoin the collection of a tax. Enacted in 1867, this statute, for more than sixty years, has been consistently applied as precluding relief, whatever the equities alleged.

MR. JUSTICE BRANDEIS joins me in this opinion.

UNITED STATES CARTRIDGE CO. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 348. Argued January 15, 1932.—Decided February 15, 1932.

1. "Obsolescence" may arise from changes in the art, shifting of business centers, loss of trade, inadequacy, supersession, prohibitory laws and other things which, apart from physical deterioration, operate to cause plant elements, or the plant as a whole, to suffer diminution in value. P. 516.
2. The Revenue Act of 1918 provided that in computing net income of a corporation there should be allowed as deductions: (7) an allowance for exhaustion, wear and tear of property used in trade or business, including an allowance for obsolescence; (8) in the case of buildings constructed on or after April 6, 1917, for production of articles contributing to the prosecution of the war, a deduction for the amortization of such part of the cost of such facilities as had

been borne by the taxpayer, but not again including any amount otherwise allowed by that or previous Acts as a deduction in computing net income. *Held:*

(1) Subsection (8) does not exclude allowance for obsolescence of buildings erected before April 6, 1917, which were used to produce munitions for the war. P. 516.

(2) "Obsolescence" and "amortization," as used in the Act, are not synonymous. *Id.*

(3) The context and legislative history show that subsection (7) was intended to establish a general rule allowing for obsolescence, etc., and subsection (8) was to authorize, in a limited class of cases and under special circumstances, the amortization of certain costs by deductions not duplicating any other allowed by that or previous Acts. P. 517.

3. Buildings erected by an ammunition company in 1914 as an extension of its plant on leased land, for the purpose of making ammunition for the World War, and which were so used until the Armistice, thereupon lost their use in the company's business, so that their remaining value to the company was in the nature of salvage. *Held* that the depreciated cost, less the value of the right to use the buildings after 1918 until the expiration of the lease, should be taken into account in determining the company's 1918 income and profits taxes. P. 517.
4. Provisions in contracts for production of war munitions for the United States, whereby the Government might stop further production upon the termination of the war and must then reimburse the manufacturer for the cost of materials purchased by it for the performance of the contracts and then on hand,—*held* to have been superseded by another arrangement for suspension of operations and for settlements through further negotiations. P. 518.
5. An ammunition company, at the close of 1918, had on hand materials purchased for performance of government contracts, but for which the Government was not bound to pay and which were inventoried at market value, below cost. *Held,* that in determining the company's 1918 income and profits taxes, this inventory value should be used and not a higher value which the company received from the Government under settlements in later years. P. 520.
6. Amounts in excess of the inventory value of one year, which are realized from sales in subsequent years, are attributable to the years in which they were realized, since gains and losses must be accounted for in the years in which they are realized, and the purpose of inventories is to assign to each period its profits and losses. P. 520.

71 Ct. Cls. 575, reversed.

CERTIORARI * to review a judgment rejecting parts of a claim made on account of an overpayment of income and profits taxes.

Mr. Harry LeBaron Sampson for petitioner.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher,* and *Messrs. Claude R. Branch, Fred K. Dyar, Bradley B. Gilman, Clarence M. Charest,* and *Isadore Graff* were on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner sued to recover an alleged overpayment of income and profits taxes for 1918. The court made findings of fact, ruled in favor of petitioner as to a part of the amount and gave it judgment for $160,978.83, which is not here challenged. The court dismissed petitioner's complaint as to two other claims, which this writ brings up for consideration. One is on account of buildings erected by it for war purposes on leased land. The other involves the valuation of petitioner's inventories relating to government contracts. There is printed in the margin a statement showing the net income and taxes as determined by the Commissioner, the reduction made by the judgment, and the deductions claimed by petitioner and denied by the court.[1]

The substance of the findings as to the buildings may be stated as follows:

Petitioner, for some years before the war, had been a manufacturer of ammunition for small arms used in times

* See table of cases reported in this volume.

[1]

Net income.....	$1,792,432.58	Taxes....	$1,152,123.53
Reduction by court....	195,362.67	Taxes....	160,978.83
Leaving income.....	1,597,069.91	Taxes....	991,144.70
Deduction claimed on account of buildings.	327,937.35	Taxes....	270,220.38
Deduction on account of inventories.....	500,473.19	Taxes....	412,389.91

of peace. It carried on at Lowell, Massachusetts, principally in buildings rented from a power company. During the years 1911 to 1914, inclusive, its business was relatively small and not profitable. In 1914 it commenced making ammunition for use in the war, and for the purpose of continuing that business while the war should last, it constructed new buildings upon the power company's land at a cost of $802,499.49 pursuant to an agreement that it should have the right to use them rent free until December 31, 1924, and then hand them over to the power company. Until the armistice, at first for foreign governments and later for our own, it had orders, and used all the buildings up to their capacity, in the manufacture of war ammunition. There was no way of knowing when this demand would cease.

Petitioner did not expect to make military ammunition after conflict ended, and in fact received no orders after the armistice. It continued the commercial ammunition business but made no profit in any year from 1918 to the end of the lease. The buildings could not be rented. Those belonging to the power company had been incorporated into the new ones. The space so made was much greater than required for its commercial ammunition business. Petitioner, for the purpose of utilizing the excess, undertook the manufacture of some other things, but that business was small and resulted in loss each year. There was a garage, used during the war production but not needed afterwards. Petitioner attempted to operate the building as a public garage but, realizing no net return, rented it to others from October, 1923, until the end of the lease.

The Commissioner allowed deductions on account of the cost of the buildings for the years from 1914 to 1917, inclusive, amounting in all to $197,107.74, leaving as of the end of 1917, cost less depreciation, $605,391.75. In the settlement of its 1918 taxes petitioner claimed that, as

of the end of that year, the value of its right to use the new buildings during the remainder of the term was $190,969.86, and the Court of Claims found it not in excess of that amount. Petitioner claimed a deduction of the difference between the depreciated cost and such residual value. The Commissioner disallowed the claim on the ground that it had not abandoned the use of the buildings or permanently devoted them to a radically different use. He allowed $86,484.54, arrived at by distributing the cost of each building ratably over the period ending with the term of the lease. The difference between the deduction claimed and that allowed is $327,937.35. In its tax returns for the remaining years of the lease, petitioner claimed deductions on account of the buildings amounting in all to $190,969.86, but the Commissioner added to such deductions $327,937.35.

The Revenue Act of 1918, 40 Stat. 1077, controls and its pertinent provisions are printed in the margin.[2] The

[2] Sec. 234 (a). That in computing the net income of a corporation subject to the tax imposed by section 230 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;

(8) In the case of buildings . . . or other facilities, constructed . . . or acquired, on or after April 6, 1917, for the production of articles contributing to the prosecution of the present war, and in the case of vessels constructed or acquired on or after such date for the transportation of articles or men . . . there shall be allowed a reasonable deduction for the amortization of such part of the cost of such facilities or vessels as has been borne by the taxpayer, but not again including any amount otherwise allowed under this title or previous Acts of Congress as a deduction in computing net income. At any time within three years after the termination of the present war the Commissioner may, and at the request of the taxpayer shall, reëxamine the return, and if he then finds as a result of an appraisal or from other evidence that the deduction originally allowed was incor-

Government maintains that subsection (8) excludes the allowance claimed. The contention is without merit. The argument is that, by authorizing amortization in respect of buildings erected for war production after April 6, 1917, Congress denied allowances for obsolescence as to like buildings constructed before the war. But obsolescence and amortization are not synonymous. While in some connections like meaning may be attributed to them, they do not necessarily or generally refer to the same thing. Obsolescence may arise from changes in the art, shifting of business centers, loss of trade, inadequacy, supersession, prohibitory laws and other things which, apart from physical deterioration, operate to cause plant elements or the plant as a whole to suffer diminution in value. *Burnet* v. *Niagara Brewing Co.*, 282 U. S. 648, 654. *Gambrinus Brewery Co.* v. *Anderson*, 282 U. S. 638. Amortization as used in the Act is not so broad; it refers to deductions on account of such part of the costs of certain facilities as has been borne by the taxpayer, "but not again including any amount otherwise allowed." This safeguard against duplication of allowances on account of the same diminution in value shows that deductions for amortization were not intended to exclude obsolescence, but rather were to be made in addition or having regard to allowances deducted on account of obsolescence and the like.

The legislative history of the Act negatives the contention. In explanation of the deduction for amortization the Committee on Ways and Means, having charge of the measure, reported that many facilities provided for

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rect, the taxes imposed by this title, and by Title III [war-profits and excess-profits tax] for the year or years affected shall be redetermined and the amount of tax due upon such redetermination, if any, shall be paid upon notice and demand by the collector, or the amount of tax overpaid, if any, shall be credited or refunded to the taxpayer in accordance with the provisions of section 252; . . .

war purposes would be of little value after termination of the conflict; that, under the law then existing, it was impossible to allow deductions other than for the "ordinary exhaustion, wear and tear, and depletion of such property" and that the purpose was "to allow special amounts for amortization, according to the peculiar condition in each case . . ." [3] When that report was made, and as the draft of the Act was originally passed by the House and amended and passed in the Senate, it contained no provision expressly authorizing allowances for obsolescence. Subsection (7) in the form in which it was finally adopted was formulated in conference much later than the committee report, and after the provision for amortization as finally enacted had been agreed to. See *Gambrinus Brewery Co.* v. *Anderson, supra,* 643. Manifestly, Congress intended by subsection (7) to establish a general rule and by subsection (8) to authorize, in a limited class of cases and under special circumstances, the amortization of certain costs by deductions not duplicating any other allowed by that or previous Acts of Congress.

Under the circumstances disclosed by the findings, the buildings erected by petitioner are not to be distinguished from equipment designed, constructed and suitable only for the performance of a single job or from brewery plants put out of use by prohibitory laws. The Government does not suggest that any part of the allowance claimed should have been deducted in petitioner's returns for years prior to 1918. It was impossible to know when the conflict would cease, but it was certain that, when demand for war materials ended, there necessarily would be great diminution in the value of the buildings. That remaining after the armistice, November 11, 1918, was prop-

[3] House Report 767, 65th Congress, 2d Session, p. 10. Senate Report 617, 65th Congress, 3d Session, p. 7.

erly to be regarded as in the nature of salvage. The depreciated cost less the value of petitioner's right to use the buildings after 1918 must be taken into account for the proper determination of petitioner's 1918 income and profits taxes. *Gambrinus Brewery Co.* v. *Anderson, supra. Burnet* v. *Niagara Brewing Co., supra.*

The findings as to inventories may be stated as follows:

At the end of 1918, petitioner had large quantities of material, acquired for the production of war ammunition to be supplied by it under four contracts with the Government. The contracts provided that the Chief of Ordnance, upon termination or limitation of the war, might notify petitioner that any part of the articles then remaining undelivered should not be manufactured or delivered, and that: "In the event of such complete or partial termination [of performance of the contract] the United States shall inspect all completed articles then on hand and such as may be completed within thirty (30) days after such notice and shall pay to the contractor the price herein fixed for all articles accepted . . . The United States shall also pay to the contractor the cost of materials and component parts purchased by the contractor for the performance of this contract and then on hand . . ." together with other allowances mentioned.[4]

In December, 1918, the Chief of Ordnance caused letters to be sent petitioner in respect of each of its contracts stating: "You are requested in the public interest immediately to suspend further operations under your contract . . . and incur no further expenses in connection with the performance of said contract. This request is made with a view to the negotiation of a supplemental contract providing for the cancellation, settlement and

[4] Each of the contracts contained a provision substantially the same as that quoted. One of them, GA-126, did not give petitioner a right to continue production for 30 days after termination.

adjustment of your existing contract, in a manner which will permit of a more prompt settlement and payment than will be practicable under the terms of said existing contract. Please acknowledge receipt of this notice immediately, and indicate your decision as to compliance with or rejection of this request. Upon notice of your compliance, a representative of the Ordnance Department will forthwith take up with you the proposed negotiation." [5] Before the end of the year petitioner complied with these requests and ceased production under the contracts.

At the end of that year there was no market for the materials in the inventories; they were not saleable at any price approaching cost; it was wholly uncertain what amounts might be obtained in settlement, and no negotiations for adjustments or settlement had been made.

After negotiations involving much time and expense, partial settlements were reached in 1920 under which the Government took over and paid petitioner's cost for most of the raw material and work in process, except labor and overhead items chargeable to the latter. In final settlements in 1921 and 1922 there were compromises under which the Government paid a portion of the cost of some items and made no allowance for others.

Petitioner kept its books on the accrual basis and elected to price its inventories at cost or market, whichever was lower. The difference between petitioner and the Commissioner as to 1918 taxes was whether inventories of material on hand at that date should be taken at $231,615.43, the then market value, or at $732,088.62, which was made up of amounts eventually realized by petitioner under the contracts of settlement. The latter was used by the Commissioner.

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[5] The suspension requests were not in identical words, but in substance all were the same.

Mere inspection of the suspension requests discloses that they were not intended to be the notices provided for in the clauses authorizing the Government to terminate manufacture or deliveries. *College Point Boat Corp.* v. *United States,* 267 U. S. 12, 15. And upon petitioner's compliance with such requests the contract provisions as to payments by the Government to petitioner of cost were superseded. At the end of 1918, the Government was not bound to take or to pay petitioner for any property covered by the inventories. Petitioner had no assurance as to what settlements finally would be made or that it ever would receive more than the then market value of the inventories. Up to the time of the partial settlements in 1920, petitioner had no agreement that it would be paid the cost of any part of the property. Cf. *Lucas* v. *American Code Co.,* 280 U. S. 445, 449.

Petitioner's position was not different from that of a merchant whose stock on hand at the end of the tax year and not covered by contracts of sale had declined in value and was inventoried below cost. In such case amounts in excess of inventory value realized from sales in subsequent years are attributable to such years. Gains or losses must be accounted for in the year in which they are realized. The purpose of the inventories is to assign to each period its profits and losses. *Lucas* v. *Structural Steel Co.,* 281 U. S. 264, 268. The tax laws are calculated to produce revenue ascertainable and payable at regular intervals. Otherwise it would not be practicable to devise methods of accounting, assessment or collection capable of operation. *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359, 365. The taking of petitioner's inventories at market value was essential to a proper disclosure of its financial position. Regulations in force at the time of the Commissioner's determination declare that items such as claims for compensation under canceled government contracts constitute income for the year in which

they are allowed or their value is otherwise definitely determined. Regulations 65, Article 50. And see Regulations 45, Articles 1582–1584, as amended by T. D. 3296. On the facts found there was no warrant for including in petitioner's 1918 taxable income on account of such inventories any amount in excess of market value at the end of that year.

The lower court's dismissal of petitioner's claims for deduction of $327,937.35 on account of buildings and $500,473.19 on account of inventories cannot be sustained.

Reversed.

MATTHEWS ET AL. *v.* RODGERS ET AL.

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

No. 84. Argued December 1, 2, 1931. Reargued January 11, 1932.—Decided February 15, 1932.

1. Objection to the equity jurisdiction of the District Court *held* to have been properly raised by motion to dismiss the bill, and preserved by assignments of error in this Court. P. 524.
2. The rule, emphasized by Jud. Code § 267, that suits in equity shall not be maintained in the federal courts in any case where a plain, adequate and complete remedy may be had at law, is of peculiar force in cases in which it is sought to enjoin the collection of state taxes. P. 525.
3. That refusal to pay an allegedly unconstitutional state tax will result in civil and criminal penalties and irreparable damage to the plaintiff's business is not basis for a suit in the federal court to enjoin collection, if the legal remedy of paying under protest and suing the collector to recover is afforded by the state law. P. 526.
4. Such a legal remedy exists under the statutes and decisions of Mississippi. P. 527.
5. Such legal remedy, although against the collecting officer rather than the State or municipality, is to be deemed adequate, where the bill does not allege special circumstances showing inability of the plaintiff to pay the tax, or of the collecting officer to respond to judgment. P. 528.

6. The equity jurisdiction of the inferior federal courts is that of the English Court of Chancery at the time of the separation of the two countries; it can not be enlarged by state legislation creating new equitable remedies in the state courts. P. 529.
7. Therefore, the fact that a State has provided a remedy against illegal state taxes by injunction does not authorize the federal courts to enjoin where the legal remedy is adequate. *Id.*
8. In general, the jurisdiction of equity to avoid multiplicity of actions at law is restricted to cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties, involving the same issues of law or fact. It does not extend to cases where there are numerous parties plaintiff, and the issues between them and the adverse party are not necessarily identical. *Id.*
9. Where the alleged unconstitutionality of a state tax depends in the case of each of many taxpayers upon its effect upon his particular business in interstate commerce, a suit by or on behalf of all to enjoin the collector can not be supported as one to avoid a multiplicity of actions. P. 530.

Reversed.

APPEAL from a decree of the District Court of three judges, which enjoined the county sheriff and *ex officio* tax collector and three members of the State Board of Tax Commissioners from collecting certain "privilege" taxes. The bill was filed by numerous plaintiffs on behalf of themselves and of all others similarly situated.

Mr. J. A. Lauderdale, Assistant Attorney General of Mississippi, with whom *Mr. George T. Mitchell,* Attorney General, was on the brief, for appellants.

Messrs. Edward W. Smith and *Sam C. Cook,* with whom *Mr. J. W. Cutrer* was on the brief, for appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

This is an appeal, §§ 238, 266 of the Judicial Code, from a decree of a District Court of three judges, for the Northern District of Mississippi, enjoining the collection from the several appellees of a state tax, as an unconstitutional burden on interstate commerce. After argument here on

the merits, the cause was restored to the docket "for reargument, limited to the question of the jurisdiction of the District Court both with respect to the amount involved in the suit and the jurisdiction of the court as a court of equity." Reargument has been had accordingly.

The bill of complaint assails the constitutionality of § 56, c. 88, 1930 Laws of Mississippi, as applied to appellees. The section imposes an annual license or "privilege" tax of $100, payable in advance by "every person engaged in the business of buying or selling cotton for himself." It also requires employers engaged in the business of buying or selling cotton to pay a similar "tax of twenty-five dollars ($25) for every employe engaged in their business as buyer or seller." Penalties are imposed in double the amount of the tax for its nonpayment. § 225. Failure to make application for the license, or engaging in the business without having procured the license or paid the tax, are misdemeanors, punishable by fine not exceeding $500 or imprisonment not exceeding six months, or both. § 242.

The bill, which is in the form of a class bill, filed by the numerous appellees for the benefit of themselves and others similarly situated, alleges that they are engaged in interstate and foreign commerce, in the course of which they purchase cotton within the state and sell and ship it in interstate or foreign commerce to purchasers outside the state; that the business of each of the several appellees and the right to conduct it is of a value of more than $3,000, the jurisdictional amount for suits brought in a district court of the United States; that the tax imposed by the state statute is, as to them, an unconstitutional burden on interstate commerce, and that appellants, state officers, charged with the duty of collecting the tax, threaten to enforce its collection by criminal proceedings and the imposition of penalties. The bill states that resort to equity to prevent collection of the tax is either

necessary or authorized for the following, among other, reasons:

(1) That the enforcement of the unconstitutional statute would irreparably injure or destroy the business of each of the appellees.

(2) That the taxes, if paid, can not be recovered by any action or proceeding at law.

(3) That § 304 of Hemingway's Annotated Mississippi Code of 1927, has conferred on the appellees the right to proceed in equity in the state courts to enjoin the collection of an unconstitutional tax, and that that remedy is available in the federal district court.

(4) That resort to equity is necessary in order to avoid a multiplicity of separate suits by the appellees and others similarly situated, three hundred in all, to enjoin collection of the tax, or otherwise necessary in order to recover it if paid or to prevent successive prosecutions for the violation of the act, in all of which suits or proceedings the issue of the constitutionality of the tax would be substantially the same.

The right of appellees, if any, to maintain the present suit, is conferred by § 24 of the Judicial Code, 28 U. S. C. § 41 (1), which, regardless of the citizenship of the parties to the suit, vests in district courts of the United States jurisdiction over suits at law or in equity "arising under the Constitution or laws of the United States," where the matter in controversy exceeds $3,000. Although the present suit arises under the Constitution of the United States, see *Davis* v. *Wallace,* 257 U. S. 478, and it be assumed, without deciding, that the jurisdictional amount is involved, the suit cannot be maintained if not within the equity jurisdiction of the district court. The want of equity jurisdiction, if obvious, may and should be objected to by the court of its own motion. *Twist* v. *Prairie Oil Co.,* 274 U. S. 684, 690. In other cases, this jurisdictional requirement, unlike the others men-

tioned, may be treated as waived if the objection is not presented by the defendant *in limine*. *Duignan* v. *United States,* 274 U. S. 195, 199; *Singer Sewing Machine Co.* v. *Benedict,* 229 U. S. 481, 484; *Thompson* v. *Railroad Companies,* 6 Wall. 134; compare *Matson Navigation Co.* v. *United States, ante,* p. 352; *Hilton* v. *Dickinson,* 108 U. S. 165, 168; *Grace* v. *American Central Ins. Co.,* 109 U. S. 278, 283–284; *Börs* v. *Preston,* 111 U. S. 252, 255. Here, the objection to the equity jurisdiction of the district court was properly raised by appellants' motion to dismiss the bill, and is preserved by their assignments of error in this Court.

Section 16 of the Judiciary Act of 1789, 1 Stat. 82, perpetuated without material change as Rev. Stat. 723, 28 U. S. C. § 384, Jud. Code § 267, declares that suits in equity shall not be sustained in the courts of the United States "in any case where plain, adequate and complete remedy may be had at law." The effect of this section, which was but declaratory of the rule in equity, established long before its adoption, is to emphasize the rule and to forbid in terms recourse to the extraordinary remedies of equity where the right asserted may be fully protected at law. See *Deweese* v. *Reinhard,* 165 U. S. 386, 389; *New York Guaranty Co.* v. *Memphis Water Co.,* 107 U. S. 205, 214.

The reason for this guiding principle is of peculiar force in cases where the suit, like the present one, is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or

unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved, Jud. Code § 237, or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present. See *Boise Water Co.* v. *Boise City,* 213 U. S. 276; *Shelton* v. *Platt,* 139 U. S. 591; *Dows* v. *Chicago,* 11 Wall. 108, 110, 112.

It may be assumed that if appellees do not pay the challenged tax, and in consequence of that omission they are subjected, as it is alleged they will be, to the civil and criminal penalties for nonpayment, the resulting injury to their business will be irreparable and can be avoided only by resort to equity to prevent the threatened wrong. But appellants insist that the appellees are under no such constraint, either to expose themselves to the penalties for failure to pay the tax, or to seek equitable relief against its collection, since each of them may pay the tax to the collecting officer under protest and, under the laws of Mississippi, may maintain a suit at law for its recovery on the ground that it was exacted in violation of the Constitution of the United States. That such a procedure saves to the taxpayer his federal right, and if available will defeat the jurisdiction of federal courts to enjoin the collection of the tax, has long been the settled rule in this Court. *Henrietta Mills* v. *Rutherford County,* 281 U. S. 121; *Arkansas Bldg. & Loan Assn.* v. *Madden,* 175 U. S. 269; *Atchison, Topeka & Santa Fe Ry.* v. *O'Connor,* 223 U. S. 280; *Shelton* v. *Platt, supra; Singer Sewing Machine Co.* v. *Benedict, supra; Allen* v. *Pullman's Palace Car Co.,* 139 U. S. 658; *Indiana Mfg. Co.* v. *Koehne,* 188 U. S. 681.

From an examination of the decisions of the highest court of the state we conclude, as the Attorney General

of the State insists, that that procedure is open to the appellees in Mississippi, if the tax is paid under protest, to avoid penalties or criminal proceedings. In *Coulson* v. *Harris,* 43 Miss. 728, the Supreme Court of Mississippi denied the jurisdiction of equity to enjoin the collection of an illegally assessed tax on the sole ground that the taxpayer might pay the tax to the collecting officer and sue at law for its recovery. In *Tuttle* v. *Everett,* 51 Miss. 27, recovery was allowed of a tax thus paid, in a suit at law brought against the collector before he had paid over the tax to the proper treasury. In *Vicksburg* v. *Butler,* 56 Miss. 72, and *Pearl River County* v. *Lacey Lumber Co.,* 124 Miss. 85; 86 So. 755, suits at law for recovery of a tax, were maintained against the city, in the first case, and the county, in the second, to which the collector had paid the taxes. But in the former the court was at pains to point out, pp. 75, 76:

"Some of the cases refer to a notice to the collector that suit will be brought to recover the money back. That notice is necessary, if the payer intends to sue the collector. After its receipt, if he pays it over to the proper treasury, he does so at his risk, and does not relieve himself from responsibility. If, however, he pays it over without such notice, suit can only be brought against his principal,—in this case the city of Vicksburg."

In *Pearl River County* v. *Lacey Lumber Co., supra,* the court said, p. 109:

"We do not think that the county can shield itself from repayment of money collected under an unconstitutional law, paid under protest, on the ground that the county had disbursed the money so collected into various taxing districts, or has expended the money which it wrongfully collected. The fact that the county might not be able to recover from the taxing districts the amount of money paid to such districts would not exempt it from liability to the taxpayer from whom it wrongfully collected it."

Such a suit, although against the collecting officer rather than the state or municipality, affords an adequate legal remedy, in the absence of allegations in the bill, which are wanting here, of special circumstances showing inability of the taxpayer to pay the tax or of the collecting officer to respond to the judgment: see *Arkansas Bldg. & Loan Assn.* v. *Madden, supra,* p. 274; *Atchison, Topeka & Santa Fe Ry.* v. *O'Connor, supra,* p. 285; *Singer Sewing Machine Co.* v. *Benedict, supra,* p. 487; and this is the rule in Mississippi; *Coulson* v. *Harris, supra,* p. 752; *Richardson* v. *Scott,* 47 Miss. 236.

Collection of the money by the collector in the name of the state, if wrongful, would not protect him. *Atchison, Topeka & Santa Fe Ry.* v. *O'Connor, supra.* The statutes, §§ 3289, 3290, Mississippi Code of 1930, which require payment over by the collector of taxes to the appropriate treasury, allow the penalties for nonpayment to be remitted on certificate of the governor or attorney general "if they are satisfied that the delay has not been wilful or avoidable by the collector," and § 3278 makes provision for the repayment to any sheriff or tax collector of taxes "by mistake or oversight erroneously paid" to the state treasurer. See *Taylor* v. *Guy,* 119 Miss. 357; 80 So. 786. These provisions would seem to contemplate suits against the collector for the recovery of the tax and to afford him some protection in the event of a judgment against him. *Atchison, Topeka & Santa Fe Ry.* v. *O'Connor, supra,* p. 287. But as no facts are presented to show that the suit against the collector in the present case will not be adequate, it is unnecessary to consider their precise scope and effect.

The suit in equity to enjoin an illegal tax, authorized by § 304 of Hemingway's Code for 1927 (§ 420, Mississippi Code of 1930), appears not to be available when there is any other adequate remedy. See *Anderson* v. *Ingersoll,* 62 Miss. 73; *Board of Supervisors* v. *Ames,*

3 So. 37. In any case, the section cannot affect the jurisdiction of federal courts of equity. The equity jurisdiction conferred on inferior courts of the United States by § 11 of the Judiciary Act of 1789, 1 Stat. 78, and continued by § 24 of the Judicial Code, is that of the English court of chancery at the time of the separation of the two countries. *Payne v. Hook,* 7 Wall. 425, 430; *In re Sawyer,* 124 U. S. 200, 209–210. While local statutes may create new rights, for the protection of which recourse may be had to the remedies afforded by federal courts of equity if the remedy at law is inadequate and the other jurisdictional requirements are present, state legislation cannot enlarge their jurisdiction by the creation of new equitable remedies, nor can it avoid or dispense with the prohibition against the maintenance of any suit in equity in the federal courts, where the legal remedy is adequate. *Henrietta Mills* v. *Rutherford County, supra,* pp. 127, 128; *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491, 500.

Appellees' bill of complaint does not state a case within the jurisdiction of equity to avoid multiplicity of suits. As to each appellee a single suit at law brought to recover the tax will determine its constitutionality and no facts are alleged showing that more than one suit will be necessary for that purpose. See *Boise Water Co.* v. *Boise City,* 213 U. S. 276, 285–286; *Dalton Adding Machine Co.* v. *State Corporation Comm.,* 236 U. S. 699, 700–701.

But it is said that since each appellee must pay the tax to avoid penalties and criminal prosecution, all must maintain suits for the recovery of the tax unconstitutionally exacted, in order to protect their federal rights, and that to avoid the necessity of the many suits, equity may draw to itself the determination of the issue necessarily involved in all the suits at law.

In general, the jurisdiction of equity to avoid multiplicity of suits at law is restricted to cases where there would otherwise be some necessity for the maintenance of

numerous suits between the same parties, involving the same issues of law or fact. It does not extend to cases where there are numerous parties plaintiff or defendant, and the issues between them and the adverse party are not necessarily identical. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McKnight,* 244 U. S. 368, 375; *Kelley* v. *Gill,* 245 U. S. 116, 120; *Francis* v. *Flinn,* 118 U. S. 385; *Scott* v. *Donald,* 165 U. S. 107, 115; *Hale* v. *Allinson,* 188 U. S. 56, 77 *et seq.;* and see Pomeroy, Equity Jurisprudence (4th ed. 1918), §§ 251, 251½, 255, 259, 268.

While the present bill sets up that the single issue of constitutionality of the taxing statute is involved, the alleged unconstitutionality depends upon the application of the statute to each of the appellees, and its effect upon his business, which is alleged to be interstate commerce. The bill thus tenders separate issues of law and fact as to each appellee, the nature of his business and the manner and extent to which the tax imposes a burden on interstate commerce. The determination of these issues as to any one taxpayer would not determine them as to any other. There was thus a failure of such identity of parties and issues as would support the jurisdiction in equity.

Reversed.

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

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

No. 178. Argued December 2, 3, 1931. Reargued January 11, 1932.—Decided February 15, 1932.

1. A suit will not lie in a federal court to enjoin a state officer from collecting a tax that violates the Federal Constitution, where the state law affords a legal remedy through payment of the tax under protest and suit to recover it from the collecting officer, and no special circumstances are alleged in the bill which would render the

legal remedy inadequate. Cf. *Matthews* v. *Rodgers, ante,* p. 521. Pp. 532–534.

2. Such a legal remedy is afforded by the law of Illinois where the tax payment is under duress, as where made to avoid forfeiture of a corporate franchise. P. 532.
3. A state law providing a new equitable remedy cannot increase or diminish the equity jurisdiction of federal courts. P. 533.
4. In determining what is a legal remedy and its adequacy to defeat their equity jurisdiction, the federal courts are guided by the historic distinction between law and equity in those courts, not by the name given to remedies or to distinctions made between them by state practice. P. 534.
5. A remedy by action to recover a tax which has been paid is essentially a legal remedy, and not the less so because the state practice has annexed to it a remedy by injunction for staying payment over of the tax money, so that it may be available to satisfy judgment against the collector. *Id.*

Reversed.

APPEAL from a decree of the District Court of three judges, enjoining assessment and collection of a corporation 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 *Mr. J. R. Turney* was on the brief, for appellee.

MR. JUSTICE STONE delivered the opinion of the Court.

This case is here on appeal, Jud. Code §§ 238, 266, from a final decree of a District Court of three judges for the Southern District of Illinois, enjoining the assessment and collection from appellee of the minimum annual corporation franchise tax of $1,000, under §§ 105, 107, 112, 114, of the Illinois Corporation Act, as an unconstitutional burden on interstate commerce, and as violating the due process clause of the Fourteenth Amendment. After argument here on the merits, the cause was again argued

by direction of the Court, argument being limited to the question of the jurisdiction of the district court, both with respect to the amount involved in the suit and its jurisdiction as a court of equity.

The bill sets up as ground for equitable relief the threat of revocation of appellee's certificate of authority to do business within the state for failure to pay the tax, pursuant to §§ 92 and 94 of the Act, and the consequent irreparable injury to its business. The equity jurisdiction of the district court was challenged by appellant's motion below to dismiss the bill of complaint, and by the assignments of error here, and the question presented, like that in *Matthews* v. *Rodgers, ante,* p. 521, is whether, under state laws, the appellee is afforded such an adequate remedy, by payment of the tax and the maintenance of a suit at law to recover it, as to preclude resort to the preventive jurisdiction of equity.

By the laws of Illinois, as appellant argues, a tax paid under duress and protest that it is illegally exacted, may be recovered at law in an action of assumpsit, brought either against the taxing body, the state excepted, see *Harvey & Boyd* v. *Olney,* 42 Ill. 336; or against the collecting officer, see *Yates* v. *Royal Ins. Co.,* 200 Ill. 202; 65 N. E. 726; *School of Domestic Arts and Sciences* v. *Harding,* 331 Ill. 330; 163 N. E. 15. See also *German Alliance Ins. Co.* v. *Van Cleave,* 191 Ill. 410, 413–414; 61 N. E. 94, and *Hawkins* v. *Lake County,* 303 Ill. 624, 629; 136 N. E. 487, in each of which the court entertained bills by numerous taxpayers to enjoin the collection of taxes or to compel their refund, on the express ground that to do so would avoid a multiplicity of suits at law.

Recovery of the tax may not be had, even though illegally exacted, unless its payment is procured by duress. See *Richardson Lubricating Co.* v. *Kinney,* 337 Ill. 122; 168 N. E. 886. But where the payment is of a corporate franchise tax like the present, made to avoid forfeiture

of the franchise, which would result from nonpayment, there is such duress as entitles the taxpayer to recover. *O'Gara Coal Co.* v. *Emmerson,* 326 Ill. 18, 21; 156 N. E. 814; *Western Cartridge Co.* v. *Emmerson,* 335 Ill. 150; 166 N. E. 501; see *Chicago & Eastern Illinois Ry. Co.* v. *Miller,* 309 Ill. 257; 140 N. E. 823.

By the Illinois statute, applicable to the present tax, Smith-Hurd's 1931 Revised Illinois Statutes, c. 127, par. 172, § 2 (a), it is provided that:

"It shall be the duty of every officer, board, commission, commissioner, department, institute, arm or agency brought within the provisions of this Act by Section 1 hereof to hold for thirty days all moneys received for or on behalf of the State under protest and on the expiration of such period to deposit the same with the State Treasurer unless the party making such payment shall within such period file a bill in chancery and secure a temporary injunction restraining the making of such deposit, in which case such payment shall be held until the final order or decree of the court."

This statute, for reasons stated at length in *Matthews* v. *Rodgers, supra,* can neither enlarge nor diminish the equity jurisdiction of the federal courts. It does not purport to confer any new remedy for the recovery of the tax. Nor does it impair the existing legal remedy, but supplements it by providing a method under the local procedure for staying payment over of the tax money, so that it may be available for the satisfaction of any judgment obtained against the collector. See *Interstate Iron & Steel Co.* v. *Stratton,* 340 Ill. 422; 172 N. E. 705; *O'Gara Coal Co.* v. *Emmerson, supra; Hump Hairpin Mfg. Co.* v. *Emmerson,* 293 Ill. 387; 127 N. E. 746; 258 U. S. 290.

These cases recognize the continued existence in Illinois of the right to recover the tax. The fact that in them the suits brought were denominated "equitable,"

although the only relief of an equitable nature, sought or allowed, was the injunction against payment over of the tax, which was but incidental to the recovery of the money, cannot alter the character of the right as one enforcible at law. In determining what is a legal remedy and its adequacy to defeat their equity jurisdiction, the federal courts are guided by the historic distinction between law and equity in those courts, not by the name given to remedies or to distinctions made between them by the state practice. *Scott* v. *Neely,* 140 U. S. 106, 110–111; *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, 379. By this test the remedy by suit to recover a tax which has been paid is essentially a legal remedy, and it is not any the less so nor any the less adequate because the state practice has annexed to it an equitable remedy.

There being a legal remedy for the recovery of the tax, no case is made for invoking the jurisdiction of equity to enjoin collection of it in the absence of allegations setting up special circumstances which would render the legal remedy inadequate. See *Matthews* v. *Rodgers, supra; Arkansas Bldg. & Loan Assn.* v. *Madden,* 175 U. S. 269; *Atchison, Topeka & Santa Fe Ry.* v. *O'Connor,* 223 U. S. 280; *Singer Sewing Machine Co.* v. *Benedict,* 229 U. S. 481.

Reversed.

UTAH ET AL. *v.* UNITED STATES.*

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

No. 42. Argued January 19, 20, 1932.—Decided February 15, 1932.

1. One who has contracted with a State to purchase lands, the legal title to which was certified to the State by the United States in reliance upon false proofs as to their character fraudulently made or procured by him, and who, in a suit against him by the United States,

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* Together with No. 48, *Carbon County Land Co.* v. *United States.*

has been perpetually enjoined from setting up any claim to the lands by a decree establishing the fraud and adjudging the equitable title and the right of possession to be in the United States and no right, title or interest in himself,—can gain no interest in the lands adverse to the United States by a subsequent conveyance from the State. See s. c., 274 U. S. 640. P. 542.

2. The same disability attaches to one who purchased from the participant in the fraud, with notice. *Id.*
3. A contract to sell land at so much per acre payable in yearly installments passes the equitable title, leaving in the vendor the mere right to retain the legal title as security for the unpaid balance. P. 543.
4. Where the equitable title to land that a State contracted to sell to a private vendee on deferred payments has been adjudged in a suit against the latter to be entirely in the United States because of his fraud in inducing the United States to grant the State its title, the State, having notice of the decree, can not thereafter receive any interest by transfer from such vendee, or from a purchaser from him with notice; and if it relinquish its rights under its contract and assume to convey title to such vendee, or his purchaser, for a new price secured by mortgage on the premises, the deed and mortgage, and also liens for taxes thereafter laid on the land, are subject to be canceled in a suit by the United States to which the State is a party. Pp. 543–545.
5. A special assistant to the Attorney General, employed to recover land of which the United States has been defrauded, can not, by statements made to an adverse claimant, estop the United States from asserting its rights in the land. P. 545.
6. The question of mineral character need not be reëxamined in this case, since it was adjudicated against the private claimants in the earlier suit, and the State, having relinquished to one of them its only interest (its vendor's title), has no standing to raise the question. P. 546.
7. Whether the statute of limitation on suits to cancel patents applies to a suit to cancel a certification, need not be decided where the relief sought and obtained is the establishment of equitable rights without disturbing the certification. *Id.*

46 F. (2d) 980, affirmed.

CERTIORARI, 283 U. S. 816, to review a decree reversing one of the District Court and directing cancellation of a mortgage and tax liens, claimed by the State, and direct-

ing a conveyance of the lands and accounting for their use by the other petitioners, who were vendees under the State. See s. c., 274 U. S. 640; 9 F. (2d) 640. Also 228 Fed. 431; 248 U. S. 594.

Mr. Wm. J. Donovan, with whom *Mr. George P. Parker,* Attorney General of Utah, was on the brief, for Utah.

The State is not estopped by the decree entered in 1914 in a suit in which it was not a party.

This suit is barred by the statute of limitations. *United States* v. *Winona & St. P. R. Co.,* 165 U. S. 463. See also *Deweese* v. *Reinhard,* 165 U. S. 386; *Shaw* v. *Kellogg,* 170 U. S. 312; *Langdeau* v. *Hanes,* 21 Wall. 521; *Curtner* v. *United States,* 149 U. S. 662, 675; *McCreery* v. *Haskell,* 119 U. S. 327; *Frasher* v. *O'Connor,* 115 U. S. 102; *United States* v. *Kern River Co.,* 264 Fed. 412.

The General Land Office, both before and after the passage of the Act of 1891, has consistently employed the word "patent" to include both "patent" and "certification." Congress has repeatedly used the word in both senses.

The United States may not avoid the bar of limitations by suing to impress the lands with a constructive trust. *United States* v. *Chandler-Dunbar Co.,* 209 U. S. 447, 450; *United States* v. *Winona & St. P. R. Co.,* 165 U. S. 463; *Elmendorf* v. *Taylor,* 10 Wheat. 152; *Lockhart* v. *Leeds,* 195 U. S. 427; *United States* v. *New Orleans Pac. Ry. Co.,* 248 U. S. 507.

In so far as the State is concerned the lands were not obtained as a result of a material misrepresentation of the known facts as to the character of the lands.

Mr. Mahlon E. Wilson, with whom *Mr. Frank K. Nebeker* was on the brief, for the Independent Coal & Coke Co.

Neither the State nor the Independent Coal & Coke Company is affected by the decree entered in 1914.

The limitation act of March 3, 1891, barred the right of the United States as against the State, and had the effect of conferring ownership on the State; and this ownership inures to the benefit of the Independent Coal & Coke Co.

The certifications were not fraudulent. According to the legal standard existing at the time, the land was non-mineral. It was not known to be mineral in character before the year 1907, if ever. If, under the evidence, such land can be determined to be coal land, the determination can be arrived at only by making a retroactive application of a standard adopted approximately ten years after the certifications were made.

The State took the grant from the United States, charged with the obligation of establishing and maintaining the agricultural college and other institutions. This was a valuable consideration. The State acted innocently and is a purchaser for value without notice. The relation of the Independent Coal & Coke Company to the State is direct, and not through the Carbon County Land Company; and therefore the State's title inures to the benefit of the former as to 1,120 acres.

Mr. Samuel A. King for the Carbon County Land Co.

Appellant's rights are not controlled by the decree of 1914. A party whose right to land has been adversely adjudicated in a former suit is not precluded in a second suit between the same parties from setting up a newly acquired title. *Barrows* v. *Kindred,* 4 Wall. 399; *Merryman* v. *Bourne,* 9 Wall. 592; *United States* v. *Southern Pac. R. Co.,* 223 U. S. 565.

A decree can be *res judicata* only as to matters actually decided, or which can be decided in such suit. *Dowell* v. *Applegate,* 152 U. S. 327.

The statute of limitations has run in favor of the State. *United States* v. *Beebe,* 17 Fed. 36; *United States* v. *McElroy,* 25 Fed. 804; *United States* v. *Stinson,* 197 U. S. 300; *United States* v. *Detroit T. L. Co.,* 131 Fed. 668; *Shooters Island Shipyard Co.* v. *Standard Shipbuilding Corp.,* 293 Fed. 706, 715; *United States* v. *The Thekla,* 266 U. S. 328; *United States* v. *Hines,* 298 Fed. 853; *United States* v. *Chandler,* 209 U. S. 447; *United States* v. *Smith,* 181 Fed. 545; *Kansas Lumber Co.* v. *Moores,* 212 Fed. 153; *United States* v. *Whited & Wheeless,* 232 Fed. 140; *United States* v. *Winona R. Co.,* 165 U. S. 467; *United States* v. *Bellingham Bay Co.,* 6 F. (2d) 102; *Stockley* v. *United States,* 260 U. S. 532, 542, 543; *Bourke* v. *Southern Pac. R. Co.,* 234 U. S. 669, 693; *Cramer* v. *United States,* 261 U. S. 219, 234; *Shaw* v. *Kellogg,* 170 U. S. 312, 351; *Barden* v. *Southern Pac. R. Co.,* 154 U. S. 288.

The rights of the Carbon County Land Company are inseparably connected with the rights of the State.

The certifications were not fraudulent because, according to the legal standard existing at the time, the lands were non-mineral. *Clancey* v. *Barker,* 131 Fed. 161, 171.

The State is not bound by the decree of 1914.

Solicitor General Thacher, with whom *Assistant Attorney General Richardson,* and *Messrs. Whitney North Seymour* and *Nat M. Lacy* were on the brief, for the United States.

Mr. Justice Stone delivered the opinion of the Court.

Certiorari was granted in these cases, 283 U. S. 816, to review a decree of the Circuit Court of Appeals for the Tenth Circuit, by which it reversed a decree of the District Court for Utah and adjudged that the United States was entitled to certain lands described in the bill of complaint and that the petitioners' title to the land is impressed with a trust in favor of the United States.

It specifically decreed the cancellation of a certain mortgage and of tax liens on the lands claimed by the State of Utah, and directed conveyance of the lands and an accounting for their use by the other petitioners. 46 F. (2d) 980.

The sufficiency of the original bill of complaint was upheld and substantially all the questions now presented were considered and determined by this Court in *Independent Coal & Coke Co.* v. *United States,* 274 U. S. 640. The suit was originally brought against the two corporate petitioners and certain individuals, the state not being a party, and the circumstances, so far as they then appeared, were set out in the opinion of this Court as follows (pp. 642–644):

"This is a second suit by the United States, and is in aid of the first, for the restoration to the government of some fifty-five hundred acres of public lands located in Utah, title to which was procured by a fraud perpetrated upon the land officers of the United States. The first suit, which resulted in a judgment for the government (affirmed 228 Fed. 431), was predicated upon the following circumstances.

"The United States, in 1894, made a grant of public lands to the State of Utah to aid in the establishment of an agricultural college, certain schools and asylums and for other purposes. (§§ 8 and 10, Act of July 16, 1894, c. 138, 28 Stat. 107, 109, 110.) Mineral lands were not included. See *Milner* v. *United States,* 228 Fed. 431, 439; *United States* v. *Sweet,* 245 U. S. 563; *Mullan* v. *United States,* 118 U. S. 271, 276; § 2318 R. S. The grant was not of lands in place. Selections were to be made by the state with the approval of the Secretary of the Interior, from unappropriated public lands, in such manner as the legislature should provide. The legislature (Laws, Utah, 1896, c. 80) later created a board of land commissioners with general supervisory powers over the disposition of

the lands and with authority to select particular lands under the grants.

"During the period from December 10, 1900, to September 14, 1903, Milner and others, the predecessors in interest of the Carbon County Land Company, one of the petitioners, made several applications to the State Commission to select and obtain in the name of the state the lands now in question, and at the same time entered into agreements with the Commission to purchase the lands from the state. In aid of the applications and agreements, Milner and his associates filed affidavits with the Commission stating that they were acquainted with the character of these lands which they affirmed were non-mineral and did not contain deposits of coal. They also deposed that the applications were not made for the purpose of fraudulently obtaining mineral holdings, but to acquire the land for agricultural use. The applicants were obviously aware that the affidavits or the information contained in them would in due course be submitted to the Land Office of the United States with the State Commission's selections, as they were in fact. On the faith of these and other documents, the selections were approved by the Secretary of the Interior and the tracts in question were certified to the state on various dates, the last being in December, 1904. Certification was the mode of passing title from the United States to the state.

"In January, 1907, the United States brought the first suit, against Milner and his associates and the Carbon County Land Company, which had been organized by Milner to take over the land, and was controlled by him. The suit was founded on the charge that the certifications were procured by the fraudulent misrepresentations of Milner and the others since they knew at the time of the applications that the lands contained coal deposits. . . . the bill . . . sought the quieting of the government's title. It affirmatively appears that on June 8, 1914, the district

court entered a decree declaring that the United States 'is the owner' and 'entitled to the possession' of the lands in question and that the defendants 'have no right, title or interest, or right of possession,' and perpetually enjoining them 'from setting up or making any claim to or upon said premises.' The Court of Appeals, in affirming the decree, held that 'the whole transaction was a scheme or conspiracy on the part of Milner to fraudulently obtain the ownership of the lands from the United States.'"

In its first opinion, this Court held, for reasons stated and upon authorities cited, that the decree in the earlier suit conclusively established that the Carbon County Land Company was a party to the fraudulent conspiracy to procure certification of the title to the lands to the state; that as against the Land Company and all claiming under it, the United States was equitably entitled to the land; that the Land Company, so far as it had acquired any interest in the land, was not shielded from the consequence of its fraud by having procured a conveyance to the state, even though the latter was not a party to the fraud; and that the Land Company could not acquire any further interest in the property from the state free of the obligation to make restitution of it, which equity imposes on one who despoils another of his property by fraud. *Independent Coal & Coke Co.* v. *United States, supra,* pp. 647, 648.

As the Independent Coal & Coke Company had acquired its alleged interest in the lands subsequently to their certification by the United States, it was held that it took them subject to the equities of the United States unless the defense of bona fide purchaser was affirmatively established, and "that none of the defendants, nor any claiming under them with notice, could by any legal device, however ingenious, acquire title from the state free from the taint of their fraud." *Ibid.,* pp. 646, 647.

After the cause had been remanded to the district court, the two corporate petitioners answered, and the state, which had contented itself with filing a brief *amicus curiae* when the cause was first here, was permitted to intervene. By its bill of complaint in intervention the state set up that at the time of the selection and certification of the lands it "believed and has ever since believed that the land so certified by it was agricultural in character and it did not contain any known mineral;" that in 1920, which was subsequent to the decree in the first suit, it had entered into a new contract with the Land Company, under which it had sold and conveyed the lands to that Company for $100 an acre, or a total of $556,428, taking back a mortgage for that amount, and had since assessed taxes, which were liens upon the lands, aggregating $40,000. The Government, by its answer, prayed the cancellation of the mortgage and tax liens or, in the alternative, if that relief were denied, that the certification of the lands to the state by the United States be cancelled.

After a trial upon evidence, the district court, without making findings, gave judgment cancelling the patent from the state to the Land Company and quieting the state's title. The Court of Appeals, in reversing this decree, made findings, which the evidence supports, that the state, as alleged, had, in 1920, patented the lands to the Carbon County Land Company, taking back a mortgage for the purchase price, and that in the same year the Land Company had sold 1120 acres of the land to the Independent Coal & Coke Company, which had notice of all the proceedings, including the final decree in the first suit.

Upon these findings, it is apparent, from our earlier opinion, that neither of the corporate petitioners can retain any interest in the land, as against the United States. As the Coal Company purchased a part of the lands with notice of the equities of the United States against the Land Company, it took subject to those equities and can

be in no better position with respect to them than its grantor. The Land Company, a party to the fraud by which the certification of the lands to the state was procured, and to the decree in the first suit which so determined, could not improve its position by taking any further conveyance from the state. However innocent the state and its officials may have been in this transaction, any interest the Land Company could acquire from the state in its own behalf was but the fruit of its fraud and of its violation of the decree against it. This aspect of the case was discussed and passed upon in our first opinion, pp. 647, 648, 649, and the conclusion there reached requires affirmance of the decree so far as it affects the Land Company and the Coal Company.

The State of Utah can stand in no better situation with respect to the mortgage and tax liens which it asserts. A copy of the bill of complaint in the original suit was handed to the State Board of Land Commissioners when the suit was begun in 1907 and the state has been fully advised of all the subsequent proceedings. By 1904, it had contracted to sell the lands to Milner and associates for $1.50 an acre, payable in installments of 25 cents a year. By virtue of these contracts, the vendees were equitably entitled to the land, and the state's interest was but that of a vendor, having the mere right to retain the title as security for any unpaid balance of the agreed purchase price. See *Williams* v. *United States,* 138 U. S. 514, 516; *Boone* v. *Chiles,* 10 Pet. 177, 224. It was the equitable ownership in the lands thus acquired by Milner and associates and conveyed by them to the Land Company, which the decree in the first suit, in 1914, adjudged to be in the United States.

The Government's allegation in its answer to the intervention complaint of the state, that at the time of the decree the purchase price had been paid in full, was not denied by the state's replication. No evidence on the

point was offered, but in the present circumstances we do not think it material. Subject to the state's security title and right as vendor, every interest in the land was vested in the Land Company, whose rights remained unchallenged and unaffected by any action of the state when the decree was entered in the first suit. That decree irrevocably fastened the equities of the United States upon every right and interest which the Land Company had or could procure in the land. So far as the state was concerned, the decree substituted the United States in the place and stead of the Land Company as equitable owner of the land and stripped the latter of power to surrender its interest to the state. The decree [1] was likewise of binding force upon everyone, including the state, who might later knowingly attempt to acquire any new or different interest in the land in derogation of the equities adjudged to be in the United States. Even if we were to assume that at the time of the decree there was an unpaid balance of purchase money (which could not have exceeded $1.50 an acre), the state was entitled only to retain its title until payment was made. Beyond this it could make no profit and derive no benefit free of the equitable rights of the United States. Any grant of the lands by the state to the Land Company or to a stranger,

[1] The decree provided "That the plaintiff [the United States] is the owner and entitled to possession of the following described property, to-wit: . . . and that plaintiff's title thereto be quieted against any and all claims of the defendants, or either of them or of any person or persons claiming, or hereafter to claim through or under the said defendants, or any or either of them; that said defendants, and each of them, have no right, title or interest, or right of possession in or to said premises hereinabove described, or to any part thereof; and the said defendants, and each of them, are perpetually restrained and enjoined from setting up or making any claim to or upon said premises, or any part thereof, and all claims of said defendants, and each of them, are hereby quieted."

without the assent of the United States, would have been in violation of its equitable rights as they had been adjudicated by the decree. See *Gorham* v. *Farson,* 119 Ill. 425; 10 N. E. 1; *Houghwout* v. *Murphy,* 22 N. J. Eq. 531, 546–547; *Taylor* v. *Kelly,* 56 N. C. 240.

Ignoring those rights, the state issued a patent to the Land Company, receiving as the proceeds of its wrongful conveyance, the mortgage of the Land Company, an active participant in the fraudulent scheme, to secure the increased payments of $100 an acre. It actively facilitated the conveyance to the Coal Company by the Land Company, by agreeing with both that the state would release from the mortgage the lands conveyed to the Coal Company upon payment of $112,000, which the Coal Company undertook to pay. This attempted enlargement of the state's interest in the lands, in diminution of the equities of the United States, like the conveyance, mortgage, and agreement by which the attempt was made, was a violation of the decree and of the equitable rights confirmed by it, from which the state can take no benefit. This is not any the less the case because the Land Company, as against the United States, could not rightly receive the patent or retain its benefits or grant to any other than the United States any interest in the patented lands.

The state urges that the United States is estopped to assert any claim to the lands as against it by statements made by a Special Assistant Attorney General in a conversation between him and members of the Board of Land Commissioners in 1907, when he delivered to them a copy of the bill of complaint in the first suit. We agree with the court below that his statements cannot be regarded as so inconsistent with the bill as to form any basis for the alleged estoppel. In any case, he was obviously without authority to dispose of the rights of the

United States in its mineral lands and could not estop it from asserting rights which he could not surrender. . *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408, 409; see also *San Pedro and Cañon del Agua Co.* v. *United States,* 146 U. S. 120, 131 *et seq.*

It is also argued that the lands were not mineral lands, and that the adjudication to that effect in the first suit is not *res adjudicata* as to the state. That question was again litigated in the present suit, and upon this issue the court below, upon sufficient evidence, found in favor of the United States. See *Diamond Coal & Coke Co.* v. *United States,* 233 U. S. 236. But we do not think that question requires our examination or is open upon the present record. The decree in the first suit adjudicated the equitable rights of the United States as against the corporate petitioners. For reasons already stated, the state has at no time had or asserted any interest superior to that of the United States, except its vendor's title, which it has since relinquished to the Land Company.

In our first opinion we held that the six year statute of limitation of actions to cancel patents granted by the United States, even if embracing a suit brought for cancellation of a certification of lands by the United States, had no application to the relief sought against the corporate petitioners. For the same reason it can have none to the relief granted against the state in accordance with the prayer of the bill. The present suit did not seek cancellation of the certification unless that prayer was denied. It asserts equitable rights to interests in the land derived under and by virtue of the certification. The decree proceeds, and is affirmed here, on the ground that the mortgage and tax liens asserted by the state are subordinate to those rights.

We have considered, but find it unnecessary to discuss, other objections to the decree.

Affirmed.

REALTY ACCEPTANCE CORP. *v.* MONTGOMERY.

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

No. 314. Argued January 12, 1932.—Decided February 15, 1932.

1. The District Court has no power to set aside its judgment after the term, for the purpose of hearing newly discovered evidence. P. 549.
2. The Circuit Court of Appeals has no original jurisdiction, and has only such appellate jurisdiction as is conferred by statute. *Id.*
3. Section 701 of the Revised Statutes, providing that this Court may affirm, modify or reverse judgments of federal courts brought before it for review, or may direct such judgment or order to be rendered, or such further proceedings to be had, by the inferior court, as justice may require, which section was made applicable to the Circuit Courts of Appeals by the Judiciary Act of 1891, does not authorize a Circuit Court of Appeals to reverse a judgment at law in which it has found no error upon the record, and to remand the case to the District Court in order that that court may reopen it after expiration of the term at which such judgment was rendered, for the purpose of hearing new evidence. P. 550.
4. Where the Circuit Court of Appeals first affirms a judgment for lack of error in the record, and thereafter rescinds the affirmance and dismisses the appeal, its action is final and deprives it of all power to add to or alter the record as certified. P. 551.

51 F. (2d) 642, affirmed.

CERTIORARI * to review two orders of the Circuit Court of Appeals, one reversing an order of the District Court granting a new trial, the other vacating its own previous order whereby it had dismissed an appeal " without prejudice " and remanded the case to enable the District Court to grant such new trial.

Mr. R. Randolph Hicks, with whom *Mr. Charles F. Curley* was on the brief, for petitioner. They cited:

Angle v. *United States,* 162 Fed. 264; *Martin* v. *United States,* 17 F. (2d) 973; *Scott* v. *United States,* 165 Fed.

* See table of cases reported in this volume.

172; *Davis* v. *United States,* 47 F. (2d) 1071; *Perry* v. *United States,* 39 F. (2d) 52; *Larrison* v. *United States,* 24 F. (2d) 82; *Gasoline Products Co.* v. *Champlin Refining Co.,* 283 U. S. 494; *Ballew* v. *United States,* 160 U. S. 187; *Kendall* v. *Ewart,* 259 U. S. 139; *Hazeltine* v. *Wildermuth,* 35 F. (2d) 733. Distinguishing: *United States* v. *Mayer,* 235 U. S. 55; *Roemer* v. *Simon,* 91 U. S. 149; *Russell* v. *Southard,* 12 How. 138.

Mr. Thomas J. Crawford, with whom *Mr. Robert H. Richards* was on the brief, for respondent.

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner complains of two orders entered by the Circuit Court of Appeals, one which reversed an order of the District Court setting aside a judgment entered at an earlier term and granting a motion for new trial for the purpose of considering certain newly discovered evidence as to damages, and the other, which vacated its own order previously entered dismissing an appeal from the same judgment and remanding the cause so that the District Court might, in the exercise of its discretion, grant such new trial.

At the March term, 1929, respondent recovered judgment against petitioner for the breach of a contract of employment. An appeal was perfected to the Circuit Court of Appeals, was heard in that court subsequent to the expiration of the term of the District Court, and resulted in an affirmance. Petitioner filed a motion for rehearing, and before disposition thereof presented a petition setting forth that at trial the respondent had failed to disclose certain earnings of which he had been in receipt, which should have been taken into account in mitigation of damages; that these facts had been discovered after appeal from the judgment; that the mandate of the

Court of Appeals should be stayed to afford the District Court opportunity, if it thought proper, to request the return of the record so that the judgment could be opened and, if justice should so require, a new trial be granted on the issue of the *quantum* of damages. This petition was granted, respondent applied to the District Court, and that court requested the Court of Appeals to return the record for the purpose mentioned. Thereupon the latter court made an order vacating its affirmance of the judgment and dismissing the appeal, thus returning the record to the District Court, which then entertained a motion for a new trial, found the evidence newly discovered within the applicable rule of law, set aside the judgment, and granted a new trial. Respondent then appealed to the Circuit Court of Appeals, assigning this action as error. The latter court held that except for its own orders the District Court would have been without authority to set aside the judgment after the term had expired; that no additional power had been conferred upon the trial court by the previously recited orders in the appellate proceedings; and that there had been error in dismissing the first appeal. Accordingly it reversed the District Court's order granting a new trial, revoked its own order dismissing the first appeal, overruled the petition for a rehearing therein, and reinstated the order affirming the original judgment of the District Court.

The petitioner concedes the District Court lacked power to set aside its judgment after the expiration of the term for the purpose of hearing newly discovered evidence (*United States* v. *Mayer,* 235 U. S. 55, 67; *Delaware, L. & W. R. Co.* v. *Rellstab,* 276 U. S. 1); it admits the Circuit Court of Appeals has no original jurisdiction, and possesses only such appellate jurisdiction as is conferred by statute. *United States* v. *Jahn,* 155 U. S. 109, 112; *Whitney* v. *Dick,* 202 U. S. 132; *United States* v. *Mayer, supra.*

But the claim is that § 701 of the Revised Statutes, which defines our appellate jurisdiction, and is made applicable to the Circuit Courts of Appeals by the Act of March 3, 1891, c. 517, § 11, 26 Stat. 829 (see *Ballew* v. *United States,* 160 U. S. 187), authorizes those courts, in the proceeding in error, to set aside a judgment and receive additional evidence, if justice so requires, and that such power may also be exercised by remanding the cause to the trial court for similar proceedings. The section is copied in the margin.[1]

Stress is placed upon the point that in addition to mere power to affirm, reverse or modify, jurisdiction is given in the alternative to order such judgment to be rendered or such further proceedings to be had by the inferior court as the justice of the case may require. From this the conclusion is that, though no error appears in the record justifying a modification or reversal, the appellate court may, if justice so demands, take further proof which the trial court would be powerless to receive because its term has ended, and on the basis of such proof reverse or modify the judgment. In addition the contention is that, though there be no error upon the face of the record, the section authorizes its return to the lower court for the opening of the judgment and reception of newly discovered evidence.

The section has been construed as applying to cases where a judgment or decree is affirmed upon appeal and further proceedings in the court below are appropriate in

[1] "The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon."

aid of the relief granted. And the statute warrants the giving of directions by an appellate court for further proceedings below in conformity with a modification or a reversal of a judgment where, in consequence of such action, such proceedings should be had. *Insurance Co.* v. *Piaggio,* 16 Wall. 378; *Little Miami & C. X. R. Co.* v. *United States,* 108 U. S. 277, 280; *Fort Scott* v. *Hickman,* 112 U. S. 150, 165; *Pullman Car Co.* v. *Metropolitan Ry. Co.,* 157 U. S. 94, 112; *United States* v. *Eaton,* 169 U. S. 331, 352; *Camp* v. *Gress,* 250 U. S. 308, 318; *Cole* v. *Ralph,* 252 U. S. 286; *Kendall* v. *Ewert,* 259 U. S. 139. *Ballew* v. *United States, supra,* on which petitioner relies, went no farther than this; for there a judgment was reversed in part. Nothing was there said to indicate that this court would order further proceedings below to attack or set aside a judgment entered on a record which disclosed no error calling for a modification or reversal. No authority is cited in which R. S. 701 has been construed as extending this court's powers in the manner for which petitioner contends. *Roemer* v. *Simon,* 91 U. S. 149, is to the contrary. The holding was that upon an appeal in equity this court could not upon motion set aside the decree of the court below and grant a rehearing, and could not receive new evidence; and, further, that as the court below was without power to grant a rehearing after the term at which the decree was entered, the remanding of the cause for such purpose would be useless. The opinion adds that if the term had not expired the appellate court might in a proper case, upon request of the court below, return the record, for the opening of the decree and for rehearing.

In the present case there is a further conclusive reason why the remission of the cause to the District Court was ineffective to give authority to hear the motion to set aside the judgment. Upon the original appeal the Circuit Court of Appeals found no error in the record and

affirmed the judgment, but subsequently rescinded the order of affirmance and dismissed the appeal. This action was final, ended the case in that court, and deprived it of all power to add to or alter the record as certified. Since there was no case pending, power was wanting to make any order granting leave to the court below for any purpose. The attempt by remanding the record, with leave to the court below to take action which would otherwise have been beyond its powers, left the matter precisely as if no such order had been made.

It follows that the Circuit Court correctly held that what was done subsequently to the affirmance of the judgment in the first appeal was improvident and unauthorized and should be rescinded, and the order which accomplished this end and reinstated the original judgment is

Affirmed.

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

OLD COLONY RAILROAD CO. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 349. Argued January 18, 1932.—Decided February 15, 1932.

1. Under Treasury Regulations promulgated by authority of the Revenue Act of 1921, the net amount of premium received by a corporation from subscribers to its bonds is income. P. 557.
2. The repeated reënactment of a statute without substantial change is evidence of an implied legislative approval of a construction placed upon it by executive officers. *Id.*
3. Where a corporation issued its bonds at a premium, which was received prior to the adoption of the Sixteenth Amendment, the

amount of the premium is income for the year in which it was received, and no part thereof may be taxed by a subsequent income tax act. P. 557.

4. This conclusion is not affected by the provision of a Treasury Regulation which directs that the amount of bond premiums received by a corporation be prorated or amortized over the life of the bonds. *Id.*
5. The words of a statute are to be interpreted in their usual, ordinary and everyday meaning; and this rule applies to taxing acts. P. 560.
6. Under § 234 of the Revenue Act of 1921, which allows as a deduction from the gross income of a corporation "all interest . . . on its indebtedness," the word "interest" in the quoted phrase means the amount agreed to be paid, which the contract denominates "interest," and does not mean the so-called "effective rate" of interest. Pp. 559–561.
7. The fact that bonds of a corporation were issued at a premium does not operate to reduce the amount deductible as interest on indebtedness under the revenue acts. Pp. 559, 563.
8. Where the language of a tax statute is ambiguous, the Court adopts that construction which is most favorable to the taxpayer. P. 561.
9. The rules of accounting enforced upon a carrier by the Interstate Commerce Commission are not binding upon the Commissioner of Internal Revenue, nor may he resort to the rules of that body, made for other purposes, for the determination of tax liability under the revenue acts. P. 562.

50 F. (2d) 896, reversed.

CERTIORARI * to review a judgment of the Circuit Court of Appeals reversing a decision of the Board of Tax Appeals. The Board held erroneous the Commissioner's finding of a deficiency in petitioner's return for 1921. 18 B. T. A. 267.

Mr. James S. Y. Ivins, with whom *Mr Kingman Brewster* was on the brief, for petitioner.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher,* and *Messrs. Sewall Key, J.*

* See table of cases reported in this volume.

Louis Monarch, and *Paul D. Miller* were on the brief, for respondent.

The method adopted by the Commissioner in computing the petitioner's 1921 net income was in accordance with principles of accounting recognized as sound by leading authorities and by the Interstate Commerce Commission. It reflected accurately the petitioner's financial condition and net income, and was the method actually used by the petitioner in keeping its books and making its reports to the Commission. It was, in essence, in accordance with the Treasury Regulations uniformly followed since the enactment of the Revenue Act of 1918, and applied to the billions of dollars of outstanding indebtedness of American railroads upon long-term obligations. See Thirty-First Annual Report of Interstate Commerce Commission on the Statistics of Railways in the United States for the year ending December 31, 1917, pp. 34–36, 54–56. Under such circumstances the determination of the Commissioner should not be disturbed.

Moreover, unless the Commissioner's theory as to the treatment of bond premiums is adopted, it would seem that a corporation, by selling its bonds at a high nominal interest rate so as to produce a premium, could reduce its taxable net income by the amount of the premium and to that extent escape taxation.

Mr. Justice Roberts delivered the opinion of the Court.

The Revenue Act of 1921 defines gross income as including gains, profits and income derived by the taxpayer from any source whatever, and provides that in computing net income of a corporation "all interest paid or accrued within the taxable year on its indebtedness" is deductible from such gross income. Treasury regulations promulgated under authority of the statute state that if

bonds are issued by a corporation at a premium the net amount of such premium is gain or income which should be amortized over the life of the bonds.[1]

In making return for 1921 the Old Colony Railroad Company deducted from gross income the full amount paid during the year as interest to holders of its bonds. These had been issued at various dates between 1895 and 1904 and the subscribers had taken them at prices in excess of par. The total of the premiums thus paid the company was $199,528.08. At the dates of issuance of the bonds, and until 1914, the company kept its accounts on a cash basis and credited the sums so received in an account designated "Premium on Bonds." In the last named year the Interstate Commerce Commission ordered that they should be amortized over the periods of the respective lives of the bonds. The company complied under protest, extinguished by appropriate entries the ratable proportion of the premiums for the years prior to 1914, and thereafter reported to the Commission as income a yearly ratable proportion of the remainder of the premiums, but entered the same on its books in the profit and loss account (a surplus account) and not as income. The proportion of the premiums attributable to 1921 and reported to the Commission as income for that year was $6,960.64, but the company did not in its tax return include this figure in gross income or deduct it from the amount of interest paid on its bonds.[2] The Commis-

[1] Act of November 3, 1921, c. 136, §§ 213, 234; 42 Stat. 227, 237, 254. Treasury Regulations 62, Art. 545.

[2] By lease dated February 15, 1893, still in force, petitioner leased all its property to The New York, New Haven and Hartford Railroad Company, the lessee agreeing to operate and maintain petitioner's railroad, to assume the payment of the principal of and interest upon its bonded indebtedness and other obligations, and to pay a certain additional sum as rental. Although the bonds in question were issued

sioner, in his audit of the return, made no adjustment in the item of interest paid, but added the sum of $6,960.64 to the company's gross income for 1921 and found a resulting deficiency in the amount of tax. Upon a petition for redetermination the Board of Tax Appeals held that the Commissioner erred in treating this amount as taxable income of the year in question.[3]

The Commissioner asked reconsideration, asserting that the mere form of the calculation by which he arrived at a redetermination of the tax was immaterial and that the result was correct since the year's proportion of amortization of bond premiums was in reality a deduction from the stipulated interest paid the bondholders. The Board adhered to its ruling.[4] The Circuit Court of Appeals adopted the Commissioner's view and reversed the Board.[5] The court distinguished its earlier decision in

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after the effective date of the lease they were the direct obligation of petitioner and it remained liable for the payment of interest. Petitioner bases certain arguments upon the fact that in the tax year under review it charged itself with bond interest received from the lessee and took credit for the same amount as interest paid to bondholders. These facts are unimportant in the view we take of the case. We shall treat it as if the lease were nonexistent and the bonds had been issued by a company operating its own property.

[3] 18 B. T. A. 267. In reaching this conclusion the Board followed its earlier decision in Old Colony Railroad Co. *v.* Commissioner, 6 B. T. A. 1025, wherein it had held that under similar provisions of the Revenue Act of 1918 and a like treasury regulation the premiums were income in the year in which they were received, thus becoming a part of the company's capital prior to the adoption of the Sixteenth Amendment and not taxable. See *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179; *Lynch* v. *Turrish,* 247 U. S. 221; *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330; *Goodrich* v. *Edwards,* 255 U. S. 527. The Board's holding was affirmed in *Commissioner* v. *Old Colony R. Co.,* 26 F. (2d) 408. See also *Chicago, R. I. & P. R. Co.* v. *Commissioner,* 47 F. (2d) 990.

[4] 18 B. T. A. 267.

[5] 50 F. (2d) 896.

Commissioner v. *Old Colony R. Co., supra,* note 3, stating that its attention had not been called to the fact that the profit made in the years prior to 1913 was not being taxed, but was used only to determine the expense of the payment of interest on the bonds for the year 1921. We granted certiorari.

The regulations state that the net amount of premium is gain or income. Necessarily, then, the premium is gain or income of the year in which it is received. The provisions of the Revenue Acts of 1918, 1921, 1924 and 1926 are the same as respects gross income of corporations and deductions therefrom. The regulations under the relevant sections of the acts of 1918, 1924 and 1926 employ substantially the same phraseology as that found in those issued under the 1921 Act.[6] The repeated reënactment of a statute without substantial change may amount to an implied legislative approval of a construction placed upon it by executive officers. *National Lead Co.* v. *United States,* 252 U. S. 140; *United States* v. *Farrar,* 281 U. S. 624; *Poe* v. *Seaborn,* 282 U. S. 101, 116.

There is no ambiguity in the language of the regulation, which defines a bond premium as income. As a corollary from this definition it follows that the petitioner received the income represented by the premiums here involved prior to the adoption of the Sixteenth Amendment, for these premiums could not be income for any other year than that in which they were received. That income had become capital prior to the adoption of the Amendment and could not be reached by a subsequent income tax act. This conclusion is not affected by the provision of the regulation which allows the proration or amortization of this item over the life of the bonds, and extends to the taxpayer the privilege of treating the premium as income

[6] Regulations 45, Art. 544; Regulations 62, Art. 545; Regulations 69, Art. 545; Regulations 74, Art. 68.

received in instalments instead of in a lump sum in the year of its receipt.

Nor does the fact that the regulation thus ameliorates the burden of the taxpayer authorize the use of the grant to convert income of years prior to the effective date of the Sixteenth Amendment into income assumed to have been received thereafter. The amortization requirement may properly be applied to premiums paid subsequent to March 1, 1913, but cannot operate to contradict the definition of a premium as gain or income.

The Government, however, insists that nothwithstanding the regulation's designation of a premium paid by the subscriber to corporate bonds as income it is not such to the corporation, but is in the nature of capital loaned which must be returned to the lender during the life of the bonds. Reference is made to the practice of bond buyers in determining the amount they will bid. It is said that a purchaser, in arriving at the price he is willing to pay for a bond, has regard to the current rate of interest for money, and if the bond bears a stipulated rate in excess of the ruling rate he will pay a premium. He does this although he knows that at maturity he can only receive the par of the bond, but considers that he will be repaid the premium by the excess of the agreed rate of interest over the rate he is content to receive. On the other hand, where the stipulated interest is less than the going rate bond buyers will bid less than the par of the bond by such amount as is necessary to redress the difference between the agreed rate of interest and the going rate which the subscriber demands. The conclusion is that the actual return to one who pays a premium is less than the nominal interest carried by the bond, and to one who buys at a discount is greater than such nominal rate. The argument is that although the regulations are inaptly phrased and are susceptible of the construction petitioner places upon them their real intent was to adjust the nomi-

nal interest paid on a corporation's indebtedness to the actual amount it is paying for the use of the money represented by the par of the bond,—that is, to what accountants have called the "effective rate" of interest. In this view the Government says that each time the debtor pays an instalment of stipulated interest what it in fact does is to pay interest at a lesser rate on the par of the bond and return a ratable proportion of the premium, which really constitutes a loan by the investor to the debtor. Thus that portion of the instalment paid at each interest date which is a return of the loaned capital represented by the premium must be deducted from the nominal interest in order to arrive at the "effective rate" of interest the debtor is really paying. It is said the regulation is intended to afford a method of adjusting the taxpayer's income in the light of these facts, and that it is immaterial whether, as provided, the pro rata yearly return of capital loaned in excess of the face of the bond is added to gross income or deducted from interest paid, for in either case the result in dollars will be exactly the same.

Doubtless the premium received by the corporation is acquired capital rather than income. But if this be admitted the concession does not answer the question whether a premium paid prior to 1913 is taxable. Obviously, therefore, it is not enough for the Government's purpose to disregard the regulation which designates this item as income or gain. The Commissioner must and does go farther and contend that the receipt of such a premium reduces the item of interest paid and renders the sum nominated as such in the bond something different from the "interest . . . on its indebtedness" mentioned in § 234 of the Revenue Act of 1921 as a permissible deduction from gross income.

In other words the contention is that by the use of the quoted phrase the statute did not intend to allow the deduction of the amount agreed to be paid, which the con-

tract denominates "interest," but of a different sum to be ascertained by a calculation which will allocate the payment between a partial and ratable return of the premium and "effective" interest on the par of the security.

Is this the reasonable construction of the language of the act,—"all interest . . . on its indebtedness"? The rule which should be applied is established by many decisions. "The legislature must be presumed to use words in their known and ordinary signification." *Levy's Lessee* v. *McCartee,* 6 Pet. 102, 110. "The popular or received import of words furnishes the general rule for the interpretation of public laws." *Maillard* v. *Lawrence,* 16 How. 251, 261. And see *United States* v. *Buffalo Gas Co.,* 172 U. S. 339, 341; *United States* v. *First Nat. Bank,* 234 U. S. 245, 258; *Caminetti* v. *United States,* 242 U. S. 470, 485. As was said in *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364, 370, "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." This rule is applied to taxing acts: *DeGanay* v. *Lederer,* 250 U. S. 376, 381.

Applying the accepted tests to the language of the statute, we are of opinion that the construction contended for by the Commissioner is inadmissible. In common parlance the bonded indebtedness of a corporation imports the total face of its outstanding bonds,—the amount which must be paid at their maturity. The phrase is not generally used to connote par plus an unreturned proportion of premium.

And as respects "interest," the usual import of the term is the amount which one has contracted to pay for the use of borrowed money. He who pays and he who receives payment of the stipulated amount conceives that the whole is interest. In the ordinary affairs of life no one stops for refined analysis of the nature of a premium,

or considers that the periodic payment universally called "interest" is in part something wholly distinct—that is, a return of borrowed capital. It has remained for the theory of accounting to point out this refinement. We cannot believe that Congress used the word having in mind any concept other than the usual, ordinary and everyday meaning of the term, or that it was acquainted with the accountants' phrase "effective rate" of interest and intended that as the measure of the permitted deduction.

In the present case, as with corporate obligations generally, the bond has a par value and each coupon stipulates that on a date therein mentioned the company will pay a named sum as interest on the bond. Until the present contention was put forward no one supposed that the taxpayer was not entitled to deduct the entire amount specified in the coupon and actually paid during the taxable year as interest. The person who receives this sum certainly considers it interest and so, apparently, does the Government, which requires him to return it all as such and does not permit him, if he or his predecessor holder paid more than par for the bond, to treat part of the sum received as a return of capital loaned and the remainder as interest received.

In short, we think that in the common understanding "interest" means what is usually called interest by those who pay and those who receive the amount so denominated in bond and coupon, and that the words of the statute permit the deduction of that sum, and do not refer to some esoteric concept derived from subtle and theoretic analysis.

If there were doubt as to the connotation of the term, and another meaning might be adopted, the fact of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer. *Gould* v. *Gould,* 245 U. S. 151; *United States* v. *Merriam,* 263 U. S.

179; *Bowers* v. *Lighterage Co.*, 273 U. S. 346; *United States* v. *Updike*, 281 U. S. 489; *Burnet* v. *Niagara Falls Brewing Co.*, 282 U. S. 648.

A further contention is advanced that inasmuch as by the ruling of the Interstate Commerce Commission the company was compelled to designate the annual amount of premium amortization as income, and under protest did so treat it in reporting to the Commission, the ruling of the Commissioner of Internal Revenue is in conformity with the method of bookkeeping adopted by the petitioner and hence is justified by § 212 (b) of the Revenue Act of 1921,[7] which provides that the net income of a corporation shall be computed in accordance with the method of accounting regularly employed in keeping the books of the taxpayer, and by § 213 (a) of the same act, which authorizes the accrual method of reporting income. This position is inconsistent with the other arguments advanced. If the amortized premium is to be deducted from interest paid by the taxpayer it is not income. If it is income, then by hypothesis it is income received prior to the date of the Sixteenth Amendment and not income which accrues to the taxpayer from year to year. Moreover, the rules of accounting enforced upon a carrier by the Interstate Commerce Commission are not binding upon the Commissioner, nor may he resort to the rules of that body, made for other purposes, for the determination of tax liability under the revenue acts. *Kansas City Southern Ry. Co.* v. *Commissioner*, 52 F. (2d) 372; certiorari denied, *post*, p. 676. Compare Chicago, R. I. & P. Ry. Co. *v.* Commissioner, 13 B. T. A. 988, 1027; Fall River Electric Light Co. *v.* Commissioner, 23 B. T. A. 168.

We conclude that the yearly pro rata amortization of bond premiums is not income received in the year to which

[7] Note 1, *supra*.

it is applicable; and that so far as the deduction of interest on indebtedness is concerned the fact that a premium was paid does not operate to reduce interest paid on bonded indebtedness within the meaning of the revenue acts.

The judgment is

Reversed.

AMERICAN SURETY CO. *v.* GREEK CATHOLIC UNION.

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

No. 401. Argued January 22, 1932.—Decided February 15, 1932.

A surety company executed in favor of a benefit society a fidelity bond conditioned upon the faithful performance of the duties of its treasurer. He subsequently violated his duty by depositing with a bank a sum greatly in excess of that permitted by the by-laws of his organization. The bank came into financial difficulty, and its assets were taken over and its liabilities assumed by a trust company. To assure the transfer, and in an attempt to minimize the loss, but without the consent of the surety company, the society entered into an agreement with the trust company to leave on deposit with it a sum of money, for a stated period, without interest. At the expiration of this period the money was paid back in full. The society sued the surety company to recover a sum representing the amount of interest lost on the money as a result of these arrangements. It was admitted that the course pursued by the society had deprived the surety company of its right of subrogation against the bank. *Held:*

1. The agreement made between the society and the trust company so varied the risk as to release the surety company from liability under its bond. P. 567.

2. The surety company did not have the burden of proving affirmatively that its risk was increased. Pp. 568–569.

3. The cause of the loss sued for was the voluntary action of the society in making an entirely new agreement with the trust company, and this was not one of the events specified in the bond on which payment was conditioned. P. 569.

51 F. (2d) 1050, reversed.

CERTIORARI * to review a judgment affirming a judgment against the surety company in an action upon a fidelity bond. See also, 25 F. (2d) 31.

Messrs. James M. Magee and *Edmund W. Arthur* for petitioner.

Messrs. Thomas Stephen Brown and *Ralph C. Davis* for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioner executed in favor of the respondent a bond in the sum of $100,000 conditioned upon the payment of pecuniary loss the corporation should sustain through the failure of one Kondor, its treasurer, faithfully to perform his duties as prescribed by the constitution and by-laws, or through his failure to keep intact and absolutely to account for all funds of the corporation. Kondor violated his duty by depositing with the Peoples State Bank of Johnstown, Pennsylvania, of which he was president, a sum greatly in excess of that permitted by the by-laws to be lodged in any one depositary. The bank became embarrassed and the state banking department instituted an investigation of its affairs. The amount on deposit to the credit of respondent was found to be over $241,000; and checks for $89,000 had been prepared for signature by Kondor as treasurer and were about to be issued. The representatives of the state determined that if these checks were issued and presented for payment they could not be met out of the bank's available resources and the institution would have to be closed and placed in the hands of an official liquidator.

News of the situation reached certain executive officers of the Union who lived in Pittsburgh, and they came to

* See table of cases reported in this volume.

Johnstown with their attorneys. They were informed that unless $100,000 additional cash was deposited with the bank the state would not permit the institution to honor the checks for $89,000. In this exigency counsel for the respondent called up an official of the petitioner at Pittsburgh and was advised by him that he had no authority to act in the premises. The only one to whom he could refer counsel was the general claim agent of the petitioner, who lived in New York. When reached by telephone he stated that he had no authority to pay or deposit $100,000, that such a matter would have to be referred to the executive committee. He was told that negotiations were under way to have another bank or trust company in Johnstown take over the assets and liabilities of the Peoples Bank, that a definite arrangement would have to be reached in less than twenty-four hours, and that the petitioner should have someone representing it come at once to Johnstown to join in the conferences on this subject. It does not appear that a promise was made that any such person could or would arrive in time to take part in the matter. This conversation took place on a Sunday morning. Late the same night a contract was entered into between the Peoples State Bank and the United States Trust Company of Johnstown whereby the latter assumed all the liabilities of the bank, except for its capital stock, in consideration of the conveyance of all its assets. The trust company was unwilling to make this agreement unless respondent would stipulate to leave with it $200,000 of the existing deposit with the bank for four years without interest. To assure the consummation of the transfer the respondent executed such an undertaking. The trust company proceeded with the liquidation of the affairs of the former bank, paid checks for some $41,000 of the deposit standing to the credit of the respondent, and at the expiration of the stipulated

four year period paid the respondent the remaining $200,000.

Respondent brought this action, alleging Kondor's breach of duty under the by-laws and his failure to keep intact the moneys entrusted to him as treasurer, and the consequent liability of petitioner on its bond. The declaration detailed the facts we have summarized, asserted due notice of breach to the surety, and its failure to meet the accruing liability; recounted the arrangement made in order to save loss, and claimed some $41,000 of interest lost to the corporation by reason of Kondor's default and the resulting agreement with the United States Trust Company made necessary thereby. The amount demanded was made up by showing that for four years $200,000 of the respondent's moneys had yielded no income, and that in conformity with the by-laws all of these funds would have been promptly invested except for Kondor's default; that the corporation normally earned five per cent. on investments, and had lost the opportunity to earn at that or any rate by reason of having to leave the $200,000 on deposit with the United States Trust Company without interest. The petitioner filed a statutory demurrer which was sustained by the District Court, whose decision was overruled by the Circuit Court of Appeals, 25 F. (2d) 31, and the case remanded for further proceedings. A trial on the merits resulted in a verdict and judgment for the amount claimed. The Circuit Court of Appeals affirmed. 51 F. (2d) 1050. This court granted certiorari.

At trial the court affirmed a point for charge presented by respondent, which permitted the jury to find whether the arrangement entered into between respondent and the United States Trust Company created a material variation of the surety's risk. Petitioner presented a point to the effect that the agreement with the trust company created a material variance in the contract of suretyship,

deprived the surety of recovery of salvage from the Peoples State Bank, and relieved the petitioner of the burden of showing that the variance was prejudicial. This was refused.

The parties agree that Kondor's conduct with respect to the deposit in the Peoples State Bank was a breach of his obligations and entailed a liability upon the bond; that the ascertainment of Kondor's defaults and notice thereof to the surety matured the surety's obligation to pay the loss sustained up to $100,000; that if petitioner had made such payment it would have been entitled to be subrogated to the rights of the respondent against the Peoples State Bank and Kondor, and that the course adopted by the officers of the Union deprived the surety of any opportunity to pursue the Peoples State Bank. In its brief and at bar respondent conceded that the telephone conversations with petitioner's employees on the eve of entering into the agreement with the United States Trust Company in no way affected the reciprocal rights and liabilities consequent on Kondor's defaults. These agreements and concessions narrow the issue presented to the question whether the arrangements made and approved by the officers of the obligee so varied the risk as to release the obligor from liability under its bond. The court below was of opinion the exigency which confronted the Union's officers was similar to one which an insured faces when a fire occurs, and the efforts at salvage ought not to be held a prejudicial variation of the hazard; that the burden rested upon petitioner affirmatively to prove that what was done increased its risk, and that the trial judge properly left this question as one of fact to the jury.

We cannot agree with this view. Assuming that respondent is right in its contention that the obligation here was in the nature of an insurance contract rather than one of strict suretyship (*American Surety Co.* v. *Pauly,* 170 U. S. 133, 144; *Guaranty Co.* v. *Pressed Brick*

Co., 191 U. S. 416, 423), and that consequently a variation of the risk does not *ipso facto* discharge the insurer, who in order to escape liability must prove that the change was material and prejudicial, it remains, as a practical matter, that what was done made proof of actual detriment impossible. If the bank had been closed, the surety would have remained liable for the penal sum named in the bond, and upon payment thereof would have been subrogated to the respondent's rights against the bank and the defaulting treasurer. Whether the resulting loss would have been more than $41,000 no one can tell. The state authorities, from such examination as they had made, were of the opinion that the depositary might pay from twenty to forty per cent. of its liabilities. It appears, however, that by the administration of the United States Trust Company the debts have been paid almost in full, and some assets of doubtful value remain to be converted. The action of the Union's officials has placed the question of probable prejudice due to the adoption of one of the two alternatives presented wholly in the realm of conjecture, and respondent now seeks to cast upon petitioner the burden of proving the consequences of an event which never in fact occurred.

The cases relied on by respondent have to do with an alteration of the terms of a principal obligation prior to any breach, and without the surety's consent. They address themselves to the question whether such a change discharges the indemnitor from liability consequent upon a breach. *Young* v. *American Bonding Co.,* 228 Pa. 373; 77 Atl. 623; *Philadelphia* v. *Fidelity & Deposit Co.,* 231 Pa. 208; 80 Atl. 62; *Brown* v. *Title Guaranty & Surety Co.,* 232 Pa. 337; 81 Atl. 410; *Philadelphia* v. *Ray,* 266 Pa. 345; 109 Atl. 689.

The instant case presents an altogether different situation. A breach had occurred which entailed a loss for which the bondsman was liable; and thereafter the ob-

ligee, without consulting the surety, entered into a wholly new arrangement relative to the recoupment of such loss. The claim is that this action was in fact in the interest of the surety and saved it money, and that if this is not true, the surety must assume the burden of proving what would have been the result of refraining from the attempt to minimize loss. We are referred to no authority in support of this position, and we think it unsound as applied even to the case of a paid surety company, which is often treated as an insurer merely.

Viewed in another aspect, the facts preclude a recovery. The cause and genesis of the loss was not one of the events specified in the bond on which payment was conditioned. The defaults for which the petitioner agreed to be liable were clearly defined. The bond guaranteed against fraud, dishonesty, forgery, theft, etc. of the treasurer; against his neglect faithfully to perform his duties as prescribed by the constitution and by-laws; against his omission to keep intact and absolutely to account for all the funds of the corporation; and against the failure of any bank or trust company in which he might deposit such funds. There is no evidence that the loss occurred through the fraud, dishonesty, or forgery of Kondor. It did not arise from the failure of the depositary, for the bank was not allowed to fail. The breach for which indemnity was to be afforded was Kondor's default in the performance of his duties and with respect to the protection of the funds of the corporation. There is nothing in the instrument which by the farthest stretch of construction can be said to undertake the payment of a loss due to an agreement of the corporation to substitute some other bank or trust company for the Peoples Bank. The voluntary action of the respondent in making an entirely new agreement, whereby in effect it loaned $200,000 to the United States Trust Company for four years without interest, caused the loss for which

the suit is brought. In view of the situation confronting it the Union thought well to incur the risk of losing that interest. It cannot now ask that the bond be rewritten to cover an event not therein specified or contemplated. Where an insured without the agreement of the insurer undertakes to substitute a new obligation under a new agreement with a third party in lieu of those arising from a breach of the officer whose fidelity is insured, thus substituting a new and different liability from any undertaken in the instrument of suretyship, and depriving the insurer of the right of subrogation, such conduct operates to discharge the obligation of the indemnity contract.

Judgment reversed.

MR. JUSTICE MCREYNOLDS is of the opinion that the judgment should be affirmed.

DECISIONS PER CURIAM, FROM OCTOBER 5, 1931, TO AND INCLUDING FEBRUARY 15, 1932*

No. —, original. Ex parte Murphy. October 12, 1931. The motion for leave to file a petition for writ of mandamus is denied. *Mr. James Edward Murphy, pro se.*

No. —, original. Ex parte Husty. October 12, 1931. The motion for leave to file a petition for writ of mandamus is denied. *Mr. Percy F. Parrott* for petitioner.

No. 630 (October Term, 1930). DeForest Radio Co. *v.* General Electric Co. October 19, 1931. Ordered, that the opinion in this case (283 U. S. 664, 686) be amended as follows:

(1) By substituting for the words "In July, 1912," in the 12th line of the last paragraph of the opinion, the following:

"August 20, 1912, the earliest date claimed for Langmuir, was rejected, rightly, we think, by the District Court, which held that Langmuir was anticipated by Arnold in November, 1912. But before the earlier date . . ."

(2) By substituting for the 3d sentence from the end the following:

"By August, 1912, the Telegraph Company used De Forest amplifying audions at 54 volts, and, by November, they were used by another at 67½ volts. This was possible only because the tubes had thus been exhausted of gas which would otherwise have ionized with blue glow at from 20 to 30 volts."

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* For decisions on applications for certiorari, see *post,* pp. 599, 617.

No. 44. ORNSTEIN ET AL. *v.* CHESAPEAKE & OHIO RY. Co. Appeal from the Supreme Court of Ohio. Jurisdictional statement submitted October 12, 1931. Decided October 19, 1931. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. *Grays Harbor Logging Co.* v. *Coats-Fordney Logging Co.,* 243 U. S. 251, 255–257. *Mr. Stuart R. Bolin* for appellants. *Mr. Fred C. Rector* for appellee. Reported below: 123 Oh. St. 260; 174 N. E. 772.

No. 53. PALM *v.* HOLLOPETER. Appeal from the Supreme Court of Oregon. Jurisdictional statement submitted October 12, 1931. Decided October 19, 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), certiorari is denied. *Mr. Alfred Evan Reames* for appellant. *Mr. Gus Newbury* for appellee. Reported below: 134 Ore. 546; 291 Pac. 380.

No. 56. STUART ET AL. *v.* FOX ET AL.;

No. 57. SAME *v.* MINOTT; and

No. 58. SAME *v.* SHWARTZ ET AL. Appeals from the Supreme Judicial Court of Maine. Jurisdictional statement submitted October 12, 1931. Decided October 19, 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 were allowed as petitions for writs of certiorari as required by § 237 (c), Judicial Code as amended (43 Stat. 936, 938), certiorari is denied. *Messrs. Frank H. Purinton* and

Jacob H. Berman for appellants. *Mr. Robert Hale* for appellees. Reported below: 129 Me. 407; 152 Atl. 413.

No. 80. WASHINGTON EX REL. CLITHERO ET AL. *v.* SHOWALTER ET AL. Appeal from the Supreme Court of Washington. Jurisdictional statement submitted October 12, 1931. Decided October 19, 1931. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Wabash Ry. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. Co.* v. *Solomon,* 237 U. S. 427; *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. Raymond M. Hudson* and *Robert L. Edmiston* for appellants. *Messrs. John H. Dunbar* and *E. W. Anderson* for appellees. Reported below: 159 Wash. 519; 293 Pac. 1000.

No. 105. WALNUT & QUINCE STREETS CORP. *v.* MILLS, SUPERINTENDENT OF PUBLIC SAFETY, ET AL. Appeal from the Supreme Court of Pennsylvania. Jurisdictional statement submitted October 12, 1931. Decided October 19, 1931. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Wabash Ry. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. Co.* v. *Solomon,* 237 U. S. 427; *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. Maurice Bower Saul, Walter Biddle Saul,* and *Earl G. Harrison* for appellant. *Mr. G. Coe Farrier* for appellees. Reported below: 303 Pa. 25; 154 Atl. 29.

No. 136. PASSERA ET AL. *v.* PONTCHARTRAIN REALTY CO., INC. Appeal from the Supreme Court of Louisiana. Jurisdictional statement submitted October 12, 1931. De-

cided October 19, 1931. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Wabash Ry. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. Co.* v. *Solomon,* 237 U. S. 427; *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. Wm. C. Dufour* and *J. Zach Spearing* for appellants. *Mr. Henry P. Dart, Jr.,* for appellee. Reported below: 172 La. 243; 133 So. 761.

No. 89. Augusta Power Co. et al. *v.* Savannah River Electric Co. Appeal from the Supreme Court of South Carolina. Jurisdictional statement submitted October 12, 1931. Decided October 19, 1931. *Per Curiam:* The appeal herein is dismissed. *Louisiana Navigation Co., Ltd.,* v. *Oyster Commission,* 226 U. S. 99, 101; *Reddall* v. *Bryan,* 24 How. 420; *Bruce* v. *Tobin,* 245 U. S. 18, 19; *Verden* v. *Coleman,* 18 How. 86; *Moses* v. *The Mayor,* 15 Wall. 387. *Mr. Edgar Watkins* for appellants. *Mr. M. G. McDonald* for appellee. 161 S. E. 767.

No. 142. Twin City Power Co. *v.* Savannah River Electric Co. Appeal from the Supreme Court of South Carolina. Jurisdictional statement submitted October 12, 1931. Decided October 19, 1931. *Per Curiam:* The appeal herein is dismissed. *Louisiana Navigation Co., Ltd.,* v. *Oyster Commission,* 226 U. S. 99, 101; *Reddall* v. *Bryan,* 24 How. 420; *Bruce* v. *Tobin,* 245 U. S. 18, 19; *Verden* v. *Coleman,* 18 How. 86; *Moses* v. *The Mayor,* 15 Wall. 387. The petition for a writ of certiorari in this cause is denied. *Messrs. D. W. Robinson, George E. O'Connor,* and *E. H. Callaway* for appellant. *Mr. M. G. McDonald* for appellee.

No. 1. AKRON, CANTON & YOUNGSTOWN RY. CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Northern District of Illinois. Argued October 14, 15, 1931. Decided October 26, 1931. *Per Curiam:* The Court is of the opinion that the Interstate Commerce Commission acted within its authority and that its order is supported by substantial evidence. The decree is affirmed. *Western Chemical Co.* v. *United States,* 271 U. S. 268, 271; *Chicago, R. I. & P. Ry. Co.* v. *United States,* 274 U. S. 29, 33, 34; *Alabama* v. *United States,* 283 U. S. 776, 779. *Mr. Leo P. Day,* with whom *Mr. Anthony P. Donadio* was on the brief, for appellants. *Mr. J. Stanley Payne,* with whom *Solicitor General Thacher, Assistant to the Attorney General O'Brian,* and *Messrs. Daniel W. Knowlton* and *E. M. Reidy* were on the brief, for the United States et al.

No. 2. GREAT ATLANTIC & PACIFIC TEA CO. ET AL. *v.* MAXWELL, COMMISSIONER OF REVENUE. Appeal from the Supreme Court of North Carolina. Argued October 15, 1931. Decided October 26, 1931. *Per Curiam:* Judgment affirmed. *State Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE SUTHERLAND concur in the judgment solely upon the ground that the decision in *State Board of Tax Commissioners* v. *Jackson, supra,* is in point and controlling; but if the question were still open they would regard the taxing act as repugnant to the equal protection clause of the fourteenth amendment for the reasons stated in the dissenting opinion in the *Jackson* case.

MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER are of opinion that the challenged judgment should be reversed.

Mr. John W. Davis, with whom *Messrs. Edward H. Green, Martin A. Schenck, Charles W. Tillett, Jr., Clark McKercher, W. H. Dannat Pell,* and *Edward H. Holloway* were on the brief, for appellants. *Mr. Dennis G. Brummitt,* Attorney General of North Carolina, with whom *Messrs. Frank Nash, Walter D. Siler,* and *A. A. F. Seawell,* Assistant Attorneys General, were on the brief, for appellee. *Mr. J. Fraser Lyon,* by leave of Court, filed a brief on behalf of the Tax Commission of South Carolina, as *amicus curiae.* Reported below: 199 N. C. 433; 154 S. E. 838.

No. 5. Mitchell, Attorney General, et al. *v.* Penny Stores, Inc. Appeal from the District Court of the United States for the Southern District of Mississippi. Argued October 16, 1931. Decided October 26, 1931. *Per Curiam:* In this suit, brought to enjoin the enforcement of the provisions of §§ 2 (c), 11, and 13 of article 1 of chapter 90 of the Laws of Mississippi of 1930, an application was made to the District Court of the United States for an interlocutory injunction. The District Court, composed of three judges (U. S. C., Title 28, § 380), granted an interlocutory injunction upon the giving by the plaintiffs of a bond payable to the State of Mississippi in the sum of $5,000, conditioned as required by law, restraining the enforcement of the statutory provisions until the cause could be fully heard and determined. No opinion was rendered by the District Court, and the only question presented by the record upon this appeal is whether the District Court abused its discretion in granting an injunction until the case could be heard upon the merits. *Alabama* v. *United States,* 279 U. S. 229, 231; *United Fuel Gas Co.* v. *Public Service Commission,* 278 U. S. 322, 326; *National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, 338. The

order was made prior to the decision of this Court in *State Board of Commissioners* v. *Jackson,* 283 U. S. 527, and, as no abuse of discretion is shown, the order must be affirmed. *Mr. W. L. Guice,* with whom *Messrs. George T. Mitchell,* Attorney General of Mississippi, and *J. A. Lauderdale,* Assistant Attorney General, were on the brief, for appellants. *Messrs. Wm. H. Watkins, Martin A. Schenck, Clark McKercher, Robert S. Marx,* and *W. H. Dannat Pell* were on the brief, for appellee.

No. 21. VIRGINIAN RY. CO. *v.* CHAMBERS;

No. 22. SAME *v.* FITZGERALD; and

No. 23. SAME *v.* HYLTON. Certiorari to the Circuit Court of Appeals for the Fourth Circuit. Argued October 21, 1931. Decided October 26, 1931. *Per Curiam:* Judgments affirmed by a divided court. *Mr. John R. Pendleton,* with whom *Mr. W. H. T. Loyall* was on the brief, for petitioner. *Messrs. Russell S. Ritz* and *Grover C. Worrell* for respondents. Reported below: 46 F. (2d) 20.

No. 25. CHICAGO *v.* CHICAGO RAPID TRANSIT CO. Appeal from the District Court of the United States for the Northern District of Illinois. Argued October 21, 1931. Decided October 26, 1931. *Per Curiam:* This suit was brought to restrain the Illinois Commerce Commission and the Attorney General of the State of Illinois from enforcing an order of the commission prescribing rates of fare upon the appellee's railroads upon the ground that the order was confiscatory and in violation of the Fourteenth Amendment of the Constitution of the United States. The City of Chicago was permitted to intervene as defendant. The District Court, composed of three judges (U. S. C., Title 28, § 380), granted an interlocutory

injunction, and on final hearing entered its decree, adjudging, upon findings, that the rates prescribed by the state commission were confiscatory and permanently restraining the enforcement of its order. The Illinois Commerce Commission and the Attorney General of the State have not appealed from the decree, which is thus a final adjudication of the invalidity of the rate order. The present appeal is taken by the City of Chicago.

The Court is of the opinion that the City of Chicago has no separate standing which entitles it to appeal from the decree, and its appeal is dismissed. *Pawhuska* v. *Pawhuska Oil & Gas Co.*, 250 U. S. 394; *Chicago* v. *Dempcy*, 250 U. S. 651; *Denney* v. *Pacific Telephone & Telegraph Co.*, 276 U. S. 97, 102; *Railroad Commission of California* v. *Los Angeles Ry. Corp.*, 280 U. S. 145, 156; *Public Utilities Commission* v. *Quincy*, 290 Ill. 360, 369, 370; 125 N. E. 374; *Chicago Railways Co.* v. *Chicago*, 292 Ill. 190, 195; 126 N. E. 585; 257 U. S. 617; *Hoyne* v. *Chicago & Oak Park Elevated Ry. Co.*, 294 Ill. 413, 420–422; 128 N. E. 587. See also *New York City* v. *New York Telephone Co.*, 261 U. S. 312, 316. *Mr. Joseph F. Grossman*, with whom *Messrs. Wm. H. Sexton, Albert H. Veeder, Samuel A. Ettelson*, and *Edward C. Higgins* were on the brief, for appellant. *Messrs. Addison L. Gardner, Harry J. Dunbaugh*, and *Gilbert E. Porter* were on the brief for appellee.

No. 120. Public Service Commission *v.* Batesville Telephone Co. See *ante*, p. 6.

No. 68. Baxter, Administrator, *v.* Continental Casualty Co. Appeal from the Circuit Court of Appeals for the Eighth Circuit. Jurisdictional statement submitted October 12, 1931. Decided October 26, 1931. *Per Curiam:* This action was originally brought in the Circuit

Court, City of St. Louis, Missouri, and was removed to the District Court of the United States upon the ground of diversity of citizenship. The action was upon a policy of automobile insurance issued by the defendant, and recovery depended upon judgment having been obtained and execution thereon having been returned unsatisfied in an action against the assured. It was shown that action had been brought in the state court against the assured, the Southwest Motor Sales Co., a Missouri corporation, and also against one Harry Shields, its executive officer. Process had been served upon Shields personally, and jurisdiction of the Southwest Motor Sales Co. had been sought by constructive service under the Missouri law. Judgment by default had been entered against both defendants and execution had been returned unsatisfied.

In the present action the Circuit Court of Appeals, affirming judgment for the defendant, held that the insurance policy which the defendant had issued did not cover Shields and that the service in the action against the Southwest Motor Sales Co. was invalid under the decisions of the state court. *Priest* v. *Capitain,* 236 Mo. 446, 457; 139 S. W. 204; *Moss* v. *Fitch,* 212 Mo. 484, 497; 111 S. W. 475. As the decision of the Circuit Court of Appeals merely applied the law of the State, no question is presented which gives this Court jurisdiction of the appeal. *Public Service Commission* v. *Batesville Telephone Co., ante,* p. 6. Appeal dismissed. *Messrs. P. Taylor Bryan* and *Douglass H. Jones* for appellant. No appearance for appellee. Reported below: 48 F. (2d) 467.

No. 169. Brannan et al. *v.* Harrison, Comptroller General. Appeal from the Supreme Court of Georgia. Jurisdictional statement submitted October 12, 1931. Decided October 26, 1931. *Per Curiam:* The appeal herein is dismissed. *Louisiana Navigation Co., Ltd.,* v. *Oyster*

Commission, 226 U. S. 99, 101; *Reddall* v. *Bryan,* 24 How. 420; *Bruce* v. *Tobin,* 245 U. S. 18, 19; *Verden* v. *Coleman,* 18 How. 86; *Moses* v. *The Mayor,* 15 Wall. 387. *Mr. C. N. Davie* for appellants. *Messrs. Robert S. Parker* and *T. R. Gress* for appellee. Reported below: 172 Ga. 669; 158 S. E. 319.

No. 174. INTERSTATE NATURAL GAS CO., INC., ET AL. *v.* ARENT. Appeal from the Supreme Court of Louisiana. Jurisdictional statement submitted October 12, 1931. Decided October 26, 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), certiorari is denied. *Messrs. Henry P. Dart, Jr., Edward M. Freeman, Allan Sholars,* and *Henry P. Dart* for appellants. *Messrs. J. D. Barksdale* and *George Genby* for appellee. Reported below: 133 So. 157.

No. 195. SALVATIERRA ET AL. *v.* INDEPENDENT SCHOOL DISTRICT ET AL. Appeal from the Court of Civil Appeals, Fourth Supreme Judicial District, of Texas. Jurisdictional statement submitted October 12, 1931. Decided October 26, 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), certiorari is denied. *Messrs. Fred C. Knollenberg* and *John L. Dodson* for appellants. No appearance for appellees. Reported below: 33 S. W. (2d) 790.

No. 223. KIELDSEN *v.* BARRETT, STATE TREASURER. Appeal from the Supreme Court of Idaho. Jurisdictional statement submitted October 12, 1931. Decided October 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; *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. Oliver O. Haga* for appellant. *Messrs. Fred J. Babcock* and *Leon M. Fisk* for appellee. Reported below: 297 Pac. 405.

No. 266. HANSON *v.* HANSON. Appeal from the Supreme Court of Kansas. Jurisdictional statement submitted October 12, 1931. Decided October 26, 1931. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied. On consideration of the unprinted record submitted in this cause it is ordered that the appeal herein 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; *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. John F. Hanson, pro se. Mr. Frank O. Johnson* for appellee. Reported below: 131 Kan. 27; 289 Pac. 474.

No. 45. SOUTHERN RY. CO. *v.* MOORE, ADMINISTRATOR. Certiorari to the Supreme Court of South Carolina. Submitted October 23, 1931. Decided November 2, 1931. *Per Curiam:* The judgment herein is reversed, upon the ground, as matter of law, that the evidence is not sufficient to sustain a finding that negligence of the petitioner was the cause of the death of respondent's intestate. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Coogan,* 271

U. S. 472, 474, 478; *Atlantic Coast Line* v. *Driggers,* 279 U. S. 787, 788; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Toops,* 281 U. S. 351, 354–355. *Messrs. S. R. Prince, H. O'B. Cooper, Frank G. Tompkins,* and *L. E. Jeffries* were on the brief for petitioner. *Mr. Wm. C. Wolfe* was on the brief for respondent. See 161 S. E. 525.

No. 41. PAINTERS DISTRICT COUNCIL No. 14 OF CHICAGO ET AL. *v.* UNITED STATES. Appeal from the District Court of the United States for the Northern District of Illinois. Argued October 26, 1931. Decided November 2, 1931. *Per Curiam:* Decree affirmed. *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443; *United States* v. *Brims,* 272 U. S. 549; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U. S. 37. *Mr. Wm. E. Rodriguez* for appellants. *Assistant to the Attorney General O'Brian,* with whom *Solicitor General Thacher* and *Mr. Charles H. Weston* were on the brief, for the United States. Reported below: 44 F. (2d) 58.

No. 59. UNITED STATES *v.* CAMPBELL. Certiorari to the Circuit Court of Appeals for the Second Circuit. Argued October 28, 1931. Decided November 2, 1931. *Per Curiam:* Judgment reversed. Section 309, World War Veterans' Act, as amended by the Act of July 2, 1926, c. 723, 44 Stat. 790, 800 (U. S. C. App., Title 38, § 516 b); *United States* v. *Worley,* 281 U. S. 339; *Jackson* v. *United States,* 281 U. S. 344. *Assistant Attorney General St. Lewis,* with whom *Solicitor General Thacher* and *Messrs. W. Clifton Stone* and *Paul D. Miller* were on the brief, for the United States. *Mr. David F. Lee* for respondent. Reported below: 47 F. (2d) 227.

No. 371. KEOGH *v.* NEELY, COLLECTOR OF INTERNAL REVENUE. Appeal from the Circuit Court of Appeals for the Seventh Circuit. Jurisdictional statement submitted October 19, 1931. Decided November 2, 1931. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 240 (b), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938). The petition for writ of certiorari is denied. *Mr. John W. Keogh, pro se. Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Hayner N. Larson* for appellee. Reported below: 50 F. (2d) 685.

No. 31. SANTOVINCENZO, CONSUL OF THE KINGDOM OF ITALY AT NEW YORK, *v.* EGAN, PUBLIC ADMINISTRATOR, ET AL. Appeal from the Surrogate's Court of the County of New York, State of New York. Jurisdictional statement submitted April 20, 1931. Decided November 23, 1931. *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). 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 granted. For opinion in this case, see *ante,* p. 30.

No. 294. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* HOWES BROTHERS HIDE CO. ET AL. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit. Certiorari submitted October 5, 1931. Decided November 23, 1931. *Per Curiam:* The petition for a writ of certiorari in this case is granted. The decree

herein is reversed upon the authority of *Handy & Harman* v. *Burnet, ante,* p. 136. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, John Henry McEvers,* and *Paul D. Miller* for petitioner. *Mr. Robert A. Littleton* for respondents. Reported below: 49 F. (2d) 878.

No. 50. UNITED STATES *v.* ANDERSON. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. Submitted May 18, 1931. Decided November 23, 1931. The petition for a writ of certiorari in this case is granted. The decree herein is reversed upon the authority of *United States* v. *Ryan, ante,* p. 167. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Mahlon D. Kiefer, John J. Byrne,* and *Paul D. Miller* for the United States. No appearance for respondent. Reported below: 44 F. (2d) 953.

No. 328. LIAS ET AL. *v.* UNITED STATES. Certiorari to the Circuit Court of Appeals for the Fourth Circuit. Argued November 23, 24, 1931. Decided November 30, 1931. *Per Curiam:* Judgment affirmed. *Allen* v. *United States,* 164 U. S. 492, 501, 502. *Messrs. Howard D. Matthews* and *J. Bernard Handlan,* with whom *Mr. John Marshall* was on the brief, for petitioners. *Solicitor General Thacher,* with whom *Assistant Attorney General Youngquist* and *Messrs. Mahlon D. Kiefer, John J. Byrne,* and *Wilbur H. Friedman* were on the brief, for the United States. Reported below: 51 F. (2d) 215.

No. 184. GREAT ATLANTIC & PACIFIC TEA CO. *v.* MORRISSETT, STATE TAX COMMISSIONER, ET AL. Appeal from the District Court of the United States for the Eastern

District of Virginia. Argued November 25, 1931. Decided November 30, 1931. *Per Curiam:* Decree affirmed. *State Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527; *Great Atlantic & Pacific Tea Co.* v. *Maxwell, ante,* p. 575. *Mr. Thomas B. Gay* for appellant. *Mr. W. W. Martin,* with whom *Mr. Henry R. Miller, Jr.,* was on the brief, for appellees.

No. 447. HANSON *v.* KRAMER ET AL. Appeal from the Supreme Court of Kansas. Jurisdictional statement submitted November 23, 1931. Decided November 30, 1931. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied. The appeal is dismissed for the want of a substantial federal question. *Equitable Life Assurance Society* v. *Brown,* 187 U. S. 308, 311; *Campbell* v. *Olney,* 262 U. S. 352, 354; *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 444, 455, 456; *Wick* v. *Chelan Electric Co.,* 280 U. S. 108, 111. *Mr. John F. Hanson, pro se.* No appearance for appellees. Reported below: 131 Kan. 491; 292 Pac. 788.

No. —, original. EX PARTE ESTABROOK. Motion submitted November 23, 1931. Decided November 30, 1931. The motion for leave to proceed *in forma pauperis* is denied. The motion for leave to file petition for writ of mandamus is also denied. *Mr. A. W. Estabrook, pro se.*

No. 13, original. NEW JERSEY *v.* CITY OF NEW YORK. December 7, 1931.

DECREE

This cause came on to be heard upon the pleadings, evidence, and the exceptions filed by the defendant to the report of the special master, the report of the special mas-

ter on re-reference and the form of decree prepared and filed by counsel for the parties. The court being fully advised in the premises, and for the purpose of carrying into effect the decision announced May 18, 1931, 283 U. S. 473, and the report of the special master on re-reference filed November 23, 1931,

It is ordered, adjudged and decreed as follows:

1. On and after June 1, 1933, the defendant, the City of New York, its employees and agents, and all persons assuming to act under its authority, be and they are hereby enjoined from dumping, or procuring or suffering to be dumped, any garbage or refuse, or other noxious, offensive or injurious matter, into the ocean, or waters of the United States, off the coast of New Jersey, and from otherwise defiling or polluting said waters and the shores or beaches thereof or procuring them to be defiled or polluted as aforesaid.

2. That meanwhile the defendant, the City of New York, its employees and agents, and other persons assuming to act under its authority, be and they are hereby enjoined to operate and utilize the existing incinerators and other facilities for the final disposition of garbage and refuse in such a manner as to reduce to the lowest practicable limit the amount of garbage dumped at sea.

3. That the defendant, the City of New York, shall file with the Clerk of this Court, on the first days of April, and October of each year, beginning April 1, 1932, a report to this Court adequately setting forth the progress made in the construction of incinerator plants for the final disposition of garbage and refuse, and their appurtenances, and also the amount of garbage and refuse dumped at sea during the periods covered by such reports.

4. That on the coming in of each of said reports, and on due notice to the other party, either party to this suit may apply to the Court for such action or relief, either

with respect to the time allowed for the construction, or the progress of construction, or the method of operation, of the proposed incinerator plants or other means of final disposition of garbage and refuse, or with respect to the quantities, places or character of the dumping of garbage and refuse at sea, as may be deemed to be appropriate.

5. That either of the parties hereto may, irrespective of the filing of the above-described reports, apply at the foot of this decree for any other or further action or relief, and this Court retains jurisdiction of the above-entitled suit for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy.

And it is further ordered that the costs of this suit, the expenses incurred by the special master and his compensation, to be fixed by the Court, shall be taxable against the defendant.

No. 71. KEATING, RECEIVER OF TAXES OF THE CITY OF NEW YORK, ET AL. *v.* PUBLIC NATIONAL BANK. Appeal from the Circuit Court of Appeals for the Second Circuit. Argued November 30, 1931. Decided December 7, 1931. *Per Curiam:* Decree affirmed. *Bodkin* v. *Edward,* 255 U. S. 221, 223; *Texas & New Orleans R. Co.* v. *Brotherhood of Clerks,* 281 U. S. 548, 558; *First National Bank* v. *Hartford,* 273 U. S. 548; *Minnesota* v. *First National Bank,* 273 U. S. 561; *Georgetown National Bank* v. *McFarland,* 273 U. S. 658. *Mr. Arthur J. W. Hilly,* with whom *Messrs. William Herbert King,* and *Eugene Fay* were on the brief, for appellants. *Messrs. Martin Saxe* and *Robert C. Beatty,* with whom *Messrs. Henry L. Moses* and *Herman G. Kopald* were on the brief, for appellee. *Messrs. Charles L. Feldman* and *Herbert A. Hickman,* by leave of Court, filed a brief on behalf of the City

of Buffalo, N. Y., as *amicus curiae*. Reported below: 47 F. (2d) 561.

No. 72. Broad-Grace Arcade Corp. *v.* Bright, Mayor, et al. Appeal from the District Court of the United States for the Eastern District of Virginia. Argued November 30, December 1, 1931. Decided December 7, 1931. *Per Curiam:* The order denying an interlocutory injunction is affirmed (*Alabama* v. *United States,* 279 U. S. 229, 231; *United Fuel Gas Co.* v. *Public Service Commission,* 278 U. S. 322, 326; *National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, 338), but without prejudice to the power and duty of the District Court, as specially constituted, to inquire and determine whether the court has jurisdiction (Judicial Code, § 37; U. S. Code, Title 28, § 80) both in relation to the amount involved in the controversy (*Chase* v. *Wetzler,* 225 U. S. 79, 85, 86; *North Pacific Steamship Co.* v. *Soley,* 257 U. S. 216, 221), and with respect to the right of the complainant to maintain this suit in equity (*Fenner* v. *Boykin,* 271 U. S. 240, 243, 244; *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 451–453). *Mr. Andrew D. Christian* for appellant. *Mr. Collins Denny, Jr.,* with whom *Messrs. John R. Saunders,* Attorney General of Virginia, and *Edwin H. Gibson* were on the brief, for appellees. Reported below: 48 F. (2d) 348.

No. 77. Chapel State Theatre Co. *v.* Hooper. Appeal from the Supreme Court of Ohio. Argued December 1, 1931. Decided December 7, 1931. *Per Curiam:* Judgment affirmed. *Great Southern Fireproof Hotel Co.* v. *Jones,* 193 U. S. 632. *Mr. Albert D. Cash,* with whom *Mr. Levi Cooke* was on the brief, for appellant. *Mr. R. M. Lucas* was on the brief for appellee. Reported below: 123 Oh. St. 322; 175 N. E. 450.

Nos. 86 and 87. ELGIN, JOLIET & EASTERN RY. CO. *v.* CHURCHILL, ADMINISTRATOR. Certiorari to the Appellate Court of Illinois, First District, and the Supreme Court of Illinois. Argued December 2, 1931. Decided December 7, 1931. *Per Curiam:* The writs of certiorari herein are dismissed as improvidently granted. *Mr. Paul R. Conaghan,* with whom *Messrs. Kemper K. Knapp* and *William Beye* were on the brief, for petitioner. *Mr. Herbert H. Patterson* for respondent.

No. 112. BURWELL, EXECUTRIX, ET AL. *v.* POWELL ET AL. Appeal from the Supreme Court of Appeals of Virginia. Argued December 8, 1931. Decided December 14, 1931. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Ennis Water Works* v. *Ennis,* 233 U. S. 652, 657, 658; *Banning Co.* v. *California,* 240 U. S. 142, 153, 154, 155; *Board of Liquidation* v. *Louisiana,* 179 U. S. 622, 638. *Mr. James E. Heath* for appellants. *Mr. Stewart K. Powell,* with whom *Mr. Wm. M. Williams* was on the brief, for appellees. Reported below: 155 Va. 612; 155 S. E. 819.

No. 159. YALE OIL CORP. *v.* MONTANA. Appeal from the Supreme Court of Montana. Argued December 9, 1931. Decided December 14, 1931. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Wabash Ry. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. Co.* v. *Solomon,* 237 U. S. 427; *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. Frederick L. Pearce,* with whom *Mr. George M. Morris* was on the brief, for appellant. *Messrs. L. A. Foot* and *S. R. Foot* were on the brief for appellee. Reported below: 88 Mont. 506; 295 Pac. 255.

No. 163. UNITED STATES *v.* VANBIERVLIET. Certificate from the Circuit Court of Appeals for the Sixth Circuit. Argued December 9, 1931. Decided December 14, 1931.

The facts certified were as follows: The alien entered the United States at Detroit on July 14, 1924, without any immigration visa, thus entering in violation of § 13 of the Immigration Act of 1924 (Title 8, § 213, U. S. C.). He was arrested for deportation January 3, 1930; and the warrant of deportation, based upon the finding "that he was not, at the time of his entry into the United States, in possession of an unexpired immigration visa," was issued February 17, 1930. Upon his petition for habeas corpus the District Court at Detroit discharged him from custody because the period of limitation provided by § 19 of the Immigration Act of 1917 (Title 8, § 155, U. S. C.) had expired. From that order of discharge the Government appealed. Question certified: "On January 3, 1930, did § 19 of the Immigration Act of 1917 (§ 155, Title 8, U. S. C.) by its time limitations bar the deportation proceedings?"

Per Curiam: Question answered "No." *Philippides* v. *Day,* 283 U. S. 48.

Mr. Whitney North Seymour, with whom *Solicitor General Thacher, Assistant Attorney General Dodds,* and *Mr. Frank M. Parrish* were on the brief, for the United States. *Mr. Martin J. Kilsdonk* submitted for Vanbiervliet.

No. 165. AVERILL, INSURANCE COMMISSIONER, *v.* NORTHWESTERN NATIONAL INS. CO. Appeal from the District Court of the United States for the District of Oregon. Argued December 10, 1931. Decided December 14, 1931. *Per Curiam:* The order granting an interlocutory injunction is affirmed (*Alabama* v. *United States,* 279 U. S. 229, 231) without prejudice to further con-

sideration of the merits of the cause, and without prejudice to the power and duty of the District Court, as specially constituted, to inquire and determine whether the court has jurisdiction, both in relation to the amount involved in the controversy and with respect to the right of the complainant to maintain this suit in equity. *Mr. I. H. Van Winkle,* Attorney General of Oregon, with whom *Mr. Willis S. Moore,* Assistant Attorney General, was on the brief, for appellant. *Mr. Thomas MacMahon,* with whom *Mr. Guy E. Kelly* was on the brief, for appellee. Reported below: 49 F. (2d) 274.

No. 472. SAUNDERS *v.* GEORGIA. Appeal from the Supreme Court of Georgia. Jurisdictional statement submitted December 7, 1931. Decided December 14, 1931. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 555, 556, 557; *Caldwell* v. *Sioux Falls Stock Yards Co.,* 242 U. S. 559; *Merrick* v. *N. W. Halsey & Co.,* 242 U. S. 568. *Messrs. James A. Branch* and *Wm. Schley Howard* for appellant. No appearance for appellee. Reported below: 158 S. E. 791.

No. 462. OWNERS' AUTOMOBILE INS. CO. *v.* LAWRASON. Appeal from the Supreme Court of Louisiana. Jurisdictional statement submitted December 14, 1931. Decided January 4, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Standard Oil Co.* v. *Missouri,* 224 U. S. 270, 286, 287; *Lott* v. *Pittman,* 243 U. S. 588, 591; *McDonald* v. *Oregon Railroad & Navigation Co.,* 233 U. S. 665, 669, 670; *Missouri ex rel. Hurwitz* v. *North,* 271 U. S. 40, 42. *Mr. Hugh M. Wilkinson* for appellant. *Mr. Wylie M. Barrow* for appellee. Reported below: 136 So. 57.

No. 482. JARDINE *v.* SUPERIOR COURT ET AL. Appeal from the Supreme Court of California. Jurisdictional statement submitted December 14, 1931. Decided January 4, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Sugg* v. *Thornton,* 132 U. S. 524; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344. *Messrs. H. W. O'Melveny, Walter K. Tuller,* and *Irving M. Walker* for appellant. *Messrs. Leslie R. Hewitt, Aloysius I. McCormick,* and *Guy Richards Crump* for appellees. Reported below: 2 P. (2d) 756.

No. 248. SNOWDEN ET AL. *v.* RED RIVER & BAYOU DES GLAISES LEVEE & DRAINAGE DISTRICT ET AL. Certiorari to the Supreme Court of Louisiana. Argued January 6, 1932. Decided January 11, 1932. *Per Curiam:* After hearing oral argument the Court, being of opinion that no substantial federal question is presented, dismisses the writ of certiorari. *Messrs. Winston K. Joffrion* and *S. Allen Bordelon* for petitioners. *Mr. W. E. Couvillon* submitted for respondents. Reported below: 134 So. 389.

No. —, original. EX PARTE KOSOLAPOV. Submitted January 4, 1932. Decided January 11, 1932. The motion for leave to file petition for writ of mandamus is denied. *Mr. Borris M. Komar* for petitioner.

No. 319. ARNESON ET AL. *v.* UNITED IRRIGATION CO. ET AL. Appeal from the Court of Civil Appeals, Fourth Supreme Judicial District of Texas. Argued January 13, 1932. Decided January 18, 1932. *Per Curiam:* The appeal herein is dismissed for the reason that the decree of the state court sought here to be reviewed was based on non-federal grounds adequate to support it (*Farson Son*

& Co. v. *Bird,* 248 U. S. 268; *Browne* v. *Union Pacific R. Co.,* 267 U. S. 255; *Live Oak Water Users' Assn.* v. *Railroad Commission,* 269 U. S. 354, 359; *Security National Bank* v. *Twinde,* 278 U. S. 659; *Garysburg Mfg. Co.* v. *Board of Commissioners,* 280 U. S. 520); and for the want of a substantial federal question (*Wabash Ry. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. Co.* v. *Solomon,* 237 U. S. 427; *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. S. J. Brooks,* with whom *Mr. W. L. Matthews* was on the brief, for appellants. *Messrs. J. Q. Henry, pro hac vice,* by leave of Court, and *John A. Mobley,* with whom *Mr. W. L. Cook* was on the brief, for appellees. Reported below: 32 S. W. (2d) 907.

No. 324. UNITED DRUG CO. *v.* WASHBURN, COMMISSIONER OF AGRICULTURE. Appeal from the District Court of the United States for the District of Maine. Argued January 13, 1932. Decided January 18, 1932. *Per Curiam:* The order denying an interlocutory injunction is affirmed. *Alabama* v. *United States,* 279 U. S. 229, 231; *United Fuel Gas Co.* v. *Public Service Commission,* 278 U. S. 322, 326; *National Fire Ins. Co.* v. *Thompson,* 281 U. S. 331, 338. *Mr. Brenton K. Fisk* for appellant. *Messrs. Clement F. Robinson,* Attorney General of Maine, and *Nathan W. Thompson* were on the brief for appellee. *Messrs. John J. Bennett, Jr.,* Attorney General of New York, and *Henry S. Manley,* by leave of Court, filed a brief on behalf of the State of New York et al., as *amici curiae.*

No. 325. POTTER ET AL. *v.* MAYBURY, DIRECTOR OF LICENSES, ET AL. Appeal from the Supreme Court of Washington. Argued January 13, 1932. Decided January 18, 1932. *Per Curiam:* The appeal herein is dismissed for

the reason that the decree of the state court here sought to be reviewed was based upon a non-federal ground adequate to support it. *McCoy* v. *Shaw,* 277 U. S. 302, 303; *People ex rel. Doyle* v. *Atwell,* 261 U. S. 590, 591, 592; *Howat* v. *Kansas,* 258 U. S. 181, 186, 190. *Mr. George H. Rummens,* with whom *Mr. Alfred J. Schweppe* was on the brief, for appellants. *Messrs. John H. Dunbar,* Attorney General of Washington, and *Lester T. Parker,* Assistant Attorney General, were on the brief for appellees. Reported below: 161 Wash. 142; 296 Pac. 566.

No. 338. Dahlstrom Metallic Door Co. et al. *v.* Industrial Board of New York. Appeal from the Supreme Court of New York, Appellate Division. Argued January 14, 15, 1932. Decided January 18, 1932. *Per Curiam:* As this case is governed by principles set forth in *New York Central R. Co.* v. *White,* 243 U. S. 188, and *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, the judgment is affirmed. *Mr. Robert H. Jackson* for appellants. *Messrs. John J. Bennett, Jr.,* Attorney General of New York, and *Joseph A. McLaughlin,* Assistant Attorney General, were on the brief for appellee. *Messrs. John W. Reynolds,* Attorney General of Wisconsin, *Mortimer Levitan,* Assistant Attorney General, and *Walter F. Dodd,* by leave of Court, filed a brief on behalf of the State of Wisconsin as *amicus curiae.* Reported below: 256 N. Y. 199; 176 N. E. 141.

No. 449. Gant et al. v. Oklahoma City et al. Appeal from the Supreme Court of Oklahoma. Jurisdictional statement submitted January 11, 1932. Decided January 18, 1932. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. *Reddall* v. *Bryan,* 24 How. 420; *Verden* v. *Coleman,* 18 How. 86; *Augusta*

Power Co. v. *Savannah River Electric Co., ante,* p. 574; *Twin City Power Co.* v. *Savannah River Electric Co., ante,* p. 574; *Brannan* v. *Harrison, ante,* p. 579. *Mr. J. H. Everest* for appellants. No appearance for appellees.

No. 511. COUSINS *v.* SOVEREIGN CAMP, WOODMEN OF THE WORLD. Appeal from the Supreme Court of Texas. Jurisdictional statement submitted January 11, 1932. Decided January 18, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a properly presented federal question. *Hiawassee River Power Co.* v. *Carolina-Tennessee Power Co.,* 252 U. S. 341, 344; *Lawler* v. *Walker,* 14 How. 149, 152; *Maxwell* v. *Newbold,* 18 How. 511, 516, 517; *Yazoo & Mississippi R. Co.* v. *Adams,* 180 U. S. 41, 45, 48; *Mutual Life Ins. Co.* v. *McGrew,* 188 U. S. 291, 309, 312. *Mr. John D. Cofer* for appellant. *Mr. Charles L. Black* for appellee. Reported below: 35 S. W. (2d) 696.

No. 512. GIANATASIO *v.* KAPLAN ET AL. Appeal from the Supreme Court of New York, New York County. Jurisdictional statement submitted January 11, 1932. Decided January 18, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Atkin* v. *Kansas,* 191 U. S. 207; *Heim* v. *McCall,* 239 U. S. 175. *Mr. Copal Mintz* for appellant. *Messrs. Arthur J. W. Hilly, J. Joseph Lilly,* and *Frederick A. Keck* for appellees. Reported below: 178 N. E. 782.

No. —, original. EX PARTE SILVERMAN. Submitted January 11, 1932. Decided January 18, 1932. The motion for leave to file petition for writ of mandamus is denied. *Mr. William H. Lewis* for petitioner.

No. 550. BORUM ET AL. *v.* UNITED STATES. Certificate from the Court of Appeals of the District of Columbia. Argued January 22, 1932. Decided January 25, 1932.

Reporter's statement: The certificate set forth an indictment in four counts charging the three defendants with murder in the first degree. The first count named one of the defendants, the second another, and the third the last as having held the pistol with which the crime was committed. The fourth count alleged that the weapon was held by one of the defendants but that his name was to the grand jurors unknown. The certificate also set out a part of the instructions of the trial judge, and showed that all three defendants were found not guilty under the first three counts but guilty under the fourth, and were sentenced to death.

The question certified was:

"Can the judgment of the Supreme Court of the District of Columbia, based upon the conviction of the defendants on the fourth count of the indictment, be sustained in view of the acquittal of each and all of the defendants of the charge of murder in the first degree as contained in the first three counts of the indictment?"

Per Curiam: Question answered "Yes." *Dunn* v. *United States, ante,* p. 390.

Mr. John H. Burnett, with whom *Messrs. James A. O'Shea* and *Bertrand Emerson* were on the brief, for Borum et al., maintained that the verdict was bad for inconsistency, citing:

Fulton v. *United States,* 45 App. D. C. 27; *Davis* v. *United States,* 37 App. D. C. 126, 133; *Commonwealth* v. *Haskins,* 128 Mass. 60, which is followed in *Fulton* v. *United States, supra; People* v. *Koehn,* 207 Cal. 605, 611; *Tobin* v. *People,* 104 Ill. 565, 567; *John Hohenadel Brewery Co.* v. *United States,* 295 Fed. 489, 490–491; *State* v. *Headrick,* 179 Mo. 300; *Henry* v. *United States,* 49 App.

D. C. 207, 210, followed in *State* v. *Toombs,* 34 S. W. (2d) 61, 65; *Ballerini* v. *Aderholt,* 44 F. (2d) 352, distinguishing *Solomon* v. *United States,* 58 App. D. C. 182; *Salon* v. *State,* 70 Fla. 622, 627–628; *State* v. *Wiseback,* 139 Mo. 214; *People* v. *Copeland,* 46 S. C. 13; *Hurst* v. *State,* 11 Ga. App. 754; *Carlile* v. *State,* 97 Tex. Cr. Rep. 477, 262 S. W. 489; *Boyle* v. *United States,* 22 F. (2d) 547; *Murphy* v. *United States,* 18 F. (2d) 509; *Peru* v. *United States,* 4 F. (2d) 881–885.

In *Dunn* v. *United States, ante,* p. 390, the Court distinguished the criminal liabilty of a person who was guilty of maintaining a nuisance, although absent when the nuisance was carried forward, and the criminal liability of a person who was guilty and actually present carrying forward the said nuisance.

Solicitor General Thacher and *Messrs. Erwin N. Griswold, Leo A. Rover,* U. S. Attorney for the District of Columbia, and *Wm. H. Collins,* Assistant U. S. Attorney, were on the brief for the United States.

The indictment was drawn in four counts to meet all possible turns of the evidence at the trial, in order that so far as possible a variance might be avoided. The jury's verdict on this indictment is plainly to be interpreted as their statement that they were not convinced beyond a reasonable doubt that any particular named defendant held the gun, but that they were convinced beyond a reasonable doubt that some one of the three defendants did hold the gun.

But even if the verdict should be regarded as inconsistent, the conviction is correct and should not be disturbed. *Dunn* v. *United States, ante,* p. 390; *State* v. *Headrick,* 179 Mo. 300; *Dealy* v. *United States,* 152 U. S. 593, 542, 543; *Selvester* v. *United States,* 170 U. S. 262, 267; *Commonwealth* v. *Webster,* 5 Cush. 321; *Griffin* v. *State,* 18 Oh. St. 438; *Smith* v. *Commonwealth,* 21 Grat-

tan 809, 811; *Flickinger* v. *United States,* 150 Fed. 1, certiorari denied, 204 U. S. 671.

No. 391. BINFORD ET AL. *v.* J. H. MCLEAISH & CO. ET AL. Appeal from the District Court of the United States for the Southern District of Texas. Argued January 21, 22, 1932. Decided January 25, 1932. *Per Curiam:* The order granting an interlocutory injuction is affirmed. *Alabama* v. *United States,* 279 U. S. 229; *United Fuel Gas Co. v. Public Service Commission,* 278 U. S. 322, 326; *National Fire Ins. Co. v. Thompson,* 281 U. S. 331, 338. *Messrs. Albert L. Reed* and *Elbert Hooper,* Assistant Attorney General of Texas, with whom *Messrs. James V. Allred,* Attorney General, *T. S. Christopher,* Assistant Attorney General, and *Mr. W. L. Cook* were on the brief, for appellants. *Messrs. Lon E. Blankenbecker* and *John H. Crooker,* with whom *Mr. R. C. Fulbright* was on the brief, for appellees. Reported below: 52 F. (2d) 151.

No. 522. ELLISON RANCHING CO. *v.* BARTLETT. Appeal from the Supreme Court of Nevada. Jurisdictional statement submitted January 18, 1932. Decided January 25, 1932. *Per Curiam:* The appeal herein is dismissed for the reason that the judgment of the state court is based upon a non-federal ground adequate to support it. *Doyle* v. *Atwell,* 261 U. S. 590, 592; *McCoy* v. *Shaw,* 277 U. S. 302, 303. *Messrs J. D. Skeen* and *Waldemar Van Cott* for appellant. *Messrs. A. G. Mashburn* and *M. A. Diskin* for appellee. Reported below: 3 P. (2d) 151.

No. 62. AMERICAN HIDE & LEATHER CO. *v.* UNITED STATES. January 25, 1932. The opinion in this cause (*ante,* p. 343) is hereby amended by adding at the conclusion thereof the following paragraph:

"The amounts of the tax computed by the commissioner and the amount of the overpayment as stated in this opinion are those shown by the findings of the Court of Claims, but the mandate of this Court will be without prejudice to any restatement of the amount of overpayment based on a recomputation of the tax."

No. 115. LEWIS ET AL. *v.* REYNOLDS, COLLECTOR OF INTERNAL REVENUE. February 15, 1932. In this cause it is ordered that the following words be deleted from the sixth paragraph of the opinion (*ante*, pp. 282, 283):

"Also that at the time of his last decision he was restricted to consideration of the demand for refund and determination of whether the trustees were entitled to deduct the state inheritance taxes."

Otherwise the opinion will stand as heretofore announced.

DECISIONS GRANTING CERTIORARI, FROM OCTOBER 5, 1931, TO AND INCLUDING FEBRUARY 15, 1932

No. 62. AMERICAN HIDE & LEATHER CO. *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Wm. E. Hayes* and *George E. Hamilton* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg*, and *Messrs. Claude R. Branch* and *George H. Foster* for the United States. Reported below: 71 Ct. Cls. 114; 48 F. (2d) 430.

No. 79. CHICAGO & EASTERN ILLINOIS R. CO. *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Cook County, Illinois, granted. *Messrs. Edward W. Rawlins*

and *Thomas P. Littlepage* for petitioner. *Messrs. Samuel E. Hirsch, Morris K. Levinson,* and *K. L. Johnson* for respondents.

No. 137. MATSON NAVIGATION CO. *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Wm. G. Feely, Herman Phleger, Gregory C. Harrison,* and *Maurice E. Harrison* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Claude R. Branch* for the United States. Reported below: 72 Ct. Cls. 210.

Nos. 86 and 87. ELGIN, JOLIET & EASTERN RY. CO. *v.* CHURCHILL, ADMINISTRATOR. October 12, 1931. Petition for writs of certiorari to the Appellate Court of Illinois, First District, and to the Supreme Court of Illinois granted. *Messrs. Kemper K. Knapp, Paul R. Conaghan,* and *William Beye* for petitioner. *Mr. Herbert H. Patterson* for respondent.

No. 98. ARIZONA GROCERY CO. *v.* ATCHISON, TOPEKA & SANTA FE RY. CO. ET AL. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Samuel White, Frank L. Snell, Jr.,* and *R. C. Fulbright* for petitioner. *Messrs. L. H. Chalmers, Thomas G. Nairn, E. W. Camp, James E. Lyons,* and *R. S. Outlaw* for respondents. Reported below: 49 F. (2d) 563.

No. 115. LEWIS ET AL. *v.* REYNOLDS. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. N. E. Corthell* for petitioners. *Solicitor General Thacher, Assistant*

Attorney General Youngquist, Miss Helen R. Carloss, and *Messrs. Claude R. Branch, Sewall Key, Wm. H. Riley, Jr.,* and *Clarence M. Charest* for respondent. Reported below: 48 F. (2d) 515.

No. 130. DENVER & RIO GRANDE WESTERN R. CO. ET AL. *v.* TERTE, JUDGE. October 12, 1931. Petition for writ of certiorari to the Supreme Court of Missouri granted. *Messrs. Thomas Hackney* and *Cyrus Crane* for petitioners. *Mr. Clay C. Rogers* for respondent.

No. 162. UNITED STATES EX REL. POLYMERIS ET AL. *v.* TRUDELL, IMMIGRATION INSPECTOR. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Harold Van Riper* for petitioners. *Solicitor General Thacher* and *Messrs. Claude R. Branch* and *Harry S. Ridgely* for respondent. Reported below: 49 F. (2d) 730.

No. 172. MARINE TRANSIT CORP. ET AL. *v.* DREYFUS ET AL. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Horace L. Cheyney* for petitioners. *Mr. George V. A. McCloskey* for respondents. Reported below: 49 F. (2d) 215.

No. 265. NIXON *v.* CONDON ET AL. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit is granted. *Messrs. James Marshall, Arthur Spingarn, Nathan R. Margold,* and *Fred C. Knollenberg* for petitioner. *Messrs. Thornton Hardie* and *Ben R. Howell* for respondents. Reported below: 49 F. (2d) 1012.

No. 179. DANIEL, TRUSTEE, *v.* GUARANTY TRUST CO. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Halleck F. Rose, Arthur R. Wells, Winthrop B. Lane,* and *Paul L. Martin* for petitioner. *Messrs. Wm. C. Dorsey, John W. Davis* and *Porter R. Chandler* for respondent. Reported below: 49 F. (2d) 866.

No. 185. BALTIMORE & PHILADELPHIA STEAMBOAT CO. ET AL. *v.* NORTON, DEPUTY COMMISSIONER. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Vernon S. Jones, Ira A. Campbell, Cletus Keating, Raymond Parmer,* and *Edwin A. Swingle* for petitioners. *Solicitor General Thacher* and *Messrs. Claude R. Branch, J. Frank Staley, C. M. Hester,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 48 F. (2d) 57.

Nos. 200 and 201. BLACKMER *v.* UNITED STATES. October 19, 1931. Petition for writs of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. Frederick DeC. Faust, Charles F. Wilson, George Gordon Battle, Eugene D. Millikin,* and *Karl C. Schuyler* for petitioner. *Messrs. Leo A. Rover, Atlee Pomerene,* and *Frank Harrison* for the United States. Reported below: 49 F. (2d) 523.

No. 217. STEVENS *v.* THE WHITE CITY. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Wm. F. Purdy* for petitioner. *Messrs. Sanford H. Cohen, Chauncey I. Clark, Florence J. Sullivan,* and *Frederic Conger* for respondent. Reported below: 48 F. (2d) 557.

No. 242. DENTON *v.* YAZOO & MISSISSIPPI VALLEY R. CO. ET AL. October 19, 1931. Petition for writ of certiorari to the Supreme Court of Mississippi granted. *Mr. John P. Bramhall* for petitioner. *Messrs. Charles N. Burch, R. V. Fletcher, A. S. Bozeman,* and *C. H. McKay* for respondents. Reported below: 133 So. 656.

No. 248. SNOWDEN ET AL. *v.* RED RIVER & BAYOU DES GLAISES LEVEE & DRAINAGE DISTRICT ET AL. October 19, 1931. Petition for writ of certiorari to the Supreme Court of Louisiana granted. *Messrs. Winston K. Joffrion* and *S. Allen Bordelon* for petitioners. *Mr. W. E. Couvillon* for respondents. Reported below: 134 So. 389.

No. 251. MILLER, COLLECTOR OF INTERNAL REVENUE, *v.* STANDARD NUT MARGARINE CO. October 19, 1931. Petition for writ 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,* and *A. H. Conner* for petitioner. *Messrs. George N. Murdock, A. Y. Milam,* and *Robert R. Milam* for respondent. Reported below: 49 F. (2d) 79.

No. 252. ROSE, COLLECTOR OF INTERNAL REVENUE, *v.* STANDARD NUT MARGARINE CO. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Thacher* for petitioner. *Messrs. George N. Murdock, A. Y. Milam, Robert R. Milam,* and *James C. Davis* for respondent. Reported below: 49 F. (2d) 85.

No. 258. CENTRAL PACIFIC RY. CO. ET AL. *v.* ALAMEDA COUNTY ET AL. October 19, 1931. Petition for writ of

certiorari to the Supreme Court of California granted. *Messrs. C. F. R. Ogilby, Frank Thunen,* and *Guy V. Shoup* for petitioners. *Mr. T. P. Wittschen* for respondents. Reported below: 299 Pac. 75.

No. 263. NEW YORK, NEW HAVEN & HARTFORD R. Co. *v.* BEZUE. October 19, 1931. Petition for writ of certiorari to the Supreme Court of New York granted. *Messrs. Edward R. Brumley* and *John M. Gibbons* for petitioner. *Messrs. Thomas J. O'Neill* and *Charles D. Lewis* for respondent. Reported below: 256 N. Y. 427; 176 N. E. 828.

No. 314. REALTY ACCEPTANCE CORP. *v.* MONTGOMERY. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Charles F. Curley* and *R. Randolph Hicks* for petitioner. *Messrs. Thomas J. Crawford* and *Robert H. Richards* for respondent. Reported below: 51 F. (2d) 642.

No. 328. LIAS ET AL. *v.* UNITED STATES. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted limited to the question raised by the supplemental charge to the jury. *Messrs. J. Bernard Handlan, Howard D. Matthews,* and *John Mœrshall* for petitioners. *Solicitor General Thacher* for the United States. Reported below: 51 F. (2d) 215.

No. 291. ATCHISON, TOPEKA & SANTA FE RY. Co. *v.* SAXON, ANCILLARY ADMINISTRATOR. October 26, 1931. Petition for writ of certiorari to the Supreme Court of Texas granted. *Messrs. A. H. Culwell, E. E. McInnis,* and

Wm. H. Burges for petitioner. *Mr. Winbourn Pearce* for respondent. Reported below: 38 S. W. (2d) 775.

No. 296. UNITED STATES NAVIGATION CO., INC., *v.* CUNARD STEAMSHIP CO., LTD., ET AL. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Mark W. Maclay* and *John Tilney Carpenter* for petitioner. *Messrs. Roscoe H. Hupper* and *Charles C. Burlingham* for respondents. Reported below: 50 F. (2d) 83.

No. 297. BERGHOLM ET AL. *v.* PEORIA LIFE INSURANCE CO. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Tom Connally* for petitioners. *Messrs. John M. Elliott* and *J. B. Wolfenbarger* for respondent. Reported below: 50 F. (2d) 67.

No. 311. ST. PAUL FIRE & MARINE INS. CO. *v.* BACHMANN. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. Philip P. Steptoe, James M. Guiher,* and *Louis A. Johnson* for petitioner. *Messrs. Carl G. Bachmann, Charles J. Schuck,* and *J. Bernard Handlan* for respondent. Reported below: 49 F. (2d) 158.

No. 332. LEMAN, ADMINISTRATOR, ET AL. *v.* KRENTLER-ARNOLD HINGE LAST CO. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Ellis Spear, Jr.,* for petitioners. *Messrs. Robert Cushman* and *Otto F. Barthel* for respondent. Reported below: 50 F. (2d) 699.

No. 341. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* CORONADO OIL & GAS CO. October 26, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch,* and *Hayner N. Larson* for petitioner. *Messrs. Thos. P. Gore, David A. Richardson, Samuel W. Hayes,* and *Eugene Jordan* for respondent. Reported below: 50 F. (2d) 998.

No. 349. OLD COLONY R. CO. *v.* COMMISSIONER OF INTERNAL REVENUE. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. James S. Y. Ivins* and *Kingman Brewster* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Miss Helen R. Carloss,* and *Messrs. Whitney North Seymour* and *J. Louis Monarch* for respondent. Reported below: 50 F. (2d) 896.

No. 355. BOWERS, EXECUTOR, *v.* LAWYERS MORTGAGE CO. October 26, 1931. Petition for writ 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, Hayner N. Larson,* and *Paul D. Miller* for petitioner. *Messrs. John A. Garver* and *Harry W. Forbes* for respondent. Reported below: 50 F. (2d) 104.

No. 356. UNITED STATES *v.* HOME TITLE INSURANCE CO. October 26, 1931. Petition for writ 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, Hay-*

ner N. Larson, and *Paul D. Miller* for the United States. *Messrs. Hugh Satterlee* and *I. Herman Sher* for respondent. Reported below: 50 F. (2d) 107.

No. 365. Missouri Pacific R. Co. *v.* David, Administratrix. October 26, 1931. Petition for writ of certiorari to the Supreme Court of Missouri granted. *Messrs. Thomas Hackney, Edward J. White,* and *Leslie A. Welch* for petitioner. *Mr. Horace Guffin* for respondent. Reported below: 41 S. W. (2d) 179.

No. 378. Burnet, Commissioner of Internal Revenue, *v.* Chicago Portrait Co. October 26, 1931. 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* and *Andrew D. Sharpe* for petitioner. *Messrs. Albert L. Hopkins* and *Arnold R. Baar* for respondent. Reported below: 50 F. (2d) 683.

No. 374. Blockburger *v.* United States. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Harold J. Bandy* for petitioner. *Solicitor General Thacher* for the United States. Reported below: 50 F. (2d) 795.

No. 393. Dunn *v.* United States. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Messrs. Raymond T. Coughlin* and *Roger O'Donnell* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. John J. Byrne* and *W. Marvin*

Smith for the United States. Reported below: 50 F. (2d) 779.

No. 401. AMERICAN SURETY CO. *v.* GREEK CATHOLIC UNION. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. James M. Magee* for petitioner. *Messrs. Thomas Stephen Brown* and *Ralph C. Davis* for respondent. Reported below: 51 F. (2d) 1050.

No. 403. SINGLETON ET AL. *v.* CHEEK ET AL. November 2, 1931. Petition for writ of certiorari to the Supreme Court of Oklahoma granted. *Mr. A. G. C. Beirer* for petitioners. Reported below: 152 Okla. 229.

No. 413. AETNA CASUALTY & SURETY CO. *v.* PHOENIX NATIONAL BANK ET AL. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Messrs. Charles Kerr, Clinton M. Harrison, Samuel M. Wilson,* and *A. K. Shipe* for petitioner. *Messrs. Richard C. Stoll, James Park,* and *Wallace Muir* for respondents. Reported below: 44 F. (2d) 511.

No. 426. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* LEININGER. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Solicitor General Thacher* for petitioner. *Messrs. Levi Cooke, Irwin N. Loeser,* and *George R. Beneman* for respondent. Reported below: 51 F. (2d) 7.

No. 411. GALVESTON WHARF CO. ET AL. *v.* GALVESTON, HARRISBURG & SAN ANTONIO RY. CO. ET AL. November 2,

1931. Petition for writ of certiorari to the Supreme Court of Texas granted. *Messrs. Alex F. Weisberg, Rhodes S. Parker,* and *George S. Wright* for petitioners. *Messrs. John P. Bullington, Roscoe H. Hupper,* and *Burton H. White,* for respondents.

No. 429. D. GINSBERG & SONS, INC., *v.* POPKIN. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Raymond J. Mawhinney* and *Leo J. Linder* for petitioner. *Mr. Louis Jersawit* for respondent. Reported below: 50 F. (2d) 693.

No. 432. LAMB *v.* CRAMER ET AL. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Arvid B. Tanner, W. Calvin Wells, Emile Godchaux, Preston B. Cavanaugh,* and *Edward B. Burling* for petitioner. *Messrs. Gerald FitzGerald, Sam C. Cook,* and *Garner W. Green* for respondents. Reported below: 48 F. (2d) 537.

No. 433. LAMB *v.* SCHMITT, RECEIVER. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Arvid B. Tanner, W. Calvin Wells, Emile Godchaux, Preston B. Cavanaugh,* and *Edward B. Burling* for petitioner. *Messrs. Gerald FitzGerald, Sam C. Cook,* and *Garner W. Green* for respondent. Reported below: 48 F. (2d) 533.

No. 477. BOSTON & MAINE RAILROAD *v.* ARMBURG. November 2, 1931. Petition for writ of certiorari to the Municipal Court of Boston, County of Suffolk, Massachusetts, granted. *Messrs. Philip M. Jones* and *Francis*

P. Garland for petitioner. *Mr. Clarence W. Rowley* for respondent. Reported below: 276 Mass. 418; 177 N. E. 665.

No. 31. SANTOVINCENZO, CONSUL OF THE KINGDOM OF ITALY AT NEW YORK, *v.* EGAN, PUBLIC ADMINISTRATOR, ET AL. See same case, *ante,* p. 583.

No. 294. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* HOWES BROS. HIDE CO. ET AL. See same case, *ante,* p. 583.

No. 50. UNITED STATES *v.* ANDERSON. See same case, *ante,* p. 584.

No. 457. HURLEY ET AL. *v.* KINCAID. November 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Thacher, Assistant Attorney General Richardson,* and *Messrs. A. G. Iverson* and *Paul D. Miller* for petitioners. *Messrs. William C. Dufour, T. J. Freeman, Gaston Porterie,* and *John St. Paul, Jr.,* for respondent. Reported below: 49 F. (2d) 768.

No. 348. UNITED STATES CARTRIDGE CO. *v.* UNITED STATES. November 23, 1931. Petition for writ of certiorari to the Court of Claims granted. *Mr. Harry LeBaron Sampson* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch* and *Paul D. Miller* for the United States. Reported below: 71 Ct. Cls. 575.

No. 430. SPENCER KELLOGG & SONS, INC., *v.* HICKS, ADMINISTRATRIX, ET AL.; and

No. 444. ALEXANDER, ADMINISTRATRIX, ET AL. *v.* SPENCER KELLOGG & SONS, INC. November 23, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. D. Roger Englar, Chauncey I. Clark, Leonard J. Matteson,* and *George S. Brengle* for Spencer Kellogg & Sons. *Mr. Sidney Newborg* for Hicks et al. *Mr. Lucien V. Axtell* for Alexander et al. Reported below: 52 F. (2d) 129.

No. 339. SOUTHERN PACIFIC CO. *v.* UNITED STATES. November 30, 1931. Petition for writ of certiorari to the Court of Claims granted, limited to the question raised with respect to Engineer officers of the War Department in performing duties in time of peace in connection with rivers and harbors improvements and the meetings of the California Débris Commission. *Mr. Charles H. Bates* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch, Louis R. Mehlinger,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 72 Ct. Cls. 273.

No. 453. ATLANTIC COAST LINE R. CO. *v.* TEMPLE, ADMINISTRATRIX. November 30, 1931. Petition for writ of certiorari to the Supreme Court of South Carolina granted. *Messrs. Thomas W. Davis* and *Douglas McKay* for petitioner. *Messrs. John F. Williams* and *R. E. Whiting* for respondent.

No. 455. FRANKLIN-AMERICAN TRUST CO. *v.* ST. LOUIS UNION TRUST CO. ET AL. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. George B. Rose, D. H. Cantrell, J. F. Loughborough, A. W. Dobyns,* and *A. F. House* for petitioner. *Messrs. Thomas S. McPhee-*

ters, Henry Davis, Charles T. Coleman, P. Taylor Bryan, George H. Williams, and *Walter G. Riddick* for respondents. Reported below: 52 F. (2d) 431.

No. 466. UNITED STATES *v.* LEFKOWITZ ET AL. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. John J. Byrne* and *Wilbur H. Friedman* for the United States. *Mr. David P. Siegel* for respondents. Reported below: 52 F. (2d) 52.

No. 469. SHEARER *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE; and

No. 470. STEWART *v.* SAME. November 30, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Charles Henry Butler* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Norman D. Keller,* and *F. Edward Mitchell* for respondent. Reported below: 52 F. (2d) 17. See also, 48 F. (2d) 552.

No. 487. CANADA MALTING CO., LTD., *v.* PATERSON STEAMSHIPS, LTD.;

No. 488. BRITISH EMPIRE GRAIN CO., LTD., *v.* SAME; and

No. 489. STARNES *v.* SAME. November 30, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Henry J. Bigham, D. Roger Englar, Oscar R. Houston, James W. Ryan,* and *Leonard J. Matteson* for petitioners. *Messrs. Ray M. Stanley* and *Ellis H. Gidley* for respondent. Reported below: 51 F. (2d) 1007.

No. 468. LEACH, EXECUTOR, *v.* NICHOLS, COLLECTOR. December 7, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. O. Walker Taylor* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, William Cutler Thompson, Clarence M. Charest,* and *William T. Sabine, Jr.,* for respondent. Reported below: 50 F. (2d) 787.

No. 503. HARDEMAN *v.* WITBECK. December 7, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. Patrick H. Loughran* for petitioner. *Messrs. S. L. Herold* and *F. W. Clements* for respondent. Reported below: 51 F. (2d) 450.

No. 528. COOMBES *v.* GETZ. January 11, 1932. Petition for writ of certiorari to the Supreme Court of California granted. *Messrs. W. H. Douglass* and *Nat Schmulowitz* for petitioner. *Messrs. Oscar Lawler, Frank D. Madison,* and *Alfred Sutro* for respondent. Reported below: 1 P. (2d) 992; 4 P. (2d) 157.

No. 506. AMERICAN TRADING CO. *v.* H. E. HEACOCK CO.; and

No. 507. WM. A. ROGERS, LTD., ET AL. *v.* SAME. January 11, 1932. Petition for writs of certiorari to the Supreme Court of the Philippine Islands granted. *Messrs. Harry D. Nims, James J. Kennedy, Wm. Cattron Rigby,* and *Minturn DeS. Verdi* for petitioners. *Messrs. John P. Bartlett, Richard Eyre,* and *Edward S. Rogers* for respondent.

No. 537. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* PEAVY-WILSON LUMBER CO.;

No. 538. SAME *v.* PEAVY-MOORE LUMBER CO.; and

No. 539. SAME *v.* PEAVY-BYRNES LUMBER CO. January 11, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Thacher* for petitioner. *Messrs. S. L. Herold* and *John B. Files* for respondents. Reported below: 51 F. (2d) 163.

No. 576. CALLAHAN *v.* UNITED STATES. January 25, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Mr. Louis Halle* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 53 F. (2d) 467.

No. 590. HAGNER ET AL. *v.* UNITED STATES. January 25, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. Wm. J. Hughes, Jr., Lucian H. Vandoren,* and *Wm. E. Leahy* for petitioners. *Solicitor General Thacher* and *Mr. Whitney North Seymour* for the United States.

No. 575. NORTH AMERICAN OIL CONSOLIDATED *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. January 25, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr. Herbert W. Clark* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Miss Helen R. Carloss,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Francis H. Horan* for respondent. Reported below: 50 F. (2d) 752.

No. 581. ADAMS ET AL. *v.* MELLON, DIRECTOR GENERAL OF RAILROADS, ET AL. January 25, 1932. Petition for

writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Clair R. Hillyer* for petitioners. *Messrs. Silas Strawn, Ralph M. Shaw, Frank H. Towner, Sidney F. Andrews,* and *A. A. McLaughlin* for respondents. Reported below: 51 F. (2d) 620.

No. 582. Woolford Realty Co., Inc., *v.* Rose, Collector of Internal Revenue. January 25, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. W. A. Sutherland* and *Joseph B. Brennan* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, John H. McEvers,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 53 F. (2d) 821.

No. 585. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. *v.* Borum. January 25, 1932. Petition for writ of certiorari to the Supreme Court of Minnesota granted. *Messrs. Henry S. Mitchell* and *John E. Palmer* for petitioner. *Messrs. Tom Davis* and *Ernest A. Michel* for respondent. Reported below: 238 N. W. 4.

No. 600. Reed et al. *v.* Allen. January 25, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. J. Wilmer Latimer, Walter C. Clephane,* and *Gilbert H. Hall* for petitioners. *Mr. Alvin L. Newmyer* and *George C. Gertman* for respondent. Reported below: 54 F. (2d) 713.

No. 560. Continental Tie & Lumber Co. *v.* United States. February 15, 1932. Petition for writ of certiorari to the Court of Claims granted. *Mr. George E. H.*

Goodner for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch, L. A. Smith,* and *Bradley B. Gilman* for the United States. Reported below: 72 Ct. Cls. 595; 52 F. (2d) 1045.

No. 598. MICHIGAN *v.* MICHIGAN TRUST CO., RECEIVER. February 15, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Paul W. Voorhies* for petitioner. *Mr. Benjamin P. Merrick* for respondent. Reported below: 52 F. (2d) 842.

No. 608. ERIE R. CO. *v.* DUPLAK. February 15, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Duane E. Minard* and *George S. Hobart* for petitioner. *Mr. Frederick B. Scott* for respondent. Reported below: 53 F. (2d) 846.

No. 617. SMILEY *v.* HOLM, SECRETARY OF STATE. February 15, 1932. Petition for writ of certiorari to the Supreme Court of Minnesota granted. *Messrs. George T. Simpson* and *W. Yale Smiley* for petitioner. *Mr. Henry N. Benson* for respondent. See 238 N. W. 494.

No. 634. TEXAS & PACIFIC RY. CO. *v.* UNITED STATES. February 15, 1932. Petition for writ of certiorari to the Court of Claims granted. *Messrs. Adrian C. Humphreys, Chester A. Gwinn, John W. Davis,* and *Newton K. Fox* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Claude R. Branch* for the United States. Reported below: 72 Ct. Cls. 629; 52 F. (2d) 1040.

DECISIONS DENYING CERTIORARI, FROM OCTOBER 5, 1931, TO AND INCLUDING FEBRUARY 15, 1932

No. 47. ROCKY BROOK MILLS CO. *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Court of Claims denied. *Mr. John Philip Hill* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch* and *R. C. Williamson* for the United States. Reported below: 70 Ct. Cls. 646.

No. 61. FISHER ET AL. *v.* REDFIELD ET AL. October 12, 1931. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Messrs. I. H. Van Winkle* and *Willis S. Moore* for petitioners. *Mr. Erskine Wood* for respondents. Reported below: 292 Pac. 813.

No. 65. TIGER ET AL. *v.* TIMMONS ET AL. October 12, 1931. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. Creekmore Wallace* for petitioners. *Mr. Thomas J. Flannelly* for respondents. Reported below: 147 Okla. 141; 295 Pac. 614.

No. 70. HOHENBERG ET AL. *v.* LOUISVILLE & NASHVILLE R. Co. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles E. Cotterill* for petitioners. *Mr. Robert E. Steiner* for respondent. Reported below: 46 F. (2d) 952.

No. 73. DELAWARE, LACKAWANNA & WESTERN R. Co. *v.* BERRY. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Cir-

cuit denied. *Mr. Frederic B. Scott* for petitioner. *Mr. Joseph Coult* for respondent. Reported below: 48 F. (2d) 1052.

No. 74. Beck *v.* Missouri Valley Drainage District. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Cyrus Crane* for petitioner. No appearance for respondent. Reported below: 46 F. (2d) 632.

No. 75. Coakley *v.* Equitable Bank & Trust Co. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Thomas H. Mahony* for petitioner. No appearance for respondent. Reported below: 46 F. (2d) 967.

No. 76. Akties, Dampskibsselskabet Donnenborg et al. *v.* Mikkelsen et al.; and

No. 190. Mikkelsen et al. *v.* Akties, Dampskibsselskabet Donnenborg et al. October 12, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Leon T. Seawell* for Akties, Dampskibsselskabet Donnenborg et al. *Mr. Jacob L. Morewitz* for Mikkelsen et al.

No. 78. Chicago, Rock Island & Pacific Ry. Co. *v.* Commissioner of Internal Revenue. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. M. L. Bell, William F. Peter,* and *Thomas P. Littlepage* 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: 47 F. (2d) 990.

No. 81. HARKER *v.* RALSTON PURINA CO. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Henry H. Hornbrook* for petitioner. *Messrs. P. Taylor Bryan, George H. Williams,* and *Thomas S. McPheeters* for respondent. Reported below: 45 F. (2d) 929.

No. 82. I. TANENBAUM SON & CO. *v.* DRUMBOR-BINGELL CO., INC. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. William A. Carr* for petitioner. No appearance for respondent. Reported below: 47 F. (2d) 1009.

No. 83. THOMAS, ADMINISTRATOR, *v.* MORTON SALT CO. October 12, 1931. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Leo J. Carrigan* for petitioner. *Messrs. Burt D. Cady* and *Samuel D. Pepper* for respondent. Reported below: 253 Mich. 613; 235 N. W. 846.

No. 90. OLYMPIC SALT WATER CO. *v.* SHIPOWNERS & MERCHANTS TUGBOAT CO. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Herbert W. Clark* for petitioner. *Mr. Thomas A. Thacher* for respondent. Reported below: 48 F. (2d) 49.

No. 92. LEHIGH VALLEY TRANSIT CO. *v.* ZANES. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Allen Hunter White* and *Frederic L. Ballard* for petitioner. *Mr. Daniel Burke* for respondent. Reported below: 46 F. (2d) 848.

No. 93. GARBER *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE;

No. 94. MOORE *v.* SAME;

No. 95. TAIT *v.* SAME; and

No. 96. KISTLER ESTATE ET AL. *v.* SAME. October 12, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Hubert L. Bolen, S. W. Hayes,* and *D. A. Richardson* for petitioners. *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: 48 F. (2d) 526.

No. 99. DRISCOLL ET AL. *v.* COLORADO ET AL. October 12, 1931. Petition for writ of certiorari to the Supreme Court of Colorado denied. *Mr. Edwin H. Park* for petitioners. *Messrs. Paul D. Prosser, Edward M. Freeman,* and *C. L. Ireland* for respondents. Reported below: 88 Colo. 390; 297 Pac. 989.

No. 100. HAMILTON RUBBER MFG. CO. ET AL. *v.* STEWART ET AL. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John Davis* for petitioners. *Mr. Maco Stewart, Jr.,* for respondents. Reported below: 48 F. (2d) 8.

No. 101. KELLY *v.* QUEENSBORO NATIONAL BANK. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. William F. Kelly, pro se. Mr. Morris Kamber* for respondent. Reported below: 48 F. (2d) 574.

No. 102. SAMSON TIRE & RUBBER CO. *v.* EGGLESTON, TRUSTEE. October 12, 1931. Petition for writ of certio-

rari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edwin C. Brandenburg* for petitioner. *Mr. William S. Pritchard* for respondent. Reported below: 45 F. (2d) 502.

No. 103. Aetna Life Ins. Co. *v.* Wharton. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. S. Lasker Ehrman* for petitioner. *Messrs. Wm. H. Rector* and *Elbert E. Godwin* for respondent. Reported below: 48 F. (2d) 37.

No. 104. H. P. Coffee Co. *v.* Reid, Murdoch & Co. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Roy M. Eilers* for petitioner. *Messrs. Fred Gerlach* and *Douglas W. Robert* for respondent. Reported below: 48 F. (2d) 817.

No. 106. Lantz *v.* Broome. October 12, 1931. Petition for writ of certiorari to the Supreme Court of California denied. *Messrs. Edward Fitzpatrick, Robert N. Miller,* and *Donald V. Hunter* for petitioner. *Messrs. Fred E. Pettit, Jr.,* and *Charles F. Blackstock* for respondent. Reported below: 294 Pac. 709.

No. 107. Baltimore & Ohio R. Co. *v.* Cornec. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. George W. P. Whip* and *Duncan K. Brent* for petitioner. *Messrs. John C. Prizer, George Forbes, John Henry Skeen,* and *Emory H. Niles* for respondent. Reported below: 48 F. (2d) 497.

No. 108. Southern Railway-Carolina Division *v.* Neal, Administratrix. October 12, 1931. Petition for

writ of certiorari to the Supreme Court of South Carolina denied. *Messrs. S. R. Prince, H. O'B. Cooper, John B. Hyde, Lionel K. Legge, Nath B. Barnwell,* and *L. E. Jeffries* for petitioner. *Mr. John P. Grace* for respondent. Reported below: 160 S. E. 837.

No. 109. VELAZQUEZ *v.* RICKSON. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Jacob L. Morewitz* for petitioner. No appearance for respondent. Reported below: 46 F. (2d) 262.

No. 110. SCHNEIDER, TRUSTEE, *v.* LUCAS, COLLECTOR. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Elwood Hamilton* and *J. C. W. Beckham, Jr.,* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Morton K. Rothschild,* and *J. Louis Monarch* for respondent. Reported below: 47 F. (2d) 1006.

No. 111. SKAGGS SAFEWAY STORES, INC., *v.* DUNKLE. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Leonard J. Flansburg* for petitioner. No appearance for respondent. Reported below: 49 F. (2d) 169.

No. 113. LAMONT, CORLISS & CO. ET AL. *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. B. A. Levett* for petitioners. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Messrs. Claude R. Branch* and *Paul D. Miller* for the United States. Reported below: 16 Cust. App. 488.

No. 121. CELANESE CORP. *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Addison S. Pratt* for petitioner. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Messrs. Claude R. Branch* and *Paul D. Miller* for the United States.

No. 135. F. B. VANDEGRIFT & CO. ET AL. *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. J. Stewart Tompkins* for petitioners. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Messrs. Claude R. Branch* and *Paul D. Miller* for the United States.

No. 254. F. M. JABARA & BROS. *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. Samuel Isenschmid* and *Thomas M. Lane* for petitioner. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Messrs. Whitney North Seymour* and *Paul D. Miller* for the United States.

No. 255. AMERICAN FOUNDATION, INC., *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. Henry P. Adair* and *John C. Cooper, Jr.,* for petitioner. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Messrs. Whitney North Seymour* and *Paul D. Miller* for the United States.

No. 286. WILBUR-ELLIS CO. ET AL. *v.* UNITED STATES. October 12, 1931. Petitioner for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Martin T. Baldwin* for petitioners. *Solicitor General Thacher,*

Assistant Attorney General Lawrence, and *Messrs. Whitney North Seymour* and *Wm. H. Riley, Jr.,* for the United States.

No. 114. CITIZENS BANK *v.* MOORE. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. James H. Bridgers* for petitioner. No appearance for respondent. Reported below: 46 F. (2d) 307.

No. 116. SOLOMONT, TRUSTEE, *v.* O'NEILL-ORR CONSTRUCTION CO. ET AL. October 12, 1931. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Jacob J. Kaplan* for petitioner. *Messrs. Scott M. Loftin, John P. Stokes,* and *James E. Calkins* for respondents. Reported below: 132 So. 703.

No. 117. SOUTHERN PACIFIC CO. *v.* MCCREADY ET AL. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. W. I. Gilbert, Frank C. Cleary,* and *Guy V. Shoup* for petitioner. *Messrs. L. E. Dadmun* and *Walter L. Clark* for respondents. Reported below: 47 F. (2d) 673.

No. 119. AMERICAN AUTOMOBILE INS. CO. *v.* CASTLE, ROPER & MATHEWS ET AL. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Wm. H. Allen* for petitioner. *Mr. C. Petrus Peterson* for respondents. Reported below: 48 F. (2d) 523.

No. 124. GAY, EXECUTOR, *v.* NEW YORK LIFE INS. CO. October 12, 1931. Petition for writ of certiorari to the

Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Charles Kerr* and *A. K. Shipe* for petitioner. *Mr. Wm. Marshall Bullitt* for respondent. Reported below: 48 F. (2d) 595. See also, 36 F. (2d) 634.

No. 125. HILL, TAX ASSESSOR, *v.* CARTER. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frank K. Nebeker* for petitioner. *Messrs. Mason F. Prosser, Robbins B. Anderson,* and *Benjamin L. Marx* for respondent. Reported below: 47 F. (2d) 869.

No. 127. GRAND TRUNK WESTERN RY. CO. *v.* HEATLIE, ADMINISTRATRIX;

No. 128. SAME *v.* DREW, ADMINISTRATRIX; and

No. 129. SAME *v.* WHITE. October 12, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Frederic T. Harward* and *H. V. Spike* for petitioner. *Messrs. Thomas J. Bresnahan* and *Elmer H. Groefsema* for respondents. Reported below: 48 F. (2d) 759.

No. 131. BEADON ET AL. *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Abraham Rosenthal* for petitioners. *Solicitor General Thacher* and *Messrs. Claude R. Branch, Harry S. Ridgely,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 49 F. (2d) 164.

No. 132. STATES STEAMSHIP CO. *v.* WYCHGEL. October 12, 1931. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Mr. Erskine Wood* for peti-

tioner. *Mr. John C. Veatch* for respondent. Reported below: 296 Pac. 863.

No. 133. PUEBLO DE SAN JUAN *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Charles H. Fahy, Richard H. Hanna,* and *Nathan R. Margold* for petitioner. *Solicitor General Thacher, Assistant Attorney General Richardson,* and *Messrs. Claude R. Branch, George A. H. Fraser,* and *Paul D. Miller* for the United States. Reported below: 47 F. (2d) 446.

No. 134. GREAT LAKES TOWING CO. *v.* KINSMAN TRANSIT CO. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George W. Cottrell* for petitioner. *Mr. Frederick L. Leckie* for respondent. Reported below: 51 F. (2d) 1077.

No. 138. KANSAS CITY SOUTHERN RY. CO. ET AL. *v.* SILICA PRODUCTS CO. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Arthur C. Brown* for petitioners. *Messrs. I. N. Watson, Henry N. Ess,* and *Thomas E. Scofield* for respondent. Reported below: 48 F. (2d) 503.

No. 139. KLOSE *v.* UNITED STATES; and

No. 140. LORENZ *v.* SAME. October 12, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Otto W. Klose* and *Arthur Lorenz, pro se. Solicitor General Thacher* and *Messrs. Claude R. Branch, Harry S. Ridgely,*

and *W. Marvin Smith* for the United States. Reported below: 49 F. (2d) 177.

No. 141. GRAYS HARBOR MOTORSHIP CORP. *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Court of Claims denied. *Mr. Cletus Keating* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, Wm. H. Scott,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 71 Ct. Cls. 167; 45 F. (2d) 259.

No. 143. EXCELSIOR BREWING, INC., ET AL. *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John R. K. Scott* and *William T. Connor* 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: 48 F. (2d) 107.

No. 145. COOK ET AL. *v.* ILLINOIS BANKERS LIFE ASSN. ET AL. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James Bingham* for petitioners. *Mr. Ralph F. Potter* for respondents. Reported below: 46 F. (2d) 782.

No. 147. BLACKWOOD *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William H. Lewis* and *Matthew L. McGrath* for petitioner. *Solicitor General Thacher, Assistant Attorney General Young-*

quist, and *Messrs. Claude R. Branch* and *A. W. Henderson* for the United States. Reported below: 47 F. (2d) 849.

No. 148. GARCIA *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. J. Waguespack* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Mahlon D. Kiefer,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 47 F. (2d) 1083.

No. 149. MUTUAL LIFE INS. CO. *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Wm. M. Williams* and *Frederick L. Allen* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, L. A. Smith,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 72 Ct. Cls. 204; 49 F. (2d) 662.

No. 150. HOUSTON OIL & TRANSPORT CO. *v.* AETNA INSURANCE CO. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Carl G. Stearns* for petitioner. *Messrs. J. Newton Rayzor* and *Mart H. Royston* for respondent. Reported below: 49 F. (2d) 121.

No. 151. BESS *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. J. Raymond Gordon* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Mahlon D. Kiefer, A. E. Gottschall,* and *Wm. H.*

Riley, Jr., for the United States. Reported below: 49 F. (2d) 884.

No. 152. Oglesby Coal Co. *v.* Burnet, Commissioner of Internal Revenue. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Michael F. Gallagher* and *Samuel M. Rinaker* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Miss Helen R. Carloss,* and *Messrs. Claude R. Branch* and *Sewall Key* for respondent. Reported below: 46 F. (2d) 617.

No. 153. Jones *v.* Virginia. October 12, 1931. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. Minitree J. Fulton* for petitioner. No appearance for respondent.

No. 154. Gredig et al. *v.* Sterling et al. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. James A. Reed* and *Kirby Fitzpatrick* for petitioners. *Mr. John G. Logue* for respondents. Reported below: 47 F. (2d) 832.

No. 155. American Trust Co. *v.* American Railway Express Co. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Arthur L. Gilliom, Roland Obenchain, Samuel O. Pickens,* and *R. F. Davidson* for petitioner. *Messrs. H. S. Marx* and *A. M. Hartung* for respondent. Reported below: 47 F. (2d) 16.

No. 156. Cowles et al. *v.* Reddy et al. October 12, 1931. Petition for writ of certiorari to the Circuit Court

of Appeals for the Second Circuit denied. *Mr. Ray M. Stanley* for petitioners. *Messrs. Horace L. Cheyney* and *John C. Crawley* for respondents. Reported below: 48 F. (2d) 110.

No. 157. Louisville Cooperage Co. *v.* Commissioner of Internal Revenue. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Elwood Hamilton* and *J. C. W. Beckham, Jr.,* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, Hayner N. Larson,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 47 F. (2d) 599.

No. 160. Pennsylvania *v.* Estate of Paul. October 12, 1931. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Messrs. Wm. A. Schnader* and *Philip S. Moyer* for petitioner. *Mr. Leon J. Obermayer* for respondent. Reported below: 303 Pa. 330; 154 Atl. 503.

No. 161. International Brotherhood of Electrical Workers et al. *v.* Western Union Telegraph Co. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Floyd E. Thompson, Henry Jackson Darby,* and *Hope Thompson* for petitioners. *Mr. Francis Raymond Stark* for respondent. Reported below: 46 F. (2d) 736.

No. 164. Caples *v.* Caples. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Fred C. Knollenberg* for petitioner. *Mr. Chiles P. Plummer* for respondent. Reported below: 47 F. (2d) 225.

No. 167. VALLEY NATIONAL BANK ET AL. *v.* STOVER. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Douglass D. Storey* for petitioners. *Mr. Walter K. Sharpe* for respondent. Reported below: 48 F. (2d) 54.

No. 168. LEDUC *v.* UNITED STATES. October 12, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Warren E. Miller* for petitioner. *Solicitor General Thacher* and *Messrs. Claude R. Branch, Whitney North Seymour, J. Frank Staley,* and *W. Clifton Stone* for the United States. Reported below: 48 F. (2d) 789.

No. 123. VALLANVANTI *v.* ARMOUR & Co. October 19, 1931. Petition for writ of certiorari to the Superior Court in and for the County of Middlesex, Massachusetts, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Asa P. French* for petitioner. No appearance for respondent.

No. 126. FERNANDEZ *v.* KAISER, WARDEN. October 19, 1931. Petition for writ of certiorari to the County Court for Clinton County, New York, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Leonard Fernandez, pro se.* No appearance for respondent. Reported below: 256 N. Y. 581; 177 N. E. 149.

No. 144. LEIBOWITZ ET AL. *v.* UNITED STATES. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Max Leibowitz, pro se. Solicitor General Thacher* and

Messrs. Claude R. Branch, Harry S. Ridgely, and *W. Marvin Smith* for the United States. Reported below: 47 F. (2d) 1086.

No. 166. SOLEAU ET AL. *v.* SOLEAU ET AL. October 19, 1931. Petition for writ of certiorari to the Supreme Court of Michigan, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Howard Lewis* for petitioners. No appearance for respondents. Reported below: 254 Mich. 344; 236 N. W. 801.

No. 220. TUTSON *v.* HOLLAND ET AL. October 19, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Elwood G. Hubert* for petitioner. No appearance for respondents. Reported below: 50 F. (2d) 338.

No. 410. MINNICK, ADMINISTRATOR, *v.* SOUTHERN RY. CO. October 19, 1931. Petition for writ of certiorari to the Supreme Court of Tennessee, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Paul Dulaney* for petitioner. No appearance for respondent.

No. 53. PALM *v.* HOLLOPETER. See same case, *ante,* p. 572.

No. 56. STUART ET AL. *v.* FOX ET AL.;

No. 57. SAME *v.* MINOTT; and

No. 58. SAME *v.* SHWARTZ ET AL. See same cases, *ante,* p. 572.

No. 142. TWIN CITY POWER CO. *v.* SAVANNAH RIVER ELECTRIC CO. See same case, *ante,* p. 574.

No. 218. WINCHESTER MFG. CO. *v.* UNITED STATES. October 19, 1931. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Frank S. Bright, Wm. L. Rawls, H. Stanley Hinrichs,* and *Raymond S. Williams* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour* and *James A. Cosgrove* for the United States. Reported below: 72 Ct. Cls. 106.

No. 173. SKEEN *v.* LYNCH ET AL. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. James Conlon* for petitioner. *Messrs. C. B. Ames, J. M. Hervey, Edward M. Freeman,* and *Allan Sholars* for respondents. Reported below: 48 F. (2d) 1044.

No. 175. NORRIS *v.* UNITED STATES. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. M. Hanley* and *Francis Murphy* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Mahlon D. Kiefer,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 49 F. (2d) 856.

No. 176. HAMBURG INSURANCE CO. *v.* BEHA, SUPERINTENDENT OF INSURANCE. October 19, 1931. Petition for writ of certiorari to the Court of Appeals of New York denied. *Mr. Hartwell Cabell* for petitioner. *Messrs. LeRoy B. Iserman* and *Alfred C. Bennett* for respondent. Reported below: 177 N. E. 126.

No. 177. BENEFICIAL LOAN SOCIETY *v.* UNITED STATES. October 19, 1931. Petition for writ of certiorari to the

Court of Claims denied. *Messrs. Jackson R. Collins, Samuel A. Syme,* and *Edmund R. Beckwith* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, R. C. Williamson,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 71 Ct. Cls. 557; 48 F. (2d) 686.

No. 180. Faber, Coe & Gregg, Inc. *v.* United States. October 19, 1931. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. James L. Gerry* for petitioner. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Messrs. Claude R. Branch, Ralph Folks,* and *Paul D. Miller* for the United States.

No. 181. Marblehead Land Co. et al. *v.* Los Angeles. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Oscar Lawler* and *M. F. Mitchell* for petitioners. *Messrs. Erwin P. Werner* and *Frederick von Schrader* for respondent. Reported below: 47 F. (2d) 528.

No. 182. Jacobs et al. *v.* First National Bank et al. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Charles E. Dunbar* for petitioners. No appearance for respondents. Reported below: 48 F. (2d) 17.

No. 183. Minidoka Irrigation District *v.* Wilbur, Secretary of the Interior. October 19, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs F. W. Clements* and *Lawrence H. Cake* for petitioner. *Solicitor General*

Thacher, Assistant Attorney General Richardson, and *Messrs. Claude R. Branch, Whitney North Seymour,* and *A. G. Iverson* for respondent. Reported below: 50 F. (2d) 495.

No. 186. En-le-te-ke et al. *v.* Beasley et al. October 19, 1931. Petition for writ of certiorari to the Supreme Court of Oklahoma denied. *Mr. J. B. Campbell* for petitioners. No appearance for respondents.

No. 187. J. Aaron & Co., Inc., *v.* Panama Railroad Co. October 19, 1931. Petition for writ of certiorari to the Supreme Court of New York County, New York, denied. *Mr. Horace T. Atkins* for petitioner. *Mr. Richard Reid Rogers* for respondent. Reported below: 135 Misc. Rep. (N. Y.) 528; 238 N. Y. S. 24. See also, 255 N. Y. 513; 175 N. E. 273.

No. 188. Turner et al. *v.* Kirkwood. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Richard William Stoutz* for petitioners. No appearance for respondent. Reported below: 49 F. (2d) 590.

No. 189. Jarvis *v.* Chicago, Burlington & Quincy R. Co. October 19, 1931. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. W. H. Douglass* for petitioner. *Messrs. Bruce Scott, Douglas W. Robert,* and *J. C. James* for respondent. Reported below: 37 S. W. (2d) 602.

No. 191. United States Gypsum Co. *v.* Plastoid Products, Inc. October 19, 1931. Petition for writ of certio-

rari to the Court of Customs and Patent Appeals denied. *Mr. A. Arnold Brand* and *Arthur A. Olson* for petitioner. *Mr. Albert J. Fihe* for respondent. Reported below: 46 F. (2d) 580.

No. 192. CORPUS CHRISTI *v.* CORPUS CHRISTI GAS CO. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Gordon Boone* for petitioner. *Messrs. S. J. Brooks* and *Howard Templeton* for respondent. Reported below: 46 F. (2d) 962.

No. 193. SOUTHERN RY. CO. *v.* HAMILTON; and

No. 194. SEABOARD AIR LINE RY. CO. *v.* SAME. October 19, 1931. Petitions for writs of certiorari to the Supreme Court of North Carolina denied. *Messrs. S. R. Prince, H. O'B. Cooper,* and *L. E. Jeffries* for the Southern Ry. Co. *Mr. Murray Allen* for the Seaboard Air Line Ry. Co. *Messrs. Robert N. Simms* and *Clyde A. Douglass* for respondent. Reported below: 200 N. C. 543; 158 S. E. 75.

No. 196. CLAUDE NEON SOUTHERN CORP. ET AL. *v.* MCCAFFREY, TRUSTEE. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Scott M. Loftin, John P. Stokes,* and *James E. Calkins* for petitioners. No appearance for respondent. Reported below: 47 F. (2d) 72.

No. 197. PENNSYLVANIA R. CO. *v.* SHAMROCK TOWING CO., INC., ET AL. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Chauncey I. Clark* and *Van Vechten Veeder* for petitioner. *Messrs. Edward Ash* and *Horace L. Cheyney* for respondents. Reported below: 48 F. (2d) 122.

No. 199. ILLINOIS POWER & LIGHT CORP. *v.* HURLEY ET AL., TRUSTEES. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Thomas F. Doran* and *Thomas M. Pierce* for petitioner. *Mr. John S. Leahy* for respondents. Reported below: 49 F. (2d) 681.

No. 202. HANSON *v.* MICHIGAN STATE BOARD OF REGISTRATION IN MEDICINE. October 19, 1931. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Messrs. Edwin C. Brandenburg* and *Louis M. Denit* for petitioner. No appearance for respondent. Reported below: 253 Mich. 601; 236 N. W. 225.

Nos. 203 and 204. DA ROZA *v.* UNITED STATES. October 19, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ernest Spagnoli* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Mahlon D. Kiefer,* and *W. Marvin Smith* for the United States. Reported below: 48 F. (2d) 1025, 1027.

No. 205. NITRO CHEMICAL CORP. *v.* UNITED STATES. October 19, 1931. Petition for writ of certiorari to the Court of Claims denied. *Mr. Raymond M. Hudson* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Whitney North Seymour* for the United States. Reported below: 71 Ct. Cls. 453.

No. 206. SUNNY BROOK DISTILLERY CO. *v.* UNITED STATES. October 19, 1931. Petition for writ of certiorari to the Court of Claims denied. *Mr. Levi Cooke* for petitioner. *Solicitor General Thacher, Assistant Attorney*

General Rugg, and *Messrs. Whitney North Seymour* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 72 Ct. Cls. 157; 48 F. (2d) 976.

No. 207. AMERICAN MONORAIL CO. *v.* LYON, JUDGE. October 19, 1931. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Frank J. Hogan, Maurice H. Winger,* and *Edmund L. Jones* for petitioner. *Messrs. I. N. Watson, Henry N. Ess, Powell C. Groner,* and *Paul Barnett* for respondent.

No. 208. PARIS *v.* KENTUCKY-TENNESSEE LIGHT & POWER CO. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. R. H. Porter* for petitioner. *Mr. Wm. Marshall Bullitt* for respondent. Reported below: 48 F. (2d) 795.

No. 209. BUREN *v.* SOUTHERN PACIFIC CO. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John Peter Buren, pro se. Messrs. Peter F. Dunne* and *Guy V. Shoup* for respondent. Reported below: 50 F. (2d) 407.

No. 210. HARKINS ET AL. *v.* JOHNSON. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. George B. Martin* for petitioners. *Messrs. B. M. James* and *Joe Hobson* for respondent. Reported below: 48 F. (2d) 794.

No. 211. MEISENHELDER, ADMINISTRATRIX, *v.* BYRAM ET AL. October 19, 1931. Petition for writ of certiorari

to the Supreme Court of Minnesota denied. *Messrs. Mortimer H. Boutelle* and *Frederick M. Miner* for petitioner. *Messrs. F. W. Root, A. C. Erdall,* and *C. S. Jefferson* for respondents. Reported below: 182 Minn. 615; 233 N. W. 849; 236 N. W. 195.

No. 212. UNION TRUST CO. ET AL. *v.* AYER ET AL. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Archibald N. Jordan* for petitioners. *Mr. Raymond M. White* for respondents. Reported below: 48 F. (2d) 11.

No. 213. OREGON-WASHINGTON RAILROAD & NAVIGATION CO. *v.* BEVIN. October 19, 1931. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Messrs. Arthur C. Spencer, Charles H. Bates,* and *Henry W. Clark* for petitioner. No appearance for respondent. Reported below: 298 Pac. 204.

No. 214. COLGROVE ET AL. *v.* LOWE. October 19, 1931. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Cornelius J. Doyle* for petitioners. *Messrs. Oscar E. Carlstrom* and *Montgomery S. Winning* for respondent. Reported below: 343 Ill. 360; 175 N. E. 569.

No. 215. AMERICAN FLYER MFG. CO. *v.* HANDY ET AL. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. David P. Wolhaupter* for petitioner. *Mr. Robert C. Watson* for respondents. Reported below: 48 F. (2d) 1074.

No. 216. JAMES MCWILLIAMS BLUE LINE, INC., ET AL. *v.* PENNSYLVANIA R. Co.;

No. 244. PENNSYLVANIA R. Co. *v.* JAMES MCWILLIAMS BLUE LINE, INC., ET AL.; and

No. 264. LONG BEACH-ON-THE-OCEAN, INC., *v.* PENNSYLVANIA R. Co. October 19, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Anthony V. Lynch, George V. A. McCloskey, Warner Pyne,* and *Leo J. Curren* for James McWilliams Blue Line, Inc., et al. *Mr. Chauncey I. Clark* for the Pennsylvania R. Co. *Mr. Warner Pyne* for Long Beach-on-the-Ocean, Inc. Reported below: 48 F. (2d) 559.

No. 219. FESSENDEN *v.* WILSON ET AL. October 19, 1931. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Reginald A. Fessenden, pro se. Mr. DeWitt C. Tanner* for respondents Reported below: 48 F. (2d) 422.

No. 221. PITTS *v.* PEAK. October 19, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. T. Morris Wampler* for petitioner. *Solicitor General Thacher,* and *Messrs. Whitney North Seymour* and *Neil Burkinshaw* for respondent. Reported below: 50 F. (2d) 485.

No. 222. INTERSTATE TRANSIT CO. *v.* ROGERS. October 19, 1931. Petition for writ of certiorari to the Supreme Court of California denied. *Annette Abbott Adams* for petitioner. *Mr. Francis Carr* for respondent. Reported below: 297 Pac. 884.

No. 224. WELLS *v.* CHESAPEAKE & OHIO RY. CO. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. R. B. Newcomb* for petitioner. *Mr. Fred C. Rector* for respondent. Reported below: 49 F. (2d) 251.

No. 225. JOHN S. PHIPPS *v.* BOWERS, EXECUTOR;

No. 226. HENRY C. PHIPPS *v.* SAME;

No. 227. HOWARD PHIPPS *v.* SAME; and

No. 228. MARTIN *v.* SAME. October 19, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Titus* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist, Miss Helen R. Carloss,* and *Messrs. Whitney North Seymour, Sewall Key, Wm. H. Riley, Jr.,* and *Clarence M. Charest* for respondent. Reported below: 49 F. (2d) 996.

No. 229. CARR *v.* KINGSBURY, CHIEF OF THE DIVISION OF STATE LANDS;

No. 230. MAGGART *v.* SAME;

No. 231. FEISTHAMEL *v.* SAME;

No. 232. CUMINGS *v.* SAME; and

No. 233. JOYNER *v.* SAME. October 19, 1931. Petition for writs of certiorari to the District Court of Appeal, 4th Appellate District of California, denied. *Mr. George B. Bush* for petitioners. *Mr. U. S. Webb,* Attorney General of California, for respondent. Reported below: 295 Pac. 586, 590, 591.

No. 234. JONES ET AL. *v.* MELLON, SECRETARY. October 19, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Harry J. Gerrity* for petitioners. *Solicitor General Thacher,* and

Messrs. T. H. Lewis, Jr., Whitney North Seymour, and *Wm. H. Riley, Jr.,* for respondent. Reported below: 51 F. (2d) 431.

No. 235. MORSE DRY DOCK & REPAIR CO. *v.* LANCASHIRE SHIPPING CO., LTD.;

No. 236. SAME *v.* TOKIO MARINE & FIRE INS. CO.;

No. 237. SAME *v.* STANDARD TRANSPORTATION CO.; and

No. 238. SAME *v.* STANDARD OIL CO. October 19, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Courtland Palmer* for petitioner. *Messrs. George Whitefield Betts, Jr.,* and *Leonard J. Matteson* for respondents. Reported below: 48 F. (2d) 1077.

No. 239. PUGH, EXECUTRIX, ET AL. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Rush L. Holland, George E. Strong, Frank J. Looney,* and *Judson M. Grimmet* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Hayner N. Larson,* and *W. Marvin Smith* for respondent. Reported below: 49 F. (2d) 76.

No. 240. ALLEN, RECEIVER, *v.* KELLY, ASSESSOR. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George B. Webster* for petitioner. *Mr. K. Berry Peterson* for respondent. Reported below: 49 F. (2d) 876.

No. 241. PORTO RICO *v.* LIVINGSTON. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William Cat-*

tron Rigby and *Blanton Winship* for petitioner. *Mr. Carroll G. Walter* for respondent. Reported below: 47 F. (2d) 712.

No. 243. BOHENIK *v.* DELAWARE & HUDSON CO. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Sol Gelb* for petitioner. *Messrs. H. T. Newcomb* and *Carl E. Whitney* for respondent. Reported below: 49 F. (2d) 722.

No. 246. HALLAM *v.* COMMERCE MINING & ROYALTY CO. ET AL. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Joseph W. Howell* for petitioner. *Messrs. A. Scott Thompson, Ray McNaughton, George S. Ramsey,* and *F. D. Adams* for respondents. Reported below: 49 F. (2d) 103.

No. 247. SADI *v.* UNITED STATES. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Max J. Kohler* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 48 F. (2d) 1040.

No. 249. TENNESSEE R. CO. *v.* THOMPSON. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. J. A. Fowler* for petitioner. *Mr. W. T. Kennerly* for respondent. Reported below: 50 F. (2d) 892.

No. 292. ED S. VAIL BUTTERINE CO. *v.* REINECKE, COLLECTOR. October 19, 1931. Petition for writ of certiorari

to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George N. Murdock* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch,* and *S. Dee Hanson* for respondent. Reported below: 49 F. (2d) 1076.

No. 253. SLAUGHTER *v.* C. C. SLAUGHTER CO. ET AL. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. C. M. Chambers* for petitioner. No appearance for respondents. Reported below: 48 F. (2d) 210.

No. 256. HAVENER *v.* UNITED STATES. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. James M. Johnson* and *Donald W. Johnson* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 49 F. (2d) 196.

No. 257. RIEGEL *v.* PUBLIC UTILITIES COMMISSION. October 19, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. E. C. Riegel, pro se. Messrs. Wm. W. Bride* and *Wm. A. Roberts* for respondent. Reported below: 48 F. (2d) 1023.

No. 259. GRAFFE *v.* UNITED STATES. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Samuel A. King* for petitioner. *Solicitor General Thacher, Assistant*

Attorney General Youngquist, and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 49 F. (2d) 270.

No. 260. MARYLAND CASUALTY CO. *v.* UNITED STATES. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. J. F. Dammann* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch,* and *John G. Remey* for the United States. Reported below: 49 F. (2d) 556.

No. 261. UNAKA & CITY NATIONAL BANK *v.* UNITED STATES. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. John W. Price* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour* and *J. Louis Monarch* for the United States. Reported below: 50 F. (2d) 1031.

No. 262. FORT WORTH INDEPENDENT SCHOOL DISTRICT *v.* AETNA CASUALTY & SURETY CO. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Robert M. Rowland* for petitioner. *Mr. John T. Pearson* for respondent. Reported below: 48 F. (2d) 1.

Nos. 267 and 268. LIFE & CASUALTY INS. CO. *v.* HEATHCOTT. October 19, 1931. Petition for writs of certiorari to the Supreme Court of Tennessee and to the Court of Civil Appeals of Tennessee, denied. *Mr. J. Carlton Loser* for petitioner. No appearance for respondent.

No. 269. MITCHELL *v.* COMMISSIONER OF INTERNAL REVENUE. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Graham Sumner* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. J. Louis Monarch* and *Paul D. Miller* for respondent. Reported below: 48 F. (2d) 697.

No. 271. DAVIS *v.* UNITED STATES. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William J. Berne* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 47 F. (2d) 1071.

No. 272. CORBETT *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 19, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. John E. Hughes* and *William Cogger* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch, John G. Remey,* and *W. Marvin Smith* for respondent. Reported below: 50 F. (2d) 492.

No. 273. CLEVELAND-CLIFFS STEAMSHIP CO. *v.* CARGILL GRAIN CO. October 19, 1931. Petition for writ of certiorari to the Supreme Court of Minnesota denied. *Messrs. Tracy H. Duncan, Frederick L. Leckie,* and *Edgar W. McPherran* for petitioner. No appearance for respondent. Reported below: 182 Minn. 516; 235 N. W. 268.

No. 274. DIAMOND ET AL. *v.* NEW YORK LIFE INS. CO. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Walter Bachrach* and *Benjamin C. Bachrach* for petitioners. *Messrs. Frank H. Scott, Homer H. Cooper,* and *Louis H. Cooke* for respondent. Reported below: 50 F. (2d) 884.

No. 275. FROMMEL REALTY & INVESTMENT CO. ET AL. *v.* UNITED STATES. October 19, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert Ash* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch, William Cutler Thompson,* and *Paul D. Miller* for the United States. Reported below: 50 F. (2d) 73.

No. 174. INTERSTATE NATURAL GAS CO., INC., ET AL. *v.* ARENT. See same case, *ante,* p. 580.

No. 195. SALVATIERRA ET AL. *v.* INDEPENDENT SCHOOL DISTRICT ET AL. See same case, *ante,* p. 580.

No. 276. CANAL STEEL WORKS, INC., *v.* ONE DRAG LINE DREDGE. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Nicholas G. Carbajal* for petitioner. No appearance for respondent. Reported below: 48 F. (2d) 212.

No. 277. PACIFIC MUTUAL LIFE INS. CO. *v.* BARTON ET AL. October 26, 1931. Petition for writ of certiorari

to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. T. L. Doggett* and *Charles Cook Howell* for petitioner. No appearance for respondents. Reported below: 50 F. (2d) 362.

No. 278. MARY A. LINEBERRY *v.* WOODWARD & LOTHROP; and

No. 279. WILLIE E. LINEBERRY *v.* SAME. October 26, 1931. Petition for writs of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Richard L. Merrick* and *Elwood P. Morey* for petitioners. *Messrs. Frederic D. McKenney, John S. Flannery,* and *G. Bowdoin Craighill* for respondent. Reported below: 50 F. (2d) 314, 317.

No. 280. ENGELSBERG *v.* UNITED STATES. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. W. D. Stewart* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. John J. Byrne* and *W. Marvin Smith* for the United States. Reported below: 51 F. (2d) 479.

No. 281. GITLOW *v.* KIELY, POSTMASTER. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur G. Hays* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour* and *Harry S. Ridgely* for respondent. Reported below: 49 F. (2d) 1077.

No. 282. BOWLES *v.* UNITED STATES. October 26, 1931. Petition for writ of certiorari to the Circuit Court of

Appeals for the Fourth Circuit denied. *Mr. John Philip Hill* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 50 F. (2d) 848.

No. 283. RAY ET AL. *v.* SILVER SPRINGS PARADISE CO. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Henry J. Richardson* for petitioners. *Mr. H. P. Adair* for respondent.

No. 284. GLUCK *v.* KEMPER. October 26, 1931. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Walter H. Saunders* and *J. L. London* for petitioner. *Mr. Oscar Habenicht* for respondent. Reported below: 39 S. W. (2d) 330.

No. 285. CHEMICAL FOUNDATION, INC., *v.* GENERAL ELECTRIC CO. ET AL. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Hugh M. Morris, John F. Neary,* and *Louis W. McKernan* for petitioner. *Messrs. Charles Neave* and *Stephen H. Philbin* for respondents. Reported below: 49 F. (2d) 697.

No. 288. WALKER ET AL. *v.* SUTHERLAND, ALIEN PROPERTY CUSTODIAN, ET AL. October 26, 1931. Petition for writ of certiorari to the Supreme Court of Oregon denied. *Mr. James J. Crossley* for petitioners. *Solicitor General Thacher, Assistant Attorney General St. Lewis,* and *Messrs. Whitney North Seymour* and *Thomas E. Rhodes* for respondents. Reported below: 299 Pac. 335.

No. 289. ROBILLARD, EXECUTOR, *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Basil Robillard* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch,* and *A. H. Conner* for respondent. Reported below: 50 F. (2d) 1083.

No. 290. BURROWES, RECEIVER, *v.* GOODMAN, EXECUTRIX. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Francis L. Driscoll* for petitioner. No appearance for respondent. Reported below: 50 F. (2d) 92.

No. 295. WISE *v.* MILLER ET AL. October 26, 1931. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Messrs. J. T. Stokely* and *S. P. Smith* for petitioner. *Mr. Needham A. Graham, Jr.,* for respondents. Reported below: 134 So. 468.

No. 298. WADSWORTH ELECTRIC MFG. CO. *v.* WESTINGHOUSE ELECTRIC & MFG. CO. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Thomas G. Haight* and *Walter F. Murray* for petitioner. *Mr. Drury W. Cooper* for respondent. Reported below: 36 F. (2d) 319; 51 F. (2d) 447.

No. 299. MONSERRAT *v.* CARMELO ET AL. October 26, 1931. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Messrs. Clyde Alton DeWitt* and *Eugene Arthur Perkins* for petitioner. No appearance for respondents.

No. 302. FAFALIOS *v.* DOAK, SECRETARY OF LABOR. October 26, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Ward Bonsall* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Harry S. Ridgely, W. Marvin Smith,* and *Albert E. Reitzel* for respondent. Reported below: 50 F. (2d) 640.

No. 303. STRATTON ET AL., EXECUTORS, *v.* UNITED STATES. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. G. Philip Wardner* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch,* and *Andrew D. Sharpe* for the United States. Reported below: 50 F. (2d) 48.

No. 304. MILLER *v.* UNITED STATES; and

No. 305. HOFFMAN *v.* SAME. October 26, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Patrick J. Friel* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. John J. Byrne* and *W. Marvin Smith* for the United States. Reported below: 50 F. (2d) 505.

No. 306. WARREN & ARTHUR SMADBECK, INC., *v.* HELING CONTRACTING CORP. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Marion DeVries* and *Samuel J. Rawak* for petitioner. *Messrs. John W. Griffin* and *Warthon Poor* for respondent. Reported below: 50 F. (2d) 99.

No. 307. DIAMOND *v.* MCMAHON. October 26, 1931. Petition for writ of certiorari to the Court of Errors and Appeals of New Jersey denied. *Mr. Thomas G. Haight* for petitioner. No appearance for respondent. Reported below: 108 N. J. Eq. 263; 154 Atl. 840.

No. 312. LAUGHLIN, ADMINISTRATRIX, *v.* ROBERTSON, COMMISSIONER OF PATENTS. October 26, 1931. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Mr. Joshua R. H. Potts* for petitioner. *Solicitor General Thacher* and *Messrs. W. Marvin Smith* and *T. A. Hostetler* for respondent. Reported below: 48 F. (2d) 921.

No. 313. WRIGHT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. M. G. McDonald* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch, Wm. Cutler Thompson,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 50 F. (2d) 727.

No. 315. UNITED STATES FIDELITY & GUARANTY CO. *v.* MCCARTHY. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Jesse A. Miller* and *James C. Davis* for petitioner. *Mr. Charles S. Bradshaw* for respondent. Reported below: 50 F. (2d) 2.

No. 316. ROSENBERG ET AL. *v.* CARR FASTENER CO. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied.

Messrs. Edgar M. Kitchin, David L. Podell, Edmund Quincy Moses, and *Jacob J. Podell* for petitioners. *Mr. L. G. Miller* for respondent. Reported below: 51 F. (2d) 1014.

No. 317. INDEMNITY INSURANCE CO. ET AL. *v.* LEVERING. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. C. M. Ozias* for petitioners. *Mr. Hiram E. Booth* for respondent. Reported below: 50 F. (2d) 151.

No. 318. BELISARIO *v.* PHILIPPINE ISLANDS. October 26, 1931. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. Leoncio C. Belisario, pro se. Messrs. William Cattron Rigby* and *Blanton Winship* for respondent.

No. 322. GODFREY *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE; and

No. 323. ESTATE OF WALDO *v.* SAME. October 26, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Harvey K. Zollinger* and *Marion W. Ripy* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch,* and *Morton K. Rothschild* for respondent. Reported below: 50 F. (2d) 79.

No. 326. HANLON *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE; and

No. 327. HENAGHAN *v.* SAME. October 26, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. Josephus*

C. Trimble and *Jerry A. Mathews* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch,* and *Norman D. Keller* for respondent. Reported below: 51 F. (2d) 463.

No. 329. COLLENGER *v.* UNITED STATES; and

No. 330. ANTONEAN *v.* SAME. October 26, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Gerald A. Gillett* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Mr. Whitney North Seymour* for the United States. Reported below: 50 F. (2d) 345.

No. 331. DOMENECH, TREASURER OF PORTO RICO, *v.* PORTO RICAN LEAF TOBACCO CO. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. William Cattron Rigby* and *Blanton Winship* for petitioner. *Mr. Wm. M. Parke* for respondent. Reported below: 50 F. (2d) 579.

Nos. 334 and 335. SPRING CANYON COAL CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 26, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Charles Hamel* and *John Enrietto* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch,* and *J. P. Jackson* for respondent. Reported below: 43 F. (2d) 78.

No. 342. NATIONAL TANK SEAL CO. *v.* JOHNS-MANVILLE CORP. October 26, 1931. Petition for writ of certiorari

to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Richard W. Stoutz* for petitioner. *Mr. Odin Roberts* for respondent. Reported below: 49 F. (2d) 142.

No. 343. NORTH AMERICAN COAL CORP. *v.* WHEELING & LAKE ERIE RY. CO. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. H. H. Hoppe* for petitioner. *Messrs. Albert E. Powell* and *Andrew P. Martin* for respondent. Reported below: 49 F. (2d) 253.

No. 344. TODOK ET AL. *v.* UNION STATE BANK ET AL. October 26, 1931. Petition for writ of certiorari to the Supreme Court of Nebraska denied. *Mr. Frank E. Edgerton* for petitioners. *Messrs. Walter D. James* and *Frank D. Williams* for respondents. Reported below: 236 N. W. 741.

No. 345. ALLEN *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. J. Sterling Halstead* and *Martin A. Schenck* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch,* and *Morton K. Rothschild* for respondent. Reported below: 49 F. (2d) 716.

No. 346. BUICK MOTOR CO. *v.* MILWAUKEE. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John Thomas Smith* for petitioner. *Messrs. John M. Niven, Walter J. Mattison,* and *Theodore W. Brazeau* for respondent. Reported below: 48 F. (2d) 801.

No. 347. UNITED STATES FIDELITY & GUARANTY CO. *v.* KANSAS EX REL. WINKLE TERRA COTTA CO. October 26, 1931. Petition for writ of certiorari to the Supreme Court of Missouri. *Mr. Eugene S. Quinton* for petitioner. *Mr. Thomas W. White* for respondent. Reported below: 40 S. W. (2d) 1050.

No. 350. RONGETTI *v* ILLINOIS. October 26, 1931. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Charles P. R. Macaulay* for petitioner. *Messrs. Oscar E. Carlstrom* and *James B. Searcy* for respondent.

No. 351. KNUT ET AL. *v.* HENRY, EXECUTOR. October 26, 1931. Petition for writ of certiorari to the Supreme court of Mississippi denied. *Mr. S. P. Knut, pro se. Mr. Gerard Brandon* for respondent. Reported below: 135 So. 214.

No. 352. KNUT ET AL. *v.* FORSYTH ET AL. October 26, 1931. Petition for writ of certiorari to the Supreme Court of Mississippi denied. *Mr. S. P. Knut, pro se. Mr. Gerard Brandon* for respondents. Reported below: 135 So. 214.

No. 353. SCHICK *v.* NEW ORLEANS ET AL. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Claude L. Johnson* for petitioner. *Mr. Henry B. Curtis* for respondents. Reported below: 49 F. (2d) 870.

No. 354. LELAND ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the First Cir-

cuit denied. *Messrs. Harris H. Gilman* and *Merrill S. June* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist, Miss Helen R. Carloss,* and *Messrs. Whitney North Seymour, J. Louis Monarch,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 50 F. (2d) 523.

No. 359. EWBANK ET AL. *v.* UNITED STATES. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Louis B. Ewbank* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Andrew D. Sharpe,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 50 F. (2d) 409.

No. 360. LONG *v.* RIKE ET AL. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Hobart P. Young* and *Harris C. Lutkin* for petitioner. *Messrs. Frank H. Scott* and *Tappan Gregory* for respondents. Reported below: 50 F. (2d) 124.

No. 361. RANIERI *v.* SMITH, DISTRICT DIRECTOR IN CHARGE OF IMMIGRATION, ET AL. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John A. Chumbley* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Harry S. Ridgely,* and *W. Marvin Smith* for respondents. Reported below: 49 F. (2d) 537.

No. 362. SEABOARD OIL CO. *v.* CUNNINGHAM. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs.*

Martin H. Long and *Julian Hartridge* for petitioner. *Mr. Robert L. Shipp* for respondent. Reported below: 51 F. (2d) 321.

No. 363. BOARD *v.* COMMISSIONER OF INTERNAL REVENUE. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Elwood Hamilton* and *J. C. W. Beckham, Jr.*, for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch,* and *John MacC. Hudson* for respondent. Reported below: 51 F. (2d) 73.

No. 366. STEWART, EXECUTRIX, *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. B. F. Louis* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch,* and *Norman D. Keller* for respondent. Reported below: 49 F. (2d) 259.

No. 367. ESPERSON *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE; and

No. 368. ESPERSON, EXECUTRIX, *v.* SAME. October 26, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. B. F. Louis* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch,* and *John G. Remey* for respondent. Reported below: 49 F. (2d) 259.

No. 369. MELLON, DIRECTOR GENERAL OF RAILROADS, *v.* CHINA FIRE INS. CO., LTD. October 26, 1931. Petition

for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Edward N. Abbey* and *Russell H. Robbins* for petitioner. *Messrs. Oscar R. Houston* and *Arthur W. Clement* for respondent. Reported below: 50 F. (2d) 389.

No. 370. LAMSON CO., INC., *v.* WHITTEMORE, TRUSTEE. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. E. Crosby Kindleberger* for petitioner. *Mr. Horace E. Gunn* for respondent. Reported below: 51 F. (2d) 875.

No. 373. RAMIREZ *v.* TEXAS. October 26, 1931. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. *Mr. George E. Shelley* for petitioner. No appearance for respondent. Reported below: 40 S. W. (2d) 138.

No. 392. SOUTH FLORIDA LUMBER MILLS *v.* BREUCHAUD. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. N. B. K. Pettingill* for petitioner. *Mr. O. K. Reaves* for respondent. Reported below: 51 F. (2d) 490.

No. 399. BLODGETT *v.* DEHY ET AL. October 26, 1931. Petition for writ of certiorari to the Superior Court for the County of Santa Barbara, California, denied. *Mr. D. T. Blodgett, pro se. Messrs. John William Heaney* and *Francis Price* for respondents.

No. 198. TAYLOR ET AL. *v.* AMERICAN LIABILITY CO. October 26, 1931. Petition for writ of certiorari to the

Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Charles Kerr* and *A. K. Shipe* for petitioners. *Mr. Beverley R. Jouett* for respondent. Reported below: 48 F. (2d) 592.

No. 364. CHASE NATIONAL BANK *v.* SANFORD. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Henry Root Stern, H. G. Pickering, James F. Soudefur,* and *Bertram F. Shipman* for petitioner. *Messrs. Charles A. Boston* and *Lucien H. Boggs* for respondent. Reported below: 50 F. (2d) 400.

No. 375. DAVIDSON *v.* UNITED STATES. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Daniel T. Hagan* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, A. W. Henderson,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 50 F. (2d) 517.

No. 376. PHILLIPS *v.* UNION TERMINAL RY. CO. October 26, 1931. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. John G. Parkinson* for petitioner. *Mr. Robert A. Brown* for respondent. Reported below: 40 S. W. (2d) 1046.

No. 377. FORSYTHE ET AL. *v.* JAMES TREGARTHEN & SONS CO. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel D. Stein* for petitioners. *Mr. Edward Ash* for respondent. Reported below: 49 F. (2d) 1078.

No. 379. TAYLOR-MOORE SYNDICATE, INC., ET AL. *v.* CENTRAL FLORIDA LUMBER CO. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. N. B. K. Pettingill* for petitioners. *Mr. Martin Sack* for respondent. Reported below: 51 F. (2d) 1.

No. 380. KNOLLENBERG *v.* STATE BANK OF ALAMOGORDO. October 26, 1931. Petition for writ of certiorari to the Supreme Court of New Mexico denied. *Mr. Fred C. Knollenberg* for petitioner. *Mr. H. B. Holt* for respondent. Reported below: 299 Pac. 1077.

No. 382. A. SCHRADER'S SON, INC., *v.* UNITED STATES. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John B. Sullivan, Jr.,* and *Frank M. Avery* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *John Henry McEvers* for the United States. Reported below: 51 F. (2d) 1038.

No. 383. LOUISVILLE & NASHVILLE R. CO. *v.* HALL. October 26, 1931. Petition for writ of certiorari to the Supreme Court of Alabama denied. *Messrs. J. S. Stone* and *White E. Gibson* for petitioner. *Mr. C. C. Calhoun* for respondent. Reported below: 135 So. 466.

No. 384. VAUSE *v.* UNITED STATES; and

No. 386. SCHUCHMAN *v.* SAME. October 26, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert H. Elder* for Vause. *Mr. George H. Combs, Jr.,* for Schuch-

man. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Harry S. Ridgely,* and *W. Marvin Smith* for the United States.

No. 385. ALLEN *v.* CITIZENS BANK & TRUST CO. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. S. H. Sutherland* for petitioner. *Mr. Paul Dulaney* for respondent. Reported below: 48 F. (2d) 1068.

No. 388. MONARCH TOOL & MFG. CO. *v.* MILLS NOVELTY CO. October 26, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Walter F. Murray* for petitioner. *Mr. Weymouth Kirkland* for respondent. Reported below: 49 F. (2d) 28.

No. 396. FISKE *v.* MOFFETT. October 26, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Raymond J. Mawhinney* and *Ernest Wilkinson* for petitioner. *Solicitor General Thacher* and *Assistant Attorney General Rugg* for respondent. Reported below: 51 F. (2d) 868.

No. 397. SOUTHERN RY. CO. *v.* DERRINGTON, ADMINISTRATRIX. October 26, 1931. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. S. R. Prince, L. E. Jeffries, H. O'B. Cooper, R. J. Kramer,* and *Bruce A. Campbell* for petitioner. *Mr. W. H. Douglass* for respondent. Reported below: 40 S. W. (2d) 1069.

No. 417. CHICAGO & NORTH WESTERN RY. CO. *v.* STRUTHERS, ADMINISTRATOR. October 26, 1931. Petition

for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Samuel H. Cady* and *William T. Faricy* for petitioner. *Messrs. Tom Davis* and *Ernest A. Michel* for respondent. Reported below: 52 F. (2d) 88.

No. 371. KEOGH *v.* NEELY, COLLECTOR OF INTERNAL REVENUE. See same case, *ante*, p. 583.

No. 442. GENERAL MOTORS CORP. ET AL. *v.* MOTOR IMPROVEMENTS, INC., ET AL. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. The Chief Justice took no part in the consideration or decision of this petition. *Messrs. Drury W. Cooper* and *Allan C. Bakewell* for petitioners. *Messrs. William Houston Kenyon, W. W. Miller, Theodore S. Kenyon,* and *Nelson Littell* for respondents. Reported below: 49 F. (2d) 543.

No. 308. STONE *v.* UNITED STATES;

No. 309. PATTERSON ET AL. *v.* SAME; and

No. 310. HORKHEIMER ET AL. *v.* SAME. November 2, 1931. Petitions for writs of certiorari to the Court of Claims denied. *Messrs. Daniel R. Rothemel* and *Edward O. Proctor* for petitioners. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Mr. Whitney North Seymour* for the United States. Reported below: 72 Ct. Cls. 722.

No. 389. TAYLOR, TRUSTEE, *v.* JONES. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Elmer J. Lundy* for petitioner. No appearance for respondent. Reported below: 51 F. (2d) 892.

No. 390. KENNINGTON, LIQUIDATOR, ET AL. *v.* DONALD, COLLECTOR OF INTERNAL REVENUE. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Henry J. Richardson, Garner W. Green, W. H. Watkins,* and *Marcellus Green* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, William Cutler Thompson,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 50 F. (2d) 894.

No. 394. FRANKLIN *v.* CARTER, STATE AUDITOR. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. R. M. Rainey* and *Streeter B. Flynn* for petitioner. No appearance for respondent. Reported below: 51 F. (2d) 345.

No. 395. CHICAGO FRATERNAL LIFE ASSN. *v.* KARST. November 2, 1931. Petition for writ of certiorari to the Springfield Court of Appeals, of Missouri, denied. *Mr. William J. Corrigan* for petitioner. *Mr. E. E. Alexander* for respondent. Reported below: 40 S. W. (2d) 732.

No. 400. F. M. HUBBELL SON & CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. G. Gamble* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *A. H. Conner* for respondent. Reported below: 51 F. (2d) 644.

No. 402. ARCHIBALD MCNEIL & SONS CO., INC., *v.* WESTERN MARYLAND RY. CO. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. George Demming, John R. Geyer,* and *Paul G. Smith* for petitioner. *Mr. Alexander Armstrong* for respondent. Reported below: 51 F. (2d) 1073.

No. 404. UNITED STATES EX REL. KLEIN *v.* MULLIGAN, U. S. MARSHAL. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. D. Basil O'Connor* for petitioner. *Mr. Robert D. Murray* for respondent. Reported below: 50 F. (2d) 687.

No. 412. KOTABS, INC., ET AL. *v.* KOTEX CO. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Benjamin S. Kirsh* for petitioners. *Mr. Cola G. Parker* for respondent. Reported below: 50 F. (2d) 810.

No. 415. DELBRIDGE ET AL. *v.* OLDFIELD ET AL. November 2, 1931. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Mr. Orla B. Taylor* for petitioners. *Messrs. Frederick C. Kurth, Paul B. Moody,* and *Howard F. Cline* for respondents.

No. 418. MILMINE BODMAN & CO., INC., *v.* EMPIRE CANAL CORP. ET AL.; and

No. 419. NORRIS GRAIN CO., INC., *v.* SAME. November 2, 1931. Petition for writs of certiorari to the Circuit

Court of Appeals for the Second Circuit denied. *Mr. George V. A. McCloskey* for petitioners. *Messrs. Mark W. Maclay* and *John Tilney Carpenter* for respondents. Reported below: 52 F. (2d) 41.

No. 336. WILLOW GLEN *v.* SOUTHERN PACIFIC CO. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Casper A. Ornbaun* for petitioner. *Messrs. Frank C. Cleary* and *E. J. Foulds* for respondent. Reported below: 49 F. (2d) 1005.

No. 340. UNITED CIGAR STORES CO. *v.* UNITED STATES. November 2, 1931. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Sol M. Stroock, Charles C. Carlin, M. Carter Hall,* and *Edward F. Spitz* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour* and *Joseph H. Sheppard* for the United States. Reported below: 72 Ct. Cls. 453; 50 F. (2d) 466.

No. 398. DARBY-LYNDE CO. *v.* ALEXANDER, COLLECTOR OF INTERNAL REVENUE. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. O. E. Swan* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist, Miss Helen R. Carloss,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 51 F. (2d) 56.

No. 405. JOHN B. FORD *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 406. GEORGE ROSS FORD *v.* SAME;

No. 407. KNIGHT *v.* SAME;

No. 408. BACON *v.* SAME; and

No. 409. CARRIE J. FORD *v.* SAME. November 2, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Levi Cooke, Mark Eisner,* and *Ferdinand Tannenbaum* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, A. H. Conner, J. P. Jackson,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 51 F. (2d) 206.

No. 414. ACEVEDO *v.* UNITED STATES. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Benicio F. Sanchez* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 49 F. (2d) 1023.

No. 416. PORTAGE SILICA CO. *v.* COMMISSIONER OF INTERNAL REVENUE. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. William J. Dawley* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Andrew D. Sharpe, and Paul D. Miller* for respondent. Reported below: 49 F. (2d) 985.

No. 420. UNITED STATES EX REL. GOLDSCHMIDT *v.* SUTHERLAND, ALIEN PROPERTY CUSTODIAN, ET AL. November 2, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Spier Whitaker, Lawrence A. Baker,* and *Henry*

Ravenel for petitioner. *Solicitor General Thacher, Assistant Attorney General St. Lewis,* and *Messrs. Whitney North Seymour, Henry A. Cox,* and *Wm. H. Riley, Jr.,* for respondents. Reported below: 51 F. (2d) 607.

No. 421. IRVING TRUST CO., RECEIVER, *v.* UNITED STATES. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Henry Gale* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Norman D. Keller* for the United States. 50 F. (2d) 138.

No. 422. HOGAN ET AL. *v.* UNITED STATES. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Edwin C. Hollins* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. A. W. Henderson* and *W. Marvin Smith* for the United States. Reported below: 48 F. (2d) 516.

No. 424. GREATER NEW YORK DEVELOPMENT CO. *v.* SEARS ET AL. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Phillips Ketchum* for petitioner. *Mr. F. H. Nash* for respondents. Reported below: 51 F. (2d) 46.

No. 425. SCHAEFER *v.* BOWERS, EXECUTOR. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John W. Davis* and *Marion N. Fisher* for petitioner. *So-*

licitor General Thacher, Assistant Attorney General Youngquist, and *Messrs. Whitney North Seymour, Sewall Key,* and *A. H. Conner* for respondent. Reported below: 50 F. (2d) 689.

No. 428. COLQUITT, RECEIVER, ET AL. *v.* ROXANA PETROLEUM CORP. ET AL. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. T. W. Gregory* for petitioners. No appearance for respondents. Reported below: 49 F. (2d) 1025.

Nos. 435, 436, 437, 438, 439, and 440. UNITED STATES FIDELITY & GUARANTY CO. *v.* HIGHWAY ENGINEERING & CONSTRUCTION CO., INC. November 2, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. John W. Davis, Lucien H. Boggs, Herbert S. Phillips,* and *J. Kemp Bartlett* for petitioner. *Messrs. George C. Bedell* and *A. G. Turner* for respondent. Reported below: 51 F. (2d) 894.

No. 443. HARVEY *v.* AMERICAN COAL CO. ET AL. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Sol H. Esarey* for petitioner. *Mr. E. L. Greever* for respondents. Reported below: 50 F. (2d) 832.

No. 479. CAPONE *v.* UNITED STATES. November 2, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. George N. Murdock* and *Dennis M. Kelleher* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key,*

and *Paul D. Miller* for the United States. Reported below: 51 F. (2d) 609.

No. 446. THREATT *v.* AMERICAN MUTUAL LIABILITY INS. CO. ET AL. November 23, 1931. Petition for writ of certiorari to the Supreme Court of Georgia, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. David Threatt, pro se.* No appearance for respondents. Reported below: 160 S. E. 379.

No. 476. KING *v.* PETERSON ET AL. November 23, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Nannie Lee King, pro se.* No appearance for respondents.

No. 97. GONG BELL MFG. CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. November 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Ferdinand Tannenbaum* and *Mark Eisner* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch* and *John Henry McEvers* for respondent. Reported below: 48 F. (2d) 205.

No. 293. CITY BUTTON WORKS *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. November 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Donald Horne* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *John H. McEvers* for respondent. Reported below: 49 F. (2d) 705.

No. 320. ONONDAGA CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE; and

No. 321. TEN EYCK CO. *v.* SAME. November 23, 1931. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. C. J. Murphy* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, J. Louis Monarch, John Henry McEvers,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 50 F. (2d) 397.

No. 381. JOS. DENUNZIO FRUIT CO. *v.* COMMISSIONER OF INTERNAL REVENUE. November 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Theodore B. Benson, Frank S. Bright,* and *H. Stanley Hinrichs* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *S. Dee Hanson* for respondent. Reported below: 49 F. (2d) 41.

No. 427. STEIN ET AL. *v.* UNITED STATES. November 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Sanford H. Cohen* for petitioners. *Solicitor General Thacher* and *Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 50 F. (2d) 1025.

No. 441. DREYFUS *v.* INDEPENDENCE INDEMNITY CO. November 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Frank S. Monnett* and *Howard Morgan Jones* for petitioner. *Mr. A. I. Vorys* for respondent. Reported below: 49 F. (2d) 599.

No. 445. IRVING TRUST CO., RECEIVER, ET AL. *v.* OLIVIER STRAW GOODS CORP. ET AL. November 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Moses Cohen* for petitioners. *Messrs. Selden Bacon* and *John W. Crandall* for respondents.

No. 448. JENKINS-KREER & CO., INC., *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. November 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Clarence N. Goodwin* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key,* and *William Cutler Thompson* for respondent. Reported below: 50 F. (2d) 53.

No. 452. TAYLOR, TRUSTEE, *v.* TAYRIEN ET AL. November 23, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Elmer J. Lundy* for petitioner. *Messrs. T. J. Leahy* and *Charles Stuart Macdonald* for respondents. Reported below: 51 F. (2d) 884.

No. 431. PETERSON *v.* NAKNEK PACKING CO. November 30, 1931. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. F. H. Dam* for petitioner. *Mr. Francis V. Keesling* for respondent. Reported below: 299 Pac. 54.

No. 450. EAVENSON *v.* COMMISSIONER OF INTERNAL REVENUE. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Cir-

cuit denied. *Messrs. Wm. A. Seifert* and *Wm. Wallace Booth* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, Hayner N. Larson,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 51 F. (2d) 664.

No. 451. DAHLINGER *v.* COMMISSIONER OF INTERNAL REVENUE. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Wm. A. Seifert* and *Wm. Wallace Booth* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, Hayner N. Larson,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 51 F. (2d) 662.

No. 456. O'BRIEN *v.* UNITED STATES. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. James A. O'Callaghan* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key,* and *John H. McEvers* for the United States. Reported below: 51 F. (2d) 193.

Nos. 458 and 459. ANGIER CORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE. November 30, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. George T. Weitzel* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, S. Dee Hanson,* and *Wilbur H. Friedman* for respondent. Reported below: 50 F. (2d) 887.

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No. 461. BANK OF AMERICA, GUARDIAN, *v.* FULTON TRUST CO. ET AL. November 30, 1931. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. U. S. Webb, Raymond Benjamin, Charles D. Hamel,* and *John Enrietto* for petitioner. *Messrs. Frederic D. McKenney, John S. Flannery, G. Bowdoin Craighill,* and *Ralph D. Quinter* for respondents. Reported below: 50 F. (2d) 1005.

No. 464. BATON COAL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Wm. A. Seifert* and *Wm. Wallace Booth* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, John MacC. Hudson,* and *Paul D. Miller* for respondent. Reported below: 51 F. (2d) 469.

No. 465. NATIONAL PRESSURE COOKER CO. *v.* STROETER. November 30, 1931. Petition for writ of certiorari to the Circuit Court of appeals for the Seventh Circuit denied. *Mr. P. M. Beach* for petitioner. *Mr. Harry F. Payer* for respondent. Reported below: 50 F. (2d) 642.

No. 467. BAUMGARTNER *v.* COMMISSIONER OF INTERNAL REVENUE. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Allen L. Chickering, Walter C. Fox, Jr.,* and *Blair S. Shuman* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, John H. McEvers,* and *W. Marvin Smith* for respondent. Reported below: 51 F. (2d) 472.

No. 473. Los Angeles Dock & Terminal Co. *v.* Pacific Dock & Terminal Co. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Wm. J. Hughes, Wm. J. Hughes, Jr., Walter M. Campbell,* and *W. H. Anderson* for petitioner. *Mr. T. T. C. Gregory* for respondent. Reported below: 50 F. (2d) 557.

No. 474. Southern Pacific R. Co. et al. *v.* United States. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. C. F. R. Ogilby, Frank Thunen,* and *Guy V. Shoup* for petitioners. *Solicitor General Thacher, Assistant Attorney General Richardson,* and *Messrs. Claude R. Branch* and *E. T. Burke* for the United States. Reported below: 51 F. (2d) 873.

No. 478. Danciger et al. *v.* Jacobs, Administrator. November 30, 1931. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. I. J. Ringolsky* and *Harry L. Jacobs* for petitioners. No appearance for respondent. Reported below: 41 S. W. (2d) 389.

No. 480. Commerce Farm Credit Co. *v.* Shropshire et al. November 30, 1931. Petition for writ of certiorari to the Supreme Court of Texas denied. *Mr. Robert J. McMillan* for petitioner. *Mr. Crawford B. Reeder* for respondent. Reported below: 30 S. W. (2d) 282; 39 S. W. (2d) 11.

No. 481. Southern Ry. Co. et al. *v.* Eagle Cotton Oil Co. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit

denied. *Messrs. Charles Clark* and *W. N. McGehee* for petitioners. *Messrs. Nuel D. Belnap, Luther M. Walter,* and *John S. Burchmore* for respondent. Reported below: 51 F. (2d) 443.

No. 483. American Insurance Co. *v.* General Motors Acceptance Corp. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. T. A. Hammond, Alston Cockrell,* and *Alex. W. Smith, Jr.,* for petitioner. *Messrs. N. B. K. Pettingill* and *T. M. Shackleford, Jr.,* for respondent. Reported below: 50 F. (2d) 803.

No. 484. W. E. Hedger Company, Inc., *v.* United States. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Horace T. Atkins* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 52 F. (2d) 31.

No. 493. New York Title & Mortgage Co. *v.* First National Bank et al. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. James C. Rogers* and *Henry S. Conrad* for petitioner. *Mr. Arthur Mag* for respondents. Reported below: 51 F. (2d) 485.

No. 495. Kansas City Southern Ry. Co. *v.* Commissioner of Internal Revenue. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Samuel W. Moore* and *F. H. Moore* for petitioner. *Solicitor Gen-*

eral Thacher, Assistant Attorney General Youngquist, and *Messrs. Claude R. Branch, J. Louis Monarch, Morton K. Rothschild,* and *Paul D. Miller* for respondent. Reported below: 52 F. (2d) 372.

No. 497. UNITED BRICK & TILE CO. *v.* MCKISSICK ET AL. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. B. J. Flick, Silas H. Strawn,* and *H. M. Havner* for petitioner. *Mr. Charles S. Bradshaw* for respondents. Reported below: 51 F. (2d) 67; 52 F. (2d) 426.

No. 499. MANHATTAN OIL CO. ET AL. *v.* MOSBY. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. George L. Edwards* for petitioners. *Mr. H. M. Langworthy* for respondent. Reported below: 52 F. (2d) 364.

No. 500. HAWAII *v.* GAY ET AL. November 30, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Frank E. Thompson* for petitioner. *Messrs. A. G. M. Robertson, Mason F. Prosser, Benjamin L. Marx,* and *Robbins B. Anderson* for respondents. Reported below: 52 F. (2d) 356.

Nos 86 and 87. ELGIN, JOLIET & EASTERN RY. CO. *v.* CHURCHILL, ADMINISTRATOR. See same cases, *ante,* p. 589.

No. 490. SUPER MAID COOK-WARE CORP. *v.* HAMIL ET AL. December 7, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied.

Mr. Edwin C. Hollins for petitioner. No appearance for respondents. Reported below: 50 F. (2d) 830.

No. 491. DEVASTO ET AL. *v.* UNITED STATES. December 7, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Sanford H. Cohen* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. A. E. Gottschall* and *W. Marvin Smith* for the United States. Reported below: 52 F. (2d) 26.

No. 492. KEARING *v.* UNITED STATES. December 7, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas J. Mangan* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch* and *John J. Byrne* for the United States.

No. 501. WADDINGTON, TRUSTEE IN BANKRUPTCY, *v.* PEDRICK. December 7, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Frank A. Mathews, Jr.,* for petitioner. No appearance for respondent. Reported below: 51 F. (2d) 1052.

No. 505. SUTHERLAND, ALIEN PROPERTY CUSTODIAN, *v.* NEW YORK. December 14, 1931. The motion of Herman F. M. Mutzenbecher et al. to continue on their own behalf the petition filed in the name of the Alien Property Custodian is denied. The petition for a writ of certiorari herein to the Court of Appeals of New York is also denied. *Messrs. Nathan Ottinger, Sidney Newborg,* and *Charles J. Schuck* for petitioner. *Messrs. LeRoy B. Iserman* and

Alfred C. Bennett for respondent. Reported below: 256 N. Y. 177; 176 N. E. 133.

No. 496. CAPRON *v.* VAN HORN. December 14, 1931. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. A. Haines* for petitioner. *Mr. M. W. Conkling* for respondent. Reported below: 300 Pac. 150.

No. 502. SIEGEL ET AL., EXECUTORS, *v.* UNITED STATES. December 14, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Frank H. Sullivan* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Hayner N. Larson,* and *Wilbur H. Friedman* for the United States. Reported below: 52 F. (2d) 63.

No. 510. NEW ERA MOTORS, INC., ET AL. *v.* BURST ET AL. December 14, 1931. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. S. Mayner Wallace* and *T. M. Pierce* for petitioners. No appearance for respondents. Reported below: 53 F. (2d) 41.

No. 515. NAVIGAZIONE LIBERA TRIESTINA ET AL. *v.* MOLINELLI, GIANNUSA & RAO, INC., ET AL.;

No. 516. SAME v. R. GERBER & CO. ET AL.;

No. 517. SAME *v.* ITALIAN IMPORTING CO.;

No. 518. SAME *v.* WESTERN SAUSAGE & PROVISION CO.; and

No. 519. SAME *v.* KURTZ ET AL. December 14, 1931. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Homer L.*

Loomis for petitioners. *Messrs. Horace T. Atkins* and *Harry D. Thirkield* for respondents.

No. 85. UNITED STATES *v.* OLYMPIA SHIPPING CORP. January 4, 1932. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Thacher* for the United States. *Mr. Walter F. Welch* for respondent. Reported below: 71 Ct. Cls. 251.

No. 520. IRA M. PETERSIME & SON *v.* ROBBINS. January 4, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. H. A. Toulmin, H. A. Toulmin, Jr.,* and *Melville Church* for petitioner. *Mr. Raymond Ives Blakeslee* for respondent. Reported below: 51 F. (2d) 174.

No. 523. SOUTHERN LUMBER CO. *v.* UNITED STATES. January 4, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Thomas S. Buzbee* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, Norman D. Keller,* and *W. Marvin Smith* for the United States. Reported below: 51 F. (2d) 956.

No. 524. WOODRUFF *v.* LAUGHARN, TRUSTEE IN BANKRUPTCY. January 4, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. J. A. Coleman* for petitioner. *Mr. Hugh L. Dickson* for respondent. Reported below: 50 F. (2d) 532.

No. 532. DRAINAGE DISTRICT No. 17 ET AL. *v.* GUARDIAN TRUST CO., TRUSTEE, ET AL. January 4, 1932. Petition

for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles T. Coleman* for petitioners. *Mr. Charles D. Frierson* for respondents. Reported below: 52 F. (2d) 579.

No. 527. WILLIAMS *v.* MACLAUGHLIN, COLLECTOR OF INTERNAL REVENUE. January 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Ira Jewell Williams, pro se. Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, Andrew D. Sharpe,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 52 F. (2d) 724.

No. 533. CARLSON ET AL. *v.* INDUSTRIAL ACCIDENT COMMISSION ET AL. January 11, 1932. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Oliver Dibble* for petitioners. *Mr. George C. Faulkner* for respondents. Reported below: 2 P. (2d) 151.

No. 534. CARLSON ET AL. *v.* INDUSTRIAL ACCIDENT COMMISSION ET AL. January 11, 1932. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Oliver Dibble* for petitioners. *Mr. George C. Faulkner* for respondents. Reported below: 2 P. (2d) 154.

No. 535. KLAUDER, TRUSTEE IN BANKRUPTCY, ET AL. *v.* SMYTH, ASSIGNEE. January 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. D. Arthur Magaziner* for petitioners. *Mr. Russell Duane* for respondent. Reported below: 52 F. (2d) 109.

No. 536. JONAS & NEUBURGER *v.* GENERAL MOTORS ACCEPTANCE CORP. ET AL. January 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Louis S. Posner* and *David Haar* for petitioner. *Messrs. Albert M. Levert* and *John Thomas Smith* for respondents. Reported below: 51 F. (2d) 984.

No. 540. SWARTTZ ET AL. *v.* MILLER. January 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Julius C. Levi* and *Robert T. McCracken* for petitioners. *Mr. Frank S. Busser* for respondent. Reported below: 52 F. (2d) 542.

No. 541. KNUTSEN *v.* ASSOCIATED OIL CO. January 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. H. Richard Kelly, Chalmers G. Graham,* and *Ira S. Lillick* for petitioner. *Mr. S. Hasket Derby* for respondent. Reported below: 52 F. (2d) 397.

No. 543. ARGONAUT CONSOLIDATED MINING CO. *v.* ANDERSON, COLLECTOR. January 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John Thomas Smith* and *Anthony J. Russo* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, John H. McEvers,* and *W. Marvin Smith* for respondent. Reported below: 52 F. (2d) 55.

Nos. 544 and 545. MINAR ET AL. *v.* HAMMETT. January 11, 1932. Petition for writs of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. John*

S. Barbour for petitioners. *Messrs. Julius I. Peyser* and *Milton Strasburger* for respondent. Reported below: 53 F. (2d) 144, 149.

No. 549. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO. *v.* HENKEL, ADMINISTRATRIX. January 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Ray N. Van Doren* and *William T. Faricy* for petitioner. *Messrs. Mortimer H. Boutelle* and *Robert J. McDonald* for respondent. Reported below: 52 F. (2d) 313.

No. 551. FRANCES-RALPH REALTY CO. *v.* UNITED STATES. January 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. J. L. London* for petitioner. *Solicitor General Thacher, Assistant Attorney General Richardson,* and *Messrs. Whitney North Seymour* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 52 F. (2d) 92.

No. 552. UNITED DRUG CO. *v.* IRELAND CANDY CO. ET AL. January 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Brenton K. Fisk* and *Delos G. Haynes* for petitioner. *Mr. Edward C. Taylor* for respondents. Reported below: 51 F. (2d) 226.

No. 554. INDEPENDENT SCHOOL DISTRICT *v.* AMERICAN SURETY CO. January 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. C. A. Fosnes* for petitioner. *Mr. Thomas C. Daggett* for respondent. Reported below: 53 F. (2d) 178.

No. 555. ATLANTA & CHARLOTTE AIR LINE RY. CO. ET AL. *v.* CATO, ADMINISTRATRIX. January 11, 1932. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *Messrs. S. R. Prince, H. O'B. Cooper, F. G. Tompkins,* and *L. E. Jeffries* for petitioners. *Messrs. Sam J. Nicholls* and *C. C. Wyche* for respondent. Reported below: 155 S. C. 304; 152 S. E. 522.

No. 556. DELAPP ET AL. *v.* UNITED STATES. January 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Ernest S. Cary* for petitioners. *Solicitor General Thacher* and *Mr. Whitney North Seymour* for the United States. Reported below: 53 F. (2d) 627.

No. 564. WELOSKY *v.* MASSACHUSETTS. January 11, 1932. Petition for writ of certiorari to the Superior Court of Suffolk County, Massachusetts, denied. *Mr. Joseph Bearak* for petitioner. No appearance for respondent. Reported below: 177 N. E. 656.

No. 565. FIRST NATIONAL BANK & TRUST CO. *v.* STEVENS, ORDINARY. January 11, 1932. Petition for writ of certiorari to the Supreme Court of Georgia denied. *Messrs. Clifford L. Anderson, John A. Hynds, Hughes Spalding,* and *John Sibley* for petitioner. No appearance for respondent. Reported below: 160 S. E. 243.

No. 571. ADAMS ET AL. *v.* KEYSTONE CREDIT CORP. ET AL. January 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Messrs. R. Walton Moore, John S. Barbour,*

Robert H. McNeill, A. W. Patterson, and *M. J. Fulton* for petitioners. *Messrs. Hartwell Cabell* and *John S. Eggleston* for respondents. Reported below: 50 F. (2d) 872.

No. 625. ESTABROOK *v.* ZERBST, WARDEN. January 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Alvah W. Estabrook, pro se.* No appearance for respondent.

No. 460. HAGGERTY *v.* UNITED STATES. January 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Leslie P. Whelan* for petitioner. *Solicitor General Thacher* and *Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 52 F. (2d) 11.

No. 558. LEVINSON *v.* UNITED STATES. January 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis Halle* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. John J. Byrne* and *W. Marvin Smith* for the United States.

No. 559. TRINITY METHODIST CHURCH, SOUTH, *v.* FEDERAL RADIO COMMISSION. January 18, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Louis G. Caldwell* for petitioner. *Solicitor General Thacher, Assistant to the Attorney General O'Brian,* and *Messrs. Whitney North Seymour, Charles H. Weston, W. Marvin Smith,* and *Thad H. Brown* for respondent.

No. 572. TAYLOR, ADMINISTRATRIX, *v.* SOUTHERN RY. Co. January 18, 1932. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied. *Mr. Charles Curry* for petitioner. *Messrs. George E. Walker, Thomas B. Gay,* and *Wirt P. Marks, Jr.,* for respondent.

No. 577. O. K. JELKS & SON *v.* TOM HUSTON PEANUT Co. January 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Charles R. Fenwick* and *William D. Jones, Jr.,* for petitioner. *Mr. J. Lewis Stackpole* for respondent. Reported below: 52 F. (2d) 4.

No. 579. PIONEER COOPERAGE Co. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. January 18, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Stanley S. Waite* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, Norman D. Keller,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 53 F. (2d) 43.

No. 561. TROTTER *v.* IANTHA C. ANDERSON;

No. 562. SAME *v.* JOHN RUSSEL ANDERSON ET AL.; and

No. 563. SAME *v.* BAYLIS ESTATE Co. January 25, 1932. Petition for writs of certiorari to the Supreme Court of California denied. *Mr. William Sea, Jr.,* for petitioner. *Mr. John L. McNab* for respondents. Reported below: 2 P. (2d) 373.

No. 584. PETERS, ADMINISTRATRIX, *v.* WABASH RY. Co. January 25, 1932. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Mr. William H.*

Allen for petitioner. *Messrs. N. S. Brown, W. H. Woodward,* and *Homer Hall* for respondent. Reported below: 42 S. W. (2d) 588.

No. 586. CHARPENTIER *v.* UNITED STATES. January 25, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold L. Turk* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, John J. Byrne,* and *Paul D. Miller* for the United States.

No. 587. J. P. STEVENS ENGRAVING CO. *v.* UNITED STATES. January 25, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. W. A. Sutherland* and *Joseph B. Brennan* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, Norman D. Keller,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 53 F. (2d) 1.

No. 588. UNITED STATES EX REL. STUART *v.* WILBUR, SECRETARY OF THE INTERIOR. January 25, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Chester I. Long, Peter Q. Nyce,* and *Samuel W. McIntosh,* and *Grace McDonald Phillips* for petitioner. *Solicitor General Thacher, Assistant Attorney General Richardson,* and *Messrs. Claude R. Branch* and *Paul D. Miller* for respondent. Reported below: 53 F. (2d) 717.

No. 591. GREIBLE *v.* UNITED STATES. January 25, 1932. Petition for writ of certiorari to the Circuit Court of

Appeals for the Eighth Circuit denied. *Mr. Charles A. Houts* for petitioner. *Solicitor General Thacher* and *Messrs. Whitney North Seymour, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 52 F. (2d) 79.

No. 605. MISSOURI PACIFIC R. Co. *v.* MILLER, ADMINISTRATOR. January 25, 1932. Petition for writ of certiorari to the Supreme Court of Arkansas denied. *Messrs. Edward J. White* and *Thomas B. Pryor* for petitioner. *Mr. David S. Partain* for respondent. Reported below: 41 S. W. (2d) 971.

No. 583. FISH ET AL. *v.* WISE ET AL. February 15, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Frank J. Boudinot, Robert L. Owen, H. D. Linebaugh,* and *Henry G. Thomas* for petitioners. *Messrs. James A. Veasey* and *Lloyd G. Owens* for respondents. Reported below: 52 F. (2d) 544.

Nos. 508 and 509. STANTON ET AL. *v.* T. L. HERBERT & SONS ET AL. February 15, 1932. Petition for writs of certiorari to the Supreme Court, and to the Court of Appeals, of Tennessee, denied. *Messrs. Jordan Stokes, Jr.,* and *Harvey D. Jacob* for petitioners. *Messrs. Thomas H. Malone* and *Charles C. Trabue* for respondents.

No. 589. CHICAGO & NORTH WESTERN RY. Co. ET AL. *v.* SABOL. February 15, 1932. Petition for writ of certiorari to the Supreme Court of Michigan denied. *Messrs. Ray N. Van Doren, Samuel J. Cady, Nelson J. Wilcox,* and *Arthur H. Ryall* for petitioners. *Mr. Joseph C. Fehr* for respondent. Reported below: 255 Mich. 548; 238 N. W. 281

No. 592. TAYLOR *v.* COMMISSIONER OF INTERNAL REVENUE. February 15, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Maurice Bower Saul* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key, William Cutler Thompson,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 51 F. (2d) 915.

No. 595. DORGER ET AL. *v.* OHIO. February 15, 1932. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. Smith W. Bennett* for petitioners. *Messrs. Louis J. Schneider, Dudley Miller Outcalt,* and *Robert N. Gorman* for respondent. Reported below: 179 N. E. 143.

No. 602. AMDYCO CORP. *v.* URQUHART ET AL. February 15, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. W. Brown Morton* for petitioner. *Mr. J. Claude Bedford* for respondents. Reported below: 51 F. (2d) 1072.

No. 603. SOUTHERN PACIFIC CO. *v.* THOMAS. February 15, 1932. Petition for writ of certiorari to the District Court of Appeal, 1st Appellate District, of California, denied. *Messrs. C. W. Durbrow, H. C. Booth, C. O. Amonette,* and *W. I. Gilbert* for petitioner. *Mr. George Thomas, pro se.* Reported below: 2 P. (2d) 544.

No. 604. FLEMING *v.* REINECKE, COLLECTOR OF INTERNAL REVENUE. February 15, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. John A. Kratz* for petitioner. *Solici-*

tor General Thacher, Assistant Attorney General Youngquist, and *Messrs. Claude R. Branch, Sewall Key, Carlton Fox,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 52 F. (2d) 449.

No. 607. EVERETT ET AL. *v.* WING ET AL. February 15, 1932. Petition for writ of certiorari to the Supreme Court of Vermont denied. *Mr. John Wattawa* for petitioners. *Mr. Warren R. Austin* for respondents. Reported below: 156 Atl. 393.

No. 610. BONWIT TELLER & CO. *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE. February 15, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Arthur B. Hyman* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, J. Louis Monarch,* and *John MacC. Hudson* for respondent. Reported below: 53 F. (2d) 381.

No. 612. GRATIGNY PLATEAU DEVELOPMENT CORP. ET AL. *v.* HILL ET AL. February 15, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Roscoe C. McCulloch* for petitioners. *Messrs. Andrew S. Iddings* and *D. W. Iddings* for respondents. Reported below: 52 F. (2d) 142.

No. 615. QUINZEL *v.* HENDRICKS, TRUSTEE. February 15, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Wm. J. Hughes, Jr.,* and *Wm. E. Leahy* for petitioner. *Messrs. Eugene B. Sullivan* and *Samuel J. Kaufman* for respondent. Reported below: 52 F. (2d) 1085.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM OCTOBER 5, 1931, TO AND INCLUDING FEBRUARY 15, 1932

No. 434. MARX ET AL. *v.* MAYBURY, DIRECTOR OF LICENSES, ET AL. Appeal from the District Court of the United States for the Western District of Washington. October 5, 1931. Docketed and dismissed on motion of *Mr. Blaine Mallon* for appellee. Reported below: 36 F. (2d) 397. See also, 30 F. (2d) 839.

No. 358. CLEMMONS, EXECUTOR, *v.* HALL, ADMINISTRATOR. Appeal from the Supreme Court of Georgia. October 5, 1931. Dismissed on motion of *Mr. Graham Wright* for appellant. Reported below: 172 Ga. 675; 158 S. E. 747.

No. 39. STRONG *v.* UNITED STATES. Certiorari to the Circuit Court of Appeals for the First Circuit. October 26, 1931. Dismissed, per stipulation of counsel, and mandate granted on motion of *Solicitor General Thacher* for the United States. *Mr. William H. Lewis* for petitioner. Reported below: 46 F. (2d) 257.

No. 372. HARTFORD ACCIDENT & INDEMNITY CO. ET AL. *v.* HOWELL, ADMINISTRATOR. Petition for writ of certiorari to the Supreme Court of South Carolina. October 26, 1931. Dismissed per stipulation of counsel. Reported below: 159 S. E. 380.

No. 250. CAROLINA & NORTHWESTERN RY. CO. *v.* KEY. Appeal from the Supreme Court of South Carolina. December 14, 1931. Dismissed on motion of *Messrs. Frank G. Tompkins* and *J. E. McDonald* for appellant. *Mr. R. E. Whiting* for appellee.

No. 611. UNITED STATES *v.* PEARSON. Appeal from the District Court of the United States for the Northern District of Texas. January 4, 1932. Appeal dismissed and mandate granted on motion of *Solicitor General Thacher* for the United States.

No. 573. EXCESS INSURANCE CO. *v.* CONNOR ET AL. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit. January 11, 1932. Dismissed on motion of *Messrs. Ralph E. Lum* and *Walter Gordon Merritt* for petitioner. Reported below: 51 F. (2d) 626.

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